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Limbo spaces between illegal and legal stay : resulting from EU management of non-removable third country nationals

Charles Gosme

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Institut d'Etudes Politiques de Paris

SCIENCES PO DOCTORAL SCHOOL

PhD Program of the Law School

PhD in Public Law

**Limbo spaces between illegal and legal stay:
*resulting from EU management of non-removable third country
nationals***

Charles Gosme

Director : Professor Renaud Dehousse

Defense: 19 November 2014

Jury :

Renaud Dehousse, Professor, IEP de Paris, France

Elsbeth Guild, Professor, Radboud University Nijmegen, The Netherlands
(rapporteur)

Dora Kostakopoulou, Professor, University of Warwick, United Kingdom
(rapporteur)

Horatia Muir Watt, Professor, IEP de Paris, France



Picture entitled "Ectoplasm III"
by Anne Marthe Widvey

Table of contents

<u>Acknowledgements</u>	7
<u>Introductory chapter</u>	11
Part I/ The nature and consequences of limbo spaces between illegal and legal stay	20
<u>Chapter 1. A typology of limbo spaces between illegal and legal stay: legal toleration and unrecognised legal residence</u>	21
1. <u>The positions of legal toleration and indirect toleration</u>	26
1.1. <u>The general postponed-removal status under the Return Directive</u>	32
1.2. <u>The explicit tolerated trafficking victim status under the Directive on residence permits granted to victims of human trafficking</u>	37
1.3. <u>The implicit tolerated asylum applicant status under the Asylum Reception Directive</u>	39
1.4. <u>Released-detainees stricto sensu and the position of exhausted-removal on the margins of the Return Directive</u>	42
2. <u>The positions of unrecognised legal residence and unrecognised entitlements to legal residence</u>	45
3. <u>Why legal toleration positions lie in-between illegal and legal stay</u>	48
3.1. <u>The restrictive scope of toleration in the current literature</u>	49
3.2. <u>The disagreements over how to qualify toleration positions in terms of illegal and legal stay due to a lack of conceptual clarity</u>	57
3.3. <u>The multiple ways of defining legal and illegal stay and how they impact one's view of toleration positions</u>	59
3.4. <u>The in-between nature of toleration positions by reference to the key definitional concept of authorisation</u>	62
3.5. <u>The complementary definitional concept of documentation</u>	64
4. <u>Why unrecognised legal residence positions lie in-between illegal and legal stay</u>	66
5. <u>Why these spaces are limbo-like</u>	67
5.1. <u>The concepts of limbo and liminality</u>	68
5.2. <u>The application of the limbo concept to the position of tolerated TCNs</u>	70
5.3. <u>The application of the limbo concept to the position of unrecognised legal residents</u>	75
5.4. <u>Time, regularisation, and the porosity of immigration categories</u>	76
<u>Conclusion</u>	79
<u>Chapter 2. The implementation and perception of toleration positions in France – a national case-study of EU-governed toleration positions</u>	81
1. <u>Positions of legal and indirect toleration in France</u>	84
1.1. <u>Immunity from removal and cancelled-returnees</u>	87
1.2. <u>Released-detainees stricto sensu and exhausted-returnees</u>	88
1.3. <u>Judicial and administrative postponed-returnees</u>	90
1.4. <u>Tolerated asylum applicants, tolerated pre-asylum applicants, and tolerated refugees</u>	94
1.5. <u>Tolerated trafficking victims</u>	100
2. <u>Methodology and sample of tolerated TCNs</u>	101
2.1. <u>Qualitative interview-based research with a mix of structured and semi-structured questions</u>	102
2.2. <u>Ethical and practical considerations</u>	104
2.3. <u>Sample of interviewees</u>	108
3. <u>Where toleration positions are perceived to lie on a scale between illegal and legal stay</u>	119
4. <u>Whether and why legal stay is considered to be an important goal</u>	123
5. <u>The extent to which legal toleration positions protect from removal</u>	126
6. <u>The fear of detention and expulsion during periods of legal and indirect toleration</u>	136
7. <u>The quantity and quality of rights of legally tolerated TCNs</u>	143
8. <u>How the socio-economic exclusion resulting from toleration positions is perceived</u>	150
9. <u>The security-related impact of this socio-economic exclusion</u>	153

10. How limbo-like positions between illegal and legal stay are experienced and perceived	155
11. The impact of legal toleration and indirect toleration positions on health and the ability to think about the future.....	156
Conclusion.....	159
Part II/ The impact of EU law on the management of non-removability and limbo spaces of toleration.....	162
Chapter 3. The increasingly deliberate and politicised governance of legal toleration.....	164
1. EU governance of non-removability and postponement-of-removal.....	172
1.1. The EU's impact on the nexus between legal obstacles to removal and limbo spaces of toleration.....	178
1.2. The EU's role with regard to the nexus between practical obstacles to removal and limbo spaces of toleration.....	193
1.3. The formalisation and enhancement of rights attached to the status of postponed-removal.....	201
2. The EU's role with regard to the toleration of certain asylum seekers and victims of trafficking.....	217
2.1. EU governance of the nexus between policy obstacles to removal and limbo spaces of toleration: the special case of victims of trafficking.....	218
2.2. EU governance of the nexus between asylum procedures and limbo spaces of toleration.....	223
Conclusion.....	231
Chapter 4. The transformative impact of the governance of limbo spaces of toleration on membership in the EU.....	235
1. The development of new immigration statuses to preserve the sanctity of the legal/illegal immigration divide.....	236
2. New hierarchies of desirability.....	242
3. The level of access to formal legal toleration and regularisation.....	245
4. The chances of subjection to administrative detention.....	248
5. The chances of subjection to imprisonment for criminal offences related to illegal stay.....	251
6. The entrapment of non-cooperative exhausted-returnees between administrative detention, imprisonment, and freedom-in-limbo.....	254
7. A French case-study on this entrapment.....	258
7.1. The administrative detention and imprisonment of irregular migrants in France.....	259
7.2. From one exclusionary space to another.....	263
7.3. A narrative reported by the Cimade of a third country national bounced around between the three exclusionary spaces.....	269
Conclusion.....	271
Part III/ The functions of limbo spaces of toleration.....	274
Chapter 5. The functions of limbo spaces of toleration.....	275
1. The function of retribution.....	278
2. The function of expressive State power.....	284
3. How retribution and expressive State power may legitimise disadvantageous power relations.....	288
4. The function of deterrence.....	292
5. The function of enhanced-removability.....	299
6. The function of curbing public expenditure.....	301
7. The function of selective-regularisation.....	303
8. The inclusionary functions of formal postponement-of-removal.....	306
Conclusion.....	310
Chapter 6. A French case-study on the deterrent function and effect of toleration positions.....	313
1. The perception of exclusion from legal residence status and rights as a sanction.....	322
2. The perception of exclusion from legal residence status and rights as an instrument of.....	

deterrence.....	323
3. The desire to leave France due to exclusion from legal residence status and rights.....	325
4. The factors that make departure impossible and/or that encourage continued stay.....	330
5. The initial choice of European country and hypothetical choice of European country if the migration journey were to start all over again.....	333
6. Communication with other migrants or potential migrants on difficulties experienced in France.....	346
7. Is non-removability a strategy?.....	348
Conclusion.....	350
Concluding chapter.....	361
Appendix 1: Future paradigms and policies	371
Appendix 2 : List of migrant interviewees who experienced periods of legal or indirect toleration (with their initials or aliases).....	392
Appendix 3 : List of institutional interviewees.....	393
Bibliography.....	394

Table of diagrams

Diagram 1 : The nexus between legal protection from removal and legal residence.....	31
Diagram 2 : The nexus between obstacles to removal and postponement-of-removal in the Return Directive.....	33
Diagram 3 : Toleration spaces between illegal and legal stay.....	65
Diagram 4 : Tolerated pre-asylum applicants.....	99

Table of scanned documents

Document 1: Copy of a judgment postponing removal.....	129
Document 2: Certification of safe-conduit (pre-certification of a compulsory-residence-order)....	131
Document 3: Second type/stage of certification of a compulsory-residence-order.....	132
Document 4: A document certifying the refusal of legal stay and of placement in a priority asylum procedure.....	135

Table of illustrative tables

Table 1: Positions of legal toleration of interviewees.....	111
Table 2: Toleration profiles of interviewees.....	112
Table 3: Countries of origin of interviewees.....	114
Table 4: Age range of interviewees.....	115
Table 5: Year of arrival of interviewees.....	116
Table 6: Duration of toleration of interviewees.....	118
Table 7: Interviewees' subjection to administrative detention.....	119
Table 8: Interviewees' immigration status on the day of the interview.....	119
Table 9: Interviewees' perception of tolerated stay in terms of illegal/legal stay.....	120
Table 10: Interviewees' level of fear of expulsion during periods of legal toleration.....	137
Table 11: Evolution of interviewees' fear of expulsion during periods of legal toleration.....	140
Table 12: Level of interviewees' fear of expulsion during periods of indirect toleration.....	142
Table 13: Evolution of interviewees' fear of expulsion during periods of indirect toleration.....	143
Table 14: Interviewees' perception of exclusion from legal residence as a sanction.....	323
Table 15: Interviewees' perception of exclusion from legal residence as a deterrent instrument....	324
Table 16: Interviewees' desire to leave France as a result of exclusion from legal residence.....	326
Table 17: Interviewees' desire to leave France as a result of legal toleration.....	328

Table 18: Interviewees' desire to leave France as a result of indirect toleration.....	329
Table 19: Factors that encouraged interviewees to stay in France.....	333
Table 20: Interviewees' initial choice of country of destination.....	335
Table 21: Interviewees' hypothetical choice of country of destination if they were back in their countries of origin.....	336
Table 22: Important factors in interviewees' initial choice of country of destination.....	338
Table 23: Important factors in interviewees' hypothetical choice of country of destination if they were back in their countries of origin.....	340
Table 24: Order of importance of factors in interviewees' initial choice of country of destination.....	343
Table 25: Order of importance of factors in interviewees' hypothetical future choice of country of destination.....	345

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Introductory chapter

Hundreds of thousands of illegally staying third country nationals (TCN) cannot be removed from EU Member States despite the issue of return measures against them.¹ The EU Directive on the return of illegally staying TCNs (Return Directive)² imposes an obligation on EU Member States to issue return measures against illegally staying TCNs, this obligation being subject to a limited number of exceptions such as discretionary regularisation.

Illegally staying TCNs may not be removable as a result of legal, policy, or practical obstacles to removal.³ Legal obstacles include protection from removal on a range of human rights grounds, which are largely the product of creative and proactive judicial rulings at national and European levels. Practical obstacles may for example correspond to difficulties in ascertaining the identity of returnees (due to a lack of cooperation from TCNs or from their countries of origin/transit), the refusal of countries of origin/transit to readmit TCNs, limited bureaucratic/structural capacities to deport, transportation problems, and the refusal of TCNs to board diverse modes of transport to their countries of origin or transit. A typical policy-based obstacle is discretionary humanitarian protection from removal, but there are many others such as the Union's protection of cooperative victims of human trafficking.

There are no reliable estimates on the exact number of non-removable TCNs in the EU. However, in 2009, Eurostat data suggests that out of 594,610 orders to leave the territory of an EU-

1 In this thesis, I use the terms *irregular migrant* and *illegally staying TCN* synonymously and interchangeably, and I address definitional issues in chapter 1.

2 Directive 2008/115/EC of the European Parliament and of the Council on the return of illegally staying third country nationals [2008] OJ L348/98, art 6.

3 Other words are used synonymously in this thesis with the word *removal*. These are the words *expulsion* and *deportation*. Although the latter words may have specific and different meanings in diverse legal systems and diverse fields of social science, those other meanings should be ignored here.

27 Member State, 341,820 were not effectively carried out.⁴ Over the years, the number of orders to leave has slightly decreased, but the proportion of returns that ensued has remained very similar. In 2012, 276,965 out of 483,640 orders to leave were not carried out.⁵ Thus, in 2009 and 2012, the majority of return measures were never carried out, which suggests that most illegally staying TCNs in the EU were not removable. While the European Commission noted that preliminary figures for 2013 confirmed this trend,⁶ recent Eurostat data suggests that a slight majority of return measures were carried out that year (about 50,21 % so barely over half – and it is important to note that the number of orders to leave was also a lot lower than previous years).⁷ The proportion of return measures that are carried out varies from one Member State to the next. In some countries, such as the UK, a majority of return measures lead to effective return, whereas a majority of return measures in other countries, such as Belgium, are never carried out.⁸ Eurostat and Frontex also provide data on the most common nationalities of non-removable TCNs. For example, in the first quarter of 2014, “the most commonly returned migrants were from Albania, Pakistan and India”⁹ whereas the lowest return rates concerned migrants from Syria, Afghanistan, and Morocco.¹⁰

Eurostat and Frontex do not provide more detailed data with regard to the types of obstacle to removal (legal, policy, practical).

4 Based on data extracted from Eurostat, “Statistics : Population Database: Enforcement of Immigration Legislation” < <http://epp.eurostat.ec.europa.eu/portal/page/portal/eurostat/home/> > last accessed 6 September 2014.

5 Ibid.

6 Commission, “Communication to the Council and the European Parliament on EU Return Policy” COM (2014) 199 final, 3. The estimates extracted by the Commission from Eurostat data on non-removability in 2012 are a little different to the ones I extracted. This may be for a number of reasons, one being methodological differences, another being that Eurostat data is regularly updated.

7 Eurostat, “Statistics : Population Database: Enforcement of Immigration Legislation” < <http://epp.eurostat.ec.europa.eu/portal/page/portal/eurostat/home/> > last accessed 6 September 2014.

8 Frontex, *FRAN Quarterly: Quarter 1 January-March 2014* (Frontex, 18 August 2014), 32.

9 Ibid.

10 Ibid. There is a lot of data on the number and profiles of illegally staying TCNs in the EU, namely gathered by Eurostat, Frontex, and the Clandestino project. The focus of this thesis is on those illegally staying TCNs who turn out to not be removable, which is why statistical elements on the general population of illegally staying TCNs are not provided here.

Such data is easier to find in national-level statistics gathered by institutional actors and NGOs, examples of which I provide in chapters 1 and 2. There is some information that has been gathered at the level of the EU on one particular type of practical obstacle, which is the refusal of third countries to cooperate and readmit their own nationals. Some third countries are a lot more cooperative than others,¹¹ and institutional documents suggest that several third countries are more cooperative with some EU Member States than with others in facilitating the return of their nationals, which is for example the case of Iraq.¹²

Non-removability is not always temporary and can in many cases last a very long time. Numerous non-removable persons may find themselves in administrative detention centres but many are also never detained or end up being released. And yet protracted non-removability does not necessarily lead to regularisation of status. Many individuals concerned experience protracted exclusion from legal residence despite the impossibility of return. The problem is that exclusion from the status of legal resident entails exclusion from many rights and benefits that are reserved for legal residents.

Under EU law, “fair treatment”¹³ is a policy goal reserved for legally resident TCNs. Non-legal residents, who fall outside this sphere of *fair treatment*, are not without rights. However, they only benefit from a minimal set of rights conferred to all individuals who fall under the jurisdiction of EU Member States. They are generally entitled under EU law and international instruments to emergency healthcare, education for minors, a range of civil rights, and basic anti-discrimination work rights. But exclusion from *fair*

11 The negotiation of readmission agreements between the EU and third countries is a key tool for enhancing the effective return of illegally staying TCNs. Some third countries are a lot more resistant to adopting such readmission agreements with the EU than others: Commission, “Communication from the Commission to the European Parliament and the Council: Evaluation of EU Readmission Agreements” COM (2011) 76 final, 6.

12 See European Migration Network, “Ad-Hoc Query on Co-operation with Iraq on the Issuance of the Travel Documents (Laissez-Passer)” (Compilation produced on 9 March 2010).

13 Consolidated Version of the Treaty on the Functioning of the European Union (2012) OJ C 326/47, art 79; European Council, Presidency Conclusions (Tampere, 15 and 16 October 1999), paras 18-21.

treatment usually means that they are not entitled under EU and national laws to labour market access, social and housing assistance, comprehensive healthcare, social security rights, access to long-term resident status, and the list goes on. Further, landlords can be prohibited from renting their property to them, and employers from employing them. Worst of all, their right to liberty is often limited as they are at high risk of subjection to administrative detention and imprisonment due to their violation of immigration rules.

Falling outside the domain of legal residence is therefore a problem for illegally resident TCNs who turn out to not be removable for long periods of time. They may suffer from extensive discrimination and exclusion in the absence of State action. They may be discriminated against in their relations with both State actors and private actors. This raises issues of “membership”¹⁴ in EU Member States. Many obstacles to removal are to varying degrees the result of “deepening liberal norms”¹⁵ that constrain Member States' power to deport unauthorised residents. They cannot be removed by State authorities as a result of constraints under EU Member States' legal systems, which means that the latter systems protect them from removal and imperfectly authorise their continued presence. Yet in the absence of State¹⁶ action, they are excluded from a core set of membership rights and benefits.

A recent Eurobarometer survey includes selected perspectives of TCNs on the importance of legality of status. A first generation Algerian male in France stated that legality:

14 On the issue of non-removability and membership in the UK, see: Emanuela Paoletti, “Deportation, Non-Deportability and Ideas of Membership” (July 2010) Refugee Studies Centre Working Paper 65.

15 Ibid, 18.

16 My use of the words *State* and *State authorities* in this thesis (but not the words *Member States* of the EU) must be understood as corresponding to executive (and sometimes parliamentary) branches of government as opposed to judicial branches.

“opens all the doors; it means ... (you) don’t have to deal with people who exploit you or slum landlords”.¹⁷

A second generation Chinese female in the UK further explained:

“If you haven’t got legal status you’ve got nothing, you’re not identified as being in this country. If you want to get all the benefits you’ve got to have legal status. You have to be part of that country and society”.¹⁸

In 2010, Jesuit Refugee Service (JRS) Europe interviewed an Ethiopian woman living in Italy who made the following comments on legality of status:

“How can you live without documents? There is no real job possible without documents. I cannot apply for family reunification without documents. Sometimes I cry because I don't know what will happen”.¹⁹

These personal perspectives highlight the serious consequences of being excluded from legal residence for a long period of time.

I am interested in how the EU has managed non-removability and why so many non-removable persons have been left in a limbo of exclusion from legal residence. The EU, since the early 2000s,²⁰ has played an increasingly important role in the management of non-removability. This management has included both prevention of non-removability and management of non-removable persons.

Starting with prevention, the EU and its Member States have

¹⁷ Eurobarometer, “Migrant Integration : Aggregate Report” (Qualitative Eurobarometer, May 2011), 76.

¹⁸ Ibid.

¹⁹ Jesuit Refugee Service Europe, “Living in Limbo: Forced Migrant Destitution” (Brussels, March 2010), 49.

²⁰ This is shortly after it acquired a shared competence with its Member States in the field of immigration and asylum.

sought to limit the entry of potentially non-removable persons, as well as to enhance the removability of irregular migrants already inside the EU. They have done so through the development of a multi-layered border control system which has made it increasingly hard for asylum seekers and potential irregular migrants to reach EU Member States' territorial jurisdiction. Pre-border controls include visa requirements for many TCNs as a condition of entry, document checks by private transport carriers who face penalties in the event that they transport irregular migrants into the EU, and extra-territorial patrols on the high seas. Taking a moment to focus on potential asylum seekers, as long as potential asylum seekers are kept away from EU Member States' territorial jurisdiction, they can generally be locked out of asylum systems and the temporary entitlement to remain that ensues. Some State actors are not shy about the fact that pre-border controls essentially aim to limit the number of asylum seekers who reach the territory of the EU.²¹

In terms of border control, there are checks at authorised border-crossing points, and patrols along unauthorised border-crossing points, but Member States have the obligation to process asylum claims at (and within) their borders. With regard to illegally resident TCNs who are within the EU's territory and at its borders, an increasing number of readmission agreements have been adopted between the EU and third countries, the aim of these agreements being to facilitate the swift return of illegal residents by reducing technical and practical obstacles to removal.²²

Despite measures to prevent non-removability, there are hundreds of thousands of non-removable persons in the EU. The EU has

21 Eg. See Council document 12361/00, (*Comments on the initiative of the French Republic with a view to the adoption of a Council Directive concerning the harmonisation of financial penalties imposed on carriers transporting into the territory of the Member States third-country nationals not in possession of the documents necessary for admission*), 3-4.

22 See Carole Billet, "EU Readmission Agreements: A Prime Instrument of the External Dimension of the EU's Fight against Irregular Immigration. An Assessment after Ten Years of Practice" (2010) 12 *European Journal of Migration and Law* 45-79.

played an increasingly important role in this management, notably by impacting on its Member States' policies of administrative detention and regularisation. However, this is only part of the story.

EU management of non-removable persons has witnessed the development of spaces where TCNs may find themselves in limbo between illegal and legal stay; that is where their status cannot unequivocally be described as either illegal or legal. These limbo spaces in large part emerged and developed as alternatives to administrative detention and regularisation in the management of non-removable persons. *I am interested in examining the nature and consequences of these spaces, as well as how and why EU management of non-removable persons²³ has contributed to their development.*

In **Part I**, I provide a conceptual framework for understanding the nature and consequences of a variety of positions that non-removable TCNs may find themselves in. I do so by providing a typology of what I call limbo spaces between illegal and legal stay. There are limbo spaces of toleration, on the one hand, and limbo spaces of unrecognised legal residence, on the other. I then explain why I describe these positions as lying on a spectrum between illegal and legal stay, and as having a limbo-like quality. I move on to a French-case study on the implementation and perception of limbo spaces of toleration, based on accounts provided by a purposive sample of tolerated TCNs. The remainder of the thesis focuses on limbo spaces of toleration.

In **Part II**, I argue that toleration spaces may be viewed as

²³ Migrant subjects discussed in this thesis can generally be assumed to be adult migrants, unless otherwise specified. The literature on migrants who are minors is vast and complex, and while it is of great relevance in the field of non-removable persons, I did not feel I could do it justice in this work and so chose to mainly keep it outside the scope of this thesis. However, some individual non-citizens are not removable because they are minors, and so research on non-removable minors is very relevant and important.

governmental tools for managing non-removable persons, alongside tools of regularisation and administrative detention. I contend that EU law has had an important impact on the nexus in Member States between various forms of non-removability, on the one hand, and limbo spaces of toleration, on the other. It has also had an impact on the formalisation of these limbo spaces. I examine these impacts and argue that various forms of legal toleration have gradually emerged and developed from a policy and legal gap into an increasingly deliberate governmental tool, as well as from low-key technical issues into increasingly politicised ones. I then argue that the EU's governance of these spaces has had a transformative impact on membership patterns in the EU. It has contributed to the emergence and shifts of membership categories, and more crucially to the development of a new hierarchy of desirability, with serious implications in terms of access to legal residence status and rights, subjection to administrative detention, and potential subjection to imprisonment.

In **Part III**, I argue that toleration positions can be viewed as sanctions of membership exclusion, and may be perceived by certain EU institutional actors as performing a range of functions similar to other forms of membership exclusion, such as deportation, administrative detention, and imprisonment.²⁴ These are functions of retribution, deterrence, enhanced removability, the expressive power of the State, and selection/rehabilitation. There is an added function of curbed public expenditure. However, formal postponement-of-removal, which is a specific form of toleration, may also be viewed in a semi-inclusionary light, under which it could be perceived as performing similar functions to

²⁴ For literature relating to functions of deportation, administrative detention, and imprisonment, see Juliet Stumpf, "The Crimmigration Crisis: Immigrants, Crime and Sovereign Power" (December 2006) 56 *American University Law Review* 367. See also William Walters, "Deportation, Expulsion, and the International Police of Aliens" (2002) 6 (3) *Citizenship Studies* 265, 276-280; Claire Rodier and Isabelle Saint-Saëns, "Contrôler et Filtrer : les Camps au Service des Politiques Migratoires de l'Europe" in M-C Caloz-Tshopp and V. Chetail (eds), *Mondialisation, Migrations, Droits de l'homme*, (Bruylant, 2007), 6.

regularisation.²⁵ After providing an analysis of the multiplicity of functions assigned by at least some EU institutional actors to toleration positions, I move on to a French case-study on the deterrent function and impact of toleration positions, based on accounts provided by the purposive sample of tolerated TCNs mentioned above.

25 For a good overview of the functions of regularisation, see Marc R Rosenblum, "Immigration Legalization in the United States and European Union: Policy Goals and Program Design" (December 2010) Migration Policy Institute Brief < <http://www.migrationpolicy.org/pubs/legalization-policydesign.pdf> > accessed 31 January 2014.

Part I/ The nature and consequences of limbo spaces between illegal and legal stay

In chapter 1, I provide a typology of limbo spaces between illegal and legal stay under EU law. With this typology, I explore the nature and consequences of these spaces. In chapter 2, I provide a French case-study on one broad group of limbo spaces, that I call limbo spaces of toleration. On the basis of interview-based qualitative research, I examine the implementation and perception of EU-governed toleration positions in France.

Chapter 1. A typology of limbo spaces between illegal and legal stay: legal toleration and unrecognised legal residence

In the UK context, Emanuela Paoletti has begged the question: “How can membership or non-membership statuses of people who cannot be deported be conceptualised”?²⁶ She has explained that the “question lingering has to do with explaining and understanding varying formal and informal statuses of membership in relation to norms and practices defining state capacity”.²⁷ In this chapter, I propose a possible conceptualisation of these statuses at EU level, which builds on the existing literature, but also differs from it in several respects.

Membership as status and rights

Some preliminary words about membership and citizenship are necessary. The literature on citizenship is vast, as are the understandings and uses of the word. This small section does by no means constitute a synthesis of this literature.²⁸ Nonetheless, Linda Bosniak²⁹ has identified four broad groups of understandings of citizenship which are useful here. These are citizenship as status, as rights, as political activity, and as identity.

Citizenship as status corresponds to the legal status of citizen. Legal membership statuses are highly stratified, with key categorical distinctions, namely between citizens and non-citizens as well as between legally and illegally present non-citizens. Those who possess the legal status of citizen lie at the top of this legal

²⁶ Emanuela Paoletti, “Deportation, Non-Deportability and Ideas of Membership” (July 2010) Refugee Studies Centre Working Paper 65, 15.

²⁷ *Ibid*, 20.

²⁸ I do not delve into broad theories of citizenship where distinctions for example lie between cosmopolitan and communitarian citizenship.

²⁹ Linda Bosniak, “Citizenship Denationalized” (2000) 7 *Indiana Journal of Global Legal Studies* 447.

membership ladder. *Citizenship as rights* is about entitlements to a wide range of civil, political, social, economic, and cultural rights that have generally been associated with the legal status of citizen. However, many of these rights are not solely possessed by individuals with the legal status of citizen. *Citizenship as political activity* corresponds to the notion of the citizen as an active member of a political community. This understanding of citizenship is limited to participation in formal political institutions and processes for some authors, but it extends to all forms of political activism for others. *Citizenship as identity* denotes the affective and psychological dimensions of citizenship, dimensions that correspond to how individuals feel and identify within the framework of a wider community.

The two most relevant understandings of membership for this thesis are membership as legal status and as rights, namely in terms of their relationship. TCNs are subjected to EU Member States' power to determine conditions of entry, residence, and access to legal citizenship. Nation States have a right (with exceptions) to include and exclude non-nationals which rests upon the ideological and legal foundations of national territorial sovereignty. TCNs are subjected to such a power because they are not EU/national citizens. A consequence of this power is that they have an inferior legal status to that possessed by EU citizens. Furthermore, TCN legal statuses are diverse and hierarchical. A key distinction lies between TCNs who are legally and illegally present, a line which separates those who have complied with conditions of entry/residence from those who haven't. There are further distinctions, such as those that lie between long-term legal residents and all other legal residents, as well as between economic, forced, and family migrants. TCNs also have an inferior set of rights in comparison with EU citizens, as a number of membership rights are closely tied to legal membership status. A

key question which Linda Bosniak has raised is: to what extent does/should one's legal membership status impact on one's membership rights?

When I write about TCNs in limbo spaces between illegal and legal stay, my conceptualisation of these spaces is to be understood in terms of legal membership statuses. These TCNs have legal statuses that lie between illegal and legal stay, with different degrees of formality. These spaces also have repercussions and implications in terms of membership as rights.

In chapter 4 of this thesis, I delve further into how EU governance of non-removable TCNs has had a transformative impact in terms of legal membership statuses, as well as in terms of the relationship between legal membership statuses and membership rights. Building on both the citizenship and liminality literature, I also suggest that limbo spaces between illegal and legal stay are forms of probationary membership, much like Sébastien Chauvin and Blanca Garcés-Mascareñas's contention that illegal residency is a “handicap within a continuum of probationary citizenship”.³⁰ In the concluding chapter of this thesis, I further delve into an understanding of citizenship as political activism,³¹ by examining how non-removable TCNs may be viewed as performing acts of citizenship when they use the legal and practical tools at their disposal to contest their legal status and rights.

Short overview of the current literature on non-removable TCNs

The current literature on non-removable TCNs in the EU essentially resides in three pieces of work, even if many others

30 Sébastien Chauvin and Blanca Garcés-Mascareñas, “Beyond Informal Citizenship: The New Moral Economy of Migrant Illegality” (2012) 6 *International Political Sociology*, 243.

31 Engin Isin, “Claiming European Citizenship” in Engin Isin and Michael Saward (eds), *Enacting European Citizenship* (Cambridge University Press, 2013). See also Saskia Sassen, “Towards Post-National and Denationalized Citizenship” in Engin Isin and Bryan Turner (eds), *Handbook of Citizenship Studies* (Sage, 2003), 283.

relevant works exist. These are a report by the Fundamental Rights Agency of the EU (FRA),³² a study by the European Migration Network (EMN),³³ and a study by Ramboll/Eurasylum.³⁴ This literature talks about toleration to describe and define the position of persons who cannot be removed for any variety of reasons (legal, policy, practical) and who are not granted a residence permit. Some non-removable persons find themselves in a position where their removal is postponed for a given period of time; State authorities are legally prohibited from removing them during that period. Other non-removable persons are usually persons whose removal is not postponed, but who are subjected to administrative detention and released due to the impossibility of removal.

In this young literature, non-removable persons are classified as being either formally tolerated or de facto tolerated. Formal toleration is used to define the position of persons whose removal is postponed and who are granted a document which formally certifies postponement. De facto toleration is used to describe two positions: 1) that of persons whose removal is postponed but who receive no or little certification and 2) that of persons whose removal is not postponed but who are released from administrative detention due to the impossibility of return.

Beyond the notion of toleration, one can also find hints in the literature of notions of limbo and a scale between illegal/legal stay. But it is only one of the works that makes a rigorous effort to dig deeper into these additional notions - the report by the FRA. The FRA argues that positions of formal toleration and de facto toleration lie on a scale between full legality and full illegality of

32 European Union Agency for Fundamental Rights, *Fundamental Rights of Migrants in an Irregular Situation in the European Union: Comparative Report* (Publications Office of the European Union, 2011).

33 European Migration Network, "The Different National Practices Concerning Granting of Non-EU Harmonised Protection Statuses" (Study produced in December 2010), 61-73.

34 Ramboll and Eurasylum, "Study on the Situation of Third-Country Nationals Pending Return/Removal in the EU Member States and the Schengen Associated Countries: Final Report" (Study commissioned by the European Commission, 11 March 2013).

stay.³⁵ It places them on such a scale by reference to the notion of security of residence, with full legal stay offering full security of residence, illegal stay offering none, and toleration offering intermediate levels of security. The FRA is furthermore the actor that has systematically used the notion of limbo to describe the position of tolerated TCNs who experience protracted periods of exclusion from legal residence as well as uncertainty over future return or regularisation.

The idea that at least some tolerated TCNs can end up in a position that lies between illegal and legal stay has been alluded to in other works. There is some disagreement over whether postponement-of-removal corresponds to illegal stay, legal stay, or some kind of in-between position. These disagreements are the result of definitional and conceptual complexities.

What my work adds to this literature

What does my work add to this literature?

I offer a more expansive and conceptually fleshed out definition of toleration. I include more categories of TCNs within the overall group of tolerated TCNs. I namely include certain asylum applicants; the current literature often expressly excludes all asylum applicants from the scope of toleration.³⁶ I further do not divide tolerated TCNs into groups of formal and de facto toleration. I instead opt for a division of tolerated TCNs into groups of legal toleration, indirect toleration, and tacit toleration.

I take a clear position in defining toleration positions as limbo-like and as lying between illegal and legal stay, and seek to provide

³⁵ European Union Agency for Fundamental Rights, *Fundamental Rights of Migrants in an Irregular Situation in the European Union: Comparative Report* (Publications Office of the European Union, 2011), 34.

³⁶ For example, see European Union Agency for Fundamental Rights, *Fundamental Rights of Migrants in an Irregular Situation in the European Union: Comparative Report* (Publications Office of the European Union, 2011), 16.

conceptual clarification that is sometimes lacking in the current literature. I further expand my analysis of spaces between illegal and legal stay beyond the realm of toleration. I seek to show that it is not only tolerated TCNs who lie in-between illegal/legal stay but also certain categories of TCNs whose legal residence is not recognised.

Following on from this background preface of where I situate my work, I contend in this chapter that there are two broad groups of limbo spaces between illegal and legal stay in contemporary EU law. These are limbo spaces of toleration and limbo spaces of unrecognised legal residence. I first provide an overview of positions that lie within these spaces (sections 1 and 2) before providing an explanation of why I portray them as lying between illegal and legal stay (sections 3 and 4), as well as why I characterise them as having a limbo-like quality (section 5).

I delve further into intricacies of the current literature in sections 3 and 5, in order to better explain how my positions lie in contrast with it. But sections 1 and 2 preliminarily serve to provide a detailed explanation of the TCN positions at the heart of my thesis and the literature.

1. The positions of legal toleration and indirect toleration

The term *toleration* has been used by several authors and institutional actors to describe the position of certain non-removable TCNs. It is also an actual legal term in some EU Member States³⁷ to describe the legal position of illegally staying TCNs whose removal is postponed for legal or practical reasons. But most EU Member States' national legal systems make no mention of it. The conceptual contours of the term are not truly fleshed out

³⁷ This is most famously the case in Germany. See the German Residence Act, art 60 a (available on the International Organization for Migration's Law Database).

in the literature and legal/policy texts, but rather taken for granted. It is taken for granted as a term that defines the position of TCNs who are not removable but not regularised. As a result of this absence of conceptual exploration, I believe the literature unduly excludes many categories of TCNs from the scope of *toleration*, and often uses inadequate terminology to make distinctions between diverse categories of *tolerated* TCNs. In this section, I offer my own particular conceptualisation of toleration and the diverse TCN positions it applies to. It is in section 3 that I display the differences between my conceptualisation and that of the current literature. I have made this choice because differences in conceptualisation will be easier to understand following the detailed overview I provide in this section of the TCN categories concerned.

Toleration has many definitions, which vary slightly in accordance with context. The term is used in contexts ranging from cultural and religious co-existence³⁸ to practices of permitted rule-violations. The definition which in my opinion best englobes the variety of definitions is that which defines toleration as “(r)efraining from acting against that which is disapproved of, or politically opposed, or alien”.³⁹

Illegally staying TCNs have violated conditions of entry, stay, or residence, and their presence is unauthorised. Their actions and presence are *disapproved of*. When they are not removed for any number of reasons, but are not granted legal stay, they are not deported but their presence and past actions continue to be disapproved of in terms of immigration law and policy. Their non-removal might be due to State authorities *choosing to refrain* from detaining and deporting them, or alternatively and more

38 For example, see Theodora Kostakopoulou, ““Integrating” Non-EU Migrants in the European Union: Ambivalent Legacies and Mutating Paradigms” (2002) 8 Columbia Journal of European Law, 185.

39 Simon Blackburn, *The Oxford Dictionary of Philosophy* (2nd edn, Oxford University Press, 2008) < <https://www-oxfordlanguagedictionaries-com.acces-distant.sciences-po.fr> > accessed 8 January 2014.

interestingly from the legal system imposing an *obligation* on State authorities to *refrain* from deporting them (or administratively detaining them).⁴⁰ I am mostly interested in situations where legal limits are placed on the power of State authorities to administratively detain and deport. When State authorities can legally detain and deport a TCN but choose not to, one could talk about *tacit* toleration, as some measure of choice to tolerate can be inferred from non-removal. The notion of *tolerating* irregular migrants has more widely been used to describe such tacit toleration.⁴¹ When State authorities are legally obliged to refrain from detaining and deporting, one could talk about *legal toleration*, as it is the legal system that requires State authorities to refrain from detaining and deporting illegally staying TCNs (whose actions and presence are disapproved of).

Whether toleration is a choice or the result of legal constraints, the term itself has negative connotations in this field. It is a legal term in some countries, and an EU-wide academic term to describe the position of certain non-removable TCNs. Unlike the word citizenship, toleration is a membership notion that is pejorative. Words in immigration law and policy are rarely neutral and often reflect a conscious or subconscious distancing and sub-categorising of the other. For example, the words *foreigner* and *alien* are stigmatising alternatives to more neutral terms like *dweller*, *denizen*, and *immigrant*. The same may be said of the word *illegal* in comparison with the less stigmatising term *irregular*.⁴² The word toleration, in the immigration context, clearly denotes the idea of State authorities reluctantly accepting an outsider who is neither

40 These are not the only two explanations, but two likely ones.

41 For example, see the use of the word in Olivier Clochard, Yvan Gastaut, and Ralph Schor, “Les Camps d'Étrangers Depuis 1938: Continuité et Adaptations” (Foreigner camps since 1938: continuity and adaptations) ((2004) 20 (2) *Revue européenne des migrations internationales*, 8; Franck Düvell, Anna Triandafyllidou, and Bastian Vollmer, “Ethical Issues in Irregular Migration Research in Europe” (2010) 16 (3) *Population Space and Place* 227, 231.

42 There are very interesting debates on whether or not the word illegal should be used to describe the status of unauthorised migrants. I do not delve into them in this thesis as I do not have a fixed opinion on the topic, and I chose to alternate between talking about illegally resident TCNs and irregular migrants.

wanted nor desirable. In the long-run, it might be preferable to replace the word toleration with a less stigmatising alternative. However, one of the aims of this thesis is to show that toleration is the word that best describes many TCN positions, including ones that academics refuse to categorise as toleration. Instead of pushing for lexical reform of the word toleration, those against toleration statuses might be more productive in advocating for the replacement of all toleration positions with statuses of legal stay. On the other hand, progressive lexical reform is possible and could positively influence public perception of TCNs concerned. *Tolerated stay* could alternatively be called temporary stay, provisional stay, interim stay, contingent stay, or pending stay. These alternatives draw attention away from the negative connotations of the word toleration. They however reflect the limbo-like quality of toleration positions. Such euphemisms might however have as many drawbacks as advantages, namely due to their sweet coating of highly disadvantageous positions.

It is positions of toleration resulting from legal constraints that are of interest here, as it is these positions that I qualify as lying in-between illegal and legal stay further down. Within this world of toleration resulting from legal constraints, I make a distinction between what I call positions of direct legal toleration and indirect legal toleration. Legal toleration corresponds to situations where the removal of a TCN is legally prohibited. Indirect toleration corresponds to situations where removal is not legally prohibited but where pre-removal detention is (for any given period of time). And this legal prohibition of pre-removal detention represents an indirect legal constraint on the power to remove. *For purposes of simplification, I will talk about legal toleration and indirect toleration. Legal toleration must be taken to refer to direct legal toleration. Indirect toleration must be taken to refer to indirect legal toleration.*

Legal toleration englobes positions where a TCN is (directly) legally protected from removal, but where this legal protection falls short of legal residency. Legal protection from removal means that an EU Member State is legally prohibited from removing a TCN. Legal toleration may be more or less formal, depending on whether legally tolerated TCNs are provided with written certification of their legal protection from removal, and on the nature and form of such certification.

Many laymen and jurists have trouble understanding the notion that one can be legally protected from removal and not be legally resident. It is only certain specialists in immigration and asylum law who have come to know and understand the possibility and existence of such a disjunction. The nexus between legal protection from removal, on the one hand, and legal residency, on the other, is not simple. There are three distinct possibilities that exist in EU and/or national immigration laws for those who are legally protected from removal (Diagram 1). A first group has no right to legal residency, a second group is entitled to legal residency, and a third is legally resident independently of formal administrative acknowledgement. In other words, the first group is not entitled to regularisation of status, the second is entitled to regularisation of status, and the third is legally resident. For the third group, any residence document granted merely recognises pre-existing legal residency. For the first group, regularisation can be granted, but it is discretionary.

Diagram 1: The nexus between legal protection from removal and legal residence



There are a variety of positions of legal toleration that are governed under contemporary EU law. There is a general postponed-removal status (1.1.) and a tolerated victim of trafficking status (1.2.), which are both explicitly governed by EU legislation. There are other such positions which are not so explicitly governed under EU legislation; these are positions of tolerated asylum applicant (1.3.), cancelled-removal, as well as hybrid toleration/legal statuses (1.1. again). These various positions of legal toleration come with varying degrees of formalisation, from informal legal toleration to full-fledged formal certification of legal toleration.

There are also positions of *indirect toleration* in contemporary EU law. A TCN might not be legally protected from removal, but might be legally protected from pre-removal detention, temporarily or definitively. Pre-removal detention is a key element in the coercive removal of illegally staying TCNs. But the subjection of irregular migrants to pre-removal detention is subject to legal constraints, which can lead to the release of irregular migrants from said detention. When illegally staying TCNs are released from

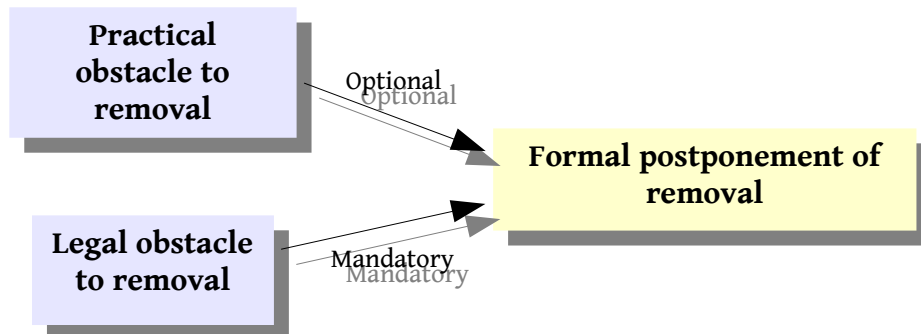
administrative detention due to such constraints, they may end up in positions of released-detainee *stricto sensu* or exhausted-returnee (1.4.). Such positions do not correspond to legal protection from removal, but they correspond to indirect (legal) protection from removal due to legal constraints placed on administrative detention. Some describe the position of released-detainees as *de facto* toleration, but I describe such a position as indirect toleration, for legal constraints lie at the heart of their toleration, even if only indirectly.

1.1. The general postponed-removal status under the Return Directive

The Return Directive,⁴³ adopted by the Council and the European Parliament in 2008, set very minimalistic European standards for a postponed-removal status. Article 9 provides that EU States *shall* postpone removal in cases where an illegal resident is protected from removal on certain legal grounds (non-refoulement and suspensive appeal proceedings), and that States *may* postpone removal in cases where an illegal resident cannot be removed on various practical grounds (namely due to a lack of cooperation from the country of origin/transit or from the returnee which causes difficulties of identification or of practical implementation of a return decision). Diagram 2 illustrates this. When the removal of a TCN is postponed, the host Member State is legally prohibited from enforcing removal, which places the postponed-returnee in a position of legal toleration. This namely concerns failed asylum seekers, but not exclusively.

⁴³ Directive 2008/115/EC of the European Parliament and of the Council on the return of illegally staying third-country nationals [2008] OJ L 348/98.

Diagram 2: The nexus between obstacles to removal and postponement-of-removal in the Return Directive



Article 6 (4) provides that States may at any moment decide to regularise the status of an illegal resident, but that regularisation does not have to be accompanied by the withdrawal of return measures; a return measure can merely be suspended following regularisation. In such cases, regularisation of status remains tainted by an existent threat of deportation, since deportation is merely suspended. Those concerned end up in a hybrid position of legal stay and postponed-removal.

The Directive states that where removal of illegal residents is postponed, either by obligation or by choice, host States must provide written certification of postponement, and ensure that principles of emergency healthcare, education for minors, and family unity are guaranteed.⁴⁴ There is therefore a minimum of formalisation and of substance. But basic conditions of subsistence are not guaranteed in the core text of the Directive⁴⁵ nor in other pieces of EU legislation, and labour market access is in principle prohibited under the Employer Sanctions Directive.⁴⁶ Furthermore, Member States may limit postponed-returnees' freedom of movement by imposing “obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of

⁴⁴ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on the return of illegally staying third-country nationals (2008) OJ L 348/98, art 14.

⁴⁵ They receive a vague mention in recital 12 of the non-binding preamble.

⁴⁶ Directive 2009/52/EC of the European Parliament and of the Council on employer sanctions (2009) OJ L168/24.

an adequate financial guarantee, submission of documents or the obligation to stay at a certain place”.⁴⁷

The Directive's provisions are not exhaustive. While the Directive mentions the prohibition of refoulement as a ground for mandatory postponement-of-removal, there are other human rights obstacles to removal that exist under international and EU human rights law. There is namely the right to private and family life, under article 8 of the European Convention on Human Rights (ECHR), which may under certain circumstances constitute a ground for non-removal, and which does not automatically lead to regularisation of stay.⁴⁸

The influence of EU law, via the adoption of the Return Directive in 2008, is very recent and still in progress. National law remains dominant in this area; postponed-removal statuses (and the rights attached) vary enormously from one Member State to the next. Some Member States grant formal toleration certificates to postponed-returnees, while others provide little to no certification (written certification for example simply coming in the form of an administrative receipt or the copy of a Court decision). Depending on the Member State, postponed-returnees might have the same rights as illegal residents *stricto sensu*,⁴⁹ or a greater set of rights which are similar (but rarely equal) to those possessed legal residents. The Ramboll/Eurasyllum study on TCNs pending return found that postponed-removal statuses across the EU can be classified in one of two groups: 1) an official postponement which grants more rights than those bestowed on illegal residents *stricto*

⁴⁷ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on the return of illegally staying third-country nationals (2008) OJ L 348/98, arts 7(3) and 9(3).

⁴⁸ See European Union Agency for Fundamental Rights, *Fundamental Rights of Migrants in an Irregular Situation in the European Union: Comparative Report* (Publications Office of the European Union, 2011), 30. There are exceptional circumstances under which article 8 ECHR may confer an entitlement to regularisation of stay: Daniel Thym, “Respect for Private and Family Life under article 8 ECHR in Immigration Cases: a Human Rights to Regularize Illegal Stay?” (2008) 57 *International and Comparative Law Quarterly* 87-112.

⁴⁹ Illegal residents *stricto sensu* are to be understood here as illegal residents who have no special status or protection from removal, and whose human rights entitlements correspond to the lowest that any given individual is entitled to, irrespective of nationality or immigration status.

sensu, 2) an official or de facto postponement which does not grant additional rights.⁵⁰ I think it is more useful to distinguish between formal and informal postponement of removal, rather than between formal and de facto postponement. The choice to distinguish between formal and de facto postponement is one made by the big studies on postponed-removal, and one which I critique further down. But for now, I just wish to highlight the distinction between formal and informal postponement-of-removal, and the fact that the reality looks more like a spectrum than a dichotomy, with varying degrees of formalisation existing across the EU and within a given Member State.

Postponed-removal status is the legal toleration position that has attracted most attention in recent years in immigration-law circles, as it was formalised at EU-level via the Return Directive. Due to the very recent nature of formal postponed-removal in many EU Member States, EU-wide and national statistics are severely limited. There are reports and studies by EU institutional actors that have recently gathered some statistical data on postponed-removal. National statistics have long been compiled in Member States with a long tradition of formal toleration, such as Germany. Member States with a shorter history of formal toleration, or where the formalisation of toleration is happening very slowly, have either not gathered any statistics or only quite recently began to compile such statistics.

In Germany, where estimates have long been gathered, there were about 89,500 TCNs who were registered as holding a formal toleration certificate on 31 December 2009,⁵¹ and about 87,136 in 2011.⁵² In 2011, “the length of their stay ... (varied) from one up to

50 Ramboll and Eurasyllum, “Study on the Situation of Third-Country Nationals Pending Return/Removal in the EU Member States and the Schengen Associated Countries: Final Report” (Study commissioned by the European Commission, 11 March 2013), 2.

51 European Migration Network, “Ad-hoc Query on Practices followed concerning Third Country Nationals whose Compulsory Removal is Impossible” (Compilation Produced on 14 April 2010), 7.

52 Ramboll and Eurasyllum, “Study on the Situation of Third-Country Nationals pending Return/Removal in the

15 years”.⁵³ In other Member States, estimates are non-existent or deficient. Where they exist, they tend to indicate very low numbers of formally tolerated TCNs.⁵⁴

A word on voluntary-return status and cancelled-removal status

Under article 7 of the Return Directive, a return decision issued to an illegally staying TCN must in principle grant a voluntary period of departure (although the granting of such a period is more the exception than the rule in many Member States). Those who are granted a period of voluntary return are entitled to the same type of formal certification and rights as postponed-returnees. Unlike postponed-removal periods, the duration of which is not limited under the Directive, voluntary return periods must be between seven and thirty days, unless Member States extend that period due to the specific circumstances of individual cases. In this thesis, I do not particularly address the issue of voluntary return, nor the subtle differences between the positions of voluntary-returnee and postponed-returnee. It is postponement-of-removal that lies at the heart of the protracted toleration issue, and which the literature on non-removable irregular migrants focuses on.

A position whose existence is not clear from the final version of the Return Directive is that of cancelled-removal. Cancellation-of-removal, as well as postponement-of-removal, was an issue discussed inter-institutionally in the early negotiations behind the Return Directive. The Commission's Return Directive proposal contained a provision that would have imposed the mandatory cancellation/withdrawal of return measures in cases of human

EU Member States and the Schengen Associated Countries: Final Report” (Study commissioned by the European Commission, 11 March 2013), 49.

53 Ramboll and Eurasyllum, “Study on the Situation of Third-Country Nationals pending Return/Removal in the EU Member States and the Schengen Associated Countries: Annex 1 – Country Reports” (Study commissioned by the European Commission, 11 March 2013), 82.

54 Ramboll and Eurasyllum, “Study on the Situation of Third-Country Nationals pending Return/Removal in the EU Member States and the Schengen Associated Countries: Final Report” (Study commissioned by the European Commission, 11 March 2013), 49.

rights protection from removal.⁵⁵ Cancellation was discussed with regard to the Commission's human rights-related proposal, but there were also talks in the European Parliament about introducing cancellation of removal as an alternative to postponement in other parts of the Directive.⁵⁶ It is often assumed that cancellation, as opposed to suspension of removal, goes hand in hand with regularisation of status. But this is not always the case. In France, for example, the status of cancelled-returnees is not systematically regularised in practice.⁵⁷ But it would seem that cancellation of removal and regularisation mostly go hand in hand.

1.2. The explicit tolerated trafficking victim status under the Directive on residence permits granted to victims of human trafficking

EU law imposes an obligation on Member States to provide victims of human trafficking with the possibility of obtaining a temporary residence permit in exchange for their cooperation against their traffickers. There is no entitlement to a residence permit; there is only an entitlement to be granted a reflection period in order to consider cooperating in exchange for a permit. Whether this leads to effective cooperation and the grant of a temporary residence permit is another story.

Standards relating to the granting of this residence permit are set out in the Cooperative Victims of Trafficking Directive (CVHT Directive)⁵⁸ adopted by the Council in 2004. Prior to the grant or refusal of this permit, victims must be granted a reflection period

⁵⁵ Commission, "Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals" COM (2005) 391 final, art 6 (4).

⁵⁶ For example, see Parliament, "Report on the Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals" COM PE 374.321v03-00, 50-51.

⁵⁷ See sections 1.1. and 5 of chapter 2 below.

⁵⁸ Council Directive 2004/81/EC on the residence permit for cooperative victims of human trafficking (2004) OJ L 261/19.

in order to escape traffickers and make an informed decision. The Directive imposes an obligation on States to not enforce removal during this reflection period.⁵⁹ Victims thus find themselves in a position of legal toleration. The word *toleration* was actually used in the CVHT Directive proposal to describe this position.⁶⁰ There is however no obligation to issue written certification of this prohibited enforcement of removal, which means that their removal need only be informally postponed/prohibited. The Directive attaches minimal subsistence rights to this toleration position as well as entitlements to emergency healthcare during this reflection period. These rights are lower than those bestowed upon trafficking victims with residence permits.⁶¹

Statistics on the number of trafficking victims in the EU are not precise due to the clandestine nature of both human trafficking and irregular migration. Between 2008 and 2010, Eurostat estimates suggest that at least 9528 victims were identified across the EU.⁶² Statistics are highly deficient with regard to the number of victims granted a reflection period and residence permit under the CVHT Directive. In 2010, “the number of victims given a reflection period in the 18 Member States that were able to provide data was 965”⁶³ and “the number of victims given a residence permit in the 19 Member States that were able to provide data was 1 196”.⁶⁴

59 Ibid, art 6.

60 Commission, “Proposal for a Council Directive on the Short-Term Residence Permit issued to Victims of Actions to Facilitate Illegal Immigration or Trafficking in Human Beings who Cooperate with the Competent Authorities” COM (2002) 71 final, 12.

61 Council Directive 2004/81/EC on the residence permit for cooperative victims of human trafficking (2004) OJ L 261/19, arts 7 and 9-12.

62 Gert Bogers, Athina Karvounaraki, Steve Clarke, and Cynthia Tavares, *Trafficking in Human Beings Report* (Eurostat Methodologies and Working papers, Publications of the European Union, Luxembourg, 2013), 10.

63 Ibid, 56.

64 Ibid, 57.

1.3. The implicit tolerated asylum applicant status under the Asylum Reception Directive

Asylum seekers, from the moment they apply for asylum, are allowed to remain in their host Member States for the duration of their asylum procedures; they are allowed to remain since they are protected from refoulement.⁶⁵ This protection from refoulement corresponds to a legal obstacle to removal. And they benefit from such protection until they are either granted or refused international protection⁶⁶ (which encompasses refugee status and subsidiary protection status). Asylum seekers are however not entitled to regularisation of status.

The Asylum Reception Conditions Directive,⁶⁷ adopted by the Council in 2003, entitles non-detained asylum seekers to written certification of their right to remain,⁶⁸ but unlike the Commission's Directive Proposal,⁶⁹ the adopted Directive does not require this document to grant them legal stay. Detained asylum seekers, as well as asylum seekers at the border, are not entitled to any document at all.⁷⁰ When asylum applicants are not granted legal stay, they find themselves in a position of legal toleration, as they are protected from refoulement but not granted legal stay. Unlike the postponed-removal position that is explicitly governed under the Return Directive, the tolerated asylum applicant position is not explicitly governed under the Asylum Reception Conditions

65 I provide further information on what protection from refoulement corresponds to in chapter 3.

66 See Directive 2011/95/EU of the European Parliament and of the Council on qualification for international protection (recast) (2011) OJ L 337/9.

67 Council Directive 2003/9/EC on asylum reception conditions (2003) OJ L 31/18.

68 Ibid, art 6.

69 Commission, "Proposal for a Council Directive laying down Minimum Standards on the Reception of Applicants for Asylum in Member States" COM(2001) 181 final, 32.

70 Council Directive 2003/9/EC on asylum reception conditions (2003) OJ L 31/18, art 6 (2). The grounds for detaining asylum seekers under EU law are quite wide, and remain so despite recent reforms of EU asylum legislation that have slightly restricted the scope for detaining asylum seekers. For more on this issue, see Kay Hailbronner, "Detention of Asylum Seekers" (2007) 9 European Journal of Migration and Law 159-172; Matiada Ngalikpima and Maria Hennessy, "Dublin II Regulation: Lives on Hold: European Comparative Report" (Project coordinated by Forum Réfugiés – Cosi, the Hungarian Helsinki Committee, and the European Council on Refugees and Exiles, February 2013).

Directive, but is merely a possibility that lies in the devilish details of the Directive's provision relating to the documentation rights of asylum seekers.

As I shall show below in section 2.2. of chapter 3, certain EU Member States have used the possibility of tolerating asylum seekers to create a distinction between legally resident and tolerated asylum applicants, with different sets of rights for both groups. Asylum applicants are procedurally segregated into numerous groups. They are principally segregated into groups of regular procedure applicants, accelerated procedure applicants, and Dublin procedure applicants.⁷¹ Asylum applicants who are placed in accelerated and Dublin procedures, which are derogatory procedures, tend to be treated as presumptively fraudulent asylum applicants. Without getting into the details of these procedures (which I do in chapter 3), it is worth noting here that the objectives of such procedures are to deter perceived abuses of asylum systems. In countries like France, accelerated and Dublin applicants are excluded from legal stay, unlike regular/normal asylum applicants whose stay is temporarily regularised.⁷² Legally staying and tolerated asylum applicants are granted a very different set of rights in France, and this discrimination is entirely compatible with the discretionary standards of treatment set out under the Asylum Reception Conditions Directive.

A Recast of Asylum Reception Conditions Directive was adopted by the Council and European Parliament in 2013,⁷³ and shall fully replace the current Directive on 21 July 2015. The provisions relating to documentation remain virtually unchanged, although the grounds for detaining asylum seekers have been further

71 There are further distinctions between first instance and appellant applicants, border and in-territory applicants, as well as detained and non-detained applicants.

72 Code de l'entrée et du séjour des étrangers et du droit d'asile (Code on the Entry and Residence of Foreigners and on the Right of Asylum, consolidated version on 24 January 2014), arts L 741-4 and 742-6.

73 Directive 2013/33/EU of the European Parliament and of the Council on asylum reception conditions (recast) (2013) OJ L 180/96.

clarified and restricted, which is relevant as detained asylum seekers are not entitled to any documentation.

EU-wide statistics exist with regard to the overall number of asylum applications, but these statistics provide little to no insight with regard to the number of asylum applications under each type and stage of the asylum procedure. However, such statistics do exist at national level. In France, where accelerated and Dublin asylum applicants are excluded from legal stay (by contrast with regular applicants), government statistics have been gathered in recent years on the number of applicants in such procedures. In 2011, out of an estimated 57,337 asylum applications, 11,899 were priority procedures, which represents about 20 % of all asylum applications.⁷⁴ The number of Dublin applicants is not as easily identifiable via statistics, but it is known that the number of Dublin transfers from France to other EU Member States in 2011 was low in relation to the overall number asylum applications, hovering around the hundreds rather than the thousands. All in all, this means that over 20% of asylum applicants in 2011 were tolerated and not legally staying. This 20% figure, which represents an increase in comparison with previous years,⁷⁵ indicates that the issue of tolerated asylum applicants should not be dismissed as a minor issue. It may however cease to be as big an issue in the near future if a current legislative proposal on asylum is adopted in its current form by the French Parliament.⁷⁶

74 Comité Interministériel de contrôle de l'immigration, *Les Chiffres de la Politique de l'Immigration et de l'Intégration – Année 2011 – Neuvième Rapport au Parlement* (Direction de l'information légale et administrative, Paris, décembre 2012), 108.

75 Comité Interministériel de contrôle de l'immigration, *Les Orientations de la Politique de l'Immigration : Quatrième Rapport au Parlement* (La documentation française, Paris, décembre 2007), 47.

76 See Ministère de l'Intérieur, "Projet de Loi relatif à la Réforme de l'Asile" (n° 2182, déposé le 23 juillet 2014). If so adopted, most accelerated and Dublin applicants would in principle be granted legal stay. However, derogations would continue to exist for accelerated applicants in detention. And Dublin applicants, especially in the later stages of a Dublin procedure, could under certain circumstances be subjected to administrative detention or a designated residence order (the latter being a form of postponement-of-removal).

1.4. Released-detainees *stricto sensu* and the position of exhausted-removal on the margins of the Return Directive

Even if illegally staying TCNs' removal is not postponed, the Return Directive provides Member States with a lot of discretion to place them in administrative detention (pending removal). It allows Member States to detain them for up to an initial maximum period of six months, which can be extended to an absolute maximum of eighteen months in cases of non-cooperation by detainees or third countries.⁷⁷ Maximum periods vary from one Member State to the next, which range from a few weeks to the full eighteen months. In Member States with lower maximum periods, such as France which has a forty-five day period, illegal residents can often be subjected to multiple placements in administrative detention. But the absolute maximum period of administrative detention under EU law is eighteen months, whether it be a one-time placement or successive placements. The principal targets of prolonged administrative detention are illegally staying TCNs who cannot be removed for practical reasons.

Member States are compelled to release administrative detainees following expiry of the maximum period of administrative detention. The Return Directive also requires them to release detainees before expiry of the maximum period if there is no *reasonable prospect of removal* within that maximum period.⁷⁸ They may also sometimes be compelled to release detainees due to procedural irregularities at diverse stages of the return procedure.⁷⁹ The *reasonable prospect of removal* standard reflects human rights constraints on administrative detention under article 5 (1) (f) ECHR, which namely requires proportionality

⁷⁷ Directive 2008/115/EC of the European Parliament and of the Council on the return of illegally staying third-country nationals [2008] OJ L 348/98, art 15.

⁷⁸ *Ibid.*

⁷⁹ The Return Directive has also very recently been interpreted by the CJEU as having the potential to be used to release administrative detainees on procedural grounds, namely where there is a breach of the right to be heard: Case C-383/13/PPU *M.G., N.R. v Staatssecretaris van Veiligheid en Justitie* (2013).

standards in the implementation of administrative detention.⁸⁰ This is part of a growing set of human rights grounds for releasing individuals from administrative detention.⁸¹

When released due to expiry of the maximum period, administrative detainees are usually released in a limbo of exhausted-removal. Their removal is not postponed; it is simply impossible due to exhaustion of the return procedure.⁸² When released before expiry of the maximum period for reasons other than postponement-of-removal, administrative detainees are simply released in a position of released-detainee *stricto sensu*. The reason I add *stricto sensu* is because some administrative detainees are released as a result of the postponement of their removal. The position of released-detainee *stricto sensu* here must be taken to define persons released for reasons other than postponement. The position of exhausted-returnee is a sub-category of the position of released-detainee *stricto sensu*.

While the Directive grants minimal standards of treatment to illegally resident TCNs in administrative detention, as well as to TCNs whose removal is postponed, it contains no such explicit standards with regard to TCNs who are released from administrative detention for reasons other than postponement. The absence of explicit standards does not however mean that no standards may be derived from the Directive. The Court of Justice of the EU (CJEU) very recently delivered a ruling in which it interpreted provisions of the Directive as implicitly containing a right to written confirmation of release for illegally resident TCNs who are released due to the absence of a reasonable prospect of

80 *Saadi v UK* App no 13229/03 (ECtHR 29 January 2008), para 74.

81 See the following case in which the European Court on Human Rights established that administratively detaining a family of irregular migrants could amount to a violation of the article 8 right to private and family life: *Popov v France* App nos 39472/07 and 39474/07 (ECtHR 19 January 2012), paras 130-148.

82 In later chapters, I make a distinction between *temporarily* exhausted-returnees and *definitively* exhausted-returnees, to account for countries like France where short maximum periods of detention only apply for one given placement in detention, and offer no long term immunity from repeated placements in detention.

removal.⁸³ The CJEU did not provide many details on the scope of this right, namely on whether or not it extends to all TCNs released from detention, particularly those released from detention following expiry of the maximum period. It did however emphasise that Member States had a lot of discretion in terms of the form of this written confirmation. Although this ruling provides a first little step towards the formalisation of released-detainees' position, in the absence of regularisation or postponement-of-removal, released-detainees *stricto sensu* and exhausted-returnees are still left in a particularly precarious legal limbo upon release.

When illegally staying TCNs are released from administrative detention, whether before or following expiry of the maximum period of detention, I believe their position can best be described as one of indirect toleration. Most authors in the current literature describe such positions as corresponding to *de facto* toleration, by opposition to formal toleration positions. The reason is that for these authors, this toleration is seen as a product of State practice as opposed to a formal product of the law. However, the distinction between formal and *de facto* is not altogether clear. Released-detainees and exhausted-returnees might not be legally protected from removal, but their continued presence is the result of legal constraints on removal procedures. They are often released from detention as a result of legal limits placed on practices of administrative detention, not as a result of State practice. Therefore, I opt to describe their position as one of indirect (legal) toleration, as they are not legally protected from removal in any direct manner, but they are indirectly protected from removal via legal constraints on pre-removal detention. Member State authorities may, for a variety of reasons, choose to release illegal residents from detention, but they are often also compelled to do so due to legal constraints. Thus, non-removability of these

83 Case C-146/14 PPU *Bashir Mohamed Ali Mahdi v Director of the Directorate for Migration at the Ministry of the Interior* (2014), para 89.

released-detainees and exhausted-returnees is not purely a matter of State practice, but is very much a product of legal constraints. The issue of formality is another matter.

Statistics at EU level are non-existent with regard to released-detainees and exhausted-returnees. But the national NGOs of certain countries have started to gather statistical data on the destinies of illegal residents who are released from administrative detention. To provide an illustration of estimates in France, annual reports by a group of French NGOs suggest that in 2010, out of a sample of 24,018 administrative detainees, 55 % were released from administrative detention, and 11,7 % of the 24,018 detainees (amounting to a number of 2803 detainees) were released following expiry of the maximum period of detention. The 2803 were therefore released in a position of exhausted-removal.⁸⁴ The annual report for 2012 by the same group of NGOs indicates that out of a sample of 25,914 administrative detainees, 47,6 % were released, and 7 % released following expiry of the maximum period (amounting to a number of 1,815 detainees).⁸⁵ The number and percentage of exhausted-returnees is low in relative terms, but important enough to deserve academic and political attention.

2. The positions of unrecognised legal residence and unrecognised entitlements to legal residence

Unrecognised legal residence englobes positions where a TCN is legally present but is not recognised as such. As illustrated in Diagram 1 (above), persons who are legally protected from removal might either have no entitlement to legal residency, have a right to legal residency, or be legally resident irrespective of formal recognition by the host EU Member State.

⁸⁴ Assfam, Forum Réfugiés, France terre d'asile, la Cimade, l'Ordre de Malte, "Centres et Locaux de Rétention Administrative: Rapport 2010" (13 décembre 2011), 13.

⁸⁵ Assfam, Forum Réfugiés, France terre d'asile, la Cimade, l'Ordre de Malte, "Centres et Locaux de Rétention Administrative: Rapport 2012" (3 décembre 2013), 13.

The distinction between those who have a right to legal residency and those who are legally resident is quite subtle but nonetheless important. This all boils down to the relationship between residence documentation, on the one hand, and legal residency, on the other. Residence documentation may be constitutive of legal residency or it may merely evidence legal residency. For most TCNs, legal residency is derived from the residence document which they are granted. But some groups of TCN are deemed to possess a legal resident status which is merely evidenced by their documentation.

I shall illustrate the difference with two different types of TCN statuses in the EU. The first is the status of international protection. The second is the status of TCN family member of an EU citizen who falls under the scope of EU free movement law. Beneficiaries of international protection are legally protected from removal as a result of the prohibition of refoulement. They are also entitled to a residence document as soon as possible following the recognition of their status. TCNs or stateless individuals with international protection status are not legally resident from the moment they acquire their status; they are simply entitled to legal residency as soon as possible.⁸⁶

TCN family members of EU citizens who fall under the scope of EU free movement law are a special group of TCNs. From the inception of their familial link with an EU citizen who falls under the scope of EU free movement law, they benefit from an automatic right of entry and residence in the state of residence of the EU citizen. They are entitled to the grant of a residence document, but this document merely evidences their legal residency and is in no way

⁸⁶ See Directive 2011/95/EU of the European Parliament and of the Council on qualification for international protection (2011) OJ L 337/9, recital 40 of the preamble and art 24.

constitutive of it.⁸⁷ Their legal residency therefore does not begin from the moment they are issued a residence document. Even if they are de facto treated like illegal residents in situations where they do not have a residence document, they are legal residents. Elspeth Guild has talked about them as one of those groups of individuals “who cannot be illegal in EC (EU) law”.⁸⁸ There are other TCNs who similarly cannot be illegally present under EU law, namely TCN workers and their family members who fall under certain international agreements between the EU and specific third countries. But I shall not delve into these other groups here.

Even when a TCN is entitled to legal residency or is legally resident, there can be problems of effectiveness with regard to the entitlement to - or formal recognition of - legal residency. Many TCNs concerned have suffered from problems of recognition of their legal residency (or entitlement to it). These are problems of protracted non-recognition (whereby State authorities deny the existence of their status) or delayed recognition (whereby State authorities take months or years to recognise their status due to bureaucratic deficiencies).

This is especially the case with regard to TCN family members of EU citizens. The automatic right of residence of these TCN family members, which exists independently of formal State recognition, was not firmly established in EU law until 2008. It was firmly established following the *Metock* ruling delivered by the European Court of Justice.⁸⁹ This ruling was politically controversial; many EU Member States disapproved of the intrusion on national immigration control that resulted from the case. By way of consequence, in some countries, there was national resistance at a

⁸⁷ See Directive 2004/38/EC of the European Parliament and of the Council on the free movement of EU citizens and their family members (2004) OJ L 158/77, art 10 (1).

⁸⁸ Elspeth Guild, “Who is an Irregular Migrant?”, in Barbara Bogusz, Ryszard Cholewinski, Adam Cygan, and Erika Szyszczak (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Martinus Nijhoff Publishers, 2004), 4-7.

⁸⁹ Case C-127/08 *Metock v Minister for Justice* (2008) ECR I-06241.

political level which trickled down to apathetic implementation at an administrative level.⁹⁰ The European Parliament has over the past decade received a large number of petitions concerning violations of TCN family members' derivative right of entry and residence.⁹¹ There would appear to be many TCN family members of EU citizens who, although legally resident by virtue of EU free movement law, are subjected to long periods of time during which Member State authorities delay the grant – or refuse to grant – a residence card recognising their pre-existing right of residence. It is hard to quantify the number of TCNs who endure protracted non-recognition or delayed recognition of their legal residence, but the large number of petitions suggest that they are numerous in certain States, namely in the United Kingdom. The European Parliament and European Commission have been – and still are – working hard to ensure the proper implementation of these TCN family members' rights under EU law.⁹²

3. Why legal toleration positions lie in-between illegal and legal stay

Why do I qualify the variety of legal toleration positions enumerated above as lying between illegal and legal stay? Are some or all of these positions qualified in this manner in the literature on non-removable persons and toleration? The current literature first of all doesn't include all of my toleration categories within the scope of toleration (3.1.). It is secondly very divided about how to qualify toleration positions by reference to illegal and legal stay (3.2.). Disagreements over how to qualify toleration positions depends on how one defines illegal and legal stay (3.3.).

90 For a deeper analysis of the antagonisms involved, see the following article which looks at the collision between EU and UK law: Jo Shaw and Nina Miller, "When Legal Worlds Collide: an Exploration of what Happens when EU Free Movement Law meets UK Immigration Law" (2013) 38 (2) *European Law Review* 137-166.

91 European Parliament Petitions Committee, "Working Document on the Communication from the Commission to the European Parliament and the Council on "An Area of Freedom, Security and Justice Serving the Citizen" also known as "The Stockholm Programme"" COM (2009) 262 final' (23 September 2009) PE428.214v02-00, 2-3.

92 For example, see European Parliament Petitions Committee, "Notice to Members" (28 June 2013) PE390.353v04-00.

After explaining the variety of manners in which one can define them, I suggest that a definition based on the concept of authorisation allows one to conceptualise legal toleration positions as lying in-between illegal and legal stay (3.4.), supplemented by a definition based on the concept of documentation (3.5.).

3.1. The restrictive scope of toleration in the current literature

As explained above, the current literature primarily consists of the above-mentioned FRA report, of a European Migration Network study, and of a Ramboll/Eurasylum study on TCNs pending return. I find the current literature on tolerated TCNs to be very restrictive in scope. For example, while I include certain groups of asylum applicants within the scope of toleration, the literature excludes all asylum applicants. I also do not entirely subscribe to the literature's conceptualisation of toleration positions. While I make a distinction between legally tolerated, indirectly tolerated, and tacitly tolerated TCNs, the literature separates tolerated TCNs into groups of formally and de facto tolerated TCNs.

The restrictive scope of toleration

This literature, while very informative and conceptually constructive, offers a very restrictive analytical scope of toleration. The main focus is on the general category of illegally TCNs whose removal is postponed. Illegally staying TCNs released from detention are also included, but in a very unclear manner. The literature tends to completely exclude all asylum applicants from the scope of toleration, and to say very little (or nothing) about persons in a position of exhausted-removal as well as victims of trafficking who are granted a reflection period. While trafficking victims and exhausted-returnees are barely mentioned, asylum applicants are often expressly excluded from the scope of studies on non-removable TCNs whose stay is not legal.

The focus on postponed-returnees would appear to result from the fact that toleration is a word associated exclusively with postponed-returnees in the Member States where toleration is a legal concept and status (such as Germany). Defining the contours of the *toleration* concept has not been a priority in the literature; it has instead very much relied on the general postponed-removal lingo to define the scope of tolerated migrant studies. Legal provisions at EU and national levels talk about postponed-removal being granted (either mandatorily or discretionarily) to illegally staying TCNs who cannot be removed for legal or practical reasons. These legal provisions tend to be completely separate from the provisions on cooperative trafficking victims and asylum applicants. Although asylum applicants and potentially cooperative trafficking victims benefit from obstacles to removal, the fact that their situation is governed under different provisions or pieces of legislation has often led to their academic treatment as persons falling outside the scope of tolerated migrant studies. And yet, like postponed-returnees, potentially cooperative trafficking victims and asylum applicants can very well be merely tolerated and locked out of legal residence. This was shown above in sections 1.2. and 1.3.. While the literature's exclusion of trafficking victims (during the reflection period) might be not deliberate, the exclusion of asylum applicants has been very deliberate in many works.

Many academic and institutional actors are uncomfortable with the inclusion of asylum applicants in any analysis of tolerated TCNs and non-removable TCNs. This comes from a protective standpoint which seeks to shield asylum applicants, who correspond to a group of vulnerable migrants, from the harshness of laws and public opinion on irregular migrants. The FRA and other authors have expressly excluded asylum applicants from the scope of

toleration positions. They have instead focused discussions of non-removability and toleration on *failed asylum applicants* who cannot be removed for legal or practical reasons. The rationale is that asylum applicants have a right to stay for the duration of their asylum procedure, unlike failed asylum applicants who might not be removable for legal or practical reasons. However, this is not an accurate portrayal of their position in the current system. And some of the literature has recognised this.⁹³ Asylum applicants are all protected from refoulement pending the outcome of their asylum procedure. They are allowed to remain thanks to this protection from refoulement. But legal protection from refoulement/removal, on the one hand, and legal stay, on the other, are not synonymous. Asylum applicants are only legally present if they are granted legal stay, and EU law does not require Member States to grant legal stay, as explained above in section 1.3.. Several Member States, including France, grant legal stay to some asylum applicants and deny legal stay to others. In France, those who are denied legal stay are nonetheless allowed to remain pending the outcome of their asylum procedure; they are simply not legally present and this leaves them in a position of legal toleration.

Certain conservative European politicians have deliberately merged the image of the asylum seeker with that of the irregular migrant, with the intent of placing the stigma of undesirability on all of those concerned. Certain academics and institutional actors have dissociated asylum applicants from irregular migrants, with the intent of shielding asylum applicants from the stigma placed on irregular migrants. This has led to the exclusion of asylum seekers from the literature on non-removable persons, this exclusion being justified by the fact that asylum seekers have a right of residence during their asylum procedures. But this doesn't

⁹³ Anna Triandafyllidou, "Irregular Migration in Europe in the Early 21st Century", in Anna Triandafyllidou (ed), *Irregular Migration in Europe: Myths and Realities* (Ashgate Publishing Limited, 2010), 5.

match the reality of law and practice, as an important number of asylum seekers end up in a position of toleration, like other non-removable persons, and they endure the consequences of exclusion from legal stay. This blurs the lines between protection-from-removal and legal-residence. If the goal is to protect asylum seekers, one must first get to grips with the harshness of the law to fight it.

The contention that all asylum seekers are legally present largely relies on the fact that refugee status and subsidiary protection status are declaratory, meaning that Member States do not grant but merely recognise that an asylum applicant is a refugee or a person eligible for subsidiary protection.⁹⁴ A practical problem with this position is that the period between an asylum applicant's lodging of an application for asylum, on the one hand, and the recognition of refugee status or subsidiary protection status, on the other, often lasts a very long time, and that the issue of immigration status during that application period cannot be conveniently ignored as a settled issue. This is especially so in light of the fact that a majority of asylum applications are rejected,⁹⁵ which means that the immigration status of those rejected asylum applicants cannot be neatly described as having always been legal by virtue of the fact that refugee and subsidiary protection statuses are declaratory. A conceptual problem is that while refugee status and subsidiary protection status are declaratory, the ensuing right of residence (and to a residence document) is not. This right only kicks in from the moment that the status is recognised.⁹⁶ The

94 Directive 2011/95/EU of the European Parliament and of the Council on qualification for international protection (recast) (2011) OJ L 337/9, recital 21, arts 2 (e) and (g).

95 See the following estimates for randomly chosen years which show an established trend of asylum applications being majoritarily rejected: Piotr Juchno, "75 Thousand Asylum Seekers Granted Protection Status in the EU in 2008" (Eurostat Statistics in focus, 92/2009), 1-3; Anthony Albertinelli, "Asylum Applicants and First Instance Decisions on Asylum Applications in 2010" (Eurostat Data in focus, 5/2011), 10; Alexandros Bitoulas, "Asylum Applicants and First Instance Decisions on Asylum Applications: 2013" (Eurostat Data in focus, 3/2014), 12; Alexandros Bitoulas, "Asylum Applicants and First Instance Decisions on Asylum Applications: First Quarter 2014" (Eurostat Data in focus, 8/2014), 12.

96 Directive 2011/95/EU of the European Parliament and of the Council on qualification for international protection (recast) (2011) OJ L 337/9, art 24.

UNHCR has itself made such a distinction when talking about how the “issuing of a residence permit (is) ... based on the granting of refugee status”.⁹⁷ The right of residence of refugees is one of the rights attached to refugee status but it is not synonymous with it. If the residence document granted to refugees and beneficiaries of subsidiary protection was merely declaratory of a pre-existing right of residence, this would have been specified in the Qualification Directive (or international asylum instruments), since such specification exists in the EU Citizenship Directive with regard to the residence document granted to TCN family members of EU citizens.⁹⁸

It might be argued that my contention that some asylum applicants are tolerated (while others are legally present) could potentially weaken the normative position of asylum applicants in a politically dangerous context. While I sympathise with such an argument, I would counter-argue that I do not weaken the normative position of asylum applicants but instead highlight an already-weak normative position of *certain* asylum applicants that exists in some EU Member States, a position which exists due to legal loopholes in EU asylum legislation.

***The conceptually uncertain framework of formal and de facto
toleration***

The literature on tolerated TCNs focuses primarily on postponed-returnees, but also includes illegally resident TCNs, whose removal is not postponed, but who are released from administrative detention due to the impossibility of return. The literature conceptually divides these TCNs into groups of formal toleration

97 UNHCR, “Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted” (28 January 2005), 27.

98 Directive 2004/38/EC of the European Parliament and of the Council on the free movement of EU citizens and their family members (2004) OJ L 158/77, art 10.

and de facto toleration. Formal toleration in the literature corresponds to situations where removal is formally postponed, namely where TCNs are granted a formal certificate (entitled a *toleration* certificate in some States). De facto toleration is not very well explained but mostly seems to correspond to situations of informally postponed-removal (where there is little or no certification of postponement) and situations where an illegal resident is released from administrative detention for reasons other than postponement. Formal toleration is meant to denote the idea of toleration by law, and de facto toleration the idea of toleration by practice. This is where I would argue that a conceptual error exists in the literature – it confuses the formal nature of toleration with the issue of whether toleration exists by law or by practice.

Many passages of the literature use the same umbrella of de facto toleration to describe the position of informally postponed-returnee, on the one hand, and released-detainee *stricto sensu* and exhausted-returnee, on the other. The positions of postponed-returnee, released-detainee *stricto sensu*, and exhausted-returnee were explained in detail above. I believe it is important to conceptually separate them, even when postponed-removal is informal. When the removal of TCNs is postponed for a given period of time, however informal that postponement might be, those TCNs are legally protected from the enforcement of removal during that period. The informal nature of postponement might weaken the effectiveness of that protection from removal, but it does not make that legal entitlement to protection disappear. When TCNs are released from detention because removal cannot be executed within the time-frame permitted under national/EU law, but removal is not actually postponed, those TCNs are not legally protected from removal upon release. They are released-detainees *stricto sensu* upon release (exhausted-returnees if released after

the maximum period of detention), and have no legal entitlement to protection from removal. They are simply protected for a short or long period of time from pre-removal detention, not from removal.

The formal or informal nature of postponement is further a matter of degree more than a matter of either/or. For example, in France, judicially postponed-returnees are not entitled to a certificate confirming postponement of removal, but they may still come to possess a copy of the Court decision postponing their removal.⁹⁹ And while walking around with a Court decision is not something which offers great peace of mind, it at least offers some kind of written proof of postponement.

Postponed-returnees with little or no certification cannot be adequately described as persons who are de facto tolerated, as their presence is not simply tolerated by practice. Their presence is tolerated by law, as State authorities are legally prohibited from removing them. The literature confuses the informal nature of their position with the issue of whether their toleration is by law or by practice. Thus, while they might not benefit from full-fledged formal toleration via a toleration permit or certificate, they are legally tolerated. Formally postponed-returnees are TCNs who are formally legally tolerated, while informally postponed-returnees are TCNs who are informally legally tolerated (not de facto tolerated).

De facto toleration might more adequately describe the position of illegally staying TCNs who are released from administrative detention for reasons other than postponement. For they are not legally protected from removal upon release, but the impossibility

⁹⁹ When removal is postponed by an administrative authority in France, as opposed to a Court, certification of postponement is a lot more formal : European Union Agency for Fundamental Rights, *Fundamental Rights of Migrants in an Irregular Situation in the European Union: Comparative Report* (Publications Office of the European Union, 2011), 32, footnote 86.

of continued administrative detention may be construed as forcing State authorities to de facto tolerate their presence. Nonetheless, as explained above, the law/practice dichotomy is not that clear cut. These illegally staying TCNs might not be legally protected from removal, but they are released from administrative detention due to legal constraints placed on pre-removal detention. The law, and not practice, is what forces State authorities to release them from pre-removal detention, and it is thus the law that indirectly affords them protection from removal. This is why I believe that my notion of indirect (legal) toleration provides a more adequate description of their position, rather than the notion of de facto toleration. However, I believe that de facto toleration is as a fair a manner of qualifying their position as indirect toleration is.

Some illegally staying TCNs are not removed as a result of a choice on the part of State authorities to not remove them. In such cases, the idea of de facto toleration makes complete sense. But the literature on formal and de facto toleration does not really have such situations in mind. And I believe that the notion of tacit toleration is more adequate to describe such deliberate but informal choices to not remove TCNs.

All the preceding paragraphs explain why I have chosen to not follow the literature's distinction between formal and de facto toleration. I believe that my alternative distinction between legal toleration, indirect toleration, and tacit toleration, is more conceptually accurate in the description of very complicated positions.

3.2. The disagreements over how to qualify toleration positions in terms of illegal and legal stay due to a lack of conceptual clarity

The current literature, as well as having a restrictive and uncertain scope of toleration, is far from unanimous on how to define toleration positions by reference to the legal/illegal immigration dichotomy. Authors and institutional actors are split over whether to define postponed-removal statuses as corresponding to illegal stay,¹⁰⁰ to legal stay,¹⁰¹ or to some creature in-between the two.¹⁰² In the US, similar positions have been qualified as “twilight statuses”,¹⁰³ which shows that this is not a strictly European phenomenon and debate.

To take two of the big works on tolerated TCNs in the EU, the FRA has conceptualised formal and de facto toleration as lying in-between illegal and legal stay,¹⁰⁴ whereas the Ramboll/Eurasylum study suggests that postponed-returnees are “in legal terms a subgroup of illegal migrants”.¹⁰⁵ But the same Ramboll/Eurasylum study acknowledges that “there is a lack of a clear definition of the difference between a postponement and a temporary legalisation”.¹⁰⁶ And the German country report for the study indicates that tolerated TCNs have a status “midway between legality and illegality”.¹⁰⁷ Furthermore, an EU parliamentary

100 Ramboll and Eurasylum, “Study on the Situation of Third-Country Nationals Pending Return/Removal in the EU Member States and the Schengen Associated Countries: Final Report” (Study commissioned by the European Commission, 11 March 2013), 23.

101 Bernard Schmid, “L'Allemagne aussi Régularise” (2/2007) 73 *Plein droit* 31-34.

102 For example, see Anna Triandafyllidou, “Irregular Migration in Europe in the Early 21st Century”, in Anna Triandafyllidou (ed), *Irregular Migration in Europe: Myths and Realities* (Ashgate Publishing Limited, 2010), 6.

103 David A. Martin, “Twilight Statuses : A Closer Examination of the Unauthorized Population” (Migration Policy Institute Policy Brief, June 2005).

104 European Union Agency for Fundamental Rights, *Fundamental Rights of Migrants in an Irregular Situation in the European Union: Comparative Report* (Publications Office of the European Union, 2011), 34.

105 Ramboll and Eurasylum, “Study on the Situation of Third-Country Nationals pending Return/Removal in the EU Member States and the Schengen Associated Countries: Final Report” (Study commissioned by the European Commission, 11 March 2013), 23.

106 *Ibid.*, 22.

107 Ramboll and Eurasylum, “Study on the Situation of Third-Country Nationals pending Return/Removal in the EU Member States and the Schengen Associated Countries: Annex 1 – Country Reports” (Study commissioned by the European Commission, 11 March 2013), 94.

adviser that I interviewed, who was deeply involved in the negotiations behind the Return Directive, considers the position of postponed-removal to correspond to legal stay.¹⁰⁸

In the REGINE report on regularisations in the EU, one can see that the categorisation of postponed-removal positions also varies from one country to the next. In that report, one can read that “Germany does not consider tolerated persons as illegally staying whereas the Netherlands includes tolerated persons in its national definition of illegally resident persons”.¹⁰⁹ Further, disagreements exist within a given EU Member State on the same position. For example, Fabian Lutz, the drafter of the Return Directive proposal, indicated in an interview that the *Duldung* toleration certificate in Germany is considered by some to grant legal stay and by others to constitute illegal stay.¹¹⁰ There is thus considerable academic and institutional confusion and disagreement over how to qualify the status of tolerated persons.

The FRA was one of the first authors/actors to attempt to conceptualise spaces that lie between illegal and legal stay, with what it defines as positions of formal and de facto toleration lying in-between the extremities of illegal and legal stay. As explained above, the FRA places formal and de facto toleration on a scale between illegal stay by reference to the notion of security of residence, with full legal stay offering full security of residence, full illegal stay offering no security of residence, and the various toleration positions offering intermediate levels of such security.

The FRA's analysis represents a conceptual breakthrough in an immigration literature that has long taken the legal/illegal

108 Interview with Michael Speiser, European Parliament, EPP Group Adviser (phone interview, 22 April 2013).

109 ICMPD, “REGINE: Regularisations in Europe: Study on Practices in the Area of Regularisation of Illegally Staying Third-Country Nationals in the Member States of the EU: Final Report” (Study commissioned by the European Commission, Ref. JLS/B4/2007/05, Vienna, January 2009), 2.

110 Interview with Fabian Lutz, European Commission, DG Home Affairs (phone interview, 7 January 2014).

immigration dichotomy for granted. The FRA's breakthrough can be subsumed within a growing literature on grey areas between illegal and legal stay. Various authors have suggested that there are numerous grey areas between illegal and legal stay. Positions of postponed-removal are one such grey area. But there is also the grey area that exists when legally resident TCNs, whose legal stay is contingent upon compliance with conditions such as labour market restrictions, violate such restrictions.¹¹¹ A legal resident who works illegally, in violation of the conditions attached to his/her legal stay, lies in murky immigration-status waters, as the period during which he/she worked illegally could be retroactively qualified as a period of illegal stay.

To return to the literature on toleration and postponed-removal, what this literature as a whole lacks is conceptual clarity in its examination of the statuses of persons who cannot be removed, namely by reference to both definitions of illegal/legal stay, as well as to perceptions by TCNs concerned. Fabian Lutz, the drafter of the Return Directive, indicated in an interview that disagreements over how to qualify toleration positions boil down to differences in how illegal and legal stay are defined.¹¹² And he is right.

3.3. The multiple ways of defining legal and illegal stay and how they impact one's view of toleration positions

I describe legal-protection-from-removal positions as lying on a spectrum between illegal and legal stay. And I would place indirect-protection-from-removal at the periphery of illegal stay. This is of course contingent on how illegal and legal stay are defined, which is not self-evident.

111 See Martin Ruhs and Bridget Anderson, "Semi-Compliance and Illegality in Migrant Labour Markets : An Analysis of Migrants, Employers and the State in the UK" (2010) 16 *Population, Space and Place* 195-211. See also Clandestino, "Pathways into Irregularity: The Social Construction of Irregular Migration" (Comparative Policy Brief, October 2009), 4-5 < http://clandestino.eliamep.gr/wp-content/uploads/2009/12/clandestino_policy_brief_comparative_pathways.pdf >.

112 Interview with Fabian Lutz, European Commission, DG Home Affairs (phone interview, 7 January 2014).

Definitions of legal and illegal stay are far from clear and “explicit”¹¹³, at both EU and national legal levels. National definitions across the EU range from non-existence in some Member States to incompleteness and unhelpfulness in others.¹¹⁴ Some States have no definition, others have a definition of only illegal entry but not illegal residence, and another set have vague definitions of illegal residence which define it by reference to the absence of immigration documentation or to the violation of immigration rules. And yet a key distinction in EU immigration policy is the one between legal and illegal immigration. The consequences for non-EU nationals of falling on one or other side of the divide are radically different, which makes definitions of both important. Definitions of illegal stay vary widely across EU Member States' national legal systems. But at EU level, the Return Directive, adopted in 2008, provided the first comprehensive and common definition of illegal stay 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”.¹¹⁵ However, this defines illegal stay “in a negative sense”,¹¹⁶ which means it is defined by reference to an absence of legality of stay under national and EU law. Legality of stay has no comprehensive definition in any piece of legislation, as it encompasses a vast and varied set of conditions of stay and residence for various categories of TCNs (namely economic, forced, and family migrants).

113 Elspeth Guild, “Who is an Irregular Migrant?”, in Barbara Bogusz, Ryszard Cholewinski, Adam Cygan, and Erika Szyszczak (eds), *Irregular Migration and Human Rights: Theoretical, European and International perspectives* (Martinus Nijhoff Publishers, 2004), 3.

114 Ibid, 15-28 ; Clandestino, “Pathways into Irregularity: The Social Construction of Irregular Migration” (Comparative Policy Brief, October 2009), 4.

115 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 [2008] OJ L 348/98, art 3 (2).

116 ICMPD, “REGINE: Regularisations in Europe: Study on Practices in the Area of Regularisation of Illegally Staying Third-Country Nationals in the Member States of the EU: Final Report” (Study commissioned by the European Commission, Ref. JLS/B4/2007/05, Vienna, January 2009), 1.

Despite the fact that definitions of legal and illegal stay appear to be extremely cryptic, complex, and require detailed accounts of varied conditions of stay and residence, there are various ways of broadly defining legal and illegal stay. Illegality of stay can be defined by reference to the violation of conditions of legal entry and/or residence, to the consequences attached to illegality (sanctions of return, removal and possible imprisonment, as well as deprivation of rights reserved for legal residents), and to key definitional concepts. Key definitional concepts can be thought of as synonymous concepts. Illegality of stay is often treated as synonymous with undocumented stay and unauthorised stay. So two key definitional concepts are those of authorisation and documentation. To sum up this paragraph, there are violation-based, consequence-based, and concept-based understandings of illegal stay.

Most of the literature on postponed-removal has acknowledged that definitions of legal and illegal stay lack clarity, and that it is therefore difficult to define the immigration status of persons whose removal is postponed. Postponed-removal is classified by some institutional actors as a form of legal or quasi-legal stay and by others as a form illegal stay.¹¹⁷ The numerous authors who suggest that persons with a postponed-removal status are illegally present tend to rely on understandings of illegal stay that focus either on the consequences attached to illegal stay (e.g. return), or on the simple violation of entry and residence conditions (the definition of illegal stay in the Return Directive).¹¹⁸ For these

117 ICMPD, "REGINE: Regularisations in Europe: Study on Practices in the Area of Regularisation of Illegally Staying Third-Country Nationals in the Member States of the EU: Final Report" (Study commissioned by the European Commission, Ref. JLS/B4/2007/05, Vienna, January 2009), 2; ICMPD, "REGINE Regularisations in Europe: Study on Practices in the Area of Regularisation of Illegally Staying Third-Country Nationals in the Member States of the EU – Appendix B : Country Profiles of 22 Member States" (Study commissioned by the European Commission, Ref. JLS/B4/2007/05, Vienna, January 2009), 53.

118 German National Contact Point of the European Migration Network, "Illegally Resident Third-Country Nationals in Germany: Policy Approaches, Profile and Social Situation" (Federal Office for Migration and Refugees, Migration and Integration Research Department, 90343 Nürnberg, Germany, September 2005) 14-15 and 25; Ramboll and Eurasyllum, "Study on the Situation of Third-Country Nationals pending Return/Removal in the EU

authors, postponed-returnees remain in a position of illegal stay either due to the continuing validity of return measures against them (as these return measures are merely postponed) and/or due to the simple fact that these individuals remain in violation of conditions of legal entry and residence. For these authors, illegally resident TCNs remain illegally present unless their status is completely regularised and their return measures cancelled (not merely postponed). These authors could conceptualise postponed-removal as a form of semi-regularisation or imperfect regularisation, but they don't. Yet such conceptualisation doesn't require a big imaginary stretch, even with a consequence-based or violation-based understanding of illegal stay. The FRA is an example of an institutional actor that made this conceptual leap. This conceptual leap is facilitated by understandings of illegal stay that go beyond purely consequence-based and violation-based understandings, and that incorporate key definitional concepts behind the legal/illegal immigration dichotomy.

3.4. The in-between nature of toleration positions by reference to the key definitional concept of authorisation

When I assert that the various legal toleration positions (of postponed-returnee, tolerated asylum applicant, and tolerated trafficking victim) lie between illegal and legal stay, I rely on the key definitional concept of *authorisation*; the concept of *documentation* also factors into the equation. The concept of authorisation, which at a more general level demarcates legal from illegal conduct, demarcates legal from illegal immigration in terms of authorised and unauthorised immigration. Primary and secondary EU law have long made the explicit equation of illegal immigration/residence with unauthorised

Member States and the Schengen Associated Countries: Final Report” (Study commissioned by the European Commission, 11 March 2013), 23.

immigration/residence.¹¹⁹

If TCNs are legally protected from removal for a certain period of time, their stay cannot be defined as unauthorised during that period since the legal system allows them to remain. However, their stay does fall short of being authorised in the sense of full-fledged legal stay; legal stay could be seen as a specific membership commodity that they do not possess. Their imperfectly authorised stay places them somewhere on a scale in-between authorised and unauthorised stay. The concept of legal toleration, in my opinion, best captures a position of legal protection from removal which falls somewhere between authorised and unauthorised presence.

When TCNs are merely released from administrative detention, and notably when they find themselves in a position of exhausted-removal, they are not protected from removal in the same manner as postponed-returnees, tolerated asylum applicants, or tolerated trafficking victims. Their removal is not postponed. But coercive removal procedures against them have been exhausted because Member States are no longer allowed to administratively detain them. The exhaustion of removal procedures against them, and their mandatory release from administrative detention, provides them with a weak and indirect form of protection from removal, as removal procedures have reached an end, and future placements in administrative detention are prohibited. Their presence is not authorised, but it could be described as indirectly tolerated, even though this indirect toleration is weaker than the legal toleration afforded by legal protection from removal. The limits placed by EU and national legal systems on coercive removal procedures indirectly allow them to remain (however imperfectly). I would place positions of indirect toleration at the periphery between spaces of illegal stay and legally tolerated stay (see the image

119 Treaty on European Union (1992) OJ C 191/01, art K.1.(3)(c) ; Consolidated Version of the Treaty on the Functioning of the European Union (2012) OJ C 326/47, art 79 (2) (c).

below). The stay of persons who are legally protected from removal cannot be described as unauthorised. But the stay of illegal residents who are merely protected from pre-removal detention is extremely close to being unauthorised, as they have no legal entitlement whatsoever to remain. Furthermore, until they land in a position of exhausted-removal, their protection from pre-removal detention is usually short-lived, and they run the risk of being subjected to a renewed coercive removal procedure.

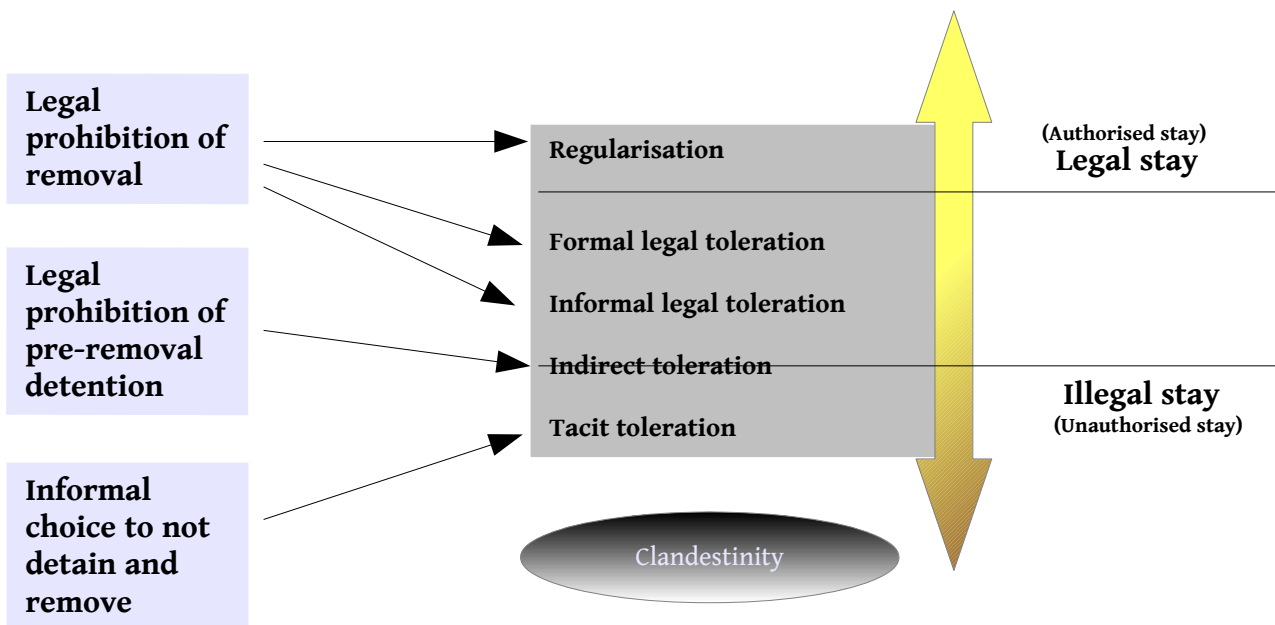
3.5. The complementary definitional concept of documentation

This work also relies on the key definitional concept of documentation, as complementing the concept of authorisation. Legal toleration, namely postponement-of-removal might be formalised through written certification, or it might be purely informal in the absence of written certification. There are therefore TCNs whose legal protection from removal is formally certified, and those who are granted little to no formal certification. If the concept of documentation supplements the concept of authorisation in our understanding of the legal/illegal immigration dichotomy, formalisation of postponement takes it one step closer towards the sphere of legality.

But as highlighted above, a clear distinction needs to be made between informal postponement-of-removal, on the one hand, and release from administrative detention for reasons other than postponement, on the other hand. The only similarity between a released-detainee whose removal is not postponed, on the one hand, and an informally postponed-returnee, on the other, is the complete or partial lack of adequate documentation. However, the informally postponed-returnee is legally protected from removal, which is not the case of someone released from administrative detention for reasons other than postponement. In practice, the

informal nature of their immigration status may lead to a similar risk of repeated apprehensions by law enforcement officers, and to a similar lack of rights. But the validity of their grounds to remain is not at all the same. The presence of informally postponed-returnees is more authorised than the presence of released-detainees *stricto sensu*. The diagram below illustrates my overall conceptualisation, and can be compared and contrasted with the FRA's similarly illustrated conceptualisation.¹²⁰ This diagram depicts a scale between illegal and legal stay, primarily based on a definition of legal stay as authorised stay, but where a documentation-based definition is of some relevance.

Diagram 3: Toleration spaces between illegal and legal stay



While I insist on the fact that informal postponement of removal corresponds to informal legal toleration and not *de facto* toleration, it is also possible for those I classify as illegally present to possess a status that is formal and documented. The degree of formality of status does not necessarily reflect the level of authorisation of stay. For example, in Spain, “while not

¹²⁰ European Union Agency for Fundamental Rights, *Fundamental Rights of Migrants in an Irregular Situation in the European Union: Comparative Report* (Publications Office of the European Union, 2011), 34.

recognizing undocumented migrants as legal residents, national law requires them to register in municipalities”.¹²¹ In such a case, independently of whether or not the presence of these illegal residents is tacitly tolerated or clandestine from the point of view of immigration enforcement authorities, their residence can be documented by municipalities. Sébastien Chauvin and Blanca Garcés-Mascareñas describe them as “documented illegals” who “can then legally access health and education facilities”.¹²² Such a situation can arise due to the fact that States are not “homogenous blocks”.¹²³ The dissociation between documentation and legality of stay works both ways – one can be a documented illegal resident but one can also be an undocumented legal resident.

4. Why unrecognised legal residence positions lie in-between illegal and legal stay

When a TCN family member of a free-movement-EU-citizen is not granted a residence document for a long period of time, that TCN is a legal resident who is not recognised as such. The absence of a residence document means that in practice, that TCN family member will be treated like a non-legal resident, which might mean that he/she is treated like a tolerated or illegal resident. He or she is authorised by law to be in the host EU State but is formally treated as someone who is not authorised. This possible dissociation between authorisation to stay, on the one hand, and documentation of stay, on the other, is one that has been noted by several authors.¹²⁴

Interestingly, one could say that such TCNs are legally present under EU law but illegally present under the national law of the

121 Sébastien Chauvin and Blanca Garcés-Mascareñas, “Beyond Informal Citizenship: The New Moral Economy of Migrant Illegality” (2012) 6 *International Political Sociology*, 245.

122 Ibid.

123 Ibid, 243.

124 Saskia Sassen, “Towards Post-National and Denationalized Citizenship” in Engin Isin and Bryan Turner (eds), *Handbook of Citizenship Studies* (Sage, 2003), 282-285.

host State, as a result of the ineffectiveness of EU law in the national legal order. EU law is superior to national law and is directly effective within the national legal order as long as it satisfies specific criteria. If one takes a strict view of the supremacy and direct effect of EU law, TCNs concerned are legally resident under both EU law and national law, and simply suffer from a lack of effectiveness of their legal residence. But the principle of supremacy is not unconditionally accepted by all national legal systems, and some authors/national-judges have advanced the notion that EU and national legal systems coexist side-by-side, even if superiority is often granted to EU norms over national norms.¹²⁵ When viewed in this alternate light, TCNs concerned could effectively be viewed as legally present under EU law and illegally present under national law. Applying the key definitional concepts of authorisation and documentation, exposed in section 3, the presence of such TCNs is authorised under EU law, but is unauthorised and undocumented under national law. Whichever way one views the relationship between EU and national law, TCNs concerned are trapped between illegal and legal stay, although the exact configuration of that entrapment varies in accordance with how that relationship is viewed.

5. Why these spaces are limbo-like

The fact that there are TCNs in positions that lie between illegal and legal stay is indicative of a limbo-like situation, as the concept of limbo describes the state of being indefinitely stuck between two points. The idea of *limbo* has been used by some academics, NGOs, and international organisations to describe numerous positions that migrants may find themselves in. Limbo-related terms have mostly been used to describe the position of irregular migrants and

125 For example, see Dominique Ritleng, “De l’Utilité du Principe de Primauté du Droit de l’Union” (2009) *Revue trimestrielle de droit européen* 677.

asylum seekers in administrative detention,¹²⁶ of refugees,¹²⁷ of families kept apart by restrictive family reunification rules,¹²⁸ and of legal residents in the very slow process of acquiring their first residence permits or of getting their residence permits renewed.¹²⁹ It has more recently been used by the FRA to describe the plight of non-removable TCNs who are locked out of legal residence.¹³⁰ This thesis builds and expands on the FRA's idea. I first flesh out this idea of limbo (5.1.) before applying it to positions of toleration (5.2.) and unrecognised legal residence (5.3.). I further discuss a related phenomenon that contributes to the limbo-like position of certain tolerated TCNs, which is the back-and-forth movements over time between illegal and legal stay, toleration positions acting as a transit stop (5.4.).

5.1. The concepts of limbo and liminality

The concept of limbo has already been used by certain institutional actors and NGOs to describe the general plight of non-removable TCNs who are locked out of legal residence. But it is a concept that has rarely been fleshed out.

Limbo “in Roman Catholic theology (is) the border place between heaven and hell where dwell those souls who, though not condemned to punishment, are deprived of the joy of eternal existence with God in heaven”.¹³¹ From this imagery of indefinite entrapment between two places, the words *in limbo* are used today to describe a variety of situations where persons or things are “in a

126 Tamsin Alger and Jerome Phelps, “Fast Track to Despair: The Unnecessary Detention of Asylum-seekers” (Detention Action, May 2011), 21-22.

127 Patricia Hynes, *The Dispersal and Social Exclusion of Asylum Seekers : between Liminality and Belonging* (The Policy Press, 2011), 30.

128 Gisela Alouan Ades, “Lawful Permanent Residents: the Forced Bachelors and Bachelorettes of America” (Spring 2009) 40 *University of Miami Inter-American Law Review* 521, 533-534.

129 David A Martin, “Twilight Statuses : A Closer Examination of the Unauthorized Population” (Migration Policy Institute Policy Brief, June 2005)

130 European Union Agency for Fundamental Rights, *Fundamental Rights of Migrants in an Irregular Situation in the European Union: Comparative Report* (Publications Office of the European Union, 2011).

131 Encyclopædia Britannica Online, “Limbo” < <https://access-distant.sciences-po.fr:443/http/www.britannica.com/EBchecked/topic/341221/limbo> > accessed 2 September 2012.

state of suspension, in a state of uncertainty, in a state of neglect ... awaiting action".¹³² Another word which can be used to describe an in-between space is *liminality*, which "connotes the position of being betwixt and between"¹³³. The concept of liminality has been used by authors in anthropological work on history, nationalism, and refugees to describe "those who are in a transition between symbolically and ritually delimited stages and therefore defy categorization".¹³⁴ These transition stages are meant to be temporary, but can last a long time. The term has also been used with regard to asylum seekers during their asylum applications in host countries, whereby they are seen as having a liminal status until refugee status is granted (even if this liminal status often corresponds to a form of legal stay).¹³⁵ The asylum application period is a liminal period in-between what they fled, on the one hand, and the recognition that they are refugees, on the other. They have "crossed the threshold of one status while not yet having crossed into another".¹³⁶

I use the idea of limbo, with that of liminality in mind as well, to describe a variety of transitory positions between illegal and legal stay that non-removable TCNs may find themselves in, and which are characterised by uncertainty over future removal or regularisation, as well as very limited access to important socio-economic rights and benefits. Persons in such positions are left in a state of indefinite suspension and neglect. The literature on liminality talks about how people in liminal or limbo spaces may be

132 Christine A. Lindberg (ed), "Limbo noun" The Oxford American Thesaurus of Current English (Oxford University Press, Oxford Reference Online, 1999) <<https://access-distant.sciences-po.fr:443/http/www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t22.e8219>> accessed 2 September 2012.

133 Patricia Hynes, *The Dispersal and Social Exclusion of Asylum Seekers : between Liminality and Belonging* (The Policy Press, 2011), 29.

134 Jennifer Riggan, "In between Nations : Ethiopian-born Eritrians, Liminality, and War" (May 2011) 34 *Political and Legal Anthropology Review*, 131. See also Liisa H. Malkki, *Purity and Exile: Violence, Memory, and National Cosmology among Hutu Refugees in Tanzania* (The University of Chicago Press, 1995), 6-7 and 253-254.

135 Patricia Hynes, *The Dispersal and Social Exclusion of Asylum Seekers : between Liminality and Belonging* (The Policy Press, 2011), 2-3.

136 Ibid, 30.

tolerated, but are also frequently perceived as threats to the pure categories that lie on each side of their transit zone. I shall come back to this later in chapter 4.

5.2. The application of the limbo concept to the position of tolerated TCNs

All legally tolerated TCNs suffer the consequences of exclusion from legal stay. Being in a position of postponed-returnee (even if coupled with temporary regularisation), tolerated asylum applicant, or tolerated trafficking victim, keeps the prospect of removal alive, as removal is merely prohibited on a temporary basis. There is a looming uncertainty over future removal or regularisation, which leaves those concerned in an indefinite state of *suspension and uncertainty*. Such a limbo can last anywhere from a few weeks to several years, depending on the specific legal toleration category, on the Member State, and on the circumstances of a given TCN's case. EU law places no limits on the period during which postponed-returnees, tolerated asylum applicants, and trafficking victims can be maintained in such positions. Where limits exist, they are set out under national law.

With regard to trafficking victims, limits on reflection periods (and so on legal toleration periods) vary from a maximum period of thirty days in some Member States to six months in others, and even to indefinite periods in others still.¹³⁷ With regard to tolerated asylum applicants, I shall turn to France for illustrative purposes. In France, it is generally asylum applicants in accelerated procedures and Dublin procedures who are tolerated (as opposed to applicants in the regular procedure who are regularised). Dublin procedures can last up to about one year, in accordance with the

¹³⁷ Commission, "Report from the Commission to the European Parliament and the Council on the application of Directive 2004/81 on the Residence Permit issued 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, who Cooperate with the Competent Authorities" COM (2010) 493 final, 4-5.

Dublin III Regulation.¹³⁸ Accelerated procedures, in theory, are supposed to last fifteen days from the moment an asylum application is transferred to the competent authority,¹³⁹ but I have documented several cases in chapter 2 of this thesis in which accelerated procedures have lasted for months (even years).

With regard to postponed-returnees, national rules on postponement vary enormously from one Member State to the next, especially in terms of how formalised postponement is. Depending on the Member State, postponement might be indefinite or there might be a specified period of postponement. Even with a specified period of postponement, it might be renewable any number of times. In Germany, it is well documented that many postponed-returnees have remained stuck in such a position for years, going beyond a decade for some.¹⁴⁰

Indirectly tolerated TCNs have even more to fear. Illegally staying TCNs, who are released from administrative detention for reasons other than cancellation, postponement, or exhaustion of removal, are not immune from renewed apprehension, detention, and removal. And exhausted-returnees, while having reached the end of an unsuccessful removal procedure, are usually released with either no documentation or with precarious documentation that does little to protect them from repeated apprehensions by police officers. The risk of being apprehended, administratively detained, and ultimately removed remains at all times on the minds of those concerned.

138 Regulation (EU) 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or stateless person (recast) OJ L 180/31, ch VI.

139 Code de l'entrée et du séjour des étrangers et du droit d'asile (Code on the Entry and Residence of Foreigners and on the Right of Asylum, consolidated version on 24 January 2014), art R 723-1.

140 See Ramboll and Eurasyllum, "Study on the Situation of Third-Country Nationals pending Return/Removal in the EU Member States and the Schengen Associated Countries: Annex 1 – Country Reports" (Study commissioned by the European Commission, 11 March 2013), 82. See also Eric Leise, "Germany to Regularize "Tolerated" Asylum Seekers"" (Migration Information Source, Migration Policy Institute, 5 April 2007).

Legally tolerated and indirectly tolerated TCNs also suffer from a lack of socio-economic inclusion within their host societies, which leaves them in an indefinite state of *neglect*. They are generally entitled to a smaller set of rights and benefits than legally resident TCNs. Socio-economic entitlements vary from one category of tolerated TCN to another, and from one Member State to the next. EU legislation provides a good starting point to compare, as it corresponds to a baseline which Member States can stick to or improve on.

Most of the legal resident statuses governed under EU legislation guarantee some degree of labour market access, of social and housing assistance, of social security rights, of healthcare beyond emergency care, of educational or vocational training, as well as of freedom of movement. By contrast, the toleration positions under examination rarely come with similar guarantees in EU legislation.

With regard to postponed-returnees, the Return Directive imposes an obligation on Member States to “ensure that the following principles are taken into account as far as possible”:¹⁴¹ emergency healthcare, education for minors and family unity. As well as being small in number, these rights are also weakly guaranteed through vague legal wording. The Return Directive is silent with regard to the position of released-detainees and exhausted-returnees. What is remarkably absent from the Return Directive is any mention of subsistence rights or labour market access rights for persons in a position of postponed-removal. The issue came up in negotiations that took place in the Council, a point I shall explore further in chapter 3. Furthermore, the Directive allows Member States to limit the freedom of movement of postponed-returnees within their territories.

141 Directive 2008/115/EC of the European Parliament and of the Council on the return of illegally staying third-country nationals [2008] OJ L 348/98, art 14 (1).

The rights and benefits of postponed-returnees vary from one Member State to the next. Some Member States are as stingy as EU legislation allows them to be, while others are more generous. For example, in Germany, postponed-returnees are entitled to a small measure of social assistance but not to labour market access, whereas in Greece, postponed-returnees are entitled to labour market access but not to social assistance.¹⁴² But even with enhanced rights, it remains a state of neglect. For example, a slightly outdated article written in 2007 on tolerated TCNs in Germany reported that tolerated TCNs “live on minimum state assistance, do not have access to the labor market ... are required to live in state-run housing complexes ... (and policies) not only make it difficult to learn German and to integrate, but they actually make it necessary to build networks by other means, such as illegal work schemes, in order to survive”.¹⁴³

With regard to exhausted-returnees, a Commission Communication recently noted that “(i)n most Member States, there is a lack of public support structures for irregular migrants who are released from detention because no reasonable prospect of removal exists”.¹⁴⁴ It further stated that “(i)n the absence of a concrete legal obligation on Member States to provide for material subsistence to this group of people, they find themselves in a ‘legal limbo’ situation, left to rely on the private or voluntary sectors, or potentially being forced to resort to non-authorized employment for subsistence”.¹⁴⁵

Tolerated asylum applicants and tolerated trafficking victims can

142 Ramboll and Eurasylum, “Study on the Situation of Third-Country Nationals pending Return/Removal in the EU Member States and the Schengen Associated Countries: Annex 1 – Country Reports” (Study commissioned by the European Commission, 11 March 2013), 85-86 and 114.

143 Eric Leise, “Germany to Regularize “Tolerated” Asylum Seekers”” (Migration Information Source, Migration Policy Institute, 5 April 2007), 3.

144 Commission, “Communication to the Council and the European Parliament on EU Return Policy” COM (2014) 199 final, 16.

145 Ibid.

end up with a slightly better set of rights than postponed-returnees and exhausted-returnees. But these rights often remain lower than those bestowed upon legally staying asylum applicants and trafficking victims. The CVHT Directive guarantees tolerated trafficking victims emergency healthcare but it also guarantees them standards of living capable of ensuring their subsistence.¹⁴⁶ There are however numerous socio-economic rights that they are not granted. An example of such a right is labour market access, a right which comes with the grant of a residence permit upon expiration of the reflection period. Practices vary once again enormously from one Member State to the next, with some Member States choosing to grant more generous rights (than they are obliged to) to victims during the reflection period.

The rights of tolerated asylum applicants are not explicitly governed under the Asylum Reception Conditions Directive,¹⁴⁷ as the Directive simply makes it possible for Member States to make a distinction between legally staying and tolerated asylum applicants. However, the rights of asylum applicants guaranteed in the Directive are so flexible that Member States have the power to grant different standards of treatment to different categories of asylum applicants. For example, article 15 of the Directive guarantees all asylum applicants necessary healthcare (not comprehensive healthcare). Article 13 of the Directive also guarantees asylum applicants material reception conditions (food, clothing and shelter) but with the paragraph 5 proviso that these reception conditions can be provided *in kind or in the form of financial allowances*. The situation in France provides a good illustration of how such flexible provisions can be used to segregate asylum applicants. In France, legally staying asylum applicants are granted comprehensive healthcare access and are

146 Council Directive 2004/81/EC on the residence permit for cooperative victims of human trafficking (2004) OJ L 261/19, art 7.

147 Council Directive 2003/9/EC on asylum reception conditions (2003) OJ L 31/18.

eligible for housing in an asylum reception centre; tolerated applicants are granted a lower form of healthcare access and they are not eligible for housing in an asylum reception centre.¹⁴⁸ Both legally present and tolerated asylum applicants are however entitled to a *financial allowance* in the absence of housing in kind. The discriminatory treatment of tolerated asylum applicants is compatible with the Asylum Reception Conditions Directive, namely due to the loopholes it contains. While it might not be incompatible with the Directive, one could argue that it constitutes one of the worst possible practices of implementation of the Directive's documentation provisions.

5.3. The application of the limbo concept to the position of unrecognised legal residents

TCN family members of free-movement-EU-citizens, who are not recognised as legal residents, can experience exclusion from the security of residence and socio-economic rights associated with possession of a residence card. This limbo of unrecognised legal residence can last a pretty long time, leaving those concerned in a limbo of *neglect and uncertainty* over future removal or recognition of legal residence. According to the European Parliament's Petition Committee, a “significant number”¹⁴⁹ of TCNs concerned testified “that it can take up to eight months for applications to be processed”,¹⁵⁰ not to mention the time wasted when applications are refused and legal battles truly commence.

Even though they are legal residents, irrespective of formal State recognition, the benefits that accrue to legal residents tend to be

148 Code de l'action sociale et des familles (Code on Social Action and Families, consolidated version on 29 January 2014), arts L. 251-1 and L.348-1 < <http://www.legifrance.gouv.fr> > accessed 31 January 2014. See also OFII, “Guide du Demandeur d'Asile” (La documentation française, Paris, 2009), 34-39 (slightly outdated but most of what is written continues to apply today).

149 European Parliament Petitions Committee, “Working Document on the Communication from the Commission to the European Parliament and the Council on “An Area of Freedom, Security and Justice serving the Citizen” also known as “The Stockholm Programme”” COM (2009) 262 final PE428.214v02-00, 2.

150 Ibid.

very dependent on proof of that legal residency, and such proof usually comes in the form of a residence document. In the *Metock*¹⁵¹ ruling delivered by the CJEU, one of four TCN family members (who were established to be legally resident under EU law despite non-recognition of that legal residence) was deported to his country of origin. This illustrates the extent to which security of residence can be non-existent or at least very fragile. With regard to socio-economic rights, the European Parliament's Petitions Committee indicated that the protracted delays in recognising legal residence “effectively (make) ... it impossible for the person to travel, work, or even open a bank account”.¹⁵²

5.4. Time, regularisation, and the porosity of immigration categories

It is not only positions between illegal and legal stay that are limbo-like. The issue of TCN statuses that lie between illegal and legal stay is intricately tied to the well documented porosity of the border between illegal and legal stay. A *Clandestino* report noted that in the 2000s, millions of TCNs moved between illegal and legal status, and vice versa.¹⁵³ In other words, these millions fell in and out of legal residency over long periods of time, which is characterised by inevitable uncertainty over what the future holds in terms of return, regularisation, and socio-economic rights. There are many ways of becoming an irregular migrant. It can happen through illegal entry. But it can also happen after an initial period of legal entry and residence which is followed by the loss of legal residence, due to non-compliance with conditions attached to legal entry or residence (for example in relation to work restrictions or security imperatives). And many irregular migrants

151 Case C-127/08 *Metock v Minister for Justice* (2008) ECR I-06241.

152 European Parliament Petitions Committee, “Working Document on the Communication from the Commission to the European Parliament and the Council on “An Area of Freedom, Security and Justice serving the Citizen” also known as “The Stockholm Programme”” COM (2009) 262 final' PE428.214v02-00, 2.

153 *Clandestino*, “Size and Development of Irregular Migration to the EU” (October 2009), 6-7.

also find pathways to legality of residence through regularisation programmes and mechanisms, which vary enormously from one Member State to the next. Regularised TCNs in some countries may fall back into illegality of stay, for example due to the loss of legal employment (if a condition of continuous employment is attached to the legal stay that was granted).¹⁵⁴ And according to findings of the Clandestino research project, many legal residents fall into illegality due to small changes in immigration regulations over time, as well as administrative delays and errors.¹⁵⁵ Furthermore, Ellie Vasta¹⁵⁶ has carried out empirical research which reveals a phenomenon of immigrants who, with the help of tight networks of family and friends, carefully and strategically navigate their way in between illegal and legal statuses. They do so through the buying and borrowing of important documentation, such as passports and residence permits, which allows them to move in and out of legal statuses over time, in order to alleviate the difficulties associated with inevitable periods of illegal stay. A significant finding of the research for Ellie Vasta is “the fluidity between irregular and regular statuses”.¹⁵⁷

While certain TCNs may end up in positions of legal toleration for very long stretches of time, others may frequently transit via such toleration positions for short periods of time as they move back and forth between illegal and legal stay. According to the FRA in 2011, all “Member States have the possibility of granting temporary residence to at least certain categories”¹⁵⁸ of non-removable persons. However, the “legal status accorded to a

154 ICMPD, “REGINE: Regularisations in Europe: Study on Practices in the Area of Regularisation of Illegally Staying Third-Country Nationals in the Member States of the EU: Final Report” (Study commissioned by the European Commission, Ref. JLS/B4/2007/05, Vienna, January 2009), 44-45; Clandestino, “Size and Development of Irregular Migration to the EU” (October 2009), 7.

155 Clandestino, “Pathways into Irregularity: The Social Construction of Irregular Migration” (Comparative Policy Brief, October 2009), 2.

156 Ellie Vasta, “The Paper Market: “Borrowing” and “Renting” of Identity Documents” (2008) Centre on Migration, Policy and Society Working Paper 61.

157 Ibid, 12.

158 European Union Agency for Fundamental Rights, *Fundamental Rights of Migrants in an Irregular Situation in the European Union: Comparative Report* (Publications Office of the European Union, 2011), 37.

person is rarely definitive ... (and) can change as the circumstances upon which it was granted evolve”.¹⁵⁹ Conditions are often attached to the temporary residence documents granted to non-removable persons, as well as to the renewal of these documents. The FRA provides the example of temporary residence documents not being renewed when “the obstacle to removal disappears”.¹⁶⁰ Non-renewal can lead to either tolerated or illegal stay. So while toleration positions are limbo-like, so is the state of constantly moving between illegal and legal stay. The border strip between illegal and legal stay is both large and porous, and a very fertile source of legal limbos.

Tolerated victims of trafficking and tolerated asylum applicants correspond to very specific groups of non-removable TCNs who are not usually discussed in the literature relating to non-removable persons. Such victims and asylum applicants can also experience toleration as a temporary stop off point in a back-and-forth movement between illegal and legal stay. Identified trafficking victims, who start out in a position of illegal stay, move on to a tolerated status during the reflection period. Upon expiry of the reflection period, the quality and utility of their cooperation may lead to the issue of a temporary residence permit or to a demotion into illegality of stay. Even if they obtain a temporary residence permit in exchange for a certain quality of cooperation, their fall back down into illegality is expressly catered for in EU legislation. Asylum applicants, whose application for asylum is often preceded by a period of illegal stay, are granted either a temporary form of legal stay or a toleration status during their application for asylum. A successful application leads to a more secure form of legal stay. And a failed application usually leads either to illegal stay or to tolerated stay, depending on whether or not there are practical or legal obstacles to removal.

¹⁵⁹ Ibid, 35.

¹⁶⁰ Ibid.

Conclusion

In this first chapter, I have provided a typology of limbo spaces between illegal and legal stay, which serves as a conceptual framework for the remainder of the thesis. This typology clarifies, but also builds and expands on, various strands of literature on non-removable persons, toleration, liminality, grey areas, and the free movement of persons in the EU. My typology builds on some of the conceptual work already done on tolerated TCNs in the EU, but it also provides an alternate conceptual framework.

There are limbo spaces of toleration and limbo spaces of unrecognised legal residence. Having explained what these two broad groups of limbo spaces correspond to, the remainder of this thesis focuses on limbo spaces of toleration. Limbo spaces of toleration englobe a variety of positions, governed under EU and national law, which lie in-between illegal and legal stay, and which are characterised by uncertainty over future removal or regularisation, as well as socio-economic marginalisation. I include many more positions within these toleration spaces than the current literature allows for, such as the position of tolerated asylum applicant. And I offer an alternate typology to that employed by the current literature. Instead of a typology which distinguishes formal toleration from de facto toleration, I offer one that makes a distinction between legal toleration, indirect toleration, and tacit toleration. Positions of legal toleration, which correspond to legal protection from removal, include those of postponed-returnee (formal or informal), tolerated asylum applicant, and tolerated trafficking victim. Positions of indirect toleration, which correspond to indirect protection from removal, include those of released-detainee *stricto sensu* and exhausted-returnee. My description of the limbo-like quality of these

positions builds on the FRA's work, and digs deeper by borrowing from the limbo and liminality literature, a depth which comes to light in chapter 4 on membership. My description of these positions as lying in between illegal and legal stay allows me to clarify the disagreements that exist in the current literature, and to take a solid stance within the context of this literature. I break down the various definitions of illegal and legal stay into violation-based, consequence-based, and concept-based definitions. It is on the basis of concepts of authorisation and documentation that I justify my stance.

My typology and conceptualisations correspond to a subjective scholarly interpretation of EU law on non-removable TCNs, which is not shared by all who have written on the topic or who work in the field. In order to insert some depth to my conceptualisation, and to ground it in reality, I carried out empirical research in France with those who fall under my conceptualisation of toleration spaces. This research serves as a French case study on the legal and practical implementation of the EU-governed positions that fall within these spaces, as well as on how tolerated TCNs perceive these positions in terms of illegal/legal stay and their limbo-like qualities.

Chapter 2. The implementation and perception of toleration positions in France – a national case-study of EU-governed toleration positions

Describing toleration positions as lying between illegal and legal stay, as well as by reference to the limbo idea, is the result of my scholarly interpretation of legal provisions and their social impact. To enrich my limited scholarly interpretation of rules, I wished to see whether persons in such positions actually perceived these positions as limbo-like and lying in-between illegal and legal stay. I carried out interviews with TCNs in France who fell under a variety of toleration positions. These interviews took place between April and July 2013.

There is part of a JRS Europe Report that provided some insight into how persons with a formal toleration certificate in Germany experienced their legal toleration status. The Report stated that interviewees “live in abject poverty ... live in constant fear of being removed”¹⁶¹ and “were unable to plan their future and develop future goals”.¹⁶² Many interviewees told JRS Europe that they felt like they were “standing still”.¹⁶³ There is also a report that was very recently published by a group of NGOs with stories of non-removable TCNs in four European countries, such stories conveying the same feelings of being “put on hold”.¹⁶⁴

Persons in a position of indirect toleration are in an even bigger void than legally tolerated TCNs, especially when they are in a position of exhausted-removal. They are not protected from

161 Jesuit Refugee Service Europe, “Living in Limbo: Forced Migrant Destitution” (Brussels, March 2010), 27.

162 Ibid, 37.

163 Ibid.

164 Maaïke Vanderbruggen, Jerome Phelps, Nadia Sebtaoui, Andras Kovats, and Kris Pollet, “Point of No Return: The Futile Detention of Unreturnable Migrants” (Collaboration between Flemish Refugee Action (Belgium), Detention Action (UK), France terre d’asile (France), Menedék – Hungarian Association for Migrants, and The European Council on Refugees and Exiles (ECRE), project supported by EPIM, January 2014), 13.

removal like persons with postponed-removal status; they are protected from administrative detention which essentially neutralises the ability of States to remove them. But they have no explicitly set out rights to documentation or socio-economic benefits. Exhaustion-of-removal, after being subjected to long or successive periods in administrative detention, can physically and psychologically destroy those concerned. Some released-detainees *stricto sensu* and exhausted-returnees were interviewed by the London Detainee Support Group in the UK. One interviewee, named Arben Draga, from Kosovo, was subjected to administrative detention for nine months, before being released and re-subjected to detention. The UK does not have an explicit maximum period of detention, but UK authorities have to release detainees when there is no reasonable prospect of removal, which was the case for Arben Draga. Mr Draga's recorded perception of his position was as follows:

“they ruined my life .. I lost everything I had ... I feel depressed ... Keep hearing voices at night time ... I don't see a future you know, I don't see a future”.¹⁶⁵

It was these passages of the JRS Europe and London Detainee Support Group reports that triggered the desire on my part to dig much deeper into how a variety of tolerated TCNs describe and perceive their position. I was in particular interested in where they saw their position by reference to notions of legal and illegal stay. I therefore carried out interview-based qualitative research with a purposive sample of TCNs in France who had experienced a variety of legal toleration and indirect toleration positions.

The purpose of this research was three-fold. First, it served to gather deeper descriptive information on the legal and practical

¹⁶⁵ London Detainee Support Group, “No Return No Release No Reason: Challenging Indefinite Detention” (September 2010), 16.

implementation of toleration statuses in France, as a national case-study of the EU legal provisions discussed in chapter 1. Second and most importantly, it served to discover how tolerated TCNs perceived various aspects of their own position, namely in terms of legal/illegal stay, rights-exclusion, fear of removal, and the overall consequences of their limbo-like position. Thirdly, it served to gather qualitative information on the deterrent function and impact of toleration positions, insofar as these positions exclude tolerated TCNs from legal stay and the rights attached to legal stay. This third purpose falls outside the scope of this chapter, and serves as the theme of the final thesis chapter. This final chapter is preceded by a theoretical chapter on the functions of toleration positions, a key function being that of deterrence. It seemed appropriate to empirically address the issue of deterrence after proper theoretical contextualising.

I begin this chapter by setting out the legal and indirect toleration positions that exist in France (section 1), as well as the methodology and sampling I employed (section 2). I then get to the substance of the research. This begins with how interviewees perceived their toleration positions in terms of illegal/legal stay (section 3), as well as the reasons they coveted legal stay (section 4). I move on to assess the extent to which legal toleration statuses in France actually protect their holders from removal (section 5), as well as how fearful of removal interviewees actually were during periods of toleration (section 6). I then assess the quantity and quality of rights possessed by tolerated TCNs (section 7), how interviewees perceived their exclusion from key socio-economic rights (section 8), and the security-risks that can result from this exclusion (section 9). I end with how interviewees described the overall experience of being in limbo between illegal and legal stay (section 10), and the impact this limbo had on their health and ability to project into the future (section 11).

Sections 5 and 7 partly assess the implementation of EU law relating to the various categories of tolerated TCNs, in terms of their entitlements to protection from removal, to documentation, and to socio-economic rights.

1. Positions of legal and indirect toleration in France

France is an EU Member State where formal postponement-of-removal is deemed to not exist at all in the three big Europe-wide studies that have been carried out (mentioned in chapter 1), namely because there is no *toleration* permit or *Duldung* status, akin to what exists in Germany. The idea that formal postponement-of-removal does not exist in France is not correct, a point I shall come to.

A few historical words first. France is a European country which has long had a large immigrant population. The existence of non-removable migrants is not a 21st century phenomenon in France. In the first half of the 20th century (and throughout), informal administrative detention practices developed to handle unauthorised migrants who were not immediately removable for a range of structural, bureaucratic, and diplomatic reasons.¹⁶⁶ However, at the turn of the 20th century, there was a massive increase in the types of non-removability and the number of non-removable migrants. Practical obstacles to removal (namely relating to documentation and cooperation problems) were on the rise, and human rights related obstacles were a novelty that constantly grew from the 1990s onwards. Administrative detention had evolved from an informal practice to an increasingly institutionalised one.¹⁶⁷ This institutionalisation led to increasing

166 See Olivier Clochard, Yvan Gastaut et Ralph Schor, “Les Camps d'Étrangers Depuis 1938: Continuité et Adaptations” 20 (2004) 2 *Revue européenne des migrations internationales*, < <http://revues.org> > accessed 20 January 2014.

167 See Nicolas Fischer, “Entre Urgence et Contrôle. Éléments d'Analyse du Dispositif Contemporain de Rétention

legal limits being placed on detention, which in turn limited the use of administrative detention as a one-solution tool for handling irregular migrants who were not immediately removable. This was partly due to the fact that the institutionalisation of administrative detention led to judicial and NGO actors' proactive use of legal tools to help release administrative detainees.¹⁶⁸

When administrative detention was institutionalised in the early 1980s, there was a presumption in favour of administrative postponement-of-removal¹⁶⁹ for non-removable irregular migrants, and administrative detention was the exception.¹⁷⁰ But this presumption progressively shifted towards administrative detention, with administrative postponement becoming the exception.

The 1990s also witnessed a huge rise in the numbers of asylum applicants (like in many other European countries). The political response was to limit and deter access to the asylum procedure and to refugee status, which led to an increase in the number of failed asylum seekers.¹⁷¹ Most failed asylum seekers were not removable, and this was an issue that was acknowledged by State authorities in several of the regularisation mechanisms and programmes that were set up over the years.¹⁷² Dublin and priority procedures were also creatures of the 1990s, and with these creatures came the informal creation of the tolerated asylum applicant, excluded from legal stay for presumptively abusing the asylum system in one way

Administrative pour les Étrangers en Instance d'Éloignement du Territoire" (Recueil Alexandries, Collections Esquisses, février 2007) < <http://www.reseau-terra.eu/article560.html> > accessed 20 January 2014.

168 See Nicolas Fischer, 'Une Frontière "Négociée": l'Assistance Juridique Associative aux Étrangers Placés en Rétention Administrative' (2009/3) 87 *Politix*, 71; Antoine de Ravnigan, "La Cimade, Grain de Sable dans la Machine à Expulser" *Alternatives économiques* (9/2010) 294, 48.

169 Administrative postponement coming in the form of a compulsory-residence-order, something I explain a little further down.

170 Daniel Wilsher, *Immigration Detention: Law, History, Politics* (Cambridge University Press, 2011), 111.

171 ICMPD, "REGINE: Regularisations in Europe: Study on Practices in the Area of Regularisation of Illegally Staying Third-Country Nationals in the Member States of the EU: Appendix A Country Studies" (Study commissioned by the European Commission, Ref. JLS/B4/2007/05, Vienna, January 2009), 2.

172 *Ibid.*, 7-8.

or other.¹⁷³ The scope of these procedures expanded over time, as did the proportion of asylum applicants to be placed in these derogatory procedures.¹⁷⁴

In contemporary France, like in the rest of Europe, there are numerous irregular migrants and asylum seekers who cannot be removed for legal, practical, and policy reasons, and who are locked out of legal stay. Eurostat estimates suggest that there were respectively 88,565, 76,590, and 83,440 illegally staying TCNs who were ordered to leave *mainland* France in 2009, 2010 and 2011.¹⁷⁵ They also suggest that only 18,400, 17,045, and 20,425 returned following an order to leave in 2009, 2010, and 2011. The overwhelming majority were thus never returned. This trend persisted in 2012 (22,760 out of 77,600 orders to leave led to return) and 2013 (20,140 out of 84,890 orders to leave led to return).¹⁷⁶

Illegally staying TCNs can be subjected to a variety of return measures under French administrative and criminal law. There is a measure obliging them to leave the territory (OQTF), an expulsion measure (obliging those who pose a serious public order threat to leave), and a criminal penalty measure which prohibits those concerned from being present within France's territory (ITF).¹⁷⁷ The OQTF is the most common administrative return measure, and one which normally grants a thirty day period of voluntary departure. The voluntary period can exceptionally be extended by administrative authorities, taking account of the specific circumstances of returnees. Normal and extended voluntary

173 See Coordination Française pour le Droit d'Asile, "Les Demandeurs d'Asile Sans Papiers: les Procédures Dublin II et Prioritaires" (avril 2006); Sharon Oakley, "Accelerated Procedures for Asylum in the European Union : Fairness Versus Efficiency" (April 2007) Sussex Migration Working Paper 43, 67.

174 See Coordination Française pour le Droit d'Asile, "Les Demandeurs d'Asile Sans Papiers: les Procédures Dublin II et Prioritaires" (avril 2006); Commission Nationale Consultative des Droits de l'Homme, "L'Asile en France: Etude Préparatoire à l'Avis de la CNCDH" (juin 2001).

175 Eurostat, "Statistics : Population Database: Enforcement of Immigration Legislation" < <http://epp.eurostat.ec.europa.eu/portal/page/portal/eurostat/home/> > last accessed on 6 September 2014.

176 Ibid.

177 Code de l'entrée et du séjour des étrangers et du droit d'asile (Code on the Entry and Residence of Foreigners and on the Right of Asylum, consolidated version on 24 January 2014), arts L 511, 521 and 541.

periods of departure are certified in a document granted to voluntary returnees. But an OQTF can be devoid of a voluntary period under numerous circumstances, namely when there is a security risk or a risk of absconding. In such a case, removal is immediately enforceable.

An expulsion decision is an administrative return measure issued in cases where there is serious threat to public order. The ITF is a criminal penalty, issued by a criminal judge within the context of a criminal trial. Following the issue of an expulsion measure or an ITF penalty, removal is immediately enforceable. I shall not delve any further into the variety of return measures, but focus on the toleration positions that exist in relation to such measures.

There are a variety of legal toleration and indirect toleration positions in contemporary French law. There is an accidental legal toleration position of cancelled-returnee (1.1.), indirect toleration positions of released-detainee *stricto sensu* and of exhausted-returnee (1.2.), as well as legal toleration positions of postponed-returnee (1.3.), tolerated asylum applicant (1.4.), and tolerated trafficking victim (1.5.).

1.1. Immunity from removal and cancelled-returnees

There is a long list of TCNs who are legally immune from return measures, and who are correspondingly entitled to a residence permit.¹⁷⁸ These are TCNs with particular familial or cultural ties, as well as TCNs with an exceptionally serious medical condition. Examples of TCNs concerned are TCNs under the age of 18 and TCNs who have been married to a French national for at least three years. In the event that such TCNs are subjected to return measures, these measures should theoretically be cancelled upon review by a judge. When a return measure is cancelled, TCNs

178 Ibid, arts L 511-4, 521-2, 521-3, 521-4, 541-1.

concerned should in principle be granted a document which temporarily authorises their stay, pending examination of an entitlement to a residence permit.¹⁷⁹ However, administrative authorities do not always grant this document in practice, and many TCNs do not necessarily know to ask for it. This means that there are cancelled-returnees who remain in limbo, even though they shouldn't under French law.

1.2. Released-detainees stricto sensu and exhausted-returnees

Irregular migrants can be placed in administrative detention if an enforceable return measure has been issued against them. The maximum period of administrative detention in France is quite short in comparison with the maximum period in other EU member states (it is forty-five days).¹⁸⁰ This period used to be shorter (thirty-two days), and was increased after the entry into force of the Return Directive. Placement in administrative detention is for an initial period of five days, which can be prolonged for an extra twenty days, and prolonged a second time for another twenty days. Administrative authorities may only lawfully prolong detention following judicial oversight. Exhausted-returnees in France are irregular migrants who have been continuously detained for the maximum forty-five day period. But there are no limits under French law on the number of times an irregular migrant can be placed in administrative detention, the only limit coming from EU law which sets out an absolute maximum of eighteen months.

Illegally staying TCNs might be released from administrative detention before expiry of the maximum period for any number of reasons, but two groups of reasons stand out. First, they might be released, following judicial oversight, due to procedural

179 Ibid, art L 512-4.

180 Ibid, arts L 551-552.

irregularities surrounding the arrest and decision to place them in administrative detention.¹⁸¹ Secondly, they might be released due to the absence of a reasonable prospect of removal, namely due to difficulties in obtaining travel documentation. When released, they are theoretically entitled to protection from enforcement of removal for a seven day period,¹⁸² and should be granted certification to this effect (but this seldom happens).

There are no precise figures on the number of placements in administrative detention following an order to leave. According to NGO reports, there were respectively at least 50,000, 60,282, 51,385, and 43,746 administratively detained irregular migrants in *mainland and overseas France* in 2009, 2010, 2011, and 2012.¹⁸³ Thus, a large proportion of irregular migrants ordered to leave are subjected to administrative detention in France.

In 2010, a group of French NGOs found that out of a sample of 24,018 administrative detainees, 13,333 were released and freed (55,5%), whereas 10,004 were effectively removed from France (41,7%).¹⁸⁴ Amongst those who were released, only 2,803 were released following expiry of the maximum period of administrative detention (11% of the 24,018 detainees). Data provided by the same NGOs in 2011 and 2012 show similar proportions of administrative detainees who were released, removed, or imprisoned.¹⁸⁵ The

181 On the issue of release due to procedural irregularities surrounding the apprehension of an irregular migrant, see GISTI, "Irrégularité du Séjour et Directive « Retour »: un Délit par Intermittence" (2012/1) 92 *Plein droit* I-VIII, especially III. On the issue of release due to the breach of a right to be heard, see Conseil d'Etat, 2ème et 7ème sous-sections réunies, 4 juin 2014, n°370515, recueil Lebon ; Xavier Domino (rapporteur public), "Droit d'être entendu et OQTF: un exemple du dialogue entre les jurisprudences" (2014) *AJDA* 1501; Cour administrative d'appel de Bordeaux, 6ème chambre, 23 juin 2014, n°13BX03149, inédit, considérant 5.

182 Code de l'entrée et du séjour des étrangers et du droit d'asile (Code on the Entry and Residence of Foreigners and on the Right of Asylum, consolidated version on 24 January 2014), art L 551-1.

183 La Cimade, "Centres et Locaux de Rétention Administrative: Rapport 2009" (6 octobre 2010), 17 ; Assfam, Forum Réfugiés, France terre d'asile, la Cimade, l'Ordre de Malte, "Centres et Locaux de Rétention Administrative: Rapport 2010" (13 décembre 2011), 9 ; Assfam, Forum Réfugiés, France terre d'asile, la Cimade, l'Ordre de Malte, "Centres et Locaux de Rétention Administrative: Rapport 2011" (20 novembre 2012), 9 ; Assfam, Forum Réfugiés, France terre d'asile, la Cimade, l'Ordre de Malte, "Centres et Locaux de Rétention Administrative: Rapport 2012" (3 décembre 2013), 9.

184 Assfam, Forum Réfugiés, France terre d'asile, la Cimade, l'Ordre de Malte, "Centres et Locaux de Rétention Administrative: Rapport 2010" (13 décembre 2011), 13.

185 Assfam, Forum Réfugiés, France terre d'asile, la Cimade, l'Ordre de Malte, "Centres et Locaux de Rétention

percentage of administrative detainees who were released is thus high. That of administrative detainees released upon expiry of the maximum period is small, but not insignificant.

1.3. Judicial and administrative postponed-returnees

Postponed-removal positions are not all explicitly governed under French legislation. The execution of a return measure (otherwise referred to as removal) can be postponed by a judge or by an administrative authority. When removal of a TCN is postponed by a judge, administrative authorities have no choice but to refrain from removing that TCN. When removal is postponed by an administrative authority, the latter made a formal choice to postpone removal, or to formally confirm pre-existing postponement by a judge.

Judicial postponement-of-removal happens when an illegally staying TCN seeks review of a return decision before a judge, usually an administrative judge. First instance review procedures of a return decision are suspensive, which means that those seeking review are legally protected from removal for the duration of the procedure.¹⁸⁶ And moving on to the substance of the review procedure, the TCN seeks review of two decisions taken by an administrative authority; first a decision establishing an obligation to return (return-decision) and secondly a decision establishing the country of destination (country-of-destination-decision). If both decisions are cancelled by a judge, the obligation to return withers away and the administrative authority is legally obliged to grant the TCN a document which temporarily authorises legal stay.¹⁸⁷ However, if the country-of-destination-decision is cancelled but the return-decision is not, then execution of the return-decision is

Administrative: Rapport 2011” (20 novembre 2012), 11; Assfam, Forum Réfugiés, France terre d'asile, la Cimade, l'Ordre de Malte, “Centres et Locaux de Rétention Administrative: Rapport 2012” (3 décembre 2013), 13.

186 Code de l'entrée et du séjour des étrangers et du droit d'asile (Code on the Entry and Residence of Foreigners and on the Right of Asylum, consolidated version on 24 January 2014), art L 512-3.

187 Ibid, art L 512-4.

postponed.¹⁸⁸ It is essentially human rights obstacles to removal that lead judges to postpone removal in this manner. This namely concerns situations where removal of a TCN would amount to a violation of the prohibition of refoulement under the European Convention on Human Rights (even though the TCN might not qualify for asylum). This is an area where disjunctions exist between the family of grounds for protection from refoulement under international human rights law, on the one hand, and the asylum system, on the other. There are failed asylum seekers who are protected from refoulement, namely under the European Convention on Human Rights. But they either do not fall under the personal scope of an international protection status, or they do fall under this scope but are excluded from international protection for security-related reasons.

It is either a national judge that postpones removal on such grounds, or exceptionally the European Court of Human Rights (ECtHR) that obliges French authorities to postpone removal. The ECtHR can impose a postponement obligation on French authorities, either pending the outcome of a case as an interim measure,¹⁸⁹ or following the positive outcome of a case. The return-decision may remain intact but the country-of-destination-decision does not. The big drawback of judicial postponement is the lack of certification that comes with it. TCNs may obtain a copy of the ruling, but that is it. And so the only proof of postponement that they have is a multi-page ruling written in cryptic French legalese.

Administrative postponement-of-removal is more formal and not necessarily unrelated to judicial postponement. It usually comes in the form of a compulsory order of residence. TCNs concerned are obliged to live in a strictly delineated location and to comply with

188 See for example Cour administrative d'appel de Nancy, 3ème chambre, 30 janvier 2014, n° 13NC00804, inédit.

189 European Union Agency for Fundamental Rights, *Handbook on European law relating to Asylum, Borders and Immigration* (Luxembourg, Publications of the European Union, 2013), 47-48.

frequent reporting obligations. They are not free to move around the country but they are not under house arrest either. Illegally staying TCNs can apply for – or be subjected to – a long-term compulsory-residence-order if there is no reasonable prospect of removal (to the country of origin or any other country) in the foreseeable future.¹⁹⁰ Where there is a reasonable prospect of removal, illegally staying TCNs are normally subjected to administrative detention.¹⁹¹ However, they may be granted a short-term compulsory-residence-order, as an alternative to detention, if they provide sufficient documentation and guarantees to the effect that they will not abscond. A long-term compulsory-residence-order can be issued for a maximum of six months, renewable once. A short-term compulsory-residence-order can be issued for a maximum of forty-five days, renewable once. The most interesting form of administrative postponement for the purposes of this thesis is the long-term one.

How is administrative postponement certified? Administrative postponed-returnees are to be issued a document (sometimes in the form of a receipt) which certifies their identity, the compulsory-residence-order, the geographical area and duration of that order, as well as the protection from removal conferred by it. For some reason, the Ramboll/Eurasylum study indicates that administrative postponement of removal in France is merely *de facto* and not formal.¹⁹² This is not the case. The document in France might not be a full blown toleration permit like in Germany, but it certainly provides adequate formal certification of postponement. It is a big step up from the inadequate certification that exists with regard to judicial postponement-of-removal. Furthermore, administrative postponed-returnees can apply for –

190 Code de l'entrée et du séjour des étrangers et du droit d'asile (Code on the Entry and Residence of Foreigners and on the Right of Asylum, consolidated version on 24 January 2014), art L 561-1.

191 Ibid, art L 561-2.

192 Ramboll and Eurasylum, “Study on the Situation of Third-Country Nationals pending Return/Removal in the EU Member States and the Schengen Associated Countries: Annex 1 – Country Reports” (Study commissioned by the European Commission, 11 March 2013), 158.

and potentially be granted – a work permit.¹⁹³ This adds an important socio-economic right over and above the basic socio-economic rights possessed by illegal residents *stricto sensu*.

Who can benefit from long-term administrative postponement? There are typically two profiles that can benefit from the discretionary grant of long-term administrative postponement. It can first of all be granted to persons whose removal is judicially postponed, namely on human rights grounds. In such cases, administrative postponement follows and formalises judicial postponement. Secondly, long-term administrative postponement can be granted to persons in administrative detention, who are not removable for practical reasons, and for whom there is no reasonable prospect of removal before the expiry of the maximum period of administrative detention. Postponement leads to their release. Short-term administrative postponement theoretically caters to illegal residents who can provide sufficient guarantees and documentation pending their imminent return, but it especially caters to irregular migrant families who cannot be placed in administrative detention on the ground of the right to private and family life under the European Convention on Human Rights.¹⁹⁴

Statistics on administrative and judicial postponement are virtually non-existent. There are no figures with regard to judicial postponements by national judges. There are however figures on postponements by the European Court of Human Rights, but these only represent a small portion of the overall number of judicial postponements. In 2011, the European Court of Human Rights ordered the postponement of 116 TCNs' removal pending the

193 Code de l'entrée et du séjour des étrangers et du droit d'asile (Code on the Entry and Residence of Foreigners and on the Right of Asylum, consolidated version on 24 January 2014), arts R 561-3 and 561-4.

194 See Ministère de l'Intérieur, "Mise en Oeuvre de l'Assignment à Résidence prévue à l'article L.561-2 du CESEDA, en Alternative au Placement des Familles en Rétention Administrative sur le Fondement de l'article L.551-1 du même code" (NOR INTK1207283C, 6 juillet 2012); *Popov v France* App nos 39472/07 and 39474/07 (ECtHR 19 January 2012), paras 130-148.

outcome of cases on the potential violation of non-refoulement.¹⁹⁵ This corresponds to twenty-three times the number of such orders in 2006.

With regard to administrative postponement-of-removal, there are no figures at all. On the basis of qualitative research, the Ramboll/Eurasylum Study suggests that the practice of compulsory-residence-orders “is rare”¹⁹⁶ and that the more frequent practice is to simply release an illegal resident from detention or choose “not to pursue the return order”.¹⁹⁷ This suggests that indirect toleration is often preferred to formal legal toleration.

1.4. Tolerated asylum applicants, tolerated pre-asylum applicants, and tolerated refugees

There are tolerated asylum applicants under French law, as well as tolerated pre-asylum applicants and tolerated refugees in practice. Tolerated asylum applicants are applicants who are refused temporary legal stay, but nonetheless allowed to remain by virtue of the prohibition of refoulement. Their stay is legally tolerated. Tolerated pre-asylum applicants are asylum seekers who are subjected to long delays before they are administratively registered as asylum applicants, and who are locked out of temporary legal stay throughout the delays. Tolerated refugees are recognised refugees who should be in possession of a residence permit but aren't as a result of kafkaesque misapplications of French law.

¹⁹⁵ Comité Interministériel de contrôle de l'immigration, *Les Chiffres de la Politique de l'Immigration et de l'Intégration – Année 2011 – Neuvième Rapport au Parlement* (Direction de l'information légale et administrative, Paris, décembre 2012), 116.

¹⁹⁶ Ramboll and Eurasylum, “Study on the Situation of Third-Country Nationals pending Return/Removal in the EU Member States and the Schengen Associated Countries: Final Report” (Study commissioned by the European Commission, 11 March 2013), 163.

¹⁹⁷ Ibid.

To begin with tolerated asylum applicants, in French legislation, first instance asylum applicants are either granted or refused temporary legal stay.¹⁹⁸ Temporary legal stay is granted to asylum applicants whose application is examined under a normal/regular procedure. Refused legal stay is inflicted on asylum applicants who are placed in a Dublin procedure or to applicants whose application is examined under a derogatory priority procedure. Although the latter are refused legal stay, they are nonetheless allowed to remain pending the outcome of their Dublin or priority procedure at first instance.¹⁹⁹ The grant of temporary legal stay comes in the form of a document entitled *temporary authorisation of stay*. The refusal of legal stay comes in the form of various types of documents which certify placement in the Dublin or priority procedure and explain that legal stay is refused. Although legal stay is refused, presence is legally tolerated. In the event of a rejected asylum application at first instance, asylum applicants can appeal. Appellant applicants under the normal procedure remain legally present. However, those under a priority procedure continue to not be legally present, but additionally lose their right to tolerated stay and fall into illegal stay.²⁰⁰ Even when an appeal fails, asylum seekers can introduce an application for re-examination. These applications are generally examined under a priority procedure, and those concerned are thus tolerated at first instance and illegally staying during appeals. Figures relating to

198 Code de l'entrée et du séjour des étrangers et du droit d'asile (Code on the Entry and Residence of Foreigners and on the Right of Asylum, consolidated version on 24 January 2014), art L 741-4 < <http://www.legifrance.gouv.fr> > accessed 31 January 2014.

199 Ibid, art L 742-6.

200 The issue of suspensive appeals against first instance asylum application rejections is a hotly debated one. EU law does not provide a clear right for asylum applicants to suspensive appeal procedures against rejected applications. And under French law, priority procedure applicants are not entitled to suspensive appeal procedures, which means that they are not legally protected from removal during such procedures. EU law is not crystal clear on the matter, but some authors have argued that EU law can be interpreted as requiring that all asylum applicants be granted the right to a suspensive appeal procedures. For example, see Marcelle Reneman, "An EU Right to Interim Protection during Appeal Proceedings in Asylum Cases?" (2010) 12 *European Journal of Migration and Law* 407-434. The European Court of Human Rights has a clearer position than EU law. The French practice of excluding priority procedure applicants from suspensive appeal procedures was found to be in violation of the European Convention on Human Rights: *IM v France* App no 9152/09 (ECtHR 2 February 2012). This exclusionary practice might come to an end if the relevant provisions a bill recently introduced in the French Parliament were to be adopted: Ministère de l'Intérieur, "Projet de Loi Relatif à la Réforme de l'Asile" (n° 2182, déposé le 23 juillet 2014).

the number of tolerated asylum applicants in France were discussed in section 1.3 of chapter 1.

Moving on to tolerated pre-asylum applicants, the very notion may seem strange to some experts in the field. It's a notion that was rejected by Advocate General Sharpston in the *Cimade and Gisti* ruling delivered by the CJEU.²⁰¹ When asylum seekers express an intent to apply for asylum, they in principle undergo a metamorphosis from asylum seeker to asylum applicant. And the Asylum Reception Conditions Directive requires that Member States grant asylum seekers a document certifying their asylum applicant status within a period of three days.²⁰² The thorny issue in the *Cimade and Gisti* case was at what point exactly an asylum seeker is deemed to have made an application for asylum, so as to benefit from the material reception conditions guaranteed under the Asylum Reception Directive. There are usually two key stages in the process of applying for asylum. There is a preliminary stage in which Member State authorities seek to determine whether an application is admissible for examination (namely under the Dublin Regulation). There is then an examination stage during which competent authorities examine an application for asylum. In France, these two stages (admissibility and examination) are very separate, and the asylum seeker only sends the formal request for asylum following the positive outcome of the admissibility stage, this formal request triggering the examination stage. While French authorities in the *Cimade and Gisti* case sought to argue that an application can only be deemed to be made from the moment a formal request is sent to the competent authority for examination, the CJEU disagreed. According to the CJEU, asylum applicants cannot be distinguished in accordance with the type and stage of asylum procedure. While the Asylum Reception Conditions

201 Case C-179/11 *Cimade, GISTI v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration* (2012), Opinion of AG Sharpston, para 46.

202 Council Directive 2003/9/EC on Asylum Reception Conditions (2003) OJ L 31/18, art 6.

Directive does not provide much detail on the exact starting point at which one becomes an asylum applicant, the Dublin Regulation does. Article 20 (2) of the Dublin III Regulation states that an “application for international protection shall be deemed to have been lodged once a form submitted by the applicant for asylum or a report prepared by the authorities has reached the competent authorities of the Member State concerned. Where an application is not made in writing, the time elapsing between the statement of intention and the preparation of a report should be as short as possible”²⁰³

So the starting point is when a form is submitted, or a report is lodged, which formally registers the request of an individual to apply for asylum, even if the form or report has not been sent to the examining authority. And the time elapsing between a statement of intention and the preparation of a report should be as short as possible.

But in practice, in some parts of France, the period between a statement of intention and the formal registration of a request can last up to half a year. An asylum seeker has to approach a *préfecture* (administrative authority) in order to register a request for a document which authorises legal stay as an asylum applicant. Once the request for this document is registered, the *préfecture* technically has fifteen days to accept or refuse the request²⁰⁴ (this is arguably in violation of the Asylum Reception Conditions Directive's three-day rule). After fifteen days, an asylum seeker is theoretically either granted or refused this document.

In some parts of France, many asylum seekers have to wait months

203 Regulation (EU) 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or stateless person (recast) OJ L 180/31.

204 Code de l'entrée et du séjour des étrangers et du droit d'asile (Code on the Entry and Residence of Foreigners and on the Right of Asylum, consolidated version on 24 January 2014), art R 742-1.

before the request for the aforementioned document is actually formally registered (not to mention the actual grant or refusal of the document).²⁰⁵ During that whole time, they are summoned to multiple *appointments* that serve to delay formal registration of the request for the document which authorises legal stay for the purpose of seeking asylum. And some *préfectures* frequently require that asylum seekers provide more documentation than necessary in order to register their request for this document, such requirements being in violation of French, EU, and international law.

The period between the statement of intention, on the one hand, and formal registration of the request, on the other, is technically a pre-asylum applicant period. This is because there is no formal trace of an application for asylum during this period.

But from the moment their request for the document is finally registered, asylum seekers technically become asylum applicants. However, even when their request for said document is finally registered, asylum applicants in practice often have to wait far longer than fifteen days before being granted or denied a document authorising legal stay for the purpose of seeking asylum. Such delays prolong exclusion from legal residence.²⁰⁶

The long periods of initial exclusion from legal stay experienced by many asylum seekers made me want to include pre-asylum applicants within the scope of this study, for the toleration position of pre-asylum applicants is similar to the deliberate toleration positions under French law, in terms of both immigration status and rights. Such a toleration position should not exist under French law, but it does in practice. Below is a

205 See Coordination Française pour le Droit d'Asile, "Droit d'Asile en France: Conditions d'Accueil – État des Lieux 2012" (février 2013), 31-32 and 36-40.

206 Ibid.

diagram that seeks to facilitate the conceptualisation of the pre-asylum applicant position, which is a byproduct of rogue administrative practices.

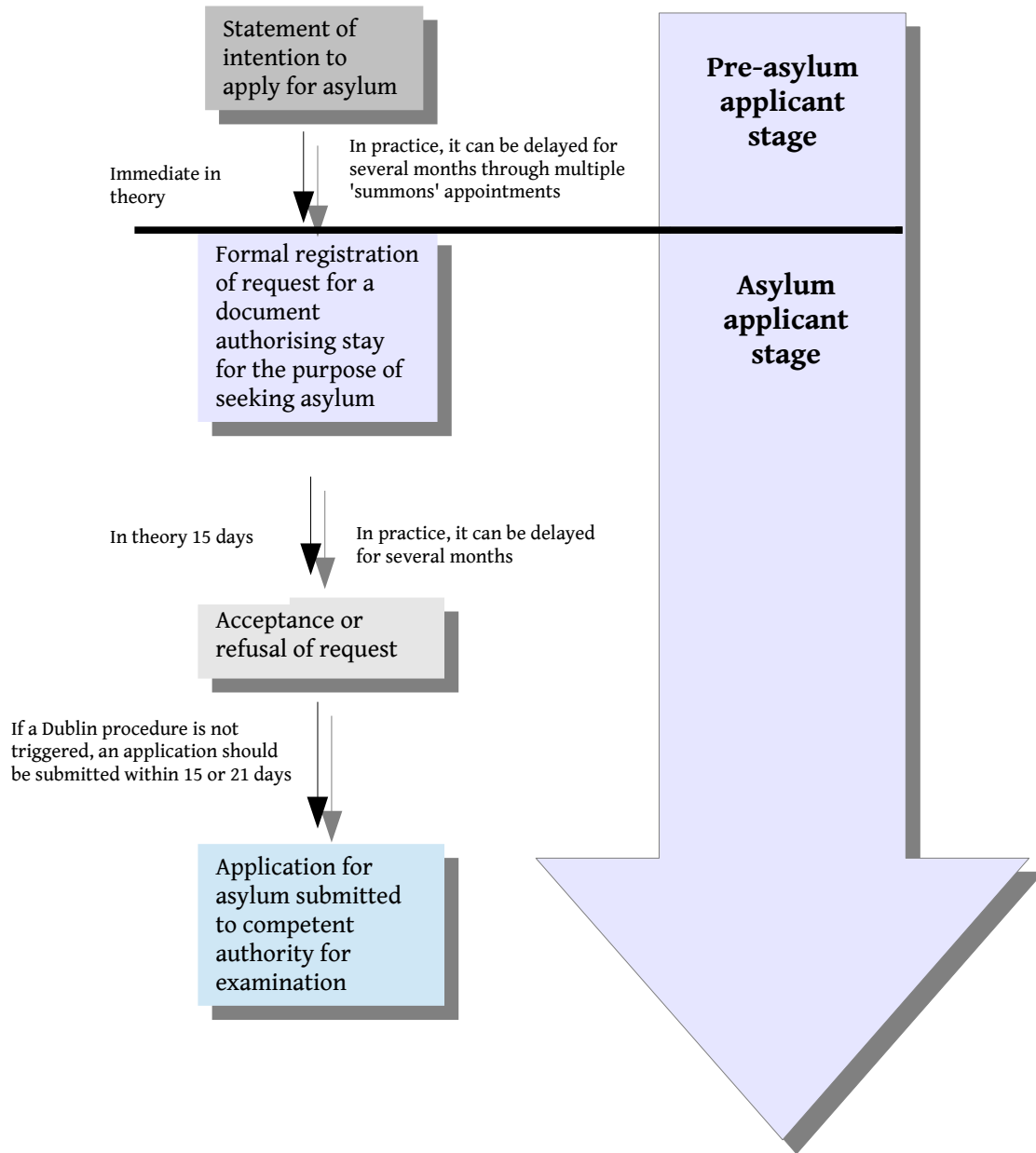


Diagram 4: Tolerated pre-asylum applicants

Another position that should not exist under French law is that of tolerated refugee. The existence of the tolerated refugee is one that I encountered through my empirical research, and one I would not have imagined before. As explained above in chapter 1, under the

Qualification Directive, recognised refugees and beneficiaries of subsidiary protection are entitled to a residence permit *as soon as possible* following recognition. Under French law, recognised refugees are entitled to a permanent residence card, but they must go through a potentially long and burdensome application process. But from the moment they apply for this permanent residence card, French law requires that administrative authorities grant them a temporary (procedural) residence document within a maximum period of eight days,²⁰⁷ and this temporary document must certify their refugee or subsidiary protection status. To summarise, recognised refugees should not be locked out of legal stay for more than eight days. But through my empirical research, I encountered cases of recognised refugees who were locked out of legal stay for years. And I managed to interview one such person.

1.5. Tolerated trafficking victims

TCN trafficking victims are often illegally present in France. Under the French legislative provisions implementing the CVHT Directive,²⁰⁸ identified victims must be informed of the possibility of obtaining a residence permit in exchange for their cooperation.²⁰⁹ They are to be granted a reflection period of thirty days. During this thirty day period, they are supposed to be granted a receipt which certifies this reflection period and the fact that they are legally protected from removal.²¹⁰ So in theory, potentially cooperative trafficking victims should only experience about thirty days during which they are legally tolerated, before obtaining a residence permit or falling back into the pit of illegality. Very little is known about how this cooperation mechanism works in practice. But the Clinic of Sciences Po's Law

207 Code de l'entrée et du séjour des étrangers et du droit d'asile (Code on the Entry and Residence of Foreigners and on the Right of Asylum, consolidated version on 24 January 2014), art R 742-5.

208 Council Directive 2004/81/EC on the residence permit for cooperative victims of human trafficking (2004) OJ L 261/19.

209 Code de l'entrée et du séjour des étrangers et du droit d'asile (Code on the Entry and Residence of Foreigners and on the Right of Asylum, consolidated version on 24 January 2014), art R 316-1.

210 Ibid, art R 316-2.

School is currently carrying out a research project on this very topic. Preliminary discussions with key informants suggest that some trafficking victims are not given a reflection period despite initial cooperation, and that others are granted a reflection period which lasts a lot longer than thirty days.

While some European countries have gathered detailed statistics for Eurostat on the number of trafficking victims who are granted a reflection period and a residence permit under the CVHT Directive, France has unfortunately not. But recent research by the Council of Europe has revealed that twenty-nine residence permits were granted in 2008, 102 in 2009, 160 in 2010, and 189 in 2011, to victims of trafficking under the French provisions implementing the CVHT Directive.²¹¹ These figures say nothing about the number of identified victims nor the number of victims granted a reflection period.

2. Methodology and sample of tolerated TCNs

Debates over how to qualify immigration statuses and their impact on migrants tend to be limited to academics' literal and contextual interpretation of legal provisions. In chapter 1, I provided my interpretation, as a doctoral legal scholar, of legal provisions relating to groups of non-removable migrants. I interpreted these legal provisions as creating positions which lie on a spectrum between illegal and legal stay, and which have a limbo-like quality. My interpretation is not one which is shared by all those who have broached the subject.

In addition to an interpretation of legal provisions by a doctoral legal scholar, I believe that a bottom-up sociological approach to

²¹¹ Group of Experts on Action against Trafficking in Human Beings, "Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by France : First evaluation round" (Strasbourg, 28 January 2013), 45.

law can add a lot to the qualification of the statuses of non-removable persons. What the law says about this immigration status or that immigration status is one thing. How those immigration statuses are perceived by their holders is another thing entirely, and something which can be made up of many more layers. One can of course have a false or erroneous perception of one's legal position. However, the person who has experienced a legal position may provide a lot more insight into how that legal position is experienced out there in the real world, a perspective that the external academic observer can never have.

I therefore sought to gather both descriptive and perceptive information on toleration positions in France, through interview-based research with a purposive sample of tolerated TCNs. I carried out qualitative research on the basis of interviews with a mix of structured and semi-structured questions (2.1.). These interviews were carried out with a diverse sample of tolerated TCNs, a diversity which I set out in section 2.3. The research has its practical and ethical limitations which I address in section 2.2. The aim was to gain descriptive as well as perceptive insight on toleration phenomena in France, as a national case-study of my EU-level analysis. The descriptive aspect of my research can be seen as offering detailed insight into the practical (not simply legal) implementation of EU law on tolerated TCNs in France. The perceptive aspect of my research can be seen as offering a sociological layer to my interpretation of EU and national legal provisions on toleration positions.

2.1. Qualitative interview-based research with a mix of structured and semi-structured questions

I designed a flexible set of structured and semi-structured questions on toleration positions in terms of illegal/legal stay, the

fear of future removal and hope of future regularisation, exclusion from numerous socio-economic rights, as well as the impact of such positions on future planning, healthcare, and public order considerations. I modelled many of my questions on previous qualitative research carried out in the field of immigration law and policy, namely a qualitative Eurobarometer study on migrant integration.²¹² I mostly chose to ask semi-structured questions, in order to dig as deep as possible into unformatted perceptions. I was open to discovering unanticipated information and insight that I might have to reconstruct.

Interviews were carried out from April to July 2013. They took place in various offices of France terre d'asile in Paris, as well as at the Gisti's headquarters, in cafés, and in apartments of interviewees. Interviews were mostly recorded, although a minority of interviewees did not give their consent to recordings. The recording of interviewees allowed for better flow of conversation and ideas. They allowed interviewees to provide answers that were highly personalised, detailed, and potentially revelatory of unanticipated information. Most interviews were in English or French. Only two interviews were carried out in another language, which required the help of a translator.

Recorded interviews were carefully transcribed. Comparative tables were then drafted for each theme. In general, the first column of these tables listed the initials/aliases of the interviewees, and the second column set out the detailed responses for each structured or semi-structured question. Precautions were taken during interviews to minimise inaccurate responses, as explained in section 2.2., and I was able to cross-check some factual

212 Eurobarometer, "Migrant Integration : Aggregate Report" (Qualitative Eurobarometer, May 2011). But also: Vaughan Robinson and Jeremy Segrott, "Understanding the Decision-Making of Asylum Seekers" (Home Office Research Study 243, Home Office Research, Development and Statistics Directorate, July 2002); Richard Black, Michael Collyer, Ronald Skeldon, Clare Waddington, "Routes to Illegal Residence : A Case Study of Immigration Detainees in the United Kingdom" (2006) 37 *Geoforum* 552-564.

elements through the files kept by NGOs on some of the interviewees. Subsequent columns then served to reconstruct patterns and types of responses, and to establish the number of interviewees who fit specific types of responses. This was important for two reasons. First, the mostly semi-structured questions led to a very complex set of answers that required some abstraction and simplification for the purpose of gathering some sort of analytical insight. Secondly, despite the qualitative nature of the research, I did not wish to succumb to easy generalisations of interviewee perceptions and positions, and wished to capture precise positions and the numbers behind those positions. Following the establishment of patterns and types of responses, differences in responses were examined by reference to the sample data (for example the type of toleration position, the country of origin, the duration of presence in France etc.) in order to discern any relevant profile variables behind different responses. This sample data is detailed in section 2.3. I provide very detailed information on the numbers of interviewees who had diverse positions and perceptions, instead of simply writing *for most interviewees* etc.. This might be perceived as giving my qualitative findings a misguided quantitative appearance. But the aim was to avoid simple shortcuts and generalisations of positions, and to provide an accurate portrayal of how a small-sized sample described and perceived the issues and laws discussed. While the research findings are not generalisable to the wider population of tolerated TCNs, that is no reason for sacrificing accuracy of findings and analysis with regard to a small sample of interviewees.

2.2. Ethical and practical considerations

Irregular migrants and asylum seekers are a generally vulnerable group of individuals. Their vulnerability can reside in both their past misfortunes in countries of origin, as well as in their current

exclusionary immigration statuses in France. They are likely to be vulnerable due to their “susceptibility to physical or emotional harm ... stemming from their legal status”²¹³ in France and from past events and traumas in their home countries. They are often legally, politically, and socio-economically excluded and alienated in their host country. They can also sometimes be illiterate or linguistically challenged in the language of their home or host country.

The fragile position of irregular migrant and asylum seeker interviewees raises a number of important issues, including whether or not: they truly consent to an interview that takes place, they expect something in exchange for the interview, the interview might pose a risk for them vis-à-vis public and private persons, “the potential social benefits from research outweigh the potential social harms”,²¹⁴ the interview might exacerbate any stress and anxiety generated by their legal status, the unbalanced power and status relationship between researcher and interviewee might have a negative impact on the interviewee or on the accuracy of responses provided, a cultural barrier might pose a problem requiring cultural sensitivity and preparedness etc. The social risk, unbalanced power relationship, and potential cultural barrier can foster an atmosphere of mistrust and hostility which might lead to inaccurate responses.

These issues require that precautions be taken when interviewing such potentially vulnerable individuals. When I talked to potential interviewees about the research and their potential involvement, I sought to be as transparent as possible about the subject and goals of the research, as well as the absence of individual benefits that would accrue to them from participating. I sought to ensure - and

213 Franck Düvell, Anna Triandafyllidou and Bastian Vollmer, “Ethical Issues in Irregular Migration Research in Europe” (2010) 16 (3) *Population Space and Place* 227, 232.

214 *Ibid.*, 228.

reassure them on – their complete anonymity in the final outcome of the research. This was especially important in light of the fact that I requested our sessions to be recorded. Some interviewees were quite resistant to the idea of being recorded, and one completely refused. He was convinced that I was an undercover police officer. Amongst those who were initially resistant to the idea of our interviews being recorded, my explanations of why I wished to record the interview sufficed to convince the majority, along with an oral guarantee of their anonymity. But for a handful, I additionally had to provide a signed document ensuring it.

I acted as friendly and respectful as possible at all stages of the process, before, during, and after interviews, always insisting on my great appreciation for their help and on their full discretion to withdraw from the interview or withhold answers on sensitive issues. I did offer preliminary legal assistance to many interviewees, even if I subsequently pointed them to NGOs who could provide more in-depth assistance. Most importantly, I sought to break down the power and cultural differentials, and to foster an atmosphere of equals despite our very unequal positions in society and in the room. I found it especially important to take time to talk about their life and story in a manner unrelated to the research, in order to show that a researcher does not have to be a purely utilitarian machine. Taking moments to show an interest in their personal and professional goals is a manner of making them feel respected and valued, as well as a fascinating window into other human beings' odysseys.

No matter how friendly and trusting an interviewee/interviewer relationship might appear to be, there might still be great mistrust or fear beneath a façade of amicability, and this can lead to the gathering of inaccurate information. Even with complete trust, cultural background can influence the way in which a person

chooses to present information and maybe even decorate it in a manner that is misleading to the culturally unaware listener. Whether intentionally or unintentionally inaccurate or deceitful, the accuracy of information is an important issue to grapple with. For apart from my desk research, I made a choice to limit my empirical research to interviews with tolerated migrants on their experiences, and to leave out key informants and French institutional actors. I made this choice due to limited time and resources, and a greater interest in what tolerated TCNs had to say. But these tolerated TCNs, like most legal subjects, have very limited legal literacy, a potentially flawed view of the law that affects them, as well as a fallible memory. It is impossible to draft a questionnaire that completely cancels out the potential for inaccurate information, but I inserted hidden repetitions of key questions throughout so as to be able to identify and address any inconsistencies. This allowed me to limit the extent to which answers might have been inaccurate.

Records of interviews only contain the initials or desired aliases of interviewees. I provide a list of the interviews and interviewees in appendix 2, as well as a very detailed account of the profile characteristics and backgrounds of the thirty-four interviewees in section 2.3.. Interviewee quotes are referenced with their initials or aliases, as well as the date and location of the interview. The written quotes are faithful to their oral source. I purposely refrained from making any linguistic corrections or stylistic improvements, so as to avoid any possible distortion of their words, as well as out of respect for each individual's unique background and mode of conversation. The interviews that were in French had to be translated for this thesis, which is where any possible distortions might exist. I however attempted to make translations as literal as possible.

2.3. Sample of interviewees

A relatively small and diverse group of tolerated TCNs were interviewed. The sample was not in any way representative, but it was purposive. Non-representative sampling is not a serious problem in light of the small size of the sample, as well as the aims of the research carried out. The aims were to gather deep insight into 1) the practical workings of the law relating to tolerated TCNs, and more fundamentally 2) on the perceptions of tolerated TCNs on various aspects of their limbo-like status. Obtaining this perceptive insight required a deep engagement with each and every interviewee, in such a way as to get into their long-term process of reflection on a variety of complex issues. This would not have been possible with a large sample of interviewees. And so like many researchers before me in this area, I sacrificed any representative and generalisable sample for quality and depth of information. However, it should be pointed out that statistics are deficient on the profiles of migrants in France who find themselves in the various toleration positions that exist. Even with a large enough sample, it would be very difficult to make that sample representative in the absence of precise statistical data.

While my research could not and did not strive to obtain any kind of large-scale representative sample of tolerated TCNs in France, I did aim to get a diverse sample so as to gain knowledge on the differences between the various toleration positions, as well as differences amongst those with the same toleration position. Through purposive sampling, I sought a variety of profiles of tolerated TCNs along the following criteria: diversity of toleration positions, duration of toleration positions, gender, age, country of origin, immigration status today, duration of presence in Europe and France, application (or not) for asylum, and subjection (or not) to administrative detention.

To a certain extent, I was a beggar and not a chooser in my sampling. Migrant interviewees were found with the help of two NGOs. These were France terre d'asile and the Gisti. Tolerated TCNs were approached one of three ways. First, NGO partners directly approached a large number of migrants to whom they had provided legal assistance in the past. Secondly, I approached migrants that I found in the NGOs' databases. Thirdly, via snowball sampling, some of the interviewed migrants talked to other migrants about the possibility of taking part in the research project. The lion's share of interviewees was made up of those directly approached by the NGOs. I was very dependent on NGO partners' identification of specific categories of tolerated TCNs, and on the willingness of identified individuals to participate. Nonetheless, my NGO partners knew the diversity of profiles to look out for.

There were a total of thirty-four interviewees who took part in this research. A wide variety of toleration positions were represented, covering the whole spectrum from the frontiers of legality to the frontiers of illegality. Most interviewees had experienced more than one type of toleration position (for example a given individual might have experienced both the tolerated asylum applicant position and postponed-removal position at different times). *Twenty-six out of the thirty-four* had experienced periods during which they were *legally tolerated*. The variety of legal toleration positions experienced by interviewees were those of: postponed-returnee, cancelled-returnee, tolerated asylum applicant, tolerated refugee, and tolerated pre-asylum applicant. The remaining interviewees did not experience periods of legal toleration, but they experienced periods of *indirect toleration* due to release from administrative detention (for reasons other than postponement-of-removal). Tolerated trafficking victims were not included in this sample, due to practical constraints and time-limits.

A majority of interviewees experienced more than one toleration position in the past. The variety of past toleration profiles is set out in Table 2 below. Table 1 shows the number of interviewees who experienced each type of toleration position. Amongst the thirty-four interviewees, one experienced the position of tolerated refugee, fifteen the position of tolerated asylum applicant, two the position of cancelled-returnee, six the position of postponed-returnee, four the position of exhausted-returnee, and fifteen the position of released-detainee *stricto sensu*.

Amongst the fifteen who experienced the position of tolerated asylum applicant, twelve were tolerated due to placement in a priority procedure, two due to placement in a Dublin procedure, and one due to successive placement in a Dublin and priority procedure. Amongst the six who experienced the position of postponed-returnee, all were judicially postponed-returnees. But three of them were additionally granted administrative postponement-of-removal. With regard to the type of judicial postponement-of-removal, three of the six had had their removal postponed on the human rights ground of non-refoulement, while the other three had had their removal postponed only due to suspensive review procedures against return measures. Amongst the three whose removal was postponed on non-refoulement grounds, two of these postponements were the result of an interim measure by the European Court of Human Rights. The third of these postponements was by an administrative court on the substantive ground that return would violate the prohibition of refoulement. This last postponement concerned a failed asylum seeker who was excluded from international protection on security-related grounds.

Seven of the thirty-four interviewees were legally staying asylum

applicants and not tolerated asylum applicants. But these seven experienced the position of tolerated pre-asylum applicant for a prolonged period of time. Many of those who experienced the position of tolerated asylum applicant had also experienced the protracted position of tolerated pre-asylum applicant, but my discussions with them focused solely on their tolerated asylum applicant position so as not to create any kind of confusion. But for those legally staying asylum applicants who experienced the position of tolerated pre-asylum applicant, I interviewed them on their pre-asylum applicant position, which contributed to the overall picture of how tolerated TCNs perceive their positions.

Table 1: Positions of legal toleration of interviewees

Positions of legal toleration	Number of interviewees who fell at some stage under the toleration positions on the left (out of 34 for each position)
Tolerated refugee	1
Tolerated asylum applicant	15
Tolerated pre-asylum applicant	7
Cancelled-returnee	2
Postponed-returnee	6
Positions of indirect toleration	Number of interviewees (out of 34) who fell at some stage under the toleration positions on the left
Exhausted-returnee	4
Released-detainee stricto sensu (for reasons other than cancelled, postponed, or exhausted removal)	15

Table 2: Toleration profiles of interviewees

Variety of past toleration profiles	Number of interviewees whose past profile corresponds to what is indicated on the left
Only one legal toleration position	
Tolerated asylum applicant	5
Tolerated pre-asylum applicant	3
Postponed-returnee	2
More than one legal toleration position	
Tolerated asylum applicant and postponed-returnee	4
Tolerated asylum applicant and cancelled-returnee	1
At least one legal toleration position and one indirect toleration position	
Tolerated asylum applicant and released-detainee	3
Tolerated asylum applicant and exhausted-returnee	2
Tolerated pre-asylum applicant and released-detainee	4
Tolerated refugee and released-detainee	1
Cancelled-returnee and released-detainee	1
One or more indirect toleration positions	
Exhausted-returnee	1
Released-detainee	6
Exhausted-returnee and released-detainee	1
Total number of interviewees	34

There were twenty-six men and eight women, who came from a very wide variety of third countries (Table 3). Each toleration position was experienced by at least one woman interviewee, with the exception of the tolerated refugee and exhausted-returnee

positions. No country was particularly well or over-represented, as the aim was not to paint portraits of tolerated TCNs from any given country. Nineteen nationalities were represented. Although I did not go for a representative sample, which in any case would not have been possible given the lack of statistical data, an effort was made to not have a completely unrepresentative sample. Many of the tolerated TCNs in France, other than tolerated asylum applicants, are failed asylum applicants. The countries represented by a higher number of interviewees are amongst the most common countries of origin of failed asylum applicants and tolerated (priority procedure) asylum applicants in France.²¹⁵ These are namely Mauritania, the Democratic Republic of Congo, Mali, Guinea, and Bangladesh. Amongst the remaining countries represented in this research, I took care to also include interviewees from common countries of origin of illegal residents (especially administratively detained illegal residents), namely the Maghreb countries of Algeria, Tunisia, and Morocco.²¹⁶

As for the representativity of the sample in terms of women and men, there is an under-representation of women in the population of illegal residents and failed asylum applicants. Statistics on illegal residents are of very weak quality, but those available suggest this under-representation is very real.²¹⁷ Statistics on failed asylum applicants in 2012 suggest that a significant majority are men (over two thirds).²¹⁸

215 Office français de protection des réfugiés et apatrides, “Rapport d'Activité 2012”, 92-93 and 104-105.

216 Assfam, Forum Réfugiés, France terre d'asile, la Cimade, l'Ordre de Malte, “Centres et Locaux de Rétention Administrative: Rapport 2012” (3 décembre 2013), 12. See also Clandestino Research Project, “Final Report” (23 November 2009), 59-60.

217 Clandestino Research Project, “Final Report” (23 November 2009), 60.

218 Office français de protection des réfugiés et apatrides, “Rapport d'activité 2012”, 92-95.

Table 3: Countries of origin of interviewees

Country of origin	Number of interviewees
Afghanistan	2
Algeria	1
Angola	2
Bangladesh	3
Central African Republic	1
Congo (DRC)	3
Guinea	3
Iran	1
Israel/Russia ²¹⁹	1
Ivory Coast	2
Mali	3
Mauritania	4
Morocco	1
Rwanda	1
Senegal	2
Syria ²²⁰	1
Togo	1
Tunisia	1
Uganda	1

The age of interviewees ranged from nineteen to fifty-two years old (see Table 4). The overwhelming majority were in an age group ranging from twenty-one to thirty-five years old. This loosely matches the age range and proportions of the overall asylum seeker and irregular migrant population in France.

²¹⁹ The interviewee concerned was a national citizen of both Russia and of Israel.

²²⁰ The interviewee concerned was not a Syrian national but a Palestinian refugee who was born and raised in Syria and possessed residence and travel documentation granted to him by Syrian authorities. All other interviewees were actually national citizens of the listed countries.

Table 4: Age range of interviewees

Age groups	Number of interviewees
19-20	2
21-25	6
26-30	7
31-35	11
36-40	4
41-45	2
50-52	2

Eleven interviewees had reached the stage of tertiary education in their home country, and the remaining interviewees' education stopped at the level of secondary or primary education. Professions in the home country varied enormously. There was a masseur, a musician, a martial artist, two journalists, three farmers, a hairdresser, a construction worker, a beautician, a dye worker, a military officer, a civil servant, a footballer, a yoghurt maker/vendor, a shop owner, a restaurant owner, a mechanic, and an IT specialist. Several were involved in local or national politics. Remaining interviewees were either students, without work, or did not wish to specify what they did.

The duration of presence in France varied a lot from one interviewee to the next (Table 5). The year of arrival in France varied from 1987 to 2013. Most interviewees arrived from 2010 onwards.

Table 5: Year of arrival of interviewees

Year of arrival in France	Number of interviewees
1987	1
1998	2
2000	1
2003	1
2006	1
2007	2
2008	3
2009	2
2010	7
2011	4
2012	7
2013	3

Fifteen entered Europe legally and nineteen illegally. Twenty-five interviewees migrated for a variety of reasons which included the seeking of asylum. Eight migrated for reasons other than asylum, which include work. One migrated for a variety of reasons, neither of which include asylum or work (the principal reason being a taste for adventure). A significant minority (of thirteen) interviewees had resided in more than one European country, either before or after their initial residence in France.

The period during which legal toleration positions were experienced also varies enormously from one interviewee to the next (see Table 6). It ranges from two months to two and a half years for those who experienced a postponed-removal position, one month to two years and three months for those who experienced the tolerated asylum applicant position, and one month to six months for those who experienced the tolerated pre-asylum applicant position. The tolerated refugee interviewee remained in that position for over twenty years. Amongst the interviewees who experienced the cancelled-removal position, one

experienced it for a year and the other was not certain of the duration.

Periods of indirect toleration are less interesting as indirectly tolerated TCNs are not legally protected from removal and thus experience their residence in France like any other illegal resident.

Table 6: Duration of toleration of interviewees

Approximate duration of specific legal toleration positions	Number of interviewees who experienced specific legal toleration positions for the duration indicated on the left
Postponed-removal position	
2 months	1
3 months	1
6 months	2
2 years	1
2 years and a half	1
Tolerated asylum applicant position	
1 month	1
1 month and a half	2
2 months and a half	1
4 months	1
6 months	2
1 year	3
1 year and a half	3
2 years	1
2 years and 3 months	1
Tolerated pre-asylum applicant position	
1 month	1
4 months	1
4 months and a half	1
5 months	3
6 months	1
Tolerated refugee position	
20 years	1
Cancelled-removal position	
1 year	1
Uncertain	1

A large majority of interviewees experienced administrative detention in France (see Table 7). Only seven did not, despite suffering from problems of documentation during administrative checks and controls. Four interviewees experienced administrative detention in another European country.

Table 7: Interviewees' subjection to administrative detention

Subjection to administrative detention	Number of interviewees
Yes	27
No	7

While all interviewees had experienced positions of legal or indirect toleration, they were not necessarily in the same position on the day of the interview. When I met them, some were legally present, while others were legally tolerated or illegally present (see Table 8).

Table 8: Interviewees' immigration status on the day of the interview

Membership status on day of interview	Number of interviewees
Full legal stay	2
Temporary legal stay	8
Legally tolerated stay	13
Illegal stay	12

3. Where toleration positions are perceived to lie on a scale between illegal and legal stay

I asked interviewees where they would place their legal toleration positions on a spectrum between illegal stay to legal stay. This question was preceded by a detailed discussion on the meaning of illegal and legal stay. This preliminary discussion aimed to

highlight two understandings of illegal and legal stay, one based on the notion of documentation (or lack thereof) and another based on the notion of authorisation (legal/illegal corresponding to authorised/unauthorised stay). A lot of people have a document-based understanding, according to which undocumented is perceived as synonymous with irregular. After detailed preliminary discussions about these two understandings, the majority of interviewees explained that they perceived their legal toleration positions as lying in-between illegal and legal stay. Some interviewees experienced more than one legal toleration position. Out of thirty-one individual legal toleration positions experienced by twenty-six interviewees, twenty of these positions were perceived as lying in-between illegal and legal stay (see Table 9).

Table 9: Interviewees' perception of tolerated stay in terms of illegal/legal stay

Perception of legal toleration position in terms of legal/illegal stay	Number of individual legal toleration positions perceived as corresponding to the type of stay on the left	
Legal		3
Illegal		3
In-between legal and illegal		20
Uncertain		5

There was at least one representative of every type of legal toleration position amongst the interviewees who had an in-between perception of their status. This indicates that all legal toleration positions provide a similar immigration-status experience. But further examination of the responses allows subtle explanations to be provided for differences in perception. Differences in perception could not be explained in terms of most variables (gender, age, country of origin, duration of toleration etc.). However, interviewees' understanding of illegal/legal stay, as well as the specific type of legal toleration position, did explain

some of the differences.

Those who perceived their legal toleration position as corresponding to illegal stay generally gave more weight to a documentation-based definition of illegal and legal stay, even after we discussed the complementary authorisation-based definition. Undocumented stay and illegal stay were synonymous to them. And either the absence of legal residence documentation, or the absence of adequate toleration documentation, led to a perception of illegal stay. However, one of the interviewees who perceived his position as illegal lacked awareness about the fact he was protected from removal. But most interviewees fully understood the distinction between authorised and unauthorised residence, subscribed to such an understanding of illegal/legal stay, and the majority believed that their residence status lay somewhere in-between.

Out of six interviewees who experienced postponed-removal, three experienced both judicial and administrative postponement, while the other three experienced only judicial postponement. Those who had experienced both forms of postponement all perceived their postponed-removal position as lying in-between illegal and legal stay. Those who had experienced only judicial postponement were split. Amongst the latter three, one perceived it as corresponding to illegal stay, one as lying in-between illegal and legal stay, and one was uncertain of where to place it. Differences in perception might be linked to the greater level of formalisation of administrative postponement, which enhances security of residence through more effective protection from return procedures.

Out of fifteen interviewees who experienced the tolerated asylum applicant status, eleven perceived it as lying in-between illegal and

legal stay, one as corresponding to legal stay, one as corresponding to illegal stay, and two were uncertain of where to place it. Out of two interviewees who experienced cancelled-removal, one perceived it as lying in-between illegal and legal stay, and the other as corresponding to illegal stay. Out of seven interviewees who experienced a long pre-asylum applicant position, three perceived it as lying in-between illegal and legal stay, two as corresponding to legal stay, and two were uncertain about where to place it. The interviewee who had been a tolerated refugee for twenty years without hesitation qualified his position as lost somewhere in-between.

Some interviewees experienced more than one type of legal toleration position. There were in particular four interviewees with a very similar toleration profile. All four of them were male asylum seekers, of a similar age, but from different countries, who had experienced quite lengthy periods of postponed-removal and periods as tolerated asylum applicants. Three of them perceived the two positions to lie in-between illegal and legal stay. But one of them, Mr H.,²²¹ perceived his tolerated asylum applicant position as lying in-between, but his postponed-removal position as corresponding to illegal stay. The only difference between Mr H. and the three others lay in the specifics of his postponement. Mr H.'s removal was judicially postponed for a period of six months, due to the suspensive judicial review of a return measure issued against him. The other three had their removal judicially postponed on the human right ground of non-refoulement. But these other three additionally and subsequently had their removal administratively postponed, via a compulsory-residence-order. And since administrative postponement comes with better certification, this reinforces the idea that the level of documentation might play some role, however small, in how a legal toleration position is perceived.

221 Interview with Mr J-P H. (France terre d'asile, Paris, France, 17 May 2013).

The only legal toleration positions that were qualified by a minority as legal stay were those of tolerated asylum applicant (by one interviewee) and pre-asylum applicant (by two interviewees). This, combined with Mr H's perception set out in the previous paragraph, would seem to indicate that being in the asylum procedure may procure slightly more peace of mind and security of residence, even when only legally tolerated. Nonetheless, there were still three interviewees who also respectively qualified their positions of postponed-removal, tolerated asylum applicant, and cancelled-removal as illegal stay. So there are undoubtedly similarities between diverse positions of legal toleration, whether one is within the asylum system or not.

Interviewees who only experienced indirect toleration were not asked about how they perceived their position in terms of the illegal/legal spectrum. Release from detention, whether before or following expiry of the maximum period, provides an indirect form of protection from removal, but interviewees understood that it did not protect them removal in any direct way, leaving the risk of removal intact and their position as unauthorised as before.

In section 10, I provide insight into how interviewees felt about being in limbo between illegal and legal stay. But before getting into such perceptions, it is first important to discuss how they described and perceived the various facets of their in-between position.

4. Whether and why legal stay is considered to be an important goal

Just about all interviewees, whether legally tolerated or indirectly tolerated, had the goal of becoming legal residents. This was

important to them. Only two interviewees didn't care too much about the commodity of legal residence. One of the two simply didn't see it as important. The other had craved it for so long but decades of exclusion in France had made him lose the taste for it. The latter is Mr T, a man who had experienced over two decades of residence in France as a legally tolerated refugee in clandestinity. He told me:

“I have lost the desire for it (legal residence) ... my sentiment might change if I obtain it one day ... it's a big nightmare ... time goes by so fast ... it's abominable to watch it fly by”²²² (excerpt translated from French into English).

The reasons for wishing to acquire legal residence varied from one person to the next. The most commonly cited reasons were the right to work legally, wider access to social rights, as well as better protection from arrest, detention, and removal. More generally, a very large number of reasons were cited throughout my research, which can be grouped under the following umbrellas: membership and self-worth, rights and autonomy, and security of residence.

A handful of interviewees mentioned reasons linked to a sense of membership and self-worth. For these interviewees, being legally resident meant: feeling human, having an identity, having a sense of belonging, being integrated, being able to build a future, feeling confident enough to enter into relationships and start a family, feeling autonomous and being able to contribute to society (via fiscal and social contributions, creation of businesses etc.).

For a very large number of interviewees, it was the socio-economic rights that they valued in legal residence. Most of them cited the right to work legally and basic social rights as key reasons for aspiring to legal residency. Behind this aspiration lies the craving

²²² Interview with Mr T. (Gisti, Paris, France, 10 June 2013).

for autonomy and respect from their entourage. It is also about having a fair chance in their judicial and administrative battles with State authorities. Adequate living conditions allow TCNs to expend more energy in procedural battles to stay (whether it be in review procedures against a return measure or in asylum procedures). Some mentioned freedom of movement and access to studies as reasons for their aspiration. One interviewee also mentioned a deep feeling of discrimination vis-à-vis legal residents.

A very large number of interviewees also indicated reasons linked to security of residence. For many of them, it boiled down to effective protection from arrest, detention, and removal. For a handful, it was also about being adequately protected from refoulement, having some peace of mind, and even being able to trust law enforcement officers.

Some interviewees expressed reasons that cut through the three umbrellas. This was the case for Mr O.S., a tolerated (priority procedure) asylum applicant from Uganda, who shared the following thoughts:

“This (legal residence) comes along with having a sense of being looked after and a sense of belonging ... when you are saying I am seeking this (asylum) just like you who is seeking the same thing ... and you are entitled to privileges A B C D ... I don't have privileges A B C D ... that amounts to a feeling of emptiness ... the playing field is not levelled ... when the playing field is not levelled ... between me and others who are seeking the same kind of protection ... we all look at seeking protection but the privileges are being squashed ... it is easier for them because ... there is a sense of being secure ... once a mind is not literally accommodated it is not facilitated ... to not work at full potential ... I stand the chance of getting

controlled”.²²³

Mrs A.K., a tolerated (priority procedure) asylum applicant from Guinea, shared the following thoughts on the importance of legal residence:

“To have an identity ... to work ... to show that I have an identity ... to live ... In France, without a residence document ... in my opinion, it's like not having a pair of legs ... without papers, without a residence document, without a residence title, without a residence card ... it's like you have no legs”²²⁴ (excerpt translated from French into English).

5. The extent to which legal toleration positions protect from removal

A key issue is the extent to which a legally tolerated TCN, who is legally protected from removal in theory, is actually protected from removal in practice. In immigration systems with strong distinctions between legal and illegal residence, which namely separate those possessing residence documents from those who do not possess such documents, the existence of legally tolerated TCNs without a residence document raises the question of how protected they are in practice from removal when they happen to encounter law enforcement officers.

To begin with postponed-returnees, article 14 (2) of the Return Directive requires Member States to provide them

“with a written confirmation in accordance with national legislation ... that the return decision will temporarily not be enforced”.²²⁵

²²³ Interview with Mr O.S. (France terre d'asile, Paris, France, 30 April 2013).

²²⁴ Interview with Mrs A.K. (France terre d'asile, Paris, France, 7 May 2013).

²²⁵ Directive 2008/115/EC of the European Parliament and of the Council on the return of illegally staying third-

This must be read in light of the Return Directive preamble's twelfth recital which indicates that postponed-returnees must be granted such written confirmation “in order to be able to demonstrate their specific situation in the event of administrative controls or checks”.²²⁶ Do postponed-returnees in France receive written confirmation of postponement which allows them to demonstrate their specific situation in the event of administrative controls or checks?

A handful of European countries have long developed practices of institutionalised toleration statuses. In Germany, TCNs whose removal is postponed are granted a toleration certificate, something which does not exist in France, even though it has recently been discussed in closed governmental quarters with no great enthusiasm.²²⁷ These toleration certificates would appear to provide those concerned with adequate protection from removal when faced with law enforcement officers, although my empirical knowledge is lacking with regard to holders of the German toleration certificate. What kind of certification exists in France and is it adequate?

In France, judicial postponed-returnees can all come to possess at least one document that they can walk around with; that is a copy of the postponing Court's decision (Document 1 below is an example of the final page of such a Court decision). When removal is postponed, those concerned can walk the streets of France with a judicial decision.

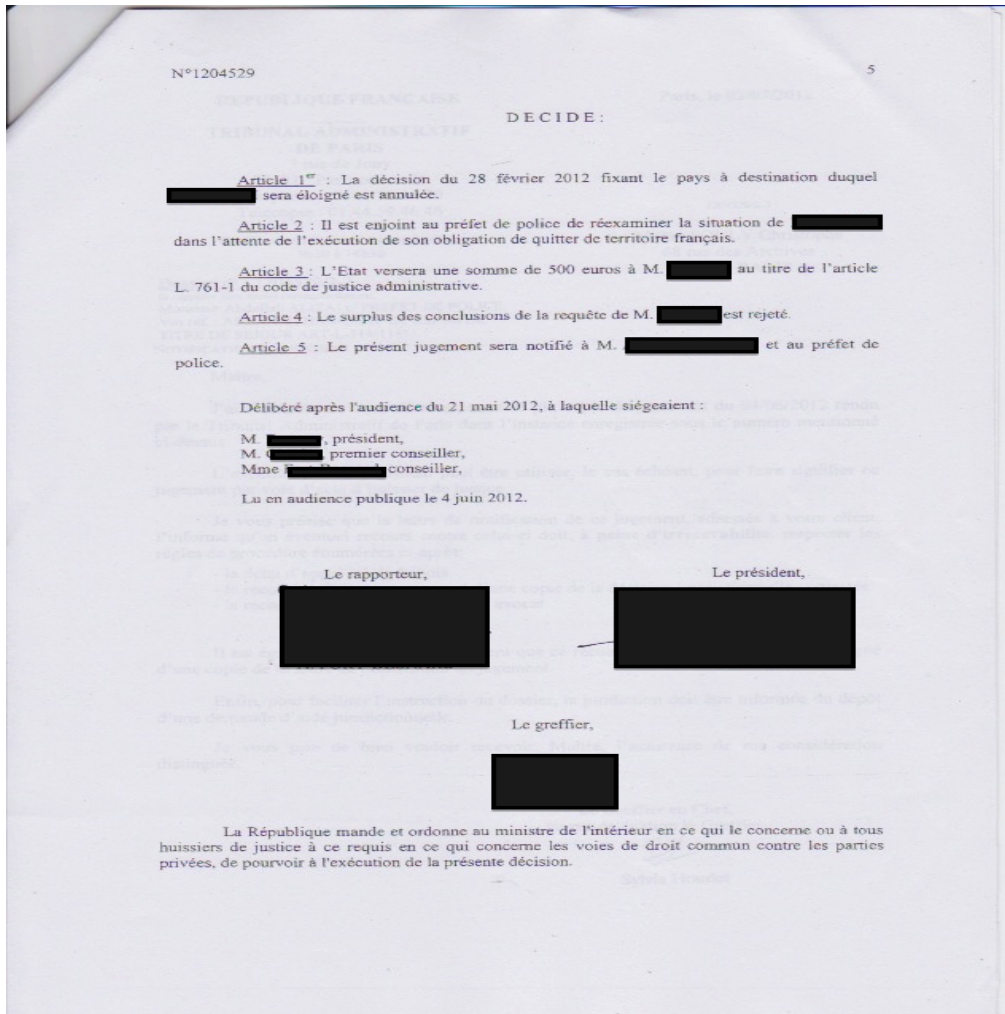
Unsurprisingly, the postponed-returnee interviewees who possessed solely this type of document did not feel very safe when

country nationals [2008] OJ L 348/98, art 14 (2).

²²⁶ Ibid.

²²⁷ See Thierry Tuot, “La Grande Nation: pour une Société Inclusive” (Rapport au Premier ministre sur la refondation des politiques d'intégration, 1 février 2013), 38-39.

walking the streets of Île de France. Showing a detailed Court decision to a police officer during administrative controls is not the same as showing an identity card, a residence card, or even a German style toleration permit. According to postponed-returnee interviewees, police officers often seemed confused about being presented a Court decision and about the immigration-status value of such a document. Some interviewees were subjected to police custody, but were systematically released once police officers came around to understanding the protection afforded by the Court decision. Others were not subjected to police custody but were held up for several hours on the spot by the controlling officers. One postponed-returnee was actually arrested and placed in administrative detention; he was released from detention on the ground that he should never have been placed there by virtue of his postponed-removal position. That does not change the fact that his Court decision did not adequately protect him from the return process!



Document 1: Copy of a judgment postponing removal


(Source: one of my interviewees)

Judicially postponed-returnees, as well as other non-removable TCNs whose removal is not judicially postponed, can apply for administrative postponement-of-removal. This administrative postponement comes in the form of a compulsory-residence-order. Alternatively, a *préfecture* can impose a compulsory-residence-order on a non-removable TCN who did not apply for it (even against his/her will).

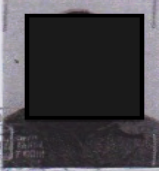
Such an order may seem to be a negative thing for those concerned, and to a large extent it is. It limits their freedom of movement to a designated area, and criminal penalties can be


imposed for stepping outside that area. On the other hand, a compulsory-residence-order also comes with some kind of document that certifies the order, and this document formally protects them from removal for a defined period of time. Below, Documents 2 and 3 provide examples of the kinds of documents granted to administratively postponed-returnees at different stages of the postponement process. These documents are understood by law enforcement officers, and therefore allow holders to walk around with some peace of mind. Out of the six postponed-returnee interviewees, three were granted a compulsory-residence-order. The three indicated that the compulsory-residence-order document provided them with adequate protection during administrative checks and controls. However, one of them indicated that the peace of mind procured by this document was offset by the difficulties of being confined to a specific area.

Document 2: Certification of safe-conduit (pre-certification of a compulsory-residence-order)


RÉPUBLIQUE FRANÇAISE
PRÉFET DE L'OISE

SAUF-CONDUIT





Le ressortissant [redacted] né le [redacted] à [redacted], est l'objet d'une obligation de quitter le territoire français depuis le 26 [redacted], dont le délai de départ volontaire est expiré depuis le [redacted].

En application de l'article L.561-1 du code de l'entrée et du séjour des étrangers et du droit d'asile, par arrêté du 6 février 2013, [redacted] est assigné à résidence dans le département de [redacted].

M. [redacted] doit se présenter :

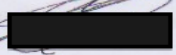

à la brigade de gendarmerie de [redacted]
[redacted]
le [redacted] 2013

afin de faire constater qu'il remplit les conditions de son assignation à résidence.

[redacted] est informé qu'aux termes de l'article L. 624-4 du code de l'entrée, du séjour des étrangers et du droit d'asile, les étrangers qui n'auront pas rejoint dans les délais prescrits la résidence qui leur est assignée, qui, ultérieurement, ont quitté cette résidence sans autorisation de l'autorité administrative, sont passibles d'une peine d'emprisonnement de trois ans.

Beauvais, le 7 février 2013

Pour le Préfet
et par délégation,
l'adjoint au chef du service immigration

[redacted]
né le [redacted]
de nationalité [redacted]
Chez [redacted]

1, place de la préfecture [redacted]
Tél : 03 44 56 12 34 - Télécopie : 03 44 45 99 01
e-mail : prefecture@oise.fr - Site Internet : www.oise.pref.gouv.fr

Page 1 / 1

(Source: one of my interviewees)

ARRETE

ARTICLE 1 : Le ressortissant [REDACTED] est assigné à résidence dans le département de [REDACTED] chez [REDACTED], pour une durée de six (6) mois.

ARTICLE 2 : A compter de la semaine suivant la notification de cette mesure, l'intéressé devra se présenter une fois par semaine à la brigade de gendarmerie de [REDACTED], afin de faire constater qu'il respecte la mesure d'assignation à résidence dont il fait l'objet.

ARTICLE 3 : Il est fait interdiction à l'intéressé de sortir du département [REDACTED] sans autorisation.

ARTICLE 4 : L'intéressé devra remettre son passeport ou tout document justificatif de son identité à la brigade de gendarmerie [REDACTED].

ARTICLE 5 : Le secrétaire général de la préfecture [REDACTED] et le colonel commandant le groupement de gendarmerie de [REDACTED] sont chargés, chacun en ce qui le concerne, de l'exécution de cette décision.

Fait à [REDACTED], le 6 février 2013

Pour le préfet
et par délégation,
le secrétaire général
[REDACTED]

Voies et délais de recours : L'intéressé(e) est informé(e) qu'il (elle) peut demander l'annulation de cette décision au président du tribunal administratif d' [REDACTED] par un recours non suspensif qui devra être formé, à peine d'irrecevabilité, dans les deux mois suivant la notification de cette mesure.

L'intéressé(e) est également informé(e) que le non-respect des prescriptions liées à l'assignation à résidence est sanctionné dans les conditions prévues à l'article L.624-4 du code de l'entrée et du séjour des étrangers et du droit d'asile, qui prévoit que « Les étrangers qui n'auront pas rejoint dans les délais prescrits la résidence qui leur est assignée en application des articles L. 523-3, L. 523-4, L. 523-5 ou L. 561-1 qui, ultérieurement, ont quitté cette résidence sans autorisation de l'autorité administrative, sont passibles d'une peine d'emprisonnement de trois ans. Les étrangers visés à l'article L. 561-3 qui n'ont pas respecté les prescriptions liées au placement sous surveillance électronique sont passibles d'une peine d'emprisonnement d'un an. Les étrangers astreints à résider dans les lieux qui leur sont fixés en application des articles L. 523-3, L. 523-4, L. 523-5 ou L. 541-3 et qui n'ont pas respecté les obligations de présentation aux services de police et aux unités de gendarmerie prévues à l'article L. 561-1 sont passibles d'une peine d'emprisonnement d'un an. »

Notifié à [REDACTED], le [REDACTED]

en langue [REDACTED] qu'il comprend / sait lire / ne sait pas lire

L'intéressé(e),
[REDACTED]
L'interprète,
[REDACTED]
L'agent notificateur,
[REDACTED]

I, place de la République,
Tel [REDACTED]
Courriel : prefecture@... [REDACTED] [REDACTED] [REDACTED]

Document 3: Second type/stage of certification of a compulsory-residence-order

(Source: one of my interviewees)

However, the adequate written certification granted to administratively postponed-returnees should not detract from the inadequate certification possessed by judicially postponed-returnees. The latter should not be limited to walking around with a Court decision, and this shortcoming might arguably constitute a violation of France's certification obligation under the Return Directive, as copies of postponing Courts' decisions do not allow those concerned to demonstrate their specific situation in the event of administrative controls or checks.

Cancelled-returnees are entitled to a temporary residence document upon cancellation, which serves as a procedural form of regularisation, because it serves to regularise their stay pending a substantive decision on their immigration status. Although they are entitled to a temporary residence document, interviews appeared to indicate that cancelled-returnees are often not granted one in practice. When deprived of this document, all they have to walk around with is a copy of the cancelling Court's decision, and similar problems were experienced by the interviewed cancelled-returnees as those experienced by judicially postponed-returnees.

A tolerated asylum applicant, like all asylum applicants, is entitled under the EU Asylum Reception Conditions Directive to:

“a document issued in his or her own name certifying his or her status as an asylum seeker or testifying that he or she is allowed to stay in the territory of the Member State while his or her application is pending or being examined”.²²⁸

This should be read in light of the prohibition of refoulement of asylum seekers, as well as in light of article 7 of the Asylum Procedures Directive, which states that:

“applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure ... (even if) (t)his right to remain shall not constitute an entitlement to a residence permit”.²²⁹

The document they receive should therefore allow them to demonstrate their right to remain in the event of administrative controls or checks, short of which they could wind up in a return procedure. Do tolerated asylum applicants receive adequate

²²⁸ Council Directive 2003/9/EC on Asylum Reception Conditions (2003) OJ L 31/18, art 6 (1).

²²⁹ Council Directive 2005/85/EC on Asylum Procedures (2005) OJ L 326/13.

documentation in this light?

Tolerated asylum applicants are not granted a document which clearly states that their presence is authorised or even tolerated. But they are given a document which states that they are asylum applicants. However the document highlights that their stay is *not* authorised due to placement in a Dublin or priority procedure. Although French *legislation* clearly states that they are allowed to remain despite not being authorised to stay (which may sound strange), the document they possess does not say as much. Below is an example of a document possessed by priority procedure applicants (Document 4). For an example of a document possessed by Dublin applicants, click on the link in the upcoming footnote and scroll down to page 12.²³⁰ Dublin applicants tend to be issued documentation which summons them to appointments. Priority procedure applicants tend to be issued documentation which confirms their refused legal stay and the priority-procedure grounds for such refusal.

²³⁰ Antoine Decourcelle, Pascale Chaudot, Annabella Orange, et Martin Rosselot, “Droit d'Asile : les Gens de « Dublin II » : Rapport d'Expérience” (Cimade/Comité Tchétchénie, décembre 2008) < <http://www.comite-tchetchenie.org/IMG/pdf/dublin2.pdf> > last accessed 6 September 2014.

PP
PREFECTURE DE POLICE

10^{ème} Bureau – GC
7503855959
E.F : [REDACTED] 2012

Paris, le [REDACTED] 2012

Monsieur, [REDACTED] 2012

Vous vous êtes présenté pour la première fois dans mes services le 30 mai 2012 en vue de solliciter l'asile. Une autorisation provisoire de séjour valable jusqu'au 19 juillet 2012 vous a été délivrée le 20 juin 2012 au regard des dispositions de l'article L.742-1 du code de l'entrée et du séjour des étrangers et du droit d'asile.

Or, il est apparu que vous n'aviez pas, ainsi que le dispose l'article L.723-1 du code de l'entrée et du séjour des étrangers et du droit d'asile, déposé votre dossier complet à l'Office Français de Protection des Réfugiés et Apatrides dans les 21 jours suivant la remise de l'autorisation provisoire de séjour par les services de la préfecture.

Par conséquent, vous avez fait l'objet, le 02 août 2012, d'un refus de séjour au regard des dispositions de l'article R.742-2 du code précité.

Présent le 22 août 2012 dans mes services, vous persistez dans votre volonté de solliciter l'asile.

Dans ces conditions et en application des dispositions de l'article L.741-4-4 du code précité, je refuse votre admission au séjour au titre de l'asile.

En outre, après un examen approfondi de votre situation personnelle, il apparaît que vous n'apportez aucun élément de nature à remettre en cause la décision de refus d'admission au séjour envisagée à votre rencontre.

L'examen de votre demande d'asile fera dès lors l'objet par l'Office Français de Protection des Réfugiés et Apatrides d'un traitement par priorité au titre de l'article L.723-1§2 du code précité.

Si vous estimez que la présente décision n'est pas justifiée, vous avez la possibilité d'en demander la révision selon les voies de recours et dans les délais mentionnés au verso de cette lettre. Je précise toutefois qu'un tel recours ne suspend pas l'application de la décision contestée.

Veillez agréer, Monsieur, l'expression de mes salutations distinguées.

Pour le Préfet de Police et par délégation
Pour le Directeur de la Police Générale
[REDACTED] bureau
[REDACTED] - M 5

Né le [REDACTED] à M [REDACTED]
Nationalité : [REDACTED]
Domicilié chez FTDA-BR-383
[REDACTED] - 75018 PARIS

Reçu, le [REDACTED] 2012
Signature [REDACTED]

REPUBLIQUE FRANÇAISE
Liberté Egalité Fraternité

PREFECTURE DE POLICE - 9, boulevard du Palais - 75195 PARIS CEDEX 04 - TEL : 01 53 71 53 71 ou 01 53 75 53 73
Serveur vocal : 08 91 01 22 22 (0,225 € la minute)
http://www.prefecture-police-paris.interieur.gouv.fr - mtl : courriel.prefecturepoliceparis@interieur.gouv.fr

Document 4: A document certifying the refusal of legal stay and of placement in a priority asylum procedure

(Source: one of my interviewees)

Experiences have varied with administrative controls or checks. Some of the interviewed tolerated asylum applicants reported that such checks went well, while others reported being questioned for hours or even being placed in police custody. Those who experienced problems during identification checks indicated that police officers did not seem to understand their documentation nor

their position. Police officers frequently told asylum applicants to go to the préfecture to get a *récépissé* document in order to *clarify* their authorisation to stay in France, and did not understand the nature of a document that denies authorisation to stay while allowing holders to remain.

It would therefore seem that in law and practice, tolerated asylum applicants are not granted documentation allowing them to demonstrate their right to remain as asylum seekers in the event of controls or checks. While EU law does not require that they be granted a temporary residence document, it arguably does require them to be granted documentation that ensures their protection from refoulement.

The position of tolerated refugee and tolerated pre-asylum applicant are positions that should not exist under French or EU law (or at least not for more than a handful of days). The tolerated refugee interviewee had lived the past twenty years between the confinement of prison cells and the freedom of clandestinity. There was no written certification for his position as it should not have existed. As for the interviewees who had experienced a protracted position of tolerated pre-asylum applicant, the documents they possessed appeared to offer sufficient protection from return procedures. They were in possession of *summons* documentation, much like Dublin asylum applicants, and they had no complaints in terms of chance meetings with law enforcement officers.

6. The fear of detention and expulsion during periods of legal and indirect toleration

Being in a position of legal toleration, as opposed to legal stay, is almost inevitably going to lead to fear about future removal, as legal protection from removal is a temporary position, even if

temporariness can turn out to not be so temporary. This protection is dampened by the poor documentation possessed by those concerned, which offers very flimsy protection in practice in the face of law enforcement encounters. The majority of interviewees indicated that their period of legal toleration was characterised by fear of detention and expulsion. A majority had already experienced administrative detention. But even those who had never experienced administrative detention described fear of arrest, detention, and removal.

Out of twenty-six interviewees who experienced legal toleration, only four stated that they did not experience fear of the expulsion process. The remaining twenty-two experienced some level of fear. Amongst these twenty-two individuals, one experienced intense fear, four experienced a low or sporadic level of fear, and a majority of seventeen experienced a regular level of fear (Table 10).

Table 10: Interviewees' level of fear of expulsion during periods of legal toleration

Level of fear of expulsion during legal toleration periods	Number of interviewees (amongst those who experienced legal toleration)
Intense fear	1
Fear	17
Small or occasional fear	4
No fear	4

It is interesting to ponder why four interviewees were not scared of expulsion? Was legal protection from removal, even short of legal residence, truly enough to provide them with the peace of mind that the majority of other interviewees did not manage to reach? The answer is yes for three of the four, and no for one of them. The latter, Mr N.T.,²³¹ a tolerated (Dublin) asylum applicant,

²³¹ Interview with Mr N.T. (France terre d'asile, Paris, France, 14 May 2013).

was fearless for reasons unrelated to his legal protection from removal. He was fearless because he walked around with a fake residence permit belonging to an acquaintance. He thus walked around as a fake legal resident. The three who were fearless thanks to their legal toleration position were Mr L.,²³² a judicially postponed-returnee (for two months), Mr S.I.,²³³ a tolerated asylum applicant (for a month and a half), and Mr B.Y.,²³⁴ a man who experienced protracted periods as both a tolerated asylum applicant and an administrative postponed-returnee. I shall focus here on the third man. Mr B.Y., a postponed-returnee from the Central African Republic, experienced over a year as a tolerated asylum applicant and three months as a postponed-returnee. He had previously been a tolerated asylum applicant due to his placement in a priority procedure. Following the rejection of his asylum application, he fell into illegality of stay, was subjected to a return measure, and was then administratively detained as France got ready to expel him. From administrative detention, he sought review of his return measure. He obtained postponement of the return measure on the ground of article 3 ECHR. He was released and provided with a safe-conduit document (see Document 2 above). He was shortly afterwards subjected to a compulsory-residence-order, which restricted his freedom of movement to the area of his place of residence. But this order also provided him with a renewable six month document that formally protected him from apprehension and removal. Mr B.Y. made a clear difference between illegal stay and legal toleration. He feared removal during the short period of illegal stay, especially when he was placed in administrative detention. He did not fear removal during his time as tolerated asylum applicant and as a postponed-returnee. On the day of the interview, he was still a postponed-returnee with a compulsory-residence-order, and explained that he would begin to

232 Interview with Mr L. (Café near the North Station, Paris, France, 25 June 2013).

233 Interview with Mr S.I. (France terre d'asile, Paris, France, 10 July 2013).

234 Interview with Mr B.Y. (France terre d'asile, Paris, France, 21 May 2013).

fear the expulsion process if the postponement of his return measure were to be lifted.

So for three interviewees, legal toleration was a step in the right direction towards greater security of residence. But this is not how the majority experienced it. The slight gain in security of residence was not enough for the majority of interviewees to acquire some peace of mind. Exclusion from legal stay and the never-ending temporariness of their legal protection from removal crystallised their fear of the expulsion process, which was palpable at all times. There are practically no particular characteristics that demarcate the fearless three from other interviewees in terms of country of origin, migration motivation (economic, humanitarian ...), immigration status on the day of the interview, specific legal toleration position, duration of legal toleration, duration of presence in France, age, and profession. There were no female interviewees amongst them. And only interviewees who had already experienced administrative detention were amongst them. But not much can be inferred from these absent profiles.

Another interesting issue is that of how the fear of expulsion evolves throughout the legal toleration period, as legal toleration may sometimes last several years (Table 11). Amongst the twenty-two interviewees who feared the expulsion process during their legal toleration periods, that fear increased for two, remained constant for ten, and decreased for the remaining ten. Therefore, the majority experienced a consistent or diminishing level of fear. Only two interviewees experienced an increase in fear over time.

Table 11: Evolution of interviewees' fear of expulsion during periods of legal toleration

Evolution of the fear of expulsion during periods of legal toleration	Number of interviewees (amongst those who experienced legal toleration and fear of expulsion)
Increase	2
Unchanging	10
Decrease	10

The fact that the majority did not experience increased fear of expulsion during protracted periods of legal toleration was not due to the progressive acquisition of peace of mind. A lot of them simply became psychologically numb due to the never-ending fear of expulsion. They learned to cope with the fear.

A perfect illustration of the progressively numbing effect of long term subjection to legal toleration can be made with Mr T.²³⁵ He was granted refugee status and a long-term resident card by France in the early 1990s. He committed a crime which landed him in prison a few years later. His residence card expired during his time in jail, but his refugee status was not revoked. Suffering from drug-related problems and multiple convictions and jail sentences, he did not seek to obtain renewal of his residence card for a long period of time. His inertia changed a few years later when he was subjected to a return procedure that almost succeeded. He was still a recognised refugee, and by that token entitled to a residence card on the ground of his status. When he finally got around to approaching French authorities with a request to provide him with a new residence card on the ground of his refugee status, he experienced a kafkaesque bureaucracy that successfully refused to grant him a residence card (to which he was entitled) for a period of eight years. During that eight-year period, he was not removable, as he was a recognised refugee who was protected from refoulement. When asked about his fear of expulsion during this

²³⁵ Interview with Mr T. (Gisti, Paris, France, 10 June 2013).

long period, Mr T. stated:

“I was scared ... because I had no ties ... but I became hardened over time ... they don't scare me anymore ... they exhaust me ... I am oppressed ... I'm in the shadows ... I'm a disturbance from time to time”²³⁶ (excerpt translated from French into English).

Those who experienced an increase in fear over time were two tolerated asylum applicants, one from Guinea and the other from Syria. The increase in fear over time was not directly linked to their immigration status in France, but to the risk they faced back home getting worse. Circumstances in their home countries that pushed them to seek asylum in Europe had gotten more dangerous since their arrival in France.

What about the fear of the expulsion process by interviewees who were never legally tolerated but merely indirectly tolerated?

The eight interviewees who were released from administrative detention for reasons other than postponement or cancellation of removal also majoritarily experienced fear of the return process (Table 12). The level of fear was intense for one, regular for four, and small for two. Only one of the eight had no fear of the expulsion process.

236 Ibid.

Table 12: Level of interviewees' fear of expulsion during periods of indirect toleration

Level of fear of expulsion during periods of indirect toleration	Number of interviewees (amongst those who only experienced indirect toleration)
Intense fear	1
Fear	4
Small or occasional fear	2
No fear	1

The one who had experienced intense fear was Mr P.T.,²³⁷ a young man from Senegal who came to France for purely economic reasons in 2010. He had managed to stay under the law-enforcement radar for almost three years, but was apprehended in a shop due to a dispute with a cashier, and was placed in administrative detention for twenty-five days. He had managed to lead a very normal life despite the illegality of his presence. He supported himself thanks to decently paid jobs with contracts. In the two months following his release from detention, he had experienced intense fear of the expulsion process. This fear was linked to the thought of losing everything that he has built for himself in France, but especially due to the humiliation he would feel with regard to those he knows back home.

The one who experienced no fear at all was Mr L.D., a fifty-two year old man from Mali who arrived legally in France in 2007, but overstayed his visa. Several years later, shortly before our interview, he was administratively detained for five days. Following his release from detention, he felt no fear at all of the expulsion process. This lack of fear stemmed from a stoic approach to life. He simply thought on a day-to-day basis and didn't project into the future. He stated:

²³⁷ Interview with Mr P.T. (France terre d'asile, Paris, France, 4 July 2013).

“I'm not scared because I'm here ... if I'm arrested, I'm arrested ... once you're here there's no reason to be scared”²³⁸ (excerpt translated from French into English).

Amongst the seven who experienced some level of fear, all claimed that the level of that fear remained constant (Table 13). It neither increased nor decreased. This is in stark contrast with the legally tolerated TCN interviewees, where a significant minority indicated a decrease in fear over time. This to a certain extent suggests that protracted periods of legal toleration provide a little more security of residence than protracted periods of illegal stay (even of indirectly tolerated illegal stay).

Table 13: Evolution of interviewees' fear of expulsion during periods of indirect toleration

Evolution of fear of expulsion during periods of indirect toleration	Number of interviewees (amongst those who only experienced indirect toleration)
Increase	0
Stable	7
Decrease	0

7. The quantity and quality of rights of legally tolerated TCNs

There is a goal in EU immigration policy of guaranteeing fair treatment to legally resident TCNs. And most legally resident TCNs are guaranteed some measure of access to the labour market, to social and housing benefits, to comprehensive healthcare, and other important socio-economic rights. EU immigration law is not so kind to towards those who are not legally resident in the EU. However, under strictly binding international human rights law, all TCNs (including those outside the sphere of legal residence) are entitled to education for minors and to emergency healthcare. There is no right to labour market, and the foundations for social

²³⁸ Interview with Mr L.D. (France terre d'asile, Paris, France, 10 July 2013).

and housing rights are very weak. But core standards relating to labour law and social exclusion are applicable to all TCNs.

EU law, for the little it says about non-legally resident TCNs, sticks very closely to international human rights law. With regard to postponed-returnees, article 14 (1) of the Return Directive states that:

“Member States shall ... ensure that the following principles are taken into account as far as possible in relation to third-country nationals ... during periods for which removal has been postponed ... :

- (a) family unity with family members present in their territory is maintained;
- (b) emergency health care and essential treatment of illness are provided;
- (c) minors are granted access to the basic education system subject to the length of their stay;
- d) special needs of vulnerable persons are taken into account.”²³⁹

With regard to all asylum applicants, including those who happen to be tolerated in some EU Member States, the Asylum Reception Conditions Directive states that:

“Member States shall ... (:)
grant to minor children of asylum seekers and to asylum seekers who are minors access to the education system under similar conditions as nationals of the host Member State ...

determine a period of time, starting from the date on which an application for asylum was lodged, during which an applicant shall

²³⁹ Directive 2008/115/EC of the European Parliament and of the Council on the return of illegally staying third-country nationals [2008] OJ L 348/98.

not have access to the labour market (of up to a maximum of one year) ...

make provisions on material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence ... (which) may be provided in kind, or in the form of financial allowances or vouchers or in a combination of these provisions ...

necessary health care which shall include, at least, emergency care and essential treatment of illness.”²⁴⁰

What rights do the various categories of legally tolerated TCNs have in French law and practice, including those whose minimal rights are governed under EU law as just shown?

The socio-economic rights of legally tolerated TCNs are practically identical to those of illegal residents in France. The rights of legally tolerated TCNs tend to be limited to eligibility for *Aide Médicale d'État*²⁴¹ (State Medical Aid) as opposed to *Couverture Maladie Universelle* (universal healthcare coverage), and eligibility for access to *emergency* housing shelters as opposed to housing in longer-term reception centres. These are the two rights possessed by all illegal residents and legally tolerated residents. Illegal residents and legally tolerated TCNs tend to be excluded from social security rights, housing and social rights, access to the labour market, and access to secondary and tertiary education. This is the baseline of legally tolerated TCNs' socio-economic rights.

Some legally tolerated TCNs may however have an extra right or two, over and above those of illegal residents. It is important to

²⁴⁰ Council Directive 2003/9/EC on Asylum Reception Conditions (2003) OJ L 31/18., arts 10 (1), 11 (1) & (2), 13 (2) & (5), and 15 (1).

²⁴¹ Code de l'action sociale et des familles (Code on Social Action and Families, consolidated version on 29 January 2014), art L 251.

separate tolerated asylum applicants, on the one hand, and the other categories of legally tolerated TCNs (postponed-returnees, cancelled-returnees), on the other hand.

Tolerated asylum applicants are asylum applicants whose stay is expressly not authorised, but who are nonetheless tolerated pending the outcome of their procedure. Legally staying asylum applicants are legally staying by virtue of a document which temporarily authorises stay. This is the document that tolerated asylum applicants are denied. And yet the socio-economic rights of asylum applicants are to a large extent determined by possession of this document.²⁴² Possession of this document entitles holders to eligibility for housing in an asylum reception centre (combined with a stipend),²⁴³ to universal healthcare coverage, and eventually to labour market access after one year. Tolerated asylum applicants do not possess this document and are as a result not eligible for housing in an asylum reception centre but must instead rely on emergency shelters. They are also not entitled to universal healthcare but to a parallel healthcare system for undocumented migrants which is called State Medical Aid (which nonetheless guarantees more than emergency healthcare services). Furthermore, they are never entitled to labour market access (which could be in violation of the Asylum Reception Conditions Directive as many Dublin and priority procedure applicants remain in their procedures for over a year).

Legally staying asylum applicants are entitled to a financial tideover allowance in the event that they are not placed in an asylum reception centre. Tolerated asylum applicants were not entitled to this financial tideover allowance until quite recently, which constituted a big point of discrimination between the two

242 For details, see Ministère de l'Intérieur, "Guide du Demandeur d'Asile: Information et Orientation" (Secrétariat Général à l'immigration et à l'intégration, mise à jour en juin 2013), 24-27.

243 Code de l'entrée et du séjour des étrangers et du droit d'asile (Code on the Entry and Residence of Foreigners and on the Right of Asylum, consolidated version on 24 January 2014), art L 348.

groups. This exclusion is no longer legally permissible following the *Cimade and Gisti* ruling delivered by the CJEU in 2011.²⁴⁴ Both legally staying and tolerated asylum applicants are at present entitled to this allowance. The only right, therefore, that tolerated asylum applicants have over and above illegal residents is an entitlement to the *financial tideover allowance*, which corresponds to a sum of over three hundred euros a month. This is in line with France's obligations under the Asylum Reception Conditions Directive, as material reception conditions can be provided *in kind or in the form of a financial allowance*. There are however problems in practice with the exercise of this right. Interviews revealed that many tolerated asylum applicants are not aware of their entitlement to this right, and the right only kicks in from the moment they formally request it before the competent authority, which is the *Pôle Emploi* (Employment Office). But according to some of the interviewees, certain *Pôle Emploi* agencies still refuse to accept their eligibility for the allowance (in violation of EU law), while others adopt a practice of postponing appointments without providing any proof to asylum applicants of their request for the tideover allowance.

For persons in a position of postponed-removal, there is a potential trade off. This trade-off is between the right to liberty, on the one hand, and enhanced socio-economic and documentation rights, on the other. Removal can be judicially postponed as a result of substantive human rights protection from removal, or alternatively as a result of suspensive judicial procedures against return measures. When removal is judicially postponed, the only document which postponed-returnees can definitely obtain is a copy of the judicial ruling that postponed removal. Walking around with the copy of a multi-page ruling is not a very secure form of documentation to walk around France with, and police authorities

²⁴⁴ Case C-179/11 *Cimade and Gisti v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration* (2012).

do not always understand what they are being shown. Furthermore, the socio-economic rights of judicially postponed-returnees are exactly the same as those possessed by all illegal residents (State Medical Aid and eligibility for access to emergency shelters). The same can be said of cancelled-returnees whose status is not regularised.

But judicially postponed-returnees and other non-removable residents can additionally apply for, or be subjected to, a compulsory-residence-order. This corresponds to administrative postponement-of-removal. This order restricts the movement of administratively postponed-returnees to specific locations, and thus severely limits freedom of movement within France. On the other hand, they are granted a document which very clearly explains their situation vis-à-vis immigration enforcement officers and which allows them to walk the streets without fear of apprehension and expulsion. Further, persons with a compulsory-residence-order can apply for the discretionary issue of a temporary residence document as well as for a work permit. These remain discretionary, but the grant of such documents opens up their socio-economic rights beyond those possessed by illegal residents (to labour market access and social security rights).

Most of the interviewees who experienced legal toleration periods were aware of their eligibility for State Medical Aid and for placement in emergency shelters. A minority truly thought they had no socio-economic rights in France. This was mainly due to linguistic barriers. But even those who were aware of their rights experienced a great amount of trouble in exercising them. The red tape for accessing State Medical Aid led to some of the interviewees having no health coverage for up to a year. As for the emergency shelter system in France, it is clogged. The 115 phone number to call is often saturated. Those who manage to talk to

someone generally suffer from a linguistic barrier, as their level of french is not always up to scratch. Housing in emergency shelters is generally provided for a very short period of time, and the conditions of emergency shelters were reported by interviewees to be disastrous and dangerous. The interviewees who had no housing alternative to emergency shelters sometimes chose to live on the streets or in subway stations.

The question of subsistence is of course very important here. When legally tolerated TCNs are excluded from labour market access, as well as social and housing assistance, how do they survive? Only two out of all the interviewees were able to obtain a work permit during their legal toleration. The legal toleration position of these two individuals was that of administrative postponed-returnee. The work permit was in both cases granted for a very short period. So the majority of interviewees were never authorised to work. Twelve had never even managed to work illegally, but all the others had. The majority of those who had worked found work on construction sites, in hospitality, or domestic work. This was a big step down for a lot of them, in comparison with what their profession was back home (as briefly discussed in section 2.3 of this chapter). Most of this work was devoid of any contract and was undeclared. Some work relationships were described as decent while others were described as exploitative. Exploitative work relationships namely involved payments in kind (as opposed to in cash), excessive working hours, overly burdensome tasks, as well as delayed payments. Those who never managed to find work were disproportionately made up of the interviewees who were either women, linguistically challenged, or network-less.

With the odd piece of illegal work or no work at all, finding shelter is no easy feat. A handful of interviewees were able to find private accommodation, either thanks to their earnings from illegal work,

from networks, or from ongoing money transfers from family back home. The majority had to sleep in emergency shelters, with friends, with family, with friendly samaritans, with predatory strangers, and/or on the streets.

In conclusion, all legally tolerated TCNs are theoretically guaranteed access to State Medical Aid and to emergency shelters. Additionally, administrative postponed-returnees can apply for the discretionary grant of a work permit, which opens up a right to labour market access and to the corresponding social security rights. Tolerated asylum applicants cannot apply for the discretionary grant of a work permit, but are eligible for social assistance in the form of a financial tide-over allowance. As far as legally tolerated TCNs who are not asylum applicants are concerned, French law provides a baseline that goes beyond EU and international obligations. With regard to tolerated asylum applicants, French law is in line with the bare minimum that asylum applicants are entitled to under the Asylum Reception Conditions Directive. The only area where there might be a violation of the Directive is that of labour market access, where first instance tolerated asylum applicants have been in France for over a year, and are not eligible for a work permit. Interestingly, administrative postponed-returnees may theoretically have more socio-economic rights than tolerated asylum applicants. But moving beyond theory, access by all legally tolerated TCNs to their socio-economic rights may be hindered by a variety of obstacles which were discussed in this section.

8. How the socio-economic exclusion resulting from toleration positions is perceived

A tiny minority of interviewees did not question the legitimacy of their socio-economic exclusion, three even going so far as to state

that their disadvantageous position was fair and entirely their fault. Mr I.A., an afghani refugee who experienced a year and a half as a tolerated asylum applicant (due to placement in a Dublin procedure and then a priority procedure), explained that:

“I'm now thinking about this, why he's (French authorities) now give me récépissé, why he's now give me house ... My mistake. I have lot of finger everywhere.”²⁴⁵

He was explaining that his previous exclusion from legal stay (and rights attached) was the result of his subjection to the Dublin procedure which he blames himself for. Some other interviewees expressed a similar sentiment. Mr B.Y., a postponed-returnee who was previously a tolerated asylum applicant, made the following clear-cut statement about his exclusion from numerous socio-economic rights: “I am to blame”.²⁴⁶

But the overwhelming majority of interviewees believed their position to be unfair, in both absolute and relative terms. They believed it to be unfair in and of itself, but the perception of unfairness was amplified by the more advantageous position of others in similar positions.

In absolute terms, the majority of interviewees expressed very strong feelings of injustice and great suffering. Mrs A. K., a tolerated asylum applicant from Guinea, described the socio-economic exclusion as “unjust, ridiculous, undignified”,²⁴⁷ particularly for a female migrant. Mr G.H., a failed asylum applicant from Mauritania who had experienced five months in France as a released-detainee (on the day of the interview), described his experience of socio-economic exclusion as being akin

²⁴⁵ Interview with Mr I.A. (France terre d'asile, Paris, France, 7 June 2013).

²⁴⁶ Interview with Mr B.Y. (France terre d'asile, Paris, France, 21 May 2013).

²⁴⁷ Interview with Mrs. A.K. (France terre d'asile, Paris, France, 7 May 2013).

to living in “hell”.²⁴⁸

More generally, the following list of problems was associated with socio-economic exclusion by one or more interviewees:

- The inability to survive without either begging, stealing, or extensive help from charities/friends/family;
- the difficulty of gathering the required documentation for regularisation applications (work contracts, proof of residency ...);
- a feeling of extreme rejection, worthlessness, and isolation;
- a feeling of excessive dependency on others and correspondingly of a lack of autonomy, which leads to very difficult, hierarchical, and potentially abusive and exploitative relationships;
- exploitative and abusive employment relationships, especially those that are underground;
- fiscal and social contributions without fiscal and social advantages (for those whose illegal work is declared);
- the particular vulnerability of homeless women with regard to specific healthcare needs, protection from predators, and avoiding the pitfall of sex-related work.

In relative terms, a number of interviewees expressed a feeling of unjust discrimination between themselves and other persons in similar positions. This was typically the case of tolerated asylum applicants who could compare their rights to those possessed by legally staying asylum applicants. Many simply did not understand why asylum applicants did not all have the same socio-economic rights. Mr O.S., a tolerated (priority procedure) asylum applicant from Uganda, believed the discrimination to be unfair for the following reasons (already quoted above in section 3):

²⁴⁸ Interview with Mr G.H. (France terre d'asile, Paris, France, 7 May 2013).

“When you are saying I am seeking this (asylum), just like you who is seeking the same thing that I am seeking, and you are entitled to privileges A B C D ... I don't have privileges A B C D ... that amounts to a feeling of emptiness ... the playing field is not levelled ... when the playing field is not levelled ... between me and others who are seeking the same kind of protection ... we all look at seeking protection but the privileges are being squashed ... it is easier for them because ... there is a sense of being secure ... once a mind is not literally accommodated, it is not facilitated ... to not work at full potential”²⁴⁹

The crux of Mr O.S.'s critique is that the lower reception conditions for tolerated asylum applicants puts them at a disadvantage in the asylum procedure vis-à-vis legally staying asylum applicants. For better reception conditions allow legally staying asylum applicants to focus less time on survival and hiding, and more time on the procedural feat of lodging a strong asylum application (or strong appeal against a rejected asylum application). This perfectly matches a critique already made by the UNHCR on this issue.²⁵⁰

9. The security-related impact of this socio-economic exclusion

In discussions about perceptions of rights-exclusion, several interviewees asked me a straightforward question – did French authorities expect them to commit crimes in order to survive? For example, Mr A.Z., a Palestinian tolerated asylum applicant who was born and raised in Syria, expressed frustration at the logic behind his human rights exclusion:

²⁴⁹ Interview with Mr O.S. (France terre d'asile, Paris, France, 30 April 2013).

²⁵⁰ UNHCR, “Improving Asylum Procedures : Comparative Analysis and Recommendations for Law and Practice : Detailed Research on Key Asylum Procedures Directive Provisions” (March 2010), 250.

“Person like me supposed to steal ? How I live ? ... They kick you on the street ... You steal, kill people, do whatever you want, it's not our problem ... after you will have problem, you will go to jail ... if you not have responsibility for people, why you receive, why you talk about human rights, why you accept refugee here?”²⁵¹

But what Mr A.Z. stated here provides insight into how keeping people in legal limbos for protracted periods of time may constitute a serious long-term risk to public order and security. Leaving people in a position of destitution and immigration-status-uncertainty negatively impacts their mental health and may stimulate the commission of crimes, either for survival or out of frustration. Other interviewees expressed similar thoughts on the crime-inducing consequences of their protracted legal toleration. This was namely the case of Mr A.A., who had experienced over four years of legal toleration in France due to exclusion from international protection on security-related grounds:

“I'm tired ... I want to leave ... if I go to Belgium, they'll send me back here (because of the Dublin system) ... only one house for me, that's France ... I think of starting fights in the street because I am ill and I am tired”²⁵² (excerpt translated from French into English).

This finding reflects findings in a report on destitute failed asylum seekers in the UK. In this report by Hannah Lewis, interviewed key informants indicated that “increasing levels of desperation leading to aggression and violence had become a notable feature of working with destitute (refused asylum seeker) clients over the last year”.²⁵³

251 Interview with Mr A.Z. (France terre d'asile, Paris, France, 15 and 24 May 2013).

252 Interview with Mr A.A. (Gisti, Paris, France, 25 April 2013).

253 Hannah Lewis, “Still Destitute : a Worsening Problem for Refused Asylum Seekers” (Joseph Rowntree Charitable Trust, 2009), 18.

10. How limbo-like positions between illegal and legal stay are experienced and perceived

The majority of interviewees described legal toleration positions as limbo-like and lying in-between illegal and legal stay, and provided some insight into how that felt or feels. Most described a feeling of entrapment. The hope and uncertainty over future regularisation, combined with the palpability of future removal and socio-economic exclusion, drove many of them crazy. It is a different kind of suffering to that of the clandestine illegal resident who is not in transition between a state of illegality and legality, or trapped between equally probable options of expulsion and legal residence. While the difficulties experienced by clandestine illegal residents are abominable, the difficulties faced by legally tolerated TCNs are of a slightly different nature. Some interviewees provided very elaborate answers on exactly how it feels to be in-between illegal and legal stay:

“Between 2008 and now (2013), I've been waiting, waiting, waiting ... I've been waiting for five years and there's still nothing ... it's difficult to think about tomorrow ... my head hurts every night ... I have negative thoughts about what I'm going to do”²⁵⁴

(Mr A.A., Afghan national in his early twenties, postponed-returnee for two years and ex-tolerated asylum applicant for two years and three months (due to exclusion from international protection on security-related grounds, excerpt translated from French into English)

254 Interview with Mr A.A. (Gisti, Paris, France, 25 April 2013).

“Somewhere between ... it is a feeling of apprehension ... there is a lot of anxiety ... there is a feeling of emptiness and I have not been given ... resources to keep me going ... it gets a bit dark towards where you are going ... it is also a feeling of insecurity ... where you've come from is even worse ... get to a point where maybe I should get back to the hands that almost killed me”²⁵⁵

(Mr O.S., 31 year old from Uganda, tolerated asylum applicant for one year)

“I am trapped in every way ... it drives me crazy ... it's especially exhausting ... it's wearisome ... I feel like a prisoner ... you can't do anything ... you can't even move ... it has prevented me from sleeping at night ... I stay awake all night until seven in the morning ... you feel tired and don't understand anything”²⁵⁶

(Mrs S., 29 year old from Mauritania, cancelled-returnee for one year and tolerated asylum applicant for six months, excerpt translated from French into English)

“The future is like the night ... the act of thinking makes me ill ... I stay awake every night”²⁵⁷

(Mr S.R., 31 year old from Bangladesh, tolerated asylum applicant for two and a half months, excerpt translated from French into English).

11. The impact of legal toleration and indirect toleration positions on health and the ability to think about the future

A large majority of interviewees stated that their protracted exclusion from legal residence during legal toleration periods hindered their ability to think about the future. A smaller majority of interviewees also indicated that such protracted exclusion negatively impacted their physical or mental health. Here are what some interviewees said about the negative impact on their ability to think about their future and/or health:

255 Interview with Mr O.S. (France terre d'asile, Paris, France, 30 April 2013).

256 Interview with Mrs S. (Home of a friend of the interviewee, Paris, France, 19 June 2013).

257 Interview with Mr R.S. (Gisti, Paris, France, 6 May 2013).

“It's difficult to think about the future ... I would like to study ... I am neither removable nor legally here ... I can't do anything ... I feel handicapped when I think about my future ... right now, I have no future, I have nothing ... I'm not moving, I always remain in the same position ... I sometimes grow tired of feeling like this, I even feel like committing suicide so that my life changes ... it's difficult to want something that you can't have ... to be blocked like this”²⁵⁸

(Mrs A.B., 25 year old asylum seeker from Mauritania, in-between illegal stay and legal toleration for two years, excerpt translated from French into English).

“I used to think a lot about the future ... but now that's over ... I don't sleep at night ... the future is like the night ... it's over ... I have no documents ... now, I feel sick when I allow myself to think a lot ... I used to be cheerful”²⁵⁹

(Mr R.S., 31 year old from Bangladesh, tolerated asylum applicant for two and a half months, excerpt translated from French into English).

“I tried here one time to kill myself ... in Paris ... you know how hard is it ... no family, no paper, no money, and that's it ... I tried to finish with my life ... you know they kill us every day ... of course I feel very, very, very confused ... I feel very bad because of all this situation”²⁶⁰

(Mr A.Z., 39 year old Palestinian from Syria, tolerated asylum applicant for one month)

A small minority of interviewees indicated that their legal toleration positions had no impact on their ability to think about the future, and a significant minority that there was no negative impact whatsoever on their physical or mental health. It is interesting to compare the radically opposite perceptions of two interviewees with a very comparable legal toleration history. Mr B.Y. And Mr M.M. both experienced approximately two and a half

258 Interview with Mrs A.B. (France terre d'asile, Paris, France, 5 July 2013).

259 Interview with Mr R.S. (Gisti, Paris, France, 6 May 2013).

260 Interview with Mr A.Z. (France terre d'asile, Paris, France, 15 May 2013).

years as legally tolerated TCNs. Mr B.Y experienced approximately two years as a tolerated (priority procedure) accelerated asylum applicant, followed by half a year as an administratively postponed-returnee. Mr M.M. experienced approximately two years as a postponed-returnee, followed by half a year as a tolerated (priority procedure) asylum applicant. Their postponed-returnee position was the result of a Court suspension of removal on the grounds of article 3 of the European Convention on Human Rights. And they were both subjected to a compulsory-residence-order. Mr M.M. stated that his years of legal toleration had negatively impacted his outlook on the future and his health, whereas Mr B.Y. indicated that they hadn't. This is how they expressed these different experiences:

“I like waiting ... I like perseverance ... even if I don't have a residence card today, I know that I'll have one some day ... I think about the future ... I'm still young, I'm not yet 40 ... I still have a future ... when I get my residence card, given my estimated life-span ... I'll be able to quickly make up for lost time ... I am in good health, I am in great shape”²⁶¹

(Mr B.Y., 32 year old from the Central African Republic, excerpt translated from French into English).

“It was difficult to think about the future ... from the beginning (of the three years) to the end ... three years is not nothing ... if you don't have nerves of steel, it can break you ... sometimes, I don't sleep at night, you think a lot ... (I have had) physical problems, sometimes stomach problems ... because you think a lot ... you are here for three years ... you're not doing anything ... nothing works”²⁶²

(Mr M.M., 33 year old from the Democratic Republic of Congo, excerpt translated from French into English).

261 Interview with Mr B.Y. (France terre d'asile, Paris, France, 21 May 2013).

262 Interview with Mr M.M. (France terre d'asile, Paris, France, 27 June 2013).

Today, Mr B.Y. is a failed asylum applicant in a position of postponed-removal. Mr M.M. is an ex-postponed-returnee, who started out as a tolerated asylum applicant, but who was transferred from the priority procedure to the regular procedure, and who was recently granted temporary legal stay. The evolution of Mr M.M.'s immigration status has therefore been much better than Mr B.Y.'s. And yet Mr M.M. is the one who was very negatively impacted, and remains so to this day. Such narratives go to show how individual each experience is, and how difficult it is to generalise about the impact of immigration positions in any meaningful sense. Two individuals with very similar immigration status experiences had radically different experiences of the impact on their future plans and health, and the one with the worse immigration-status-evolution of the two is the one with greater peace of mind and hope.

Conclusion

This chapter sought to provide empirical insight into the reality and perception of EU-governed toleration positions in France, as well as of toleration positions that are not EU-governed (and in some cases not even theoretically possible in French law). It attempted to capture how TCNs perceive complex membership statuses that they may end up in.

With a purposive sample of tolerated TCNs, I **first** showed that a majority of interviewees perceived the wide variety of legal toleration positions as lying in-between illegal and legal stay, and that most coveted legal stay for a wide variety of reasons. Differences in perception were weakly linked to understandings of illegal/legal stay, as well as adequacy of documentation. I **secondly** showed that some legal toleration statuses offered better protection from administrative checks and controls than others,

and that the inadequate documentation offered might in some cases violate EU law (both the Return Directive and Asylum Reception Conditions Directive). My examination of the documentation granted to legally tolerated TCNs also revealed a slight error in the current literature with regard to administrative postponed-returnees. I **thirdly** provided insight on the level and evolution of fear during legal toleration and indirect toleration periods. Most interviewees experienced some level of fear, but this level remained constant or decreased over time for the majority. It was legal toleration periods that tended to witness decreasing levels of fear, as opposed to indirect toleration periods, suggesting that legal toleration really does offer greater security of residence. But more generally, low, decreasing, or non-existent fear of expulsion was not the result of acquired peace of mind, but the result of the psychologically numbing effects of protracted toleration limbos.

I **fourthly** showed the varying levels of socio-economic rights possessed by legally tolerated and indirectly tolerated TCNs, with administrative postponed-returnees and tolerated asylum applicants possessing slightly better socio-economic rights than judicially postponed-returnees, cancelled-returnees, and indirectly tolerated TCNs. I noted a potential violation of EU law regarding tolerated asylum applicants' exclusion from the labour market. I **fifthly** provided insight on how legally tolerated TCNs perceived the socio-economic exclusion linked to their status. While a minority of interviewees considered this exclusion to be legitimate, a majority perceived it to be unfair in both absolute and relative terms. I **sixthly** provided some preliminary insight on how protracted legal toleration's impact on mental health may trigger violent and criminal behaviour. I **seventhly** sought to capture how it feels for some individuals to be trapped in-between illegal and legal stay, with shared perceptions that were explicitly linked to an

understanding of one's position as lying in-between illegal and legal stay. This served to highlight the real-life importance of my conceptualisation of toleration positions, by showing that conceptualising positions as lying in-between illegal and legal stay is not just a personal academic fantasy but a conceptualisation that corresponds to a very real and specific experience. I **lastly** showed that legal toleration positions had a negative impact on projections into the future for a large majority of interviewees, as well as a negative mental health impact on a smaller majority. This negative impact triggered suicidal thoughts for several interviewees, and these thoughts were very closely linked to the specificity of their limbo-like position.

This in-depth French case-study wraps up the part of my thesis on the nature and consequences of limbo spaces between illegal and legal stay in EU law. A discussion on implications and recommendations is postponed to the conclusion of chapter 6, which corresponds to the second part of this French-case study. I move on at present to examine how EU governance has contributed to the development of toleration spaces between illegal and legal stay, and the implications of this governance in terms of TCN membership in the EU.

Part II/ The impact of EU law on the management of non-removability and limbo spaces of toleration

In chapter 3, I examine the manner in which the European Union has governed the nexus between non-removability, on the one hand, and limbo spaces of toleration, on the other. I argue that the EU has played an increasingly important role in the governance of this nexus, and that it has over time taken some groups out of toleration limbos and left others in these limbos, as well as performed a role in the formalisation of these limbos. In my analysis, I argue that this governance has two principal evolutionary characteristics. The first is that limbo spaces of toleration have evolved from being treated like accidental disjunctions to becoming increasingly deliberate objects of governance. The second is that these spaces have evolved from being treated like technical issues to becoming increasingly politicised ones.

In the fourth chapter, I examine the transformative impact of EU governance of this nexus on membership patterns. Two aspects of the legal/illegal immigration dichotomy have come under strain. First, protracted non-removability has shined a negative spotlight on the strong discrimination between legal and illegal residents in terms of human rights. Secondly, the legal/illegal dichotomy as a marker of membership is suffering from the growth and formalisation of grey areas, as well as the emergence and development of more complex membership dichotomies. EU governance of non-removability and toleration has contributed to the emergence and shifts of membership categories, and more crucially to the development of a hierarchy of desirability, with

serious implications in terms of access to legal residence status and rights, subjection to administrative detention, and potential subjection to imprisonment.

Chapter 3. The increasingly deliberate and politicised governance of legal toleration

Management of non-removable persons involves decisions about what to do with them. Should they be administratively detained, should their removal be postponed, should their removal be cancelled, and/or should their status be regularised? If removal is postponed, what form should postponement take and what rights and benefits should be attached to this status? If removal is not postponed, but a non-removable person is simply released from administrative detention, what status and rights should he/she benefit from? And adding to the mix, who should be permissible targets of imprisonment for violations of immigration law?

These issues were essentially governed under national legal systems until the early 2000s. Since then, the EU has played an increasingly important role through a mix of both hard and soft law. EU management of non-removable persons has led to raising awareness, developing and gradually formalising many grey areas between illegal and legal stay across the EU. EU legislation adopted since the early 2000s has over time restricted the power of Member States to leave certain categories of non-removable persons in a limbo of legal toleration, but it also left that power intact with regard to other categories. EU law and policy have also played a vital role in taking certain forms of toleration out of the shadows and formalising them, against the wishes of numerous EU Member States. The formalisation process has sometimes gone hand in hand with a process of enhancing rights attached to specific toleration positions.

EU management of non-removability has thus involved the shifting of the nexus between non-removability, on the one hand, and limbo spaces of toleration, on the other. It has also involved the

formalisation and rights-enhancement of certain toleration positions. Via this management at EU level, in the form of both hard and soft law, limbo spaces of toleration have evolved from *accidental* disjunctions (between laws on expulsion and laws on legal residence) to objects of increasingly *deliberate* governance. The governance of these spaces, which has often been treated as a *technical* matter in comparison with other immigration-related issues, is also in the process of becoming increasingly *politicised*. Political cleavages, for example between the European Right(s) and Left(s), do loosely exist behind the curtains of what appears to be a technical governance of non-removability and toleration limbos.

In this chapter, I examine the nexus-shifting and formalisation of limbo spaces of toleration by EU law. In doing so, I include the intra and inter-institutional dynamics to illustrate the increasingly deliberate and politicised nature of the governance of these limbos. These dynamics show very clearly that despite the traditionally low-profile governance of this gap between return and legal residency, this governance is very deliberate and political.

I first examine how the EU has governed the nexus between general forms of non-removability on the one hand, and limbo spaces of toleration on the other (section 1). This includes a look at the impact of EU law on the formalisation of these limbo spaces. I secondly examine how the EU has governed this nexus with regard to specific legal toleration categories; those of tolerated asylum applicant and tolerated victims of human trafficking (section 2). Before delving into my examination of this nexus, I first wish to say a few words about the nature of this EU governance, and the institutional depth of my examination.

Accidental or deliberate limbos?

When one looks at the young literature on toleration limbos, one

sometimes gets a sense that these limbos are an anomaly in the immigration edifice, that they are the product of an accidental disjunction. And to a certain extent they are. Many of my undergraduate students have pulled puzzled faces at the notion that an individual protected from removal on human rights grounds could be a non-legal resident. But a lot of professionals in the field of immigration law are equally bewildered.

Fabian Lutz, the drafter of the Return Directive proposal, stated in an interview that protracted periods of postponed-removal were “(i)n most cases ... simply accidental ... (as it is) clear the person should leave but ... (that return) cannot be carried out for various reasons ... either ... because the person does not cooperate, doesn't disclose the(ir) identity, or for reasons beyond the control of the person because there is no possibility for safe return or for health reasons”.²⁶³ And yet, in some EU countries, protracted legal limbos have been far from purely accidental for a long time. For example, in Germany, there has been a deliberate policy of leaving certain non-removable migrants in limbo for decades, and the deliberate nature of this policy translated into a formalisation of these limbos through the creation of a toleration (*Duldung*) status. The sheer number of persons who have possessed a *Duldung* status for several years (see chapter 1, section 1(1)) provides further testament to the deliberate nature of this status.

But even at a Europe-wide level, while things might not be quite as deliberate as they have been in Germany, there has been a process whereby toleration limbos have become increasingly deliberate objects of governance. The existence of these limbos may have an accidental quality, namely because they are unwanted and result from an inability to deport which is not catered for by rules on legal residence. However, the preservation and formalisation of these limbos, as a manner of avoiding regularisation, cannot be

263 Interview with Fabian Lutz, European Commission, DG Home Affairs (phone interview, 7 January 2014).

described as accidental. The deliberate nature of this preservation and formalisation becomes clearer as the number of individuals in these protracted limbos increases. There is a point at which the ascertainment of these accidental legal limbos by surprised and overwhelmed institutional actors metamorphoses into a deliberate governmental choice to not regularise the status of individuals in these limbos. The governance of these limbos has furthermore been a low-profile one for a long time, with a technical and unpolitical appearance. But is this a technical issue?

Technical or political issue?

Much of the EU governance of toleration positions has been expert-driven as opposed to politician-driven or value-driven. Discussions and decisions on non-removability and toleration have mainly taken place within and between the lower echelons of the Council and Parliament. When issues are essentially governed by these lower echelons, they are often assumed to be of a technical nature. Issues of a political nature are deemed to generally make their way up the ladder to the higher political echelons.²⁶⁴ Without delving into the complex literature and definitions of how technical issues are demarcated from political ones, I will nonetheless say a few words here. Eves Fouilleux, Jacques de Maillard, and Andy Smith have explained that the distinction is made by some in terms of whether an issue is to be resolved by expertise (technical) or by a value-judgment (political).²⁶⁵ But these authors prefer a distinction which focuses on how practitioners use these terms, and practitioners they interviewed namely distinguished the technical from the political in terms of how major an issue was within the hierarchy of their decision-making institution.

264 Eves Fouilleux, Jacques de Maillard, and Andy Smith, "Technical or Political? The Working Groups of the EU Council of Ministers" (2005) 12 (4) *Journal of European Public Policy*, 612; Ingvild Olsen, "The Council Working Groups – Advisors or De Facto Decision Makers" (Paper presented at the Fifth Pan-European Conference on EU Politics Porto, Portugal, 23-26 June 2010), 2.

265 Eves Fouilleux, Jacques de Maillard, and Andy Smith, "Technical or Political? The Working Groups of the EU Council of Ministers" (2005) 12 (4) *Journal of European Public Policy*, 611-612.

So what does the low-echelon governance in this area mean about the issues of non-removable TCNs and toleration? Does this mean they are technical issues as they are mostly governed in low-down technical echelons of EU institutions, far away from hot and high-profile political debates?

While it is true that certain toleration positions have been treated as technical matters, issues of non-removability and toleration have always had a highly political dimension, and various aspects of these issues have been hotly debated within lower echelons of the Council and Parliament. Even the European Commission's Home Affairs DG has never perceived the issue of postponed-removal to be purely technical.²⁶⁶ According to Michael Speiser,²⁶⁷ a key political adviser in the Return Directive negotiations, political and institutional disagreements on how the EU should manage non-removability and toleration have *firstly* been linked to overall ideological disagreements over how open or closed the Union's borders should be. The open/closed border positions loosely matched a Left/Right divide. Those, usually on the Right of centre, attached to tight borders and immigration control, have tended to see regularisation of non-removable TCNs as detrimental to immigration control. Those, usually on the Left of centre, who have more flexible positions on borders and immigration control, have tended to focus on the detrimental impact of legal limbos in terms of human rights. Michael Speiser *secondly* explained that disagreements have been linked to institutional actors' respective positions within the Union's architecture – Member States defending their immigration powers via their representatives in the Council, and European Parliamentarians and Commission representatives defending a more European agenda (even if the reality is more complex). Many Member States wish to preserve the

266 Interview with Fabian Lutz, European Commission, DG Home Affairs (phone interview, 7 January 2014).

267 Interview with Michael Speiser, European Parliament, EPP Group Adviser, (phone interview, 22 April 2013).

power to handle non-removable TCNs as they believe they are best equipped to do so. Michael Speiser *thirdly* stated that disagreements have been linked to diverse country traditions and positions. Member States' traditional positions on regularisation and deportation, as well as the numbers of non-removable TCNs within their borders, to a large extent influence their views on non-removability and toleration.

If governance of non-removability and toleration has such a political dimension, why has it essentially taken place within the low-profile technical echelons of EU institutions? The most plausible reason is that these are complex issues, and ones that are not easy to simplify for mainstream political debates. They are linked to hot issues of regularisation, deportation, administrative detention, and human rights of migrants and asylum seekers. People in limbo spaces of toleration are trapped between regularisation and deportation, as well as between illegal and legal stay (which has human rights consequences). But the issue of their non-removability and toleration lies at the technical margins of these hot issues.

Their relegation to the decision-making of lower institutional echelons could be explained by the fact that they are technically complex political issues. This provides an illustration of Eves Fouilleux, Jacques de Maillard, and Andy Smith's contention that Council Working Groups do not simply filter out the technical issues so that all remaining issues of a political nature can be handled in the higher echelons.²⁶⁸ These authors' contention goes against a well-established idea that Council Working groups perform such a role of filtering technical issues, an idea that is as academically wide-spread as it is internalised by institutional actors themselves. However, issues of non-removability and

268 Eves Fouilleux, Jacques de Maillard, and Andy Smith, "Technical or Political? The Working Groups of the EU Council of Ministers (2005) 12 (4) *Journal of European Public Policy* 609-623.

toleration, governed essentially at the level of Council Working groups, have an incontestable political dimension, as their governance has taken place against a backdrop of ideological disagreements. The political nature of an issue, on the one hand, and the level of politicisation, on the other, are two very different things.²⁶⁹ Thus, as Ingvild Olsen has suggested, a political issue that is technically complex may have a low level of politicisation and risk relegation to the *technical* echelons of institutional decision-making.²⁷⁰ But that does not make that political issue a merely technical one.

The increasingly deliberate and politicised governance of limbo spaces of toleration

Toleration is not merely a technical issue about how to fix a gap between rules on return and rules on legal residence; toleration is an increasingly deliberate governmental tool for managing non-removable persons, alongside other tools such as regularisation and administrative detention. And the choice between these tools, as well as the specific implementation of each tool, is neither a minor issue nor one that can escape value-judgments; all of these choices exist within politically divisive frameworks. The toleration of certain asylum applicants and certain victims of trafficking were treated as de-politicised technical matters by most institutional actors in the early 2000s. However, various aspects of the Return Directive's postponed-removal position were politicised in the lower echelons of the Council and Parliament. But due to their complexity, they did not reach a very high level of politicisation and were barely discussed at all in the Justice and Home Affairs Council and the European Parliament plenary.

²⁶⁹ Ibid, 620.

²⁷⁰ Ingvild Olsen, "The Council Working Groups – Advisors or De Facto Decision Makers?" (Paper presented at the Fifth Pan-European Conference on EU Politics, Porto, Portugal, 23-26 June 2010), 2.

I turn now to an analysis of how the EU has managed limbo spaces of legal toleration. I analyse the manner in which EU management has shifted the nexus between various forms of non-removability, on the one hand, and limbo spaces of toleration, on the other. I also analyse the manner in which EU management has contributed to a process of formalisation of toleration spaces, as well as of scattered rights-enhancement. In doing so, I wish to display the increasingly deliberate nature of this management. Emanuela Paoletti expressed this idea of deliberateness very well when she explained that “emerging membership statuses created by the state can be seen as a way in which the state responds to, and arguably evades, certain norms and established practices which characterise the liberal polity”.²⁷¹ I do so by analysing inter-institutional and intra-institutional dynamics behind the EU's management of non-removable persons, which shows how deliberate things have been.

When analysing inter-institutional and intra-institutional dynamics behind the EU's management of non-removable persons, I include the various echelons respectively within the Council and the European Parliament. Within the Council, the lowest echelons involved in the negotiation process are the Working Parties. The relevant ones here are the Asylum Working Party and the Working Party on Migration and Expulsion. Going up the ladder, there is then the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA). These two lower echelons prepare most of the work for the COREPER, which is higher up the ladder, but which I do not mention below. And then at the top, there is the Justice and Home Affairs Council, made up of relevant Ministers of the Member States. Within the European Parliament, the only distinction I make is between the Parliament in plenary and the Committees, in particular the Civil Liberties, Justice and Home Affairs (LIBE) Committee.

²⁷¹ Emanuela Paoletti, “Deportation, Non-Deportability and Ideas of Membership” (July 2010) Refugee Studies Centre Working Paper 65, 15.

I begin by examining general EU governance of non-removability and postponed-removal/exhausted-removal positions (section 1). I then examine EU governance of the nexus between specific forms of non-removability, on the one hand, and legal toleration positions on the other (section 2). These specific forms of non-removability are the legal obstacle to removal which asylum applicants benefit from, as well as the policy-based obstacle to removal which potentially cooperative victims of human trafficking can benefit from. My examination is essentially based on desk research, but my section 1 examination is also partly based on phone interviews carried out with key EU actors involved in the Return Directive negotiations (see appendix 3). These key actors are Fabian Lutz,²⁷² the drafter of the European Commission's Return Directive proposal, and Michael Speiser,²⁷³ who was a political adviser of the European Parliament LIBE Committee's Rapporteur in the Return Directive negotiations. I also interviewed Manfred Hähnel,²⁷⁴ who is currently working in the Commission on the issue of non-removable TCNs.

1. EU governance of non-removability and postponement-of-removal

The starting point of a historical introduction to the EU's governance of non-removability lies in the 1980s and 1990s. But non-removability of illegal residents is a phenomenon which many Member States faced long before the EU's existence. For example, in France, there is a long and complex history of camps for diverse groups of *undesirable* migrants, which dates back to the first half of the 20th century.²⁷⁵ These camps served to control large groups of

272 Interview with Fabian Lutz, European Commission, DG Home Affairs (phone interview, 7 January 2014).

273 Interview with Michael Speiser, European Parliament, EPP Group Adviser (phone interview, 16 and 22 April 2013).

274 Interview with Manfred Hähnel, European Commission, DG Home Affairs (phone interview, 26 November 2013).

275 Olivier Clochard, Yvan Gastaut, and Ralph Schor, "Les Camps d'Étrangers depuis 1938: Continuité et

undesirable migrants who could not be quickly removed for a variety of reasons. By way of illustration, during the Spanish Civil War, a large number of Spanish nationals fled to France. Administrative detention centres were created and used to control approximately 350,000 of these *undesirable* Spanish nationals. Many were effectively deported, while others were released and remained in France. But years after the administrative detention of these nationals started, there were still about 120,000 to 130,000 who remained in administrative detention due to non-removability. Thus, some were deported, while others were either subjected to prolonged detention or released.

In the 1980s and 1990s, Western European States faced an increasing number of irregular migrants and asylum applicants; many asylum applications were made by persons in an initial position of illegality. The number of asylum applications in Europe increased from 13,000 in 1972 to 0.5 million in 1991.²⁷⁶ It is this increase that prompted European States to start cooperating on immigration matters, and which gradually led to immigration and asylum policies becoming shared competences between the EU and its Member States in the early 2000s. The increase in asylum applications was considered to be a challenge because asylum applicants are not removable for the duration of their asylum procedure; this non-removability was perceived by numerous Member States as a loop hole for irregular migrants to remain. Asylum applicants are considered a group *à part* in the area of non-removability. The young literature on non-removability tends to focus on failed asylum seekers who are not removable, or more generally on persons who are not removable for reasons other than an application for asylum.

Adaptations” (Foreigner camps since 1938: continuity and adaptations) ((2004) 20 (2) *Revue européenne des migrations internationales*, 4.

276 Nadine El-Enany, “Who is the New European Refugee?” (2008) 33 (3) *European Law Review*, 319.

In the first decade of the new millennium, every Member State was faced with a growing number of non-removable irregular migrants. By 2010, there were hundreds of thousands of non-removable irregular migrants in the EU. These irregular migrants were made up of failed asylum applicants and persons who had never sought asylum. They were not removable for a range of legal and practical reasons. The magnitude of non-removability phenomena, as well as the specifics, have varied from one European country to the next. But broadly speaking, EU States faced similar legal and practical barriers to effective removal policies.

The EU acquired shared competence with its Member States in immigration and asylum matters in the early 2000s. The emergence and development of an EU immigration policy witnessed the increasing prioritisation of return as the principal response for managing irregular migrant populations in the EU, the exceptional response (at least officially) being regularisation. What is interesting is that with the prioritisation of return came increasing obstacles to return. The zeal to deport was limited by the proliferation of liberal norms and processes that stood in the way of deportation. Human rights obstacles to removal developed throughout the 1990s and 2000s through judicial interpretations of international human rights instruments. The most important instrument was the European Convention on Human Rights (ECHR). Numerous rulings delivered by the European Court of Human Rights interpreted provisions of the ECHR as prohibiting the removal of non-citizens (namely article 3²⁷⁷ on the prohibition of torture and article 8²⁷⁸ on the right to family life). As well as human rights obstacles, practical obstacles stood in the way of the effective removal of many irregular migrants. A lot of irregular migrants put up a fight, by for example lying about their identity,

277 See ECtHR Press Unit, "Factsheet : Expulsions and Extraditions" (June 2011)

< http://www.echr.coe.int/Documents/FS_Expulsions_Extraditions_ENG.pdf > accessed 31 January 2014.

278 See *Üner v The Netherlands* App no 46410/99 (ECtHR 18 October 2006), para 57. This case spawned a large body of case law on protection from removal on family-related grounds.

burning their papers, and absconding. Irregular migrants received support in their fight from NGOs and parts of the general public, through both political and legal activism. Public opposition to the removal of irregular migrants has remained a prominent feature of immigration politics to this day.²⁷⁹

Even more interestingly, a lot of resistance came from irregular migrants' countries of origin. Cooperation between expelling and destination States were sometimes difficult for purely bureaucratic reasons. But countries of origin sometimes refrained from cooperating with expelling European States for political reasons; many did not and still do not like the feeling of being Europe's dustbin for undesirable individuals. It is interesting to note here that bilateral relations are crucial, and institutional documents suggest that several third countries are more cooperative with some Member States than with others in facilitating the return of their nationals.²⁸⁰ The EU has attempted to resolve the problem of non-cooperation from third countries by negotiating and adopting readmission agreements with individual third countries, such agreements imposing an obligation to readmit their own nationals as well as any third country national who transited via their country immediately prior to reaching the territory of the EU. These negotiations have been successful with a handful of third countries, but many more have resisted and refused. And “(a)ll third countries hold a deep aversion to the TCN clause”²⁸¹ which requires that they readmit TCNs who are not nationals of their country.

When faced with illegally staying TCNs who could not be removed for long periods of time, States could choose to regularise their

279 See European Migration Network, “Ad-hoc Query on Public Opposition against the Enforcement of Returns” (Compilation produced on 14 August 2013).

280 For example, see European Migration Network, “Ad-Hoc Query on Co-operation with Iraq on the Issuance of the Travel Documents (Laissez-Passer)” (Compilation produced on 9 March 2010).

281 Commission, “Communication from the Commission to the European Parliament and the Council: Evaluation of EU Readmission Agreements” COM (2011) 76 final, 9.

status or to do nothing and leave them in a legal limbo of toleration. Member States adopted diverse approaches to managing non-removable persons, making choices about who to regularise and who to leave in limbo, as well as choices about what rights (if any) to grant to persons in limbo. Despite a diversity of approaches, a large number of individuals were left in a limbo of destitution and insecurity across the EU. In the 2000s, NGOs, lawyer groups, and international organisations started to pinpoint a wide-scale problem of destitute irregular migrants who were not removable but left in a legal limbo by certain EU Member States.²⁸² The European Commission also pinpointed this problem quite early on in the 2000s.²⁸³ The Commission has been an institutional pioneer on the issue of non-removable TCNs. The Commission identified the issue and its problematic consequences long before other EU institutions. Like many of its institutional counter-parts, the Commission has sold itself over the years as a firm believer in the effective return of illegal residents. However, for those that turn out to not be removable, it has sought to take many out of limbo or to improve their limbo.

Other institutional actors in EU forums were initially not as knowledgeable or proactive as the Commission. I am talking here about actors in the various echelons of the Council and the European Parliament. Well-informed institutional actors in the Parliament and Council often treated issues of non-removability and toleration as marginally important matters, for example in comparison with the issue of administrative detention. But by 2010, the phenomenally big numbers of non-removable persons in

282 For example, see Immigration Law Practitioners' Association, "Response of The Immigration Law Practitioners' Association to The European Commission's Green Paper on a Community Return Policy on Illegal Residents" (6 August 2002), 4.

283 Commission, "Working Document: The Relationship between Safeguarding Internal Security and Complying with International Protection Obligations and Instruments" COM (2001) 743 final, 14-15; Commission, "Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee, and the Committee of the Regions, on Integration, Immigration and Employment" COM (2003) 0336 final, 25-26; Commission, "Green Paper on the future Common European Asylum System" COM (2007) 301 final, 6.

the EU attracted the political attention of many actors within Parliament and Council. Other EU institutions, that are not involved in law-making, have also gathered a lot of information in very recent years on non-removability and toleration. These are the Fundamental Rights Agency of the EU and the European Migration Network. And beyond institutional actors, there are NGO groups that have begun lobbies exclusively focused on non-removable TCNs, with the aim of pushing this issue to the top of the EU's political agenda in the field of immigration and asylum.²⁸⁴

From the early 2000s to the present day, hard and soft EU law have played an increasingly important role in the governance of non-removable persons and the limbo spaces of toleration that they can end up in. First, EU law has had an important impact on the nexus between legal and practical non-removability, on the one hand, and limbo spaces of toleration, on the other. It has secondly played an important role, through both hard law and information exchange, in the formalisation of postponed-removal positions and the rights attached to these positions. It has however remained virtually silent on the status and rights of persons who end up in a position of released-detainee *stricto sensu* and exhausted-removal. Political disagreements have surrounded the Union's management of the nexus between non-removability and toleration, as well as its management of the formalisation of - and rights attached to - tolerated persons' position. Political disagreements really played out in the inter-institutional negotiations behind the adoption of the Return Directive (although they began long before). According to Fabian Lutz, the drafter of the Return Directive proposal, political disagreements were mainly between "Parliament and Council",²⁸⁵ as well as between the Commission and the Council. But

284 See Maaïke Vanderbruggen, Jerome Phelps, Nadia Sebtaoui, Andras Kovats, and Kris Pollet, "Point of No Return: The Futile Detention of Unreturnable Migrants" (Collaboration between Flemish Refugee Action (Belgium), Detention Action (UK), France terre d'asile (France), Menedék - Hungarian Association for Migrants, and The European Council on Refugees and Exiles (ECRE), project supported by EPIM, January 2014), 11.

285 Interview with Fabian Lutz, European Commission, DG Home Affairs (phone interview, 7 January 2014).

according to Michael Speiser,²⁸⁶ a key Parliamentary adviser in the LIBE Committee, disagreements also existed within the Council and within the Parliament. Such disagreements were along ideological lines, namely in terms of a Left-Right divide and in terms of whether or not the status and rights of non-removable TCNs should be governed at EU level. Within the Council, many of the delegations were highly opposed to binding EU standards on the postponement of return and on the rights of postponed-returnees, while a tiny minority saw the pragmatic and technical virtues of such EU governance. The German delegation was one of the fiercest opponents, while the Finnish delegation was a defender of such Europeanisation.²⁸⁷

I now turn to examine the impact of EU law on the nexus between legal non-removability and toleration (1.1.), before turning to an examination of its impact on the nexus between practical non-removability and toleration (1.2.). I then analyse its role in the formalisation of postponed-removal, the rights attached to postponed-removal positions, and the problematic status and rights of persons in a position of exhausted-removal (1.3.).

1.1. The EU's impact on the nexus between legal obstacles to removal and limbo spaces of toleration

There are a large number of *legal* obstacles to removal under EU and national laws. These are essentially composed of human rights obstacles to removal, namely on family life and non-refoulement grounds. But they also include suspensive judicial procedures against return measures. The human rights obstacles are derived from a range of national, EU, and international human rights instruments. The story of human rights protection from removal is

286 Interview with Michael Speiser, European Parliament, EPP Group Adviser (phone interview, 16 and 22 April 2013).

287 Interview with Fabian Lutz, European Commission, DG Home Affairs (phone interview, 7 January 2014).

one which might often be characterised as an arm wrestle between judiciaries and migrants, on the one hand, and State authorities, on the other. As explained in section 1 of chapter 1, some categories of persons protected from removal on human rights grounds are entitled to regularisation of status. Other categories are not so entitled. Those who are not entitled to regularisation might benefit from discretionary regularisation. But in the absence of discretionary regularisation, their default position is one of postponed-removal or prohibited-removal.

The European Commission has been a highly proactive institutional defender of closing or seriously narrowing the gap between human rights protection from removal, on the one hand, and regularisation of status, on the other. The Council and European Parliament have over the years adopted EU legislation that has narrowed that gap, but nowhere near as much as what the Commission and NGOs have hoped for. There have been political disagreements between and within the Commission, Council and Parliament with regard to this gap. I focus now on the prohibition of refoulement – a specific group of human rights protection from removal- to illustrate the impact of EU law on the gap between legal obstacles to removal, on the one hand, and regularisation of status, on the other.

Case-study on the substantive prohibition of refoulement

EU Member States are prohibited from removing TCNs to a third country where they would be exposed to serious harm in violation of Member States' extra-territorial human rights obligations, namely under the 1951 UN Convention on Refugees (UNCR) and the European Convention on Human Rights (ECHR). Such obligations are generally described as prohibitions of refoulement. Judicial actors have played a very important role in prohibiting the

enforcement of removal of persons protected from refoulement under these various instruments. But Member States have also voluntarily refrained from removing certain persons on grounds of international protection, beyond the scope of their international human rights obligations.

Prohibition of refoulement may be substantive or procedural. When a TCN is *substantively* protected from refoulement, this means that his/her claim to protection from refoulement has been substantiated by a competent administrative authority or a court. When TCNs are *procedurally* protected from refoulement, this means that their claim to protection from refoulement is not yet substantiated, but that they are protected from removal during a procedure in which that claim is being examined. For example, asylum applicants hope to obtain recognition of their need for international protection, but they are not yet recognised beneficiaries of international protection. Asylum applicants are procedurally protected from refoulement for the duration of their asylum application, and international protection beneficiaries are substantively protected from refoulement. The focus here is on substantive prohibition of refoulement.

Some persons who are substantively protected from refoulement are entitled to regularisation of status, while others are not so entitled, even if they might be eligible for discretionary regularisation of status. The dividing line between those entitled and not entitled to regularisation of status has shifted over time; EU law has played an important role in the shifting of this line. Persons protected from refoulement, who are not entitled to regularisation of status, and who do not benefit from discretionary regularisation, are excluded from legal residence and left in a limbo of postponed-removal, with a set of rights and benefits attached that are usually much lower than those possessed by legal

residents.

EU legislation adopted in the 2000s firstly reduced (but did not close) the gap between non-refoulement and regularisation. It secondly contributed to the formalisation of the postponed-removal position of individuals protected from refoulement who remained excluded from legal residence. I begin by providing the state of play prior to the EU legislation that was adopted in the 2000s. I then examine the impact of EU legislation, and the inter and intra-institutional dynamics behind that impact, through a focus on two key Directives: the 2004 International Protection Directive (mostly known as the Qualification Directive) and the 2008 Return Directive. I end with some words on what is happening outside the world of hard law. The International Protection Directive was adopted by the Council, whereas the Return Directive was adopted by the Council and European Parliament. The International Protection Directive set out criteria that asylum seekers need to satisfy in order to be granted international protection in the EU. The Return Directive set out standards governing the effective return of illegally staying TCNs by EU Member States. Inter-institutional and intra-institutional activity behind the adoption of these two Directives displays the increasingly deliberate and political nature of EU governance of the non-refoulement/toleration nexus, despite a low-profile technical locus of governance.

Before EU legislation

Member States were subject to non-refoulement obligations long before EU immigration and asylum policy became a shared competence in 1999. They were first of all bound by such obligations under the 1951 UN Convention on Refugees (UNCR) and its 1967 Protocol. I shall refer to beneficiaries of the Convention as

UNCR refugees. The latter are defined as persons who are unwilling or unable to return to their country of origin or of habitual residence owing to a well-founded fear of being *persecuted* for reasons of race, religion, nationality, membership of a particular social group or political opinion. In 1976, the Parliamentary Assembly of the Council of Europe expressed its concern about what it defined as “de facto refugees”,²⁸⁸ who were persons not recognised as UNCR refugees in Council-of-Europe States but who could not return to their country of origin for the same or similar reasons as them. This institutional concern was triggered by the reported difficulties for de facto refugees in obtaining residence and work permits, as well as the societal alienation endured by these refugees.

Since 1989, the European Convention on Human Rights (ECHR), signed in 1950, has been interpreted by the European Court of Human Rights (ECtHR) in a large number of cases²⁸⁹ as similarly prohibiting removal of non-nationals to territories where such removal would amount to a violation of States' extra-territorial human rights obligations. This essentially concerns the article 3 prohibition of torture and article 2 right to life. The ECtHR's interpretation was built on foundations set up by article 3 of the 1984 UN Convention against Torture.²⁹⁰ So alongside UNCR refugees and de facto refugees, a new group of ECHR refugees thus emerged and grew over the next decades. A strong divide which has remained to this day is that between UNCR refugees and all others, most national legal systems reserving the legal definition of refugee for those who fall under the UNCR.

288 Council of Europe Parliamentary Assembly, “Recommendation 773 (1976) on the situation of *de facto* refugees” (26 January 1976) 775.

289 *Soering v. United Kingdom* App no 14038/88 (ECtHR 7 July 1989). For an overview of the subsequent case-law, see ECtHR Press Unit, “Factsheet : Expulsions and Extraditions” (June 2011)

< http://www.echr.coe.int/Documents/FS_Expulsions_Extraditions_ENG.pdf > accessed 31 January 2014.

290 See Elspeth Guild, “Examining the European Geography of Refugee Protection: Exclusions, Limitations and Exceptions from the 1967 Protocol to the Present” (2012/03) Nijmegen Migration Law Working Paper Series, 8-10.

Certain persons who would normally qualify for refugee status under the UNCR were/are excluded from it because they fell/fall under one of the UNCR's exclusionary provisions. This namely concerns persons with respect to whom “ there are serious reasons for considering that”²⁹¹ they have committed certain very serious crimes, such as crimes against peace. In today's world, these exclusions essentially target terrorists or suspected terrorists. Excluded persons do not benefit from the prohibition of refoulement contained in the UNCR. Unlike the UNCR, exclusions are not possible with regard to the prohibition of refoulement under articles 2 and 3 of the ECHR. The protection from refoulement afforded under the ECHR makes no exceptions. And so a person in need of protection who was excluded from the UNCR might be protected from refoulement under the ECHR.

By the time the EU acquired shared competence in asylum matters in 1999, UNCR refugees were generally entitled to regularisation in EU Member States. Persons who fell outside the scope of the UNCR, but who were protected from refoulement under other instruments (namely the ECHR), were not entitled to regularisation in all Member States. Short of discretionary regularisation, they found themselves in limbo positions of postponed-removal. Postponed-removal was rarely formalised through some kind of written certification, and so was often informal.

An exchange-of-practices document drawn up by the Council Asylum Working Party in 2001 shows that many EU States simply legally tolerated the presence of non-UNCR refugees.²⁹² For example, in Germany, persons protected from refoulement outside the scope of the UNCR were usually granted a formal postponed-removal status, the Duldung certificate.²⁹³ Most EU Member States

291 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (UN Refugee Convention), art 1 F.

292 Council Document 8378/01.

293 Council Document 8378/01, 9-15.

had developed complementary protection mechanisms which created the *discretionary* possibility of regularising the status of persons in need of protection who fell outside the scope of the UNCR, namely ECHR refugees and certain persons fleeing armed conflicts. However, the discretionary nature of regularisation under these complementary systems left many non-UNCR refugees in a limbo of postponed-removal.²⁹⁴

ECHR refugees included persons excluded from refugee status under a security-related exclusion clause (but these persons by no means corresponded to the majority of ECHR refugees). In 2001, the European Commission noted that Member States' "policy options for dealing adequately with (these) excludable but non-removable persons is a very unsatisfactory one".²⁹⁵ While it acknowledged the security concerns of Member States, it also pointed out that excludable refugees did "not necessarily and automatically pose a risk to the national security",²⁹⁶ and called for the harmonisation of their status and basic rights.

The privileged entitlement to regularisation, possessed by UNCR refugees in European states, was extended to certain other refugees following the adoption of the International Protection Directive by the Council of the EU in 2004.

International Protection Directive

The International Protection Directive,²⁹⁷ adopted by the Council in 2004, created an EU status of international protection, which included both UNCR refugees and a number of non-UNCR refugees, namely persons protected from refoulement on the ground of

294 Council Document 8378/01.

295 Commission, "Working Document: The Relationship between Safeguarding Internal Security and Complying with International Protection Obligations and Instruments" COM (2001) 743 final, 14.

296 Ibid, 14-15.

297 Council Directive 2004/83/EC on qualification for international protection (2004) OJ L 304/12.

articles 2 and 3 ECHR, as well as certain groups of civilians at risk of harm in situations of armed conflict. UNCR refugees are called refugees in the Directive, and all other refugees under the Directive are called beneficiaries of subsidiary protection. International protection status includes both refugee status and subsidiary protection status. This Directive conferred an *entitlement to regularisation* for all beneficiaries of international protection. Through the adoption of this Directive, the Council of the EU thus extended the entitlement to regularisation to numerous non-UNCR refugees, who were not so entitled up until that point.²⁹⁸

Persons protected from refoulement who fell under the Directive's subsidiary protection category not only benefited from a new entitlement to regularisation, but additionally to numerous rights and benefits that are part and parcel of the legality package. This namely concerns access to employment, social welfare, and comprehensive healthcare. The catalogue of rights attached to subsidiary protection status contained disappointing derogations, but as a whole, these imperfect rights surpassed entitlements that existed before the Directive's adoption.

However, it is important to note that security-related grounds for excluding TCNs from both refugee status and the new subsidiary protection status were slightly expanded in the Directive,²⁹⁹ namely as a response to terror attacks that hit the US and Spain in the early 2000s. And this slightly expanded group of excludable persons continued to be excluded from any entitlement to regularisation of status.

298 And it is worth noting here that a few years later, the European Court of Justice expanded the scope of non-UNCR refugees entitled to regularisation, as it expanded the scope of persons who qualify for subsidiary protection as civilians at risk of harm in situations of armed conflict in Case C-465/07 *Elgafaji v Staatssecretaris van Justitie* (2009) ECR I-00921.

299 See Elspeth Guild and Madeline Garlick, "Refugee Protection, Counter-Terrorism, and Exclusion in the European Union" (2010) 29 (4) *Refugee Survey Quarterly*, 71-80.

Even though the International Protection Directive reduced the gap between non-refoulement and regularisation, not all persons protected from refoulement were included within the scope of the Directive (and this does not just concern persons excluded for security-related reasons). This is despite the attempt by the European Commission, in its 2001 International Protection Directive Proposal,³⁰⁰ to cover just about all such persons. The Commission's article 15 (b) proposal suggested an entitlement to subsidiary protection status for persons who cannot return to their country of origin due to a well-founded fear of being subjected to a "violation of a human right, sufficiently severe to engage the Member State's international obligations".³⁰¹ The aim of this catch-all provision was to ensure that "Member States ... have *full regard* to their obligations under human rights instruments, such as the ECHR".³⁰² This provision would have effectively included most persons protected from refoulement, far beyond what the adopted Directive opted for. An important point to note here is that a limited number of persons protected from refoulement would have still remained outside the scope of subsidiary protection, as the Directive contains exclusionary clauses for persons having committed certain crimes.

The Commission's attempt to almost completely close the gap between non-refoulement and regularisation triggered great hostility from certain Council delegations at several levels of the Council hierarchy. In the Asylum Working Party, the Spanish, French, Finnish, and Dutch delegations disliked the general nature of the Commission's proposed provision, expressing the wish to see it narrowed down.³⁰³ Not all Member States were as hostile to the article 15 (b) proposal, and there appears to have been some hard

300 Commission, "Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons who Otherwise Need International Protection" COM(2001) 510 final, 26.

301 Ibid.

302 Ibid, 26.

303 Council Document 9038/02, 22.

bargaining. Negotiations at Ministerial level as well as in the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA), saw the article 15 (b) proposal being chewed at and shuffled about.³⁰⁴ The Danish presidency was particularly proactive in seeking a compromise that would preserve it. In the end, the hostile delegations were successful in ensuring its complete deletion from the Directive.

The European Commission's attempt to close (or at least significantly narrow) the gap between non-refoulement and regularisation thus failed, even if the adopted International Protection Directive still reduced the gap. Several delegations within the technical and political echelons of the Council displayed political hostility towards the Commission's attempt. Despite support by other delegations (namely the Danish delegation), a majority came out in favour of deleting the Commission's catch-all provision. The International Protection Directive was amended by the Parliament and Council in 2011,³⁰⁵ but article 15 remained untouched.

Thus, when the International Protection Directive was adopted, the deliberate nature of the gap between non-refoulement and regularisation can be seen. Leaving certain categories of persons protected from refoulement in a limbo of legal toleration was not a pure accident. The inter-institutional and intra-institutional disagreements did not end with the adoption of the International Protection Directive.

Return Directive

For persons protected from refoulement, but who fell outside the

304 Council Document 12148/02, 2.

305 Directive 2011/95/EU of the European Parliament and of the Council on qualification for international protection (recast) (2011) OJ L 337/9.

scope of the International Protection Directive, removal was at the very least prohibited under national legal systems. However, numerous national immigration systems did not contain explicit protection from removal, and postponement-of-removal was not always formalised through written certification.

However, the Return Directive, adopted by the Council and Parliament in 2008, created an obligation for Member States to formally postpone the removal of such persons,³⁰⁶ in order to protect them from the consequences of being undocumented, one such consequence being repeated apprehension and placement in administrative detention. A new obligation was thus imposed on States to issue written certification of postponement of removal. However, as I will show below, the degree of formalisation is very weak. And the set of rights attached to the Return Directive's formal toleration status is also very weak; it is essentially limited to *principles of emergency healthcare and education for minors*. This is the bare minimum required of Member States under international human rights instruments,³⁰⁷ and EU law simply plays a mediating role in ensuring that national laws comply with their obligations under those instruments. Hard EU law does not go beyond such a mediating role and contains no binding standards relating to the basic subsistence of such tolerated persons,³⁰⁸ nor to their labour market access.

Although the Return Directive created an obligation for Member States to formally postpone the removal of non-EU nationals who are protected from refoulement, the European Commission's 2005 Return Directive Proposal was more ambitious. The Commission's

306 Directive 2008/115/EC of the European Parliament and of the Council on the return of illegally staying third-country nationals [2008] OJ L 348/98, arts 9 and 14.

307 European Union Agency for Fundamental Rights, *Fundamental Rights of Migrants in an Irregular Situation in the European Union: Comparative Report* (Publications Office of the European Union, 2011), 19-26.

308 The Return Directive's preamble does however mention that Member States *should* define basic conditions of subsistence for non-removable persons in their national laws : Directive 2008/115/EC of the European Parliament and of the Council on the return of illegally staying third-country nationals [2008] OJ L 348/98, recital 12.

proposal echoed suggestions by NGOs and International Human Rights Organisations. It initially suggested completely closing the gap between non-refoulement and regularisation.³⁰⁹ Article 6 (4) of the Commission's Return Directive proposal provided that:

“Where Member States are subject to obligations derived from fundamental rights as resulting, in particular, from the European Convention on Human Rights, such as the right to non-refoulement, the right to education and the right to family unity, no return decision shall be issued. Where a return decision has already been issued, it shall be withdrawn”.³¹⁰

The European Commission used its Return Directive proposal as an opportunity to once again try to close the gap between non-refoulement and regularisation, where it had once failed with the International Protection Directive. But this was firmly rejected by a large majority of Council delegations at the Working Party level.³¹¹ These delegations did not simply wish to water down the provision, but wished to move it to the Preamble, where its legal value would practically disappear. And from the start, all of the Council Presidency compromise suggestions deleted the provision.

The European Parliament's LIBE Committee initially seemed to be in favour of the Commission's article 6 (4) proposal, as the Committee left it intact in its Draft Report.³¹² However, the provision was deleted in the LIBE Committee's final report, and replaced with a much less binding reference to human rights

309 Commission, “Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals” COM(2005) 391 final, art 6 (4).

310 Ibid.

311 Council Document 10002/06, 4.

312 European Parliament LIBE Committee, “Draft Report on the Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals” 2005/0167(COD).

protection from removal in another article.³¹³ Michael Speiser,³¹⁴ a political adviser of the EPP group in the European Parliament, has stated that there was a clear Left/Right divide in the LIBE committee over the maintenance-versus-deletion of the Commission's article 6 (4) proposal. The Left-leaning groups³¹⁵ generally favoured maintenance of the Commission's proposed article 6 (4), whereas the Right-leaning³¹⁶ ones generally favoured deletion. There were several rationales for the Right's position according to Michael Speiser. The main rationale was the wish to preserve the power to remove certain groups of humanitarian migrants after a temporary period of protection from refoulement. I examine the rationales in more detail in part 3 of this thesis. The Right wing groups of the LIBE Committee gathered sufficient support for their position amongst certain members of the Centrist and Centre-Left groups,³¹⁷ and were successful in obtaining the deletion of the article 6 (4) proposal.

The demise of the article 6 (4) proposal took place in negotiations within and between the technical echelons of the Council and the European Parliament. There was a very deliberate political rejection in the lower echelons of the Council and Parliament towards the closing of the limbo gap between non-refoulement and regularisation. This limbo gap was correspondingly a politically desired space, not an accidental one. This limbo gap was not only deliberately preserved; it was also formalised. The choice to not close the limbo gap and to even formalise it provides a strong indication of the deliberate nature of its governance.

The adopted Return Directive created an obligation for Member

313 European Parliament LIBE Committee, "Report on a Proposal for a Council Directive on the Short-Term Residence Permit issued to Victims of Actions to Facilitate Illegal Immigration or Trafficking in Human Beings who Cooperate with the Competent Authorities" A5-0397/2002, 11 and 13.

314 Interview with Michael Speiser, European Parliament, EPP Group Adviser, (phone interview, 16 April 2013).

315 Especially the GUE/NGL Group, but also the PSE Group and Verts/ALE Group.

316 Namely the dominant EPP-ED Group.

317 The PSE Group and ALDE Group.

States to formally postpone removal of persons protected from refoulement, by issuing them with written certification of their postponed-removal, as well as attaching certain minimal rights. It is not clear at what stage of the negotiation process this idea of a postponement obligation in cases of non-refoulement popped up. The LIBE Committee might have pushed for this provision in informal trilogues with the Council, as the Committee was more open than the Council to including non-refoulement safeguards within the operative text of the Directive.

Beyond hard law but with hard law in sight

The deliberate and political nature of the EU's governance of non-refoulement and toleration is clear from the examination of the dynamics behind the adoption of the International Protection Directive in 2004 and the Return Directive in 2008. But up till that point, governance was very much expert-led within technical echelons of EU institutions. But since 2010, there has been a growing interest beyond these technical echelons in growing phenomena of non-removability and toleration. Growing numbers of non-removable third country national Europe-wide have triggered responses in many institutional fora.

Persons protected from refoulement, but who are not entitled to regularisation, may be merely tolerated for very long periods of time, and this has become a source of concern for a number of actors, including certain State actors. This concern was partly triggered by the socio-economic and security-related problems associated with large groups of tolerated persons who are marginalised, ghettoised and excluded from basic socio-economic rights. Concerns were also linked to the threat posed to the integrity of immigration and asylum systems, that rely on the return of irregular migrants and rejected asylum applicants. The

European Commission, European Parliament,³¹⁸ Council of the EU, and national contact points of the European Migration Network,³¹⁹ have all respectively sought to gather information on this problem. In 2011, a small group of delegations in the Council Working Party on Integration, Migration and Expulsion, exchanged information on their policies of tolerating persons protected from refoulement.³²⁰ Some States provide a very formal toleration certificate to persons protected from refoulement, with a small set of socio-economic rights attached to such certificates (such as labour market access or social assistance). Other states provide very little or nothing at all in the way of formal status or entitlements. The fact that exchanges of practices have taken place in several EU institutional forums indicates the possibility that hard EU law might be proposed in the near future. In 2011, the DG Home Affairs Unit in charge of return policy talked about preparing a “legislative initiative on how to deal with so-called 'non-removable' third-country nationals”,³²¹ and to this end, it commissioned a Study on practices of postponed-removal across the EU which was published in 2013 (the Ramboll/Eurasylum study).³²² However, interviews I carried out with two persons who work in the Commission's Home Affairs DG revealed that such plans have been scrapped for the near-future.³²³ There is a general desire to focus on ensuring the effective implementation of the Return Directive as it is, rather than focusing on what is missing in the Directive with regard to non-removable TCNs. Hard EU law

318 Dr Kay Hailbronner, “Refugee Status in EU Member States and Return Policies – Final Report” (Study commissioned by the European Parliament, 2005)
< [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2005/365969/IPOL-LIBE_ET\(2005\)365969_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2005/365969/IPOL-LIBE_ET(2005)365969_EN.pdf) > accessed 31 January 2014.

319 European Migration Network, “Ad-hoc Query on Practices followed concerning Third Country Nationals whose Compulsory Removal is Impossible” (Compilation produced on 14 April 2010).

320 Council Document 8980/11.

321 Commission, “Roadmap: Communication on the Evaluation of the Common Policy on Return and on its Future Development” (DG Home Affairs Unit C1, June 2011), 1.

322 See: Ramboll and Eurasylum, “Study on the Situation of Third-Country Nationals pending Return/Removal in the EU Member States and the Schengen Associated Countries: Final Report” (Study commissioned by the European Commission, 11 March 2013).

323 Interview with Manfred Hähnel, European Commission, DG Home Affairs (phone interview, 26 November 2013); Interview with Fabian Lutz, European Commission, DG Home Affairs (phone interview, 7 January 2014).

reforms will not be proposed any time soon on non-removable TCNs, whether in the form of a Recast Return Directive, or in the form of a specific piece of legislation. However, the idea of such reform is not ruled out in the long-term. When I asked Fabian Lutz if such a reform proposal would attempt to introduce a European-wide Duldung-like status, he replied that “(t)his might well happen” but that he was “not a prophet”.³²⁴ What he really emphasised was that the challenge would reside in proposing an ambitious reform that would in some measure be acceptable to Member States.

Concluding remarks

Over time, EU management of the nexus between non-refoulement and toleration reveals a conflicting dynamic between institutional actors seeking to close the limbo gap and others seeking to preserve it. A conflicting dynamic is also shown between those seeking to formalise the limbo space and others seeking to preserve the informality or low-formality. It thus shows that decisions about the nexus and about formalisation are to a large extent deliberate, and have become increasingly so as institutional actors have had several occasions to battle this out and/or discuss it.

1.2. The EU's role with regard to the nexus between practical obstacles to removal and limbo spaces of toleration

The European Union has had an impact, but not a huge impact on the nexus between practical obstacles to removal and limbo spaces of toleration. Practical obstacles (namely of identification, documentation, and transportation) may exist despite TCNs' cooperation or as a result of their non-cooperation, or further as a result of non-cooperation on the part of countries of origin/transit.

³²⁴ Ibid.

Prior to the adoption of the 2008 Return Directive, EU States could choose to administratively detain, postpone the removal, or regularise the status of illegal residents who could not be removed on practical grounds. The Return Directive did nothing but confirm those choices.³²⁵ EU Member States may postpone removal of illegal residents who cannot be removed on practical grounds, but they do not have to. Even if Member States do not postpone removal of persons who cannot be removed for practical reasons, but instead pursue the option of administrative detention, these persons might be released from administrative detention. If they are released following expiry of the maximum period of detention, they are released in a position of exhausted-removal, which is a form of indirect toleration. They might also be released before expiry of the maximum period on a variety of grounds, leaving them in a position of released-detainee *stricto sensu*.

As I will show, EU governance of the nexus between practical non-removability and the various options for managing it has been very deliberate and political, much like the management of the nexus between non-refoulement and toleration. In this governance, the limbo toleration position of postponed-removal is actually a step up for persons who are not removable for practical reasons, a step up that many Member States disapprove of. It is a step up from pure and simple illegality of stay with no legal protection from removal. The limbo position of exhausted-removal is not really a step up, as it merely provides protection from detention and not from removal. In the inter-institutional dynamics behind the adoption of the Return Directive, it was not only postponed-returnees but also exhausted-returnees who were on decision-makers' minds and at the heart of low-profile political cleavages. I turn first to the dynamics behind the governance of practical non-removability and postponed-removal, before examining those

³²⁵ Directive 2008/115/EC of the European Parliament and of the Council on the return of illegally staying third-country nationals [2008] OJ L 348/98, above, arts 6 (4), 9 (2) and 15.

behind the governance of exhausted-removal.

The European Commission's 2005 Return Directive proposal had attempted to make postponement-of-removal mandatory in the event of *specific* (not all) practical obstacles to removal,³²⁶ but any idea of mandatory postponement was completely dropped in the compromise reached between the European Parliament and the Council. The European Parliament's LIBE Committee was initially on the Commission's side with regard to narrowing the gap between practical non-removability and postponement-of-removal, but the Council succeeded in preserving the gap. Certain Council Working Party delegations (for example Austria, Germany, Spain, Sweden) were quick to react against the Commission's idea of an *entitlement* to postponement for certain persons who were not removable on practical grounds.³²⁷ Opposition to creating any kind of entitlement to postponement existed at all echelons of the Council,³²⁸ and this Council consensus held on tight till the bitter end of the negotiations with the European Parliament. But according to Michael Speiser,³²⁹ the political adviser for the EPP group in the LIBE Committee, many of the Right-wing parliamentarians in the LIBE Committee shared the Council's position against making postponement mandatory for persons who could not be removed on practical grounds. The principal concern of the Council delegations and Parliamentarians who were against mandatory postponement was that it might encourage non-cooperative behaviour on the part of migrants concerned. The fear was that mandatory postponement would act as an incentive for irregular migrants to create practical obstacles to their removal.

326 Commission, "Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals" COM(2005) 391 final, art 8 (2). Practical obstacles that the Commission had in mind included the inability to travel due to a TCN's physical state or mental capacity, as well as a lack of transport capacity. It steered clear of practical obstacles which could be induced through non-cooperation.

327 Council Document 11051/06, 6.

328 Council Document 8357/07, 2.

329 Interview with Michael Speiser, European Parliament, EPP Group Adviser (phone interview, 22 April 2013).

Despite the fact that EU legislation did not have an impact on the gap between practical non-removability and postponement-of-removal, this is not the end of the story for individuals concerned. There is also the question of the formalisation of postponed-removal, and the even more dramatic issue of exhausted-removal.

First of all, the Return Directive requires that States formalise postponement-of-removal in the event that they decide to postpone the removal of illegally resident TCNs who cannot be removed on practical grounds.³³⁰ The status of postponed-removal in the Return Directive is the same, whether it's the result of mandatory postponement in cases of non-refoulement, or whether it's the result of optional postponement in cases of practical obstacles to removal. If this is properly implemented, it will significantly improve the position of those concerned in many EU States, since formal toleration mechanisms have generally been lacking for persons who cannot be removed on practical grounds.³³¹ Therefore, the Return Directive formalised the position of persons who cannot be removed on practical grounds and whose removal is postponed.

Secondly, article 15 of the Return Directive set a maximum limit on the period during which Member States can administratively detain illegal residents pending return. It set a lower limit of six months for all illegal residents, and a higher limit of eighteen months for illegal residents who were not removable as a result of non-cooperation on the part of third countries or on the part of illegal residents themselves. This limit of eighteen months led to an increase in the number of persons who ended up in a position of exhausted-removal. Before the adoption of the Return Directive, some Member States had no maximum period of administrative

³³⁰ Directive 2008/115/EC of the European Parliament and of the Council on the return of illegally staying third-country nationals [2008] OJ L 348/98, art 14 (2).

³³¹ European Union Agency for Fundamental Rights, *Fundamental Rights of Migrants in an Irregular Situation in the European Union: Comparative Report* (Publications Office of the European Union, 2011), 33.

detention set out in national law. Other Member States had maximum periods that varied from a few weeks to a several years. In Member States that did have maximum periods set out under national law, there was often no limit to the number of times illegal residents could be placed in administrative detention, the national maximum period only being applicable for any one placement in administrative detention. By setting an absolute maximum period of administrative detention (at eighteen months), the Return Directive put an increasing number of irregular migrants in a position where they could no longer be held or placed in administrative detention – a position of definitively exhausted-removal.³³²

The large number of persons who cannot be removed on practical grounds has been the *raison d'être* of the proliferation of administrative detention centres across the EU.³³³ When Member States are not able to ensure the immediate removal of apprehended illegal residents, it is common for them to resort to the practice of administratively detaining them until removal becomes possible.

The Return Directive set standards on practices of administrative detention in the EU, including standards on the duration of detention. The eighteen-month maximum-period rule was the result of hard bargaining between the European Parliament and the Council, since many Council delegations were opposed to an upper limit being placed on administrative detention.³³⁴ This was an intensely politicised issue, and it was an issue that led to the

332 For more information on the maximum periods of detention in EU Member States before and after the Return Directive was transposed, see: Commission, "Communication to the Council and the European Parliament on EU Return Policy" COM (2014) 199 final, 16-18.

333 See Migreurop's map of detention centres in Europe in 2011 < http://www.migreurop.org/IMG/jpg/map_18-1_L_Europe_des_camps_2011_v9_FR.jpg > last accessed 4 September 2014.

334 See discussions on this hard bargaining in Diego Acosta, "The Good, the Bad and the Ugly in EU Migration Law : Is the European Parliament Becoming Bad and Ugly ? (The Adoption of Directive 2008/15 : The Returns Directive)" (2009) 11 European Journal of Migration and Law 19-39 ; Anneliese Baldaccini, "The Return and Removal of Irregular Migrants under EU Law : An Analysis of the Returns Directive" (2009) 11 European Journal of Migration and Law, 13-15.

Return Directive being branded the *Directive of Shame* by numerous NGOs. This eighteen-month limit tightened the nexus between practical obstacles to removal and exhaustion-of-removal. The nexus was tightened because an absolute limit was placed on the overall period during which an illegal resident can be placed in administrative detention. Furthermore, provisions of the Directive require, under certain circumstances, the release of illegal residents before expiry of the maximum period of administrative detention, which thus more generally tightens the nexus between practical obstacles to removal and the position of released-detainee. This may be the case if there is no reasonable prospect of removal.³³⁵ And the CJEU recently interpreted the Directive as requiring the release of illegal residents under certain circumstances in which their procedural right to be heard has been breached at some stage in the return process.³³⁶

According to Michael Speiser,³³⁷ many Council delegations and European Parliamentarians were well aware of the exhausted-removal issue during negotiations. Many feared that the possibility of removal becoming exhausted would provide an incentive for detainees to hamper their removal. Early on, the Cypriot, Estonian, Irish, Maltese and Dutch Council Working Party delegations “expressed their concerns over the negative results, which an upper ceiling of temporary custody could have (i.e. the third-country national trying to obstruct the return until the term expires)”.³³⁸ Near the end of the long-drawn out negotiations with the European Parliament, the Danish ministerial delegation stated that “an absolute upper limit” would be “counterproductive where the returnee tries to prolong the return procedure beyond that maximum time in order to be released”.³³⁹ While many Council

335 Directive 2008/115/EC of the European Parliament and of the Council on the return of illegally staying third-country nationals [2008] OJ L 348/98, art 15 (4).

336 Case C-383/13/PPU *M.G., N.R. v Staatssecretaris van Veiligheid en Justitie* (2013).

337 Interview with Michael Speiser, European Parliament, EPP Group Adviser (phone interview, 22 April 2013).

338 Council Document 13934/06, 3.

339 Council Document 6965/08, 27.

delegations were completely hostile to the setting of a maximum period, Centre-Right wing groups in the European Parliament's LIBE Committee wished to make the maximum-period “as long as possible”³⁴⁰ in the Return Directive; but the rationale behind making it as long as possible was exactly the same – the fear of the non-cooperative irregular migrant.

In countries which previously had no maximum period of detention under national law, the Directive made release from detention mandatory after eighteen months, which was duly enforced by the Court of Justice in the 2009 *Kadzoev* case.³⁴¹ Mr. Kadzoev, who claimed to be from the Chechen Republic of Ichkeria, was arrested in Bulgaria near the border with Turkey. He was subjected to approximately three years of administrative detention. Bulgarian authorities were not able to remove him for a range of reasons during his period in administrative detention. First of all, there were periods during which he was legally protected from removal, because he applied for asylum three times, and because he made appeals against his return which were suspensive. However, there were many more periods during which he was not legally protected from removal, but during which his removal was not possible due to practical obstacles. These practical obstacles were essentially due to difficulties in ascertaining his true identity and to the refusal of Russian authorities to recognise his Russian nationality. The Court of Justice's ruling resulted in his release from administrative detention, because the imperative maximum eighteen month period had expired. To this day, some Member States still try to administratively detain certain illegal residents beyond the maximum eighteen-month period, in violation of EU law. Their targets tend to be those who are allegedly not cooperative.³⁴²

340 Interview with Michael Speiser, EPP Adviser, European Parliament (phone interview, 22 April 2013)

341 Case C-357/09 PPU *Kadzoev* (2009) ECR I-11189.

342 See European Parliament, “Prolongation of Detention by Member States of Illegally Staying Third-Country Nationals Beyond the 18-month Time Limit in Violation of the Return Directive (debate)” (2014/2701(RSP),

In countries with national maximum periods of less than eighteen months, the Directive's eighteen month rule also placed a limit on the number of times an illegal resident could be subjected to repeated cycles of arrest-detention-release. In France, the maximum period was thirty-two days when the Directive was adopted, and is now forty-five days. But there has never been any explicit limit in French law on the number of placements in administrative detention. The NGO Cimade³⁴³ has reported numerous cases of TCNs who have been placed in administrative detention fifteen times, one individual having been placed twenty-seven times. The NGO suggests that such cycles of repeated arrest-detention-release are in large part responsible for those concerned developing serious mental disorders. A narrative example provided by the NGO is that of a non-EU national who was born in Serbia before the breakup of Yugoslavia. He was not recognised by Serbia as one of its nationals, and was placed eight times in administrative detention, each time for the maximum period of thirty-two days, every placement resulting in his release.

While the Return Directive does not prevent repeated placements in detention, it makes cumulative periods of administrative detention unlawful after eighteen months. According to Michael Speiser, some European parliamentarians in the LIBE Committee were aware of the repeated placements that existed in France, and believed this to be a hypocritical and inefficient system. France's apparent low maximum period of administrative detention was not seen as some kind of human-rights benchmark due to the fictitious nature of its maximum period. But according to Fabian Lutz, the

Debates, Thursday, 17 April 2014, Strasbourg)
< <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20140417+ITEM-006+DOC+XML+V0//EN&language=EN> > accessed 4 September 2014.

343 All the information provided in this paragraph can be found in Assfam, Forum Réfugiés, France terre d'asile, la Cimade, l'Ordre de Malte, "Centres et Locaux de Rétention Administrative: Rapport 2010" (13 décembre 2011). 60.

evidence of such multiple placements was “anecdotic”³⁴⁴ at best, and little awareness was raised due to the very large number of issues that were covered in the negotiations.

Nonetheless, the cumulative eighteen month limit, which is placed on both single and multiple placements in administrative detention, has increased the number of persons ending up in positions of definitively exhausted-removal, like Mr Kadzoev. To that extent, the nexus between practical non-removability and toleration has been tightened, even if only with respect to the indirect toleration position of exhausted-removal. This indirect toleration at least provides theoretical protection from subjection to further administrative detention, which has the effect of severely limiting the probability of removal. However, the Directive contains no explicit standards relating to the status and rights of persons who are released into a limbo position of exhausted-removal.

1.3. The formalisation and enhancement of rights attached to the status of postponed-removal

In certain EU countries, most notably Germany, toleration evolved decades ago from a pure policy gap into a very deliberate and formalised measure for handling various non-removable persons.³⁴⁵ One German commentator has written that “(t)he toleration has, albeit somewhat against the spirit of the law, transformed into a residence title of its own”;³⁴⁶ many persons can come to possess a toleration certificate for several years in Germany.

344 Interview with Fabian Lutz, European Commission, DG Home Affairs (phone interview, 7 January 2014).

345 Ramboll and Eurasylum, “Study on the Situation of Third-Country Nationals pending Return/Removal in the EU Member States and the Schengen Associated Countries: Final Report” (Study commissioned by the European Commission, 11 March 2013), 87.

346 Jürgen Bast, “The Legal Position of Migrants- Germany Report” (Paper shared online on 24 April 2006, later published as a book chapter in E. Riedel and R. Wolfrum (eds.), *Recent Trends in German and European Constitutional Law. German Reports Presented to the XVIIth International Congress on Comparative Law, Utrecht, 16 to 22 July 2006* (Springer Berlin/Heidelberg/New York, 2006)), 18.

Other countries have not experienced the same level of formalisation of toleration. For some of them, it might be due to a lower historical magnitude of non-removable persons. For others, it might also (or alternatively) be due to not having the same principled policy position that Germany has long had in favour of deportation, and against regularisation. Germany's principled position means that over the years, apprehended irregular migrants have generally been removed or non-removable, but in any case seldom regularised. Formalisation of non-removability was a manner of managing non-removable persons without regularising them en masse. But effective deportation became an EU-wide priority in the 2000s. As a result of this prioritisation of deportation under EU law and policy, the ensemble of EU States have attempted to increase removal rates of irregular migrants in recent years, and that increase has revealed large numbers of non-removable persons. The lack of enthusiasm for mass regularisation, as symbolised in the 2008 European Pact on Immigration and Asylum, has highlighted the EU-wide phenomenon of non-removability.

A formalisation process (of postponement-of-removal) has taken place across the EU as a result of hard and soft EU law. The issue of formalisation goes hand in hand with the issue of rights attached to postponed-removal status(es). This formalisation process has mainly been expert-driven in the technical bodies of EU institutions, but the dynamics behind this process once again reveal the deliberate and political nature of the issue.

The European Commission's Home Affairs DG has played a key role in this process, namely in the Return Directive negotiations. It has also been proactive in trying to enhance the rights attached to postponed-removal statuses. The Commission's expressed aim in seeking to formalise postponement-of-removal and attach a decent

set of rights has been to “avoid a legal vacuum for the persons concerned”.³⁴⁷ Its attempts were quite successful with regard to formalisation, but a lot less with regard to attached rights. However, a huge void remains with regard to persons in a position of exhausted-removal. The formalisation of postponed-removal, the issue of rights attached to postponed-removal statuses, and the big void of exhausted-removal, have been subject to pretty deep inter and intra-institutional disagreements, even if these disagreements have essentially taken place within the technical bodies of EU institutions.

According to Fabian Lutz, the drafter of the Return Directive proposal, the Council “did not want to grant rights to irregular residents” who have no right to stay, while the “Parliament was much (more) concerned about migrants' rights and said there should be a basic level of minimum rights for everybody, notwithstanding his or her status”.³⁴⁸ But disagreements existed with each institution. Within the Council, most delegations, including the German one, “were vehemently opposed to regulating postponement”³⁴⁹ at EU level, believing that such regulations were most effective and adequate at national level. However, a minority, namely the Finnish delegation, were in favour of EU-level governance. And even within the European Parliament's LIBE Committee, a pretty clear Left/Right divide existed, with the Left wing groups generally favouring a high degree of formalisation as well as a large set of rights, and the Right wing groups generally favouring a minimal degree of formalisation as well as a thin set of rights.³⁵⁰ The Right-leaning groups' position on formalisation and rights was partly guided by a

347 Commission, “Staff Working Document: Detailed comments on Proposal for a European Parliament and Council Directive on Common Standards on Procedures in Member States for Returning Illegally Staying Third Country Nationals”, SEC (2005) 1175, 8.

348 Interview with Fabian Lutz, European Commission, DG Home Affairs (phone interview, 7 January 2014).

349 Ibid.

350 Interview with Michael Speiser, EPP Adviser, European Parliament (phone interview, 16 April and 22 April 2013).

subsidiarity rationale following which Member States were better equipped than the European Union to handle postponed-returnees. But according to Michael Speiser, the key ideological divide between the Left and Right positions in the LIBE Committee was linked to the Left's porous border ideology and the Right's restrictive border ideology.³⁵¹ The Right was more concerned with the integrity of selective legal migration systems and with not encouraging postponed-returnees to remain, since these postponed-returnees generally fell short of complying with these selective systems. The Left was more concerned with the welfare of those concerned since it attributed less importance to the overall integrity of selective legal migration systems.

I turn now to a detailed examination of the EU's role in the formalisation of postponement-of-removal as well as on the rights attached to postponed-removal positions. I also discuss the void in EU law with regard to the position of exhausted-removal (although a recent CJEU case has started to fill this void). I end with a note on what is happening beyond the world of hard EU law on the issue of formalisation and rights.

Formalisation of postponement-of-removal in hard EU law

For most persons stuck in a position of postponed-removal, EU legislation has played a very young part in formalising their status, and ensuring that certain basic rights are guaranteed. The 2008 Return Directive stipulates that Member States shall postpone removal in cases where there are legal obstacles to removal, and that they may postpone removal in cases where there are practical or technical obstacles to removal. But more than providing an obligation to postpone removal for some, and an option to postpone removal for others, article 14 (2) of the Directive imposes an obligation either way for States to issue them with written

³⁵¹ Ibid.

certification of their status:

“Member States shall provide the persons ... with a written confirmation in accordance with national legislation... that the return decision will temporarily not be enforced”.³⁵²

The European Commission was the propelling force behind the formalisation of postponement-of-removal. The Commission's 2005 Return Directive proposal contained the following provision:

“Member States shall provide ... written confirmation that the enforcement of the return decision has been postponed for a specified period or that the removal order will temporarily not be executed”.³⁵³

The Commission's initial proposal therefore initially proposed a greater degree of formalisation, as it suggested that the period of postponement be included in the written certificate of postponement. The proposal also contained no mention of a *national legislation* proviso. The majority of the European Parliament's LIBE Committee was fully onboard with the extent to which the Commission wished to formalise postponement-of-removal, and even suggested an amendment to the effect that confirmation of postponement would have to be “in a language they understand or are reasonably presumed to understand”.³⁵⁴ However, there were internal disagreements within the LIBE Committee.

Certain Council Working Party delegations were a lot less

³⁵² Directive 2008/115/EC of the European Parliament and of the Council on the return of illegally staying third-country nationals [2008] OJ L 348/98.

³⁵³ Commission, “Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals” COM(2005) 391 final, art 13 (2).

³⁵⁴ European Parliament LIBE Committee, “Report on a Proposal for a Council directive on the Short-term Residence Permit issued to Victims of Actions to Facilitate Illegal Immigration or Trafficking in Human Beings who Cooperate with the Competent Authorities” A5-0397/2002, 20.

comfortable with the idea of making written certification of postponement mandatory, as well as with the content of written certification proposed by the Commission. The dialogue in the Council Working Party meetings indicates that many Council delegations were aware of the fact that postponement-of-removal could last a very long time. In response to a question by the Swedish Working Party delegation in 2006, a Commission representative stated that the formalisation provision was “intended to cover only third-country nationals who are likely to remain for a certain, not so limited, time at the territory of a Member State”.³⁵⁵ In Council Working Party meetings that took place in September 2006, Irish, French, Danish, Belgian, and Norwegian delegations expressed concerns over the “consequences of giving a document to an illegal third-country national”³⁵⁶ (namely in terms of rights), especially one which would specify the period during which removal was postponed. The German delegation even proposed the addition of a proviso that would allow written certification of postponement to be in accordance with national legislation.

The Finnish Council Presidency made compromise suggestions which the Council Working Party examined in late 2006.³⁵⁷ These suggestions maintained the European Commission's proposal to make formalisation mandatory, but they dropped the requirement that the duration of postponement be specified. When discussions later took place in the SCIFA, the Council's position became more restrictive. The German Presidency's policy guidelines, in the first half of 2007,³⁵⁸ proposed that formalisation of postponement be purely optional and not mandatory.³⁵⁹ The subsequent Portuguese and Slovenian Presidency policy guidelines shifted back in favour

355 Council Document 13025/06, 7.

356 Ibid, 7.

357 Council Document 15165/1/06 REV 1, 3.

358 Council Document 15165/1/06 REV 1, 3.

359 Council Document 8357/07, 3.

of mandatory formalisation, no doubt due to the influence of the European Parliament's LIBE Committee. Despite the shift back in favour of mandatory formalisation, certain delegations (namely the Dutch delegation) in the SCIFA as well as Ministerial meetings continued to contest mandatory formalisation,³⁶⁰ but they lost in the end. However, the mandatory formalisation of postponement-of-removal was not as strong as what the Commission had initially proposed.

Following the Commission's proposal for mandatory and adequate formalisation of postponement-of-removal, there was thus political disagreement over whether formalisation should be mandatory at all, and over the degree of formalisation and harmonisation of this formalisation.

Rights of postponed-returnees in hard law

For persons who find themselves in the Return Directive's postponed-removal position, article 14 (1) of the Directive also specifies a number of rights that are to be ensured by host States, namely weakly phrased rights to emergency healthcare, education for minors, and family unity.

The European Commission was once again a propelling force behind the introduction of a catalogue of rights in EU legislation for postponed-returnees, even if that catalogue turned out to be pretty gaunt. The European Commission's 2005 Return Directive proposal initially proposed a much stronger set of rights, similar to the rights guaranteed to asylum seekers in the European Union's 2003 Asylum Reception Conditions Directive.³⁶¹ The proposal to grant rights similar to those possessed by asylum seekers was met

³⁶⁰ Council Document 15566/07, 38 ; Council Document 7919/08, 22.

³⁶¹ Commission, "Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals" COM(2005) 391 final, art 13 (1).

with immense hostility in the Council Working Party on Migration. At its September 2006 meetings, an overwhelming majority of delegations criticised this proposal, expressing the view that it was “inappropriate to assimilate en bloc the status of the illegally staying third-country nationals to that of the asylum seekers”³⁶² (even if this fear reflects an inaccurate understanding of the proposal and the issue). The Czech delegation's primary concern was with regard to postponed-returnees who are not removable for a long period of time.

Some hard bargaining appears to have taken place. Despite the overall hostility to the Commission's proposal, delegations were far from united in deciding what to do about the rights of postponed-returnees. A first set of delegations wished to delete any mention of rights in the operative text of the Directive, a second wished to include a small catalogue of rights, and a third but smaller set wished to include an enhanced catalogue of rights comparable to those contained in the Asylum Reception Conditions Directive. This disagreement made its way up to Ministerial meetings, with a small number of States strongly pushing for complete deletion of any provision on rights of postponed-returnees in the operative text of the Directive.

The delegation which really stands out in this negotiation is the Finnish delegation, due to its minority position in favour of enhancing the rights suggested by the Commission. The Finnish Presidency of the Council proposed a compromise text in the late months of 2006; this compromise text proposed an enhanced set of rights for postponed-returnees beyond what the European Commission had proposed. The Finnish compromise text proposed to include “standards of living capable of ensuring their *basic subsistence*”,³⁶³ which the Commission had not. The Commission's

362 Council Document 13025/06, 7.

363 Council Document 15165/1/06, 3.

proposal only contained a mention of “basic subsistence” rights in the preamble, whereas the Finnish Presidency proposed moving subsistence rights to the operative part of the Directive. With regard to healthcare, the Finnish compromise suggested an obligation to provide: “Necessary health care, including at least emergency care and essential treatment of illness is provided”,³⁶⁴ which mimics the right to healthcare guaranteed to asylum seekers under the Asylum Reception Directive. The Finnish delegation, at all levels of the Council hierarchy, maintained a firm position throughout the years of negotiation in favour of these high standards, especially the standard relating to basic subsistence.

The Finnish Presidency's positive approach to enhancing the rights of postponed-returnees was not followed by subsequent Council Presidencies. The German and Portuguese Presidencies in 2007 opted for a more restrictive approach, oscillating between deleting all mention of human rights, moving human rights provisions to the Directive's preamble, and including a weak set of human rights like the one that made its way into the final version of the Directive.³⁶⁵ This weak set of rights corresponds to what EU Member States were already bound to under their international human rights obligations (emergency healthcare, education for minors, and family unity). The Portuguese Presidency briefly flirted with the idea of returning to the Finnish Presidency's enhanced-rights approach, but a number of delegations in the SCIFA shot it down right away, namely the French and Dutch delegations.³⁶⁶ Disagreements persisted within the various echelons of the Council on whether to have a watered down rights catalogue in the operative text of the Directive, or to move any mention of rights to the preamble. But the European Parliament's LIBE Committee had a strong position in favour of setting out human

364 Ibid.

365 For example, see Council Document 8357/07, 5.

366 Council Document 14321/07, 25-26 ; Council Document 15566/07, 37-38.

rights guarantees in the text of the Directive, and this position no doubt played an important part in getting the Council to agree to including at least a minimal set of rights.

Despite the fact that the European Parliament LIBE Committee's final report displayed its agreement with the Commission's proposal to align the rights of postponed-returnees with those of asylum seekers, Michael Speiser has stated that there were internal disagreements within the LIBE Committee on this alignment with asylum seekers' rights.³⁶⁷ Some Centre-right wing parliamentarians in the LIBE Committee believed that postponed-returnees as a whole had a weaker right to remain than asylum seekers, and that they therefore shouldn't be entitled to the same rights as them. There must have been some difficult bargaining within and between the European Parliament and Council, as the compromise reached was to include a rights catalogue in the operative text of the Directive, but a weak catalogue. One can thus see that the issue of the rights of postponed-returnees was a politically divisive one.

The initial void regarding the status and rights of persons in a position of exhausted-removal

While the Return Directive explicitly grants minimal standards of treatment to TCNs whose removal is postponed, it contains no such standards with regard to TCNs who are released from administrative detention following expiry of the maximum period of detention (or before expiry of this maximum period). In the absence of regularisation or some form of toleration certificate, exhausted-returnees are left in a complete legal limbo upon release. To this extent, EU legislation (in the form of the Return Directive) has done nothing to explicitly improve the status and rights of exhausted-returnees. This is perfectly illustrated in the

³⁶⁷ Interview with Michael Speiser, European Parliament, EPP Group Adviser (phone interview, 22 April 2013).

2009 *Kadzoev* case,³⁶⁸ in which the European Court of Justice's ruling led to the release from administrative detention of an illegally staying TCN who had been detained for more than three years. Elitsa Mincheva has commented that upon release, Mr Kadzoev “had no valid identity documents, was not a refugee, could not be granted a residence permit under the Bulgarian Law for Foreigners and did not dispose of any financial means”.³⁶⁹ She further explained that without legal status and “identity documents, he could not do anything legal”, and that “if he were stopped on the street for an identity check, he would not be able to show any documents and could be arrested again”.³⁷⁰ Neither Bulgarian law nor the Union's Return Directive contained any explicit provisions that might compel Bulgarian authorities to improve his exhausted-removal position.

Despite a long-lasting apparent void in EU law regarding the status and rights of exhausted-returnees, a ruling delivered in 2014 by the CJEU has begun to remedy this unsatisfactory situation through creative interpretations of the Return Directive. In the *Mahdi* ruling,³⁷¹ the CJEU interpreted the detention provisions of the Return Directive, in light of other elements in the core text and preamble of the Directive, as requiring Member States to provide written confirmation of their position to illegal residents who are released from detention due to the absence of a reasonable prospect of removal.³⁷² The precise contours of this obligation were not yet very well fleshed out. It is namely unclear at this stage whether or not all released-detainees are entitled to written confirmation of release, and in particular those released following expiry of the maximum period of detention. Logic would dictate

368 Case C-357/09 PPU *Kadzoev* (2009) ECR I-11189.

369 Elitsa Mincheva, “Case Report on Kadzoev, 30 November 2009” (2010) 12 *European Journal of Migration and Law*, 369.

370 *Ibid.*

371 Case C-146/14 PPU *Bashir Mohamed Ali Mahdi v Director of the Directorate for Migration at the Ministry of the Interior* (2014).

372 *Ibid.*, paras 52 and 89.

that this entitlement should extend to illegal residents released due to expiry of the maximum period. These specifics will no doubt be dealt with in subsequent rulings at EU and national levels.

As explained above in section 1.2. on the management of the nexus between practical obstacles and toleration, many institutional actors involved in the negotiation of the Return Directive were well aware of the exhausted-returnee issue (although some weren't according to Fabian Lutz³⁷³). They were aware of this issue within the context of negotiating the maximum period of administrative detention under the Directive. Parliamentarians and Council delegations who were against the setting of a maximum period, and/or in favour of a very high maximum period, wished to limit the phenomenon of exhausted-return. According to Michael Speiser,³⁷⁴ there was some talk about the issue of their status and rights, but not much thought went into it for two reasons. There was first a desire on the part of many parliamentarians and Council delegations to not encourage administrative detainees to delay their removal in the hope of being released and obtaining a status with adequate rights. But secondly and most importantly, the issue of exhausted-returnees was deemed to fall outside the scope of the Directive. For the Directive governs the return procedures of illegally staying third country nationals. Irregular migrants in a position of exhausted-removal were deemed to no longer be within a return procedure as their procedure reached a point of exhaustion. This is not an entirely convincing argument. The Directive does not govern the status and rights of persons released from detention before expiry of the maximum period of detention (released-detainees *stricto sensu*). And the return measures issued against these released-detainees *stricto sensu* remain enforceable, which means that they technically fall within the scope of the Directive. And even with regard to exhausted-returnees, in

373 Interview with Fabian Lutz, European Commission, DG Home Affairs (phone interview, 7 January 2014).

374 Interview with Michael Speiser, European Parliament, EPP Group Adviser (phone interview, 22 April 2013).

Member States like France with maximum periods that are lower than eighteen months, persons released from detention due to expiry of the maximum period under national law are actually temporarily exhausted-returnees, not definitively exhausted-returnees. Temporarily exhausted-returnees in States like France can be subjected to repeated placements in detention, and the return measures issued against them remain enforceable following each release from detention. My counter-arguments to the notion that the status of exhausted-returnees falls outside the scope of the Directive are further bolstered by the CJEU's recent Mahdi ruling on the status of certain released-detainees.³⁷⁵

The cherry on the cake for exhausted-returnees is that they have become the privileged targets of imprisonment in recent years. This is partly the result of the CJEU's 2011 *El Dridi* and *Achughbabian* rulings.³⁷⁶ Those rulings interpreted the Return Directive as prohibiting national legislation which provides the possibility of imposing a prison sentence on the sole ground of illegal stay. The CJEU specified that such prison sentences may only be imposed on illegal residents who have been subjected to every stage of a return procedure (including administrative detention), who have been released from administrative detention following expiry of the maximum period of detention, and who have no justified ground of non-return. Prime targets here are exhausted-returnees who are deemed responsible for their non-removability. The general decriminalising move deserves some praise. But in States that criminalise illegal stay through prison sentences, exhausted-returnees were already privileged targets of imprisonment, and the Court's rulings essentially shined a brighter spotlight on them by prohibiting imprisonment of all other illegal residents. In certain EU States such as France and the UK, numerous exhausted-

375 Case C-146/14 PPU *Bashir Mohamed Ali Mahdi v Director of the Directorate for Migration at the Ministry of the Interior* (2014).

376 Case C-61/11 PPU *El Dridi, alias Karim Soufi* (2011) ECR I-03015; Case C-329/11 *Alexandre Achughbabian v Préfet du Val-de-Marne* (2011).

returnees are bounced about between prison, administrative detention, and freedom-in-limbo.³⁷⁷ I provide further examination of these CJEU rulings and their implications in chapter 4.

A report by the NGO Cimade³⁷⁸ contains a narrative of a non-removable TCN in France who experienced entrapment between administrative detention, prison and freedom-in-limbo. Within the space of about a year, he was administratively detained five times and imprisoned twice for obstructing the removal process. This narrative is further detailed in section 7.3. of chapter 4. Another insightful story was documented in a 2009 newspaper article.³⁷⁹ This is the story of Karim, a man in his 30s, of Moroccan origin, who arrived clandestinely in France in his teenage years. His adult life has been one of time spent between prison, administrative detention, and living in squats when released. He lives in a permanent state of trauma and has tried to commit suicide on numerous occasions.

Beyond hard law

Although the Return Directive imposes a degree of formalisation of postponement-of-removal, this formalisation is restricted to written certification that removal will temporarily not be enforced. It does not impose an obligation for this written certification to specify the duration or renewability of postponement. Further, the Directive leaves room for national discretion with regard to the form of written certification. The Directive does not require anything near as sophisticated or formal as Germany's toleration certificate. Furthermore, the rights attached to the Return

³⁷⁷ For some preliminary insight on the situation in France, see : Assfam, Forum Réfugiés, France terre d'asile, la Cimade, l'Ordre de Malte, "Centres et Locaux de Rétention Administrative: Rapport 2010" (13 décembre 2011), 13 and 60-62. For insight on the UK context, see the facts of the following case: *R (on the application of Feridon Rostami) v SSHD* [2009] EWHC 2094 (QB).

³⁷⁸ La Cimade, "Centres et Locaux de Rétention Administrative: Rapport 2007" (23 avril 2008), 9.

³⁷⁹ Nicolas César, "Karim, entre Prison et Centre de Détention, la Vie Brisée d'un Sans-Papier" *Aqui* (21 mai 2009) < <http://www.aqui.fr/societes/karim-entre-prison-et-centre-de-detention-la-vie-brisee-d-un-sans-papier,2060.html> > accessed 5 December 2012.

Directive's postponed-removal status are very gaunt, as they reflect the bare minimum imposed under international human rights standards; they do not ensure the human dignity of postponed-returnees. Hard EU law contains no right to labour market access nor to basic subsistence for postponed-returnees. There have been talks in the European Commission of proposing specific legislation on the status of postponed-removal, but proposals will not be made in the near-future (see the final paragraphs of section 1.1. of this chapter). Fabian Lutz and Mandred Hähnel from the Commission's Home Affairs DG have stated that the priority in the near-future is to ensure the proper implementation of the current Return Directive's provisions, as well as the pursuit of information gathering and practice-exchanges.³⁸⁰ However, the idea of proposing an EU harmonised Duldung status was not ruled out as a possibility in the more distant future.

But in the mean time, things have been happening outside the world of hard law. Member States have been exchanging *best practices* with regard to postponed-removal statuses and rights. They have done so within the framework of the Council Working Party on Migration,³⁸¹ as well as within the European Migration Network. National policies have evolved as a result of these exchanges-of-practices. For example, in 2010, the Greek national contact point of the European Migration Network sought information on how other Member States governed the status of non-removable persons; the Greek contact point was particularly interested in the existence of toleration certificates, a certificate that Greece was not yet very familiar with.³⁸² Within a year, an immigration law was adopted in Greece which inter alia created a

380 Interview with Manfred Hähnel, European Commission, DG Home Affairs (phone interview, 26 November 2013); Interview with Fabian Lutz, European Commission, DG Home Affairs (phone interview, 7 January 2014).

381 Council Document 8980/11.

382 European Migration Network, "Ad-hoc Query on Practices followed concerning Third Country Nationals whose Compulsory Removal is Impossible" (Compilation produced on 14 April 2010).

toleration certificate. What is interesting is that beyond the minimum catalogue of rights attached by the Return Directive to postponement-of-removal, States have chosen different sets of rights to add to that minimum catalogue. While certain States, namely Germany, attach basic social benefits but not labour market access, Greece opted for the opposite which was to grant labour market access but no social benefits.³⁸³

Furthermore, the Commission's 2014 Communication on return policy reveals that there has “been a consistent movement towards a wider implementation of alternatives to detention across the Member States”,³⁸⁴ the main alternatives being a requirement to regularly report to authorities as well as “an order to take up accommodation in premises specified by the authorities”.³⁸⁵ This movement has been encouraged by ongoing exchanges of practices between Member States,³⁸⁶ and the Return Directive expressly foresees the possibility for Member States to impose such requirements on TCNs in the event that they choose to prolong voluntary return or postpone removal.³⁸⁷ Recent case law of the European Court of Human Rights also encourages these alternatives in specific circumstances.³⁸⁸ While the freedom to move of TCNs concerned is limited, these alternatives to detention therefore concretely translate into some form or other of legal toleration that is formally certified. The development of alternatives to detention goes hand in hand with the development

383 European Union Agency for Fundamental Rights, *Fundamental Rights of Migrants in an Irregular Situation in the European Union: Comparative Report* (Publications Office of the European Union, 2011), 47.

384 Commission, “Communication to the Council and the European Parliament on EU Return Policy” COM (2014) 199 final, 15.

385 Ibid.

386 Ibid, 8. See also the ongoing study on alternatives to detention by the European Migration Network: European Migration Network, “The Use of Detention and Alternatives to Detention in the Context of Immigration Policies: Common Template of EMN Focused Study 2014” (9 April 2014) < http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn_study_detention_alternatives_to_detention_common_template_final_09april2014.pdf > last accessed 4 September 2014.

387 Directive 2008/115/EC of the European Parliament and of the Council on the return of illegally staying third-country nationals [2008] OJ L 348/98, art 7 (3).

388 *Popov v France* App nos 39472/07 and 39474/07 (ECtHR 19 January 2012), paras 130-148.

of formal toleration statuses, a development that is foreseen in hard law and encouraged through soft law.

This shows that beyond the world of hard law, soft EU law is contributing to the formalisation of postponed-removal statuses as well as to the rights of postponed-returnees. But this formalisation and rights-enhancement process is taking place in a very fragmented manner across the EU, with Member States making very different choices on specificities.

2. The EU's role with regard to the toleration of certain asylum seekers and victims of trafficking

The European Union has played an important role in creating an EU-wide policy-based obstacle to removal for cooperating victims of trafficking. The Commission and Council agreed on using toleration as a transitional immigration status for victims of trafficking who consider cooperating with Member States against their traffickers. The European Union has also played an indirectly important role in the distinction made by numerous Member States between legally present and tolerated asylum applicants. I examine the Union's role, first with regard to victims of trafficking (2.1.), and then with regard to asylum applicants (2.2.).

The possibilities of tolerating victims of trafficking and asylum applicants is one which was barely a topic of discussion and dispute between and within EU institutions. By contrast with the issue of postponed-removal and exhausted-removal, these possibilities were treated like technical issues that were quickly sorted out in the lower technical echelons of the Council, despite the politically significant ramifications and rationales behind allowing Member States to use toleration against these categories of TCNs. As I will show, political disagreements existed with regard to the specifics

linked to toleration, but not the tool of toleration itself nor its formalisation.

2.1. EU governance of the nexus between policy obstacles to removal and limbo spaces of toleration: the special case of victims of trafficking

Most EU Member States' national legal systems contain mechanisms for the discretionary regularisation and/or toleration of illegally staying TCNs on policy-based grounds, namely humanitarian grounds. The EU has not really had an impact on such discretionary mechanisms, if only to acknowledge their existence in the Return Directive. But the Directive did allow Member States to preserve a power – this was a power to merely suspend the return measure upon discretionary regularisation, as opposed to cancelling it. It is thus possible to be in a hybrid position of legal stay which is tainted by the continuing validity of a return measure that is merely suspended.

Article 6 (4) of the 2008 Return Directive provides that “Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory”, and that in the event that “a return decision has already been issued, it shall be withdrawn or suspended for the duration of validity of the residence permit or other authorisation offering a right to stay.”³⁸⁹ The Directive allows States to regularise status on a wide range of policy grounds, while at the same time requiring only simultaneous suspension of removal, withdrawal of return measures being optional. The Commission's 2005 Return Directive Proposal had precisely sought to ensure that regularisation would

³⁸⁹ Directive 2008/115/EC of the European Parliament and of the Council on the return of illegally staying third-country nationals [2008] OJ L 348/98.

always be accompanied by the withdrawal of return measures,³⁹⁰ and the various European Parliament Committees agreed with the Commission on this point. However, too many delegations in the Council Working Party on Migration wished to preserve the power to merely suspend removal following regularisation of status on policy grounds, and they thus expressed a clear wish to preserve the power to maintain those concerned in a grey area.³⁹¹ The hybrid grey areas were thus a clearly deliberate choice following inter-institutional disagreements.

But beyond acknowledging the existence of national policy-based obstacles to removal in the Return Directive, the EU did actually create one of its own a few years earlier. Building on practices in certain Member States, the Union in 2004 created an EU-wide policy-based obstacle to removal for victims of human trafficking who cooperate with authorities against their traffickers. This was created through the adoption of the CVHT Directive by the Council of the EU.³⁹² When State authorities identify victims of trafficking, the 2004 CVHT Directive requires that these authorities inform victims of the possibility of obtaining a residence permit in exchange for their cooperation against their traffickers. After having been identified and informed of this possibility, they are to be granted a reflection period, in order to escape and recover from their traffickers, as well as to make an informed decision, since cooperation is very dangerous. It is only following that period, and under specific conditions, that they may obtain a temporary residence permit.

They are not granted a residence permit during the reflection period. Article 6 (2) of the CVHT Directive merely guarantees

390 Commission “Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals” COM (2005) 0391 final, art 6 (5), 15.

391 Council Document 11051/06, 2.

392 Council Directive 2004/81/EC on the residence permit for cooperative victims of human trafficking (2004) OJ L 261/19.

protection from enforcement of removal during this period. Victims are thus legally tolerated during the reflection period, but there is no mention of formalising protection from removal, which means that States need only informally protect them from removal. The Directive does not set out a time limit for the reflection period, Member States having discretion over the minimum and maximum periods of reflection. This reflection period ranges from thirty days in some Member States to several months in others. During this reflection period of toleration, victims are guaranteed basic subsistence rights and emergency healthcare under article 7, which is slightly better than the rights attached by the Return Directive to the general status of postponed-removal, but much thinner than what the CVHT Directive guarantees victims who are granted a residence permit (labour market access, education rights ..).

There was inter-institutional consensus behind the idea of tolerating victims during the reflection period. Institutional disagreements surrounded the duration of the reflection period, and the rights to be granted during that period. The European Commission's 2002 CVHT Directive proposal explicitly suggested that victims of trafficking be “tolerated”³⁹³ during the reflection period; the Council accepted. The issue of tolerating victims during the reflection period was barely discussed and not at all politicised. Discussions on this issue only took place in the Working Party meetings, and not in the higher echelons of the Council.

It would appear to have been perceived as a technically complex issue. The Spanish and Greek delegations in the Council Working Party seemed to have trouble grasping what legal status one has when removal is prohibited but a residence permit is not

393 Commission, “Proposal for a Council Directive on the Short-Term Residence Permit issued to Victims of Actions to Facilitate Illegal Immigration or Trafficking in Human Beings who Cooperate with the Competent Authorities” COM(2002) 71 final, 12 and 20.

granted.³⁹⁴ They had trouble understanding the concept of legal toleration. While *tacit* toleration of illegal immigration was widespread in both countries, this idea of *legal* toleration in the form of a postponed-removal status was not so, by contrast with Germany that already had a long history of the *Duldung* toleration status. Countries that understood the concept of legal toleration deliberately accepted the idea of tolerating victims during the reflection period. For countries like Greece and Spain that did not, they at the very least agreed to not regularising the status of victims during the reflection period. The institutional consensus behind the toleration of victims during the reflection period was to deter abuse of this cooperation procedure for the sole purpose of obtaining a residence permit; this is further analysed in part 3 of this thesis.

Inter-institutional and intra-institutional disagreements surrounded the duration of the reflection period, and the rights to be granted during that period. There were huge disagreements in the Council Working Party over the issue of duration,³⁹⁵ as the European Commission proposed the setting of a maximum period of thirty days, which is a standard that the European Parliament strongly agreed with. Some Council delegations thought that thirty days was much too long; others thought it was not long enough. Desires varied from setting a deadline of seven days to a deadline of several months, while the German delegation proposed setting only a minimum period and not a maximum period. The compromise reached was to leave the duration of the reflection period entirely within the discretionary hands of each Member State.

Moving on to the issue of rights, in its 2002 CVHT Directive Proposal, the Commission proposed that during the reflection

394 Council Document 11698/03, 7.

395 Ibid.

period, victims should “have access to suitable accommodation, emergency medical and psychological treatment and medical care that cannot be postponed, and to the necessary support in the form of social welfare and means of subsistence if they do not have sufficient resources”.³⁹⁶ The German delegation was particularly vociferous in its opposition to the Commission's proposed welfare and healthcare provisions. Supported by Greece and France, the German delegation made a general statement that “creating rights for the person concerned by means of this provision should be avoided”.³⁹⁷ The Commission's proposed provision was watered down to a guarantee of emergency medical treatment and to standards of living capable of ensuring subsistence.³⁹⁸ So it can be seen that while the tool of toleration was not debated, disagreements existed over the duration of the reflection period (and incidentally of legal toleration) as well as the rights granted during the reflection period (and incidentally during the position of tolerated victims of trafficking).

The governance of the position of tolerated victim of trafficking was truly treated like a technical issue, with inter-institutional and intra-institutional consensus. There was not much deliberation and political disagreements are difficult to trace. On the other hand, the duration of toleration, as well as rights attached to toleration, were indirectly politicised and the result of greater deliberation, via hard negotiations relating to the duration and rights during the reflection period. Toleration was simply viewed as a temporary and transitional status during the reflection period, and not a long-term one. Regularisation via effective cooperation is the palpable end goal, the alternative being deportation. Toleration is simply a ritualistic stage in this process.

396 Commission, “Proposal for a Council Directive on the Short-Term Residence Permit issued to Victims of Actions to Facilitate Illegal Immigration or Trafficking in Human Beings who Cooperate with the Competent Authorities” COM(2002) 71 final, art 9.

397 Council Document 11698/03, 8.

398 Council Directive 2004/81/EC on the residence permit for cooperative victims of human trafficking (2004) OJ L 261/19, art 7.

2.2. EU governance of the nexus between asylum procedures and limbo spaces of toleration

A legal obstacle to removal exists when illegally staying TCNs apply for asylum. The application for asylum takes them out of illegality but does not necessarily take them into the realm of legality. Asylum seekers are entitled to lodge an application for asylum in an EU Member State as long as they fall under the territorial jurisdiction of that EU State. That entitlement is accompanied by a procedural right to remain for the duration of the asylum procedure (at least at first instance). It corresponds to a procedural legal obstacle to removal. To be more precise, it corresponds to a form of *procedural* protection from refoulement. Their claim to needing protection from refoulement on the ground of international protection has not yet been substantiated, but they are procedurally protected from refoulement while their claim is under examination.

Asylum applicants are not the only category of persons who may be procedurally protected from refoulement. Outside the framework of the asylum procedure, when illegally staying TCNs are subjected to return measures, and seek review of those measures on the ground of the prohibition of refoulement under the European Convention on Human Rights, Courts may suspend removal pending the outcome of the review procedure. This is notably the case when such reviews lead to the lodging of applications before the European Court of Human Rights. When the European Court of Human Rights suspends removal pending the outcome of a case, this corresponds to procedural prohibition of refoulement. Such procedural forms of protection from refoulement have grown over time, within and outside the asylum system context. The CJEU is starting to play a role in the growth

and delineations of these procedural forms of protection.³⁹⁹

My focus here is on asylum applicants, as asylum applicants are considered to be a group *à part* from other TCNs, especially illegally staying TCNs whose removal is postponed. I am interested in the nexus between the procedural protection from refoulement of asylum seekers, on the one hand, and regularisation/toleration, on the other.

The European Union has not really had a direct impact on the practices of tolerating certain asylum applicants. EU asylum legislation simply imposes no obligation on Member States to regularise the status of asylum applicants. So States that tolerated asylum applicants before the intervention of EU law often continued to do so. States that didn't were able to introduce toleration as a tool for managing certain asylum seekers. The documentation provision in EU asylum legislation which imposes no obligation on Member States to regularise the status of asylum seekers, and by implication allows Member States to merely tolerate them, was not politicised and was barely the subject of any deliberation at all. Toleration was not discussed as a tool; there really was no discussion about such a tool in inter and intra-institutional negotiations. But the absence of an obligation to regularise left Member States with manoeuvring space to use this tool.

Asylum seekers, from the moment they apply for asylum, are allowed to remain pending examination of their application, at least during first instance asylum procedures. However, they are not entitled to regularisation of status. Article 6 of the Asylum Reception Conditions Directive,⁴⁰⁰ adopted by the Council in 2003,

399 Case C-562/13 *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v Moussa Abdida* (Request for a preliminary ruling from the Cour du travail de Bruxelles (Belgium) lodged on 31 October 2013).

400 Directive 2003/9/EC on Asylum Reception Conditions (2003) OJ L 31/18.

obliges Member States to issue non-detained asylum seekers with a document which must certify their asylum applicant position or their right to remain. But unlike the Commission's 2001 Directive Proposal,⁴⁰¹ the adopted Directive does not require the document to grant them *legal* stay. Detained asylum seekers, as well as asylum seekers at the border, are not entitled to any document at all under the Asylum Reception Conditions Directive, and most Member States provide them with no document.⁴⁰² Further, Recital 9 of the Return Directive's preamble states that asylum applicants “should not be regarded as staying illegally on the territory of that Member State”⁴⁰³ by the host State. It does not provide that they *shall* not be regarded as illegally present, which confirms the potential ambiguity of their immigration status under EU law. This ambiguity has not changed with the newly adopted Recast Asylum Reception Conditions Directive,⁴⁰⁴ which shall definitively replace the current Directive by 21 July 2015.

The European Commission's 2001 Asylum Reception Conditions Directive proposal thus attempted to create an obligation for Member States to legalise the status of asylum seekers who were not detained. This attempt went virtually unnoticed and was not at all politicised. The reference to *legality* was briefly scrutinised by the Dutch delegation in the first Council Asylum Working Party meeting on the Directive,⁴⁰⁵ and was already deleted by the time the second Working Party meeting took place.⁴⁰⁶

Why does the possibility of tolerated asylum seekers, as opposed to

401 Commission, “Proposal for a Council Directive laying down Minimum Standards on the Reception of Applicants for Asylum in Member States” COM (2001) 181 final, 32.

402 Commission, “Report from the Commission to the Council and to the European Parliament on the application of Directive 2003/9/EC of 27 January 2003 laying down Minimum Standards for the Reception of Asylum Seekers” COM (2007) 745 final, 4.

403 Directive 2008/115/EC of the European Parliament and of the Council on the return of illegally staying third-country nationals [2008] OJ L 348/98.

404 Directive 2013/33/EU of the European Parliament and of the Council on asylum reception conditions (recast) (2013) OJ L 180/96.

405 Council Document 11320/01, 13.

406 Council Document 11541/01, 12.

regularising them, matter? It matters because there are reception standards that the Asylum Reception Conditions Directive guarantees all asylum seekers, but these standards are so minimalistic and discretionary that some Member States grant different reception conditions to asylum seekers in accordance with their status as either legally present or tolerated asylum applicant. Not all Member States make such a distinction between legally present and tolerated asylum applicants, but some do.⁴⁰⁷ And those who do often make this distinction matter in terms of rights. I turn now to a deeper explanation of the toleration devil that lies in the details of the EU's asylum framework.

The Asylum Reception Conditions Directive contains very open-textured and flexible standards on the reception entitlements of asylum seekers (namely labour market access, housing, social assistance, healthcare and education). These standards provide EU Member States with sufficient flexibility to offer different reception standards to different categories of asylum applicants. In both EU and national law, asylum applicants are already segregated into various procedural groups. There are first instance, appellant, and subsequent applicants. Amongst first instance applicants, applicants might be placed in a regular procedure, accelerated procedure, or Dublin procedure. They might also be administratively detained, free to move within the Member States' territory, or have restricted freedom of movement within a delineated area. This procedural segregation is governed in EU law by the 2005 Asylum Procedures Directive⁴⁰⁸ (which will be repealed and fully replaced by a Recast Asylum Procedures

407 France is not the only country to make this distinction. There is for example Austria which, at least back in 2006, made such a distinction : Claudia Priewasser, "National report for Austria", in *Odysseus Network*, "Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 laying down Minimum Standards for the Reception of Asylum Seekers in the EU Member States" (Study commissioned by the European Commission, October 2006), 19, 23, 33, and 51-52.

408 Council Directive 2005/85/EC on Asylum Procedures (2005) OJ L 326/13.

Directive on 21 July 2015⁴⁰⁹) and the Dublin III Regulation.⁴¹⁰

During an admissibility stage, asylum seekers might for example be subjected to a potentially long *Dublin* procedure if their host States believe another EU Member State to be responsible for examining their applications, in accordance with the Dublin III Regulation⁴¹¹. The European Union's Dublin system allows a given asylum applicant to apply for asylum in only one Member State, and the Dublin Regulation sets out criteria to determine which Member State is responsible for the examination of that asylum applicant's application. The most commonly applied criterion is the first EU country of illegal entry. If a host State believes that another Member State is responsible for an asylum applicant's application, a potentially long Dublin procedure can be triggered in order to transfer that asylum applicant to that other Member State.

If an asylum seeker makes it to the first instance examination stage (past the Dublin phase), his/her application might then be examined by the host state's competent authorities under a *regular/normal* procedure or a derogatory procedure which often takes the form of an *accelerated procedure*; accelerated procedures tend to offer fewer procedural safeguards than the regular procedure. The Asylum Procedures Directive⁴¹² allows EU Member States to subject asylum seekers to accelerated procedures if their applications are deemed to fall under a number of grounds of unfounded or inadmissible claims for asylum (e.g. an application is deemed to be unfounded if it is made in order to delay or frustrate a return procedure). A common trait shared by Dublin and accelerated procedures is that they target *presumptively abusive*

409 Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast) (2013) OJ L 180/60.

410 Regulation (EU) 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person (recast) OJ L 180/31.

411 Ibid.

412 Council Directive 2005/85/EC on Asylum Procedures (2005) OJ L 326/13.

asylum applicants, as opposed to presumptively genuine asylum applicants whose applications are channeled through regular procedures.

Possibilities of regularising or tolerating the stay of asylum applicants under the Asylum Reception Directive are instrumentalised by certain EU Member States, who regularise certain categories of asylum applicants and merely tolerate others. This segregation is sometimes used to grant lower standards of treatment to tolerated asylum applicants. This is for example the case in France, where accelerated and Dublin applicants are merely tolerated, whereas the status of regular/normal applicants is legalised.⁴¹³ By contrast with regular/normal asylum applicants, Dublin and accelerated applicants are not eligible for housing in accommodation centres for asylum seekers, nor are they entitled to universal healthcare insurance. And this is possible as a result of the flexible standards of reception under the Asylum Reception Conditions Directive. The CJEU delivered a ruling in 2012 (the *Cimade and Gisti* case)⁴¹⁴ which interpreted the Asylum Reception Conditions Directive as being applicable to all asylum applicants, irrespective of procedural stage or type. Some EU Member States were interpreting the Directive as not being applicable to certain groups of asylum applicants, namely Dublin applicants; they were using this interpretation as a basis for granting lower reception conditions to these groups. The Court put an end to that interpretation of the Directive. Although this was a positive step, the problem is that Member States still have the power to discriminate between diverse groups of asylum applicants since the Directive provides them with a lot of leeway to do so. I illustrate this by looking at the implementation of the Directive's provisions on healthcare and material reception conditions in

413 Code de l'entrée et du séjour des étrangers et du droit d'asile (Code on the Entry and Residence of Foreigners and on the Right of Asylum, consolidated version on 24 January 2014), arts L741(4) and L742(6) < <http://www.legifrance.gouv.fr> > accessed 31 January 2014.

414 Case C-179/11 *Cimade, GISTI v Ministre de l'Intérieur* (2012).

France.

Material reception conditions are defined in article 2 (j) of the 2003 Asylum Reception Directive as “reception conditions that include housing, food and clothing, provided in kind, or as financial allowances or in vouchers, and a daily expenses allowance”.⁴¹⁵ Article 14 (5) of the Directive states that these conditions “may be provided in *kind, or in the form of financial allowances or vouchers* or in a combination of these provisions”.⁴¹⁶ In France, legally resident asylum applicants are entitled to accommodation in a reception centre for asylum seekers, or alternatively to a temporary tide-over allowance. While tolerated asylum applicants are entitled to the temporary tide-over allowance,⁴¹⁷ they are not entitled to accommodation in a reception centre for asylum seekers. This is in perfect conformity with article 14 (5) of the Directive, as it allows Member States to provide material reception conditions in kind or in the form of financial allowances.

Article 15 of the Asylum Reception Directive states that “Member States shall ensure that asylum applicants receive the necessary health care which shall include, at least, emergency care and essential treatment of illness”, and that they “shall provide necessary medical or other assistance to applicants who have special needs”.⁴¹⁸ In France, legally resident and tolerated asylum applicants are entitled to different healthcare and material reception conditions, in full compliance with the cited provisions of the Directive. Legally staying asylum applicants are entitled to comprehensive healthcare (CMU), whereas tolerated applicants are only entitled to a parallel system of healthcare which is called

415 Council Directive 2003/9/EC on Asylum Reception Conditions (2003) OJ L 31/18.

416 Ibid.

417 For numerous tolerated asylum applicants, namely accelerated and Dublin applicants, their eligibility for the tide-over allowance was only fully recognised after many years of national and European judicial battles : Conseil d'État, 1^{ère} et 6^{ème} sous-sections réunies, 16 juin 2008, n° 300636, recueil Lebon.; Case C-179/11 *Cimade, GISTI v Ministre de l'Intérieur* (2012).

418 Council Directive 2003/9/EC on Asylum Reception Conditions (2003) OJ L 31/18.

“State Medical Aid” (Aide Médicale d'État).

While the technical issue of asylum seekers' immigration status was treated as a non-issue by EU institutional actors, it is far from a non-issue at national level where States have the freedom to grant a variety of immigration statuses. What was politicised at EU level was the set of rights and benefits to be granted to all asylum seekers. Hot inter-institutional and intra-institutional disagreements surrounded the issue of material reception conditions, detention, healthcare access and labour market access of all asylum seekers. But disagreements were completely disconnected from the issue of regularisation/toleration. They in the end led to the adoption of very flexible standards of reception. The combination of these flexible standards with the possibility of tolerating asylum seekers has allowed EU States like France to strongly discriminate between various procedural groups of asylum seekers. In France, there are strong ideological disagreements surrounding the procedural segregation of asylum seekers and the discriminatory treatment that ensues. Certain national NGOs have been fighting for all asylum applicants to be granted a temporary residence permit, irrespective of the procedural category they find themselves in.⁴¹⁹ Thanks to a questionnaire sent by the Cimade to French presidential candidates in 2012,⁴²⁰ one can get a glimpse of the national ideological divide surrounding this issue today in France. Amongst political candidates that responded to the Cimade's questionnaire, those farthest to the Left favoured a single regular procedure for all asylum seekers, with an immediate right to a residence permit and to labour market access. The Centrist and Right wing candidates favoured the status quo of procedural segregation and limited rights for non-regular applicants, which they saw as a necessary

419 For example, see La Cimade, “40 propositions pour une politique d'hospitalité” (janvier 2012), 23 < http://hospitalite.lacimade.org/files/brochure_propositions.pdf > last accessed 4 September 2014.

420 See questions and answers at: < <http://www.lacimade.org/nouvelles/3824-R-ponses-des-candidats-sur-les-propositions-de-La-Cimade> > accessed 5 August 2012.

part of tackling abuses of the asylum procedure. The moderate-Left avoided taking a clear position. At least nationally, the governance of regularised/tolerated asylum applicants is very deliberate and political.

Today, in 2014 (and since the Summer of 2012), France has a moderate Left wing President and government, following a long stretch of Right-wing rule in the country. And in July of 2014, a bill was introduced in the French Parliament,⁴²¹ which proposes to mostly scrap the distinction between regularised and tolerated asylum applicants,⁴²² and to grant the exact same material reception conditions to all. Certain asylum applicants would continue to face the prospect of administrative detention and compulsory-residence-orders on a limited number of grounds, with the ensuing lack of documentation (and thus toleration). But asylum applicants who are free to move, no matter what the stage and type of procedure (regular, accelerated, Dublin) would have their status regularised, and would only lose the benefit of that regularisation under specific circumstances. While the bill has a number of flaws that have been pointed out by NGOs,⁴²³ it would mostly put an end to the distinction between legally present and tolerated asylum applicants, along with the substantive discrimination attached to this distinction. The loophole in EU asylum legislation would thus cease to be instrumentalised. The relevant provisions of the bill might not survive the legislative process – only time will tell.

Conclusion

In this chapter, I have provided insight into how the EU has governed non-removable TCNs and toleration limbos, including the

421 Ministère de l'Intérieur, "Projet de Loi relatif à la Réforme de l'Asile" (n° 2182, déposé le 23 juillet 2014).

422 Ibid, art 14.

423 Coordination Française pour le Droit d'Asile, "Droit d'Asile: Suspicion et Contrôle sont les Maîtres Mots de la Réforme" (Communiqué de presse, 23 juillet 2014).

complex dynamics behind this governance. The EU has had an impact on the nexus between various forms of non-removability, on the one hand, and regularisation/toleration, on the other. It has taken some non-removable TCNs out of legal toleration limbos, and left others in both legal and indirect toleration limbos. The EU has also contributed to the imperfect formalisation and rights-enhancement of certain toleration limbos, namely with regard to the overarching position of postponed-removal. This has happened against a background of inter and intra-institutional disagreements. I have shown that the issue of toleration, which was initially treated by many EU institutional actors as an accidental phenomenon and technical issue, has gradually developed into an increasingly deliberate phenomenon and politicised issue. This gradual development is not complete and is still in flux.

While most of the governance of toleration issues has taken place in lower expert-led echelons of the Council and Parliament, I have shown that with regard to postponed-returnees and exhausted-returnees, important political disagreements existed within these lower echelons, and sometimes trickled upwards to the more political echelons. I namely showed this with a case-study on the governance of the nexus between the prohibition of refoulement, on the one hand, and regularisation, on the other. I also showed this with regard to TCNs who cannot be removed for practical reasons. The latter group is collectively shunned by numerous institutional actors due to the spectre of the non-cooperative migrant. By contrast, with regard to tolerated asylum applicants and tolerated trafficking victims, governance of toleration was a very low-profile issue that was quickly settled within lower technical echelons, through consensus and very little political disagreement. But while the use of toleration itself as a tool against asylum applicants and trafficking victims was rarely in dispute, political disagreements did exist with regard to issues of duration

and/or the rights of these tolerated categories.

Talking about toleration as a *tool* of governance (alongside tools of regularisation and administrative detention) evokes other fields of legal and policy literature that use this same managerial word. There is namely the literature on public-private partnerships in international governance that comes to mind, where “(p)roponents of PPPs have long argued that such arrangements increase both the problem-solving capacity and the legitimacy of international governance structures”,⁴²⁴ by contrast with purely state-based or market-based solutions. Claims that PPPs are problem-solving and legitimacy-enhancing tools is subject to critical analysis and scrutiny. The parallels with the tool of toleration are striking. Toleration is a tool of governance that lies between illegal and legal stay, which many State actors favour over regularisation and administrative detention in the governance of non-removable TCNs. The hybrid nature of toleration (legal/illegal) and of PPPs (public/private), and the third option that they provide to a seemingly two-way choice of governance, suggests that my analysis of toleration may be of relevance for the literature on PPPs, as well as for other areas that relate to hybrid tools of governance. My examination in this chapter of the evolution of toleration, as well as of the evolutionary traits of the governance of toleration (accidental to deliberate, technical to political), can also provide some analogical insight in debates that take place in these other areas, especially since the technical/political dichotomy is a frequent guest in discussions about efficiency and legitimacy. Furthermore, I examine the functions assigned by certain institutional actors to the hybrid tool of toleration in chapter 5, a functional analysis which may also have some bearing beyond the scope of toleration studies.

424 Tanja A. Börzel and Thomas Risse, “Public-Private Partnerships: Effective and Legitimate Tools of International Governance” (Prepared for Edgar Grande/Louis W. Pauly (eds.), *Complex Sovereignty: On the Reconstitution of Political Authority in the 21st Century*, 15 October 2002), 13.

I have examined the disagreements between institutions (Commission, Parliament, Council), but also the internal disagreements within the Council and within the Parliament, which at times were linked to Left/Right ideological disputes, and at others to the desirability of EU harmonisation in this area. Disputes behind this governance are very much linked to the issue of TCN membership in the EU, with institutional actors disagreeing over the membership strength, claims, and benefits that should accrue to diverse groups of non-removable TCNs. I turn now to examine the relevance of membership notions in this governance, and namely on how this governance has impacted on TCN membership patterns in the EU.

Chapter 4. The transformative impact of the governance of limbo spaces of toleration on membership in the EU

TCNs who are legally protected from removal, but excluded from legal residence, have an imperfect form of membership in the EU polity and national polity of their host Member State. They have some form of claim to remain. The same may be said, to a lesser degree, with regard to TCNs who are indirectly protected from removal. Even in opposition to the competent immigration authorities of their host countries, elements of the host country's legal system fall on their side and allow them to remain. This idea was expressed by Emanuela Paoletti in a working paper on non-deportable migrants in the UK:

“At the level of ideas of membership, the inability to deport results from, and culminates in, the creation of a variety of statuses of non-citizens who are nevertheless still considered to be more or less worthy of membership from the perspectives of the state and local groups”⁴²⁵

She further talked about “shifting degrees of membership”.⁴²⁶ Building on this idea, I argue that the impact of EU law on the development of limbo spaces has had a transformative effect on membership patterns in the EU. Transformations have occurred – and are still occurring – with regard to membership statuses and membership rights.

425 Emanuela Paoletti, “Deportation, Non-Deportability and Ideas of Membership” (July 2010) Refugee Studies Centre Working Paper 65, 18. One could view this tension between rules on deportation and residence, that culminate in awkward forms of membership, as related to the wider liberal paradox noted by James Hollifield: James F Hollifield, “Migration, Trade, and the Nation-State: The Myth of Globalization” (1998) 3 *UCLA journal of international law and foreign affairs*, 623; James F Hollifield, Valerie F Hunt, and Daniel J Tichenor, “The Liberal Paradox: Immigrants, Markets and Rights in the United States” (2008) 61 *SMU Law Review* 61-98. This liberal paradox is about the tension between the openness required by rules of the market and the apparent closure required by rules of the liberal polity and citizenship. A number of authors, namely Linda Bosniak, have similarly highlighted a tension between the universalist and exclusionary “impulses” of citizenship, but also critiqued the idea that an exclusionary impulse is inevitable: Linda Bosniak, “Varieties of citizenship” (April 2007) 75 *Fordham Law Review* 2449-2453.

426 Ibid.

New immigration statuses have been created and are in the process of being created. Some of the rights hitherto reserved for legal residents are no longer so. I would argue that these developments have happened (and are still happening) in order to preserve the sanctity of the legal/illegal immigration divide (section 1). More interestingly, a hierarchy of desirability is clearly emerging within the overall group of non-removable TCNs (section 2). A hierarchy of desirability is emerging at EU level by reference to the type of obstacle to removal (legal, policy, practical) as well as to the role played by the migrant in that obstacle. The least desirable category that is emerging is that made up of irregular migrants who cannot be removed for practical reasons, and whose practical non-removability is deemed to be the result of non-cooperation on their part. The emerging hierarchy of desirability has serious implications in terms of access to regularisation/formal toleration (section 3), subjection to administrative detention (section 4), and potential subjection to imprisonment (section 5). In several Member States, the least desirable category (of irregular migrants who cannot be removed for practical reasons due to non-cooperation) has become increasingly targeted for entrapment between freedom-in-limbo, administrative detention, and imprisonment (section 6). This increasing entrapment has been reinforced through developments in EU immigration law. I provide a detailed illustration of this entrapment in France (section 7).

1. The development of new immigration statuses to preserve the sanctity of the legal/illegal immigration divide

The shifts in membership status and membership rights were clearly illustrated in chapter 3. Over time, EU management of non-removable TCNs has led to some TCN categories being taken out of legal toleration limbos while leaving others in, or even putting new

categories in. It has further contributed to the formalisation of these toleration limbos, as well as to a dynamic of rights-enhancement for persons in these positions.

Processes of formalisation and rights-enhancement have led to the crystallisation of new membership categories that disturb a well established order. This is an order that clearly separates TCNs from EU citizens, as well as illegally resident TCNs from legally resident TCNs. There are many hierarchical dividing lines within the overall group of TCNs. Especially amongst legal residents, there are huge disparities in terms of legal status and rights between long-term residents and temporary residents, between highly skilled workers and low skilled workers, between family members of EU citizens and family members of legally present TCNs, between refugees and beneficiaries of subsidiary protection, between international protection beneficiaries and legally present asylum applicants etc. There is a veritable hierarchy of legal resident statuses, too complicated to delve into here.

But the strongest dividing line in the TCN membership hierarchy is that between legal and illegal residents. The EU has an objective of granting fair treatment rights to legal residents, which requires a minimal set of socio-economic rights in order to facilitate their integration. The EU also has an objective of fighting and deterring illegal immigration, namely by increasing deportation rates, but also by socio-economically excluding illegal residents so as to encourage departure. The rights guaranteed to illegal residents under EU law are essentially limited to emergency healthcare and education for minors.⁴²⁷ Legal residents are not a homogenous

⁴²⁷ For a very interesting conceptualisation of the relationship between immigration statuses and rights, see Linda Bosniak, "Membership, Equality, and the Difference that Alienage Makes" (December 1994) 69 *New York University Law Review* 1047. Building on work by Michael Walzer, she conceptualises this relationship in terms of a convergence or divergence between a membership sphere of power, on the one hand, and an equal personhood sphere, on the other. I could not incorporate this conceptualisation within the framework of this chapter, but this conceptualisation provides a great theoretical standpoint from which to look at what I expose in the following sections.

group of TCNs, but they are generally guaranteed some measure of socio-economic rights, namely labour market access, social assistance, comprehensive healthcare, and educational access rights.⁴²⁸

The line separating this legal/illegal immigration dichotomy is a border in itself, which separates the desirable from the undesirable at any given point or place in time. In contemporary EU immigration and asylum law, the line of desirability is mainly drawn by reference to socio-economic, security, and cultural criteria. It all depends on the precise migration category that a TCN falls under: forced, economic, family, visiting etc. These criteria definitely apply to economic, family, and visiting migrants. Forced migrants are not supposed to be subjected to socio-economic and cultural criteria. But in order to enter the EU legally, even forced migrants have to undergo such selection or find a way to enter illegally. And once in the EU, forced migrants who seek legal residency on international protection or humanitarian grounds are filtered in accordance with criteria that separate those who are most deserving of protection from those who fall short of having a problem deemed worthy of protection. Even for those who might be deserving of protection, security-related criteria are relevant in their potential exclusion from protection.

The legal/illegal line of desirability is one which the EU and its Member States seek to preserve and enforce so that the power to select desirable TCNs is not undermined. In order to endow the legal/illegal immigration dichotomy with importance, the effective return of illegal residents has become a growing priority of the EU. Furthermore, the rights of illegal residents are maintained at a low

428 Although legal residents possess a larger number of rights than non-legal residents, this does not mean that their stay in EU Member States is devoid of problems. They can, for example, also experience high degrees of social and labour market exclusion: Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: An open and Secure Europe: Making it Happen" COM (2014) 154 final, 4.

level, and marred with obstacles, so as to discourage continued illegal stay. Enforcing the return of illegal residents, as well as preventing the arrival of illegal entrants or potential overstayers, serves to ensure that there are mostly desirable TCNs in the EU.

But the legal/illegal immigration dichotomy is threatened by a growing number of non-removable TCNs who cannot easily be placed on either side of the dichotomy. The existence of spaces between illegal and legal stay disturbs the order that labels TCNs as authorised/legal or unauthorised/illegal residents, and which attaches radically different consequences in accordance with placement on one side or other of the divide.

What truly disturbs the dichotomy is the potentially long periods during which TCNs can find themselves in toleration positions. If toleration were merely a quick transit stop between illegal residence and effective return, or between illegal residence and legal residence, then there probably wouldn't be much a perceived problem or threat. But large numbers of TCNs, who are legally tolerated for long periods of time, constitute a threat to a dichotomy that seeks to preserve the purity of legal residence and the benefits reserved for legal residents. The same goes for large numbers of TCNs who are not legally tolerated but indirectly tolerated.

I derive this idea of a threat to the legal/illegal dichotomy from the liminality literature. The literature shines an illuminating spotlight on what has been happening with the development of limbo spaces of toleration. In a context of ethnic nationalism and belonging, Jennifer Riggan explains that :

“Liminal peoples may be tolerated by (and in many cases are necessary to) societies, but are always viewed as a threat to the

ideal of a bounded social structure and its requisite categories ... rules and procedures are necessary to contain those who are in in-between stages so that they do not pollute others, and to provide for a clear re-entry into a new stage”⁴²⁹

Transposing this idea within the context of EU law relating to non-removable TCNs, legally tolerated TCNs might be viewed as a threat to the clear-cut allocation of membership status and rights operated by the legal/illegal immigration dichotomy. Large groups of TCNs who are not removable for long periods of time, especially those who are legally protected from removal during these periods, do pose a number of potential problems for the legal/illegal immigration dichotomy.

This is why *rules and procedures* have emerged, following the growth of non-removability phenomena, to contain large numbers of non-removable TCNs within toleration spaces, so that they do not pollute the *purity* of legal residence and the system designed to select desirable legal residents. These rules have sometimes formalised the position of certain tolerated TCNs, and clarified the rights attached to formal toleration positions. But they also keep tolerated TCNs at a clear and controllable distance from legal residence. Toleration spaces thus both threaten and protect legal residence. Their threatening and protective aspects are not happy bedfellows but represent two stages of a process of governance. First, the threat to the legal/illegal immigration dichotomy happens when an illegal resident, who has not passed the desirability test in order to access legal residence, turns out to not be removable. His/her continued presence disturbs and disrupts the order that revolves around the legal/illegal distinction. That illegal resident has not complied with conditions of entry and residence, and yet is still present due to obstacles to removal which

429 Jennifer Riggan, “In Between Nations : Ethiopian-born Eritrians, Liminality, and War” (May 2011) 34 *Political and Legal Anthropology Review*, 135.

transform unauthorised stay into tolerated stay. It is at a subsequent stage that the non-removable person can be contained in toleration spaces so as to protect the domain of legal residence.

Non-removable persons can then be subjected to rules and procedures for access to legal residence, which serve to filter through the most desirable and deserving candidates. Toleration spaces can be seen as performing a function of ritual cleansing “to contain those who are in”⁴³⁰ between illegal and legal stay, and “to provide for a clear re-entry”⁴³¹ into either legal or illegal stay. These spaces are thus forms of probationary membership. Sébastien Chauvin and Blanca Garcés-Mascareñas have expressed such an idea with regard to illegal residency. They have suggested that illegal residency is not a form of non-citizenship or of pure membership exclusion, but a form of subordinated inclusion which corresponds to sub-citizenship. Their contention is that illegal residency is a “handicap within a continuum of probationary citizenship”,⁴³² during which, despite the ongoing risk of deportation, illegal residents “accumulate official and semiofficial proofs of presence”⁴³³ with a view to future regularisation on grounds of “good citizenship”.⁴³⁴ If illegal residency is seen as the starting point within a continuum of probationary membership, toleration spaces would be a half-way point in such a continuum. This is how some political actors explicitly perceive toleration statuses.⁴³⁵ It is important to note that the path towards legal residency is however not a linear path.

New membership statuses are settling at the increasingly fragilised

430 Jennifer Riggan, “In Between Nations : Ethiopian-born Eritrians, Liminality, and War” (May 2011) 34 *Political and Legal Anthropology Review*, 135.

431 Ibid.

432 Sébastien Chauvin and Blanca Garcés-Mascareñas, “Beyond Informal Citizenship: The New Moral Economy of Migrant Illegality” (2012) 6 *International Political Sociology*, 243.

433 Ibid.

434 Ibid.

435 For example, in the French context, see Thierry Tuot, “La Grande Nation: Pour une Société Inclusive” (Rapport au Premier ministre sur la refondation des politiques d'intégration, 1 février 2013), 38-39.

border between illegal and legal stay, via the development and crystallisation of formal postponed-removal statuses across the EU, of tolerated trafficking victim statuses (during reflection periods of cooperation procedures), and of tolerated asylum applicant statuses in certain EU Member States such as France. They are becoming a well-established feature of the immigration law landscape. And as in-between immigration statuses, hard and soft EU law are contributing to attaching a set of rights to these statuses that are greater than those possessed by illegal residents *stricto sensu*, but not equal to those possessed by legal residents *stricto sensu*. Legally tolerated TCNs are thus in the process of being granted a membership status and membership benefits that lie in-between illegal and legal stay on the membership pyramid.

2. New hierarchies of desirability

A hierarchy of (un)desirability is clearly emerging amongst the overall group of TCNs who are deemed by the EU and its Member States to be non-removable irregular migrants. A hierarchy of desirability is emerging at EU level by reference to the type of obstacle to removal (legal, policy, practical) as well as to the role played by the migrant in that obstacle. I will refer to those concerned as legal, policy, and practical non-removables. Talking about *non-removables* may sound dehumanising and managerial. That is absolutely not my intent. This simplified way of describing each category serves to avoid what would otherwise be a chapter cluttered in repetitive and overly wordy descriptions of each specific category of non-removable TCN. It allows me to present complex ideas in a fluid manner.

All non-removable irregular migrants fall short of being fully desirable legal residents, as they in one way or other fall short of complying with criteria of desirability or protection-worthiness.

However, they are not all placed in the same big box of undesirability. The CJEU, in the *El Dridi* and *Achughbabian* rulings,⁴³⁶ addressed the issue of irregular migrants who were not removable despite all attempts to coercively remove them. It addressed this issue within the context of determining which irregular migrants could be subjected to imprisonment, and which could not. In the *El Dridi* case, a distinction was made between non-removable irregular migrants who had valid grounds to remain, on the one hand, and those with no valid grounds, on the other. In *Achughbabian*, the Court expressed this same distinction in a slightly different manner, by talking about those with a justified ground for-return as opposed to those with no such justified ground.

The Court did not adequately elaborate on what valid grounds to remain (or a justified ground for non-return) corresponded to. However, it clearly expressed the notion that some groups of non-removable irregular migrants had a stronger right to remain than others. Although the Court did not provide much guidance, there has been academic speculation on the matter. Rosa Raffaelli⁴³⁷ has suggested that persons have a justified ground for non-return if they cannot be removed for legal reasons or if they cannot be removed for practical reasons beyond their control. And those without a justified ground for non-return would appear to be made up of persons who cannot be removed for practical reasons that lie within their control. Thus, legal non-removables and cooperative practical non-removables have a justified ground for non-return, while non-cooperative practical non-removables do not.

Building on this notion of valid or invalid grounds to remain, it is even more helpful to think in terms of the *degree of validity* of such

436 Case C-61/11 PPU *El Dridi*, alias *Karim Soufi* (2011) ECR I-03015; Case C-329/11 *Alexandre Achughbabian v Préfet du Val-de-Marne* (2011).

437 Rosa Raffaelli, "Case note: the Achughbabian Case Impact of the Return Directive on National Criminal Legislation" (2012) *Diritto Penale Contemporaneo*, 11.

grounds. Under EU management of non-removable persons, there is an emerging hierarchy amongst these persons in terms of the degree of validity of their ground to remain in the EU. I would argue that in decreasing hierarchical order, legal non-removables lie at the top, followed by policy non-removables, cooperative practical non-removables, and lastly by non-cooperative practical non-removables. This emerging hierarchy that I suggest largely reflects the findings and prophecies of the Ramboll/Eurasylum study on TCNs pending return.⁴³⁸ And key actors in the Return Directive negotiations, whom I interviewed, indicated that a loose version of such a hierarchy did lie at the back of the minds of many institutional actors involved in the negotiations.⁴³⁹ A cooperative practical non-removable is a person who is not deemed to be responsible for the practical obstacle to removal, whereas a non-cooperative practical non-removable is deemed to be responsible for the obstacle. The cooperative/non-cooperative dichotomy is not a pure fiction, but things are not always so clear-cut in reality. Research carried out by a group of European NGOs suggests that “(w)hile some migrants do obstruct the identification process ... others are wrongly accused when they are actively seeking to cooperate”.⁴⁴⁰

The degree of validity of grounds to remain can be expressed in terms of the level of desirability. One's stay is more desirable if one's ground to remain is stronger. One's stay is less desirable if one's ground to remain is weaker. This emerging hierarchy of desirability has serious implications in terms of access to regularisation/formal toleration, subjection to administrative

438 Ramboll and Eurasylum, “Study on the Situation of Third-Country Nationals pending Return/Removal in the EU Member States and the Schengen Associated Countries: Final Report” (Study commissioned by the European Commission, 11 March 2013), 93-97.

439 Interview with Michael Speiser, European Parliament, EPP Group Adviser (phone interview, 22 April 2013); Interview with Fabian Lutz, European Commission, DG Home Affairs (phone interview, 7 January 2014).

440 Maaïke Vanderbruggen, Jerome Phelps, Nadia Sebtaoui, Andras Kovats, and Kris Pollet, “Point of No Return: The Futile Detention of Unreturnable Migrants” (Collaboration between Flemish Refugee Action (Belgium), Detention Action (UK), France terre d’asile (France), Menedék – Hungarian Association for Migrants, and The European Council on Refugees and Exiles (ECRE), project supported by EPIM, January 2014), 23.

detention, and potential subjection to imprisonment. EU immigration law initially approached the totality of irregular migrants as targets of tough immigration control measures. But in recent years, this approach has become more selective, the severity of immigration control varying in accordance with the specific irregular-migrant profile. Non-cooperative practical non-removables are becoming increasingly privileged targets of exclusion from regularisation/formal-toleration, prolonged/repeated placement(s) in administrative detention, and imprisonment. They are singled out from the overall group of non-removable irregular migrants. Since research suggests that cooperative migrants are sometimes wrongly categorised as being non-cooperative, it would seem that the cooperative/non-cooperative construct is one that may be instrumentalised by certain State actors for exclusionary purposes.

3. The level of access to formal legal toleration and regularisation

Access to formal toleration and regularisation is easier for some non-removable TCNs than for others. This is something which I showed in chapter 1, and I examined the development of this access over time in chapter 3. Legal non-removables are the most advantaged category and practical non-removables the most disadvantaged category. Exclusion from legal residence amounts to exclusion from *fair treatment*, and exclusion from formal toleration often amounts to exclusion from very elementary residence-security and socio-economic rights.

Practical non-removables are the most disadvantaged category of non-removable TCNs. Under the Return Directive, they are *never entitled* to postponement-of-removal, and there is no particular mention of them in provisions relating to discretionary

regularisation. The Return Directive merely allows Member States to choose to postpone their removal.⁴⁴¹ Thus, their access to legal toleration (not even to mention formal legal toleration) is not catered for under EU law. Some EU Member States's national legal systems contain mechanisms of discretionary or mandatory postponement-of-removal in the event of practical obstacles to removal.⁴⁴² Other national legal systems do not make any provision whatsoever for postponement. In the Member States that do contain mechanisms of postponement, the cooperative or non-cooperative behaviour of practical non-removables can affect access to formal postponement, the rights attached to it, and the potential for future regularisation.⁴⁴³

At the level of EU law, policy and legal non-removables are in a more advantageous position, legal non-removables being in the most advantageous one. In terms of access to formal toleration, legal non-removables find themselves by default in a position of legal toleration, and this position of legal toleration is one which has become increasingly formalised in recent years. Under the Return Directive, persons who cannot be removed on the legal grounds of non-refoulement and suspensive review procedures are entitled to formal postponement-of-removal.⁴⁴⁴ Under the Asylum Reception Directive, just about all asylum applicants, who are protected from removal on the legal ground of procedural non-refoulement, are entitled to a document certifying their asylum applicant status or their right to remain.⁴⁴⁵ This document does not have to grant legal stay. Those who are not granted a document certifying legal stay, but who are legally tolerated during their asylum procedure, are at least entitled to a document certifying

441 Directive 2008/115/EC of the European Parliament and of the Council on the return of illegally staying third-country nationals [2008] OJ L 348/98, art 9 (2).

442 European Union Agency for Fundamental Rights, *Fundamental Rights of Migrants in an Irregular Situation in the European Union: Comparative Report* (Publications Office of the European Union, 2011), 33.

443 *Ibid.*, 32.

444 Directive 2008/115/EC of the European Parliament and of the Council on the return of illegally staying third-country nationals [2008] OJ L 348/98, art 9 (1).

445 Council Directive 2003/9/EC on Asylum Reception Conditions (2003) OJ L 31/18, art 6.

their position of legal protection from removal. While many legal non-removables find themselves in a default position of legal toleration, and a position that is becoming increasingly formalised, not all are left by Member States in such a position. A large number of legal non-removables are entitled to regularisation of status or are at least eligible for discretionary regularisation. As I showed in chapter 3, EU law has over time expanded the categories of legal non-removables entitled to regularisation of status. And most Member States' national legal systems contain mechanisms of discretionary regularisation for legal non-removables.

Some policy non-removables are entitled to legal toleration, while others are merely candidates for legal toleration. Under EU law, one can identify references to general policy obstacles to removal on humanitarian grounds, as well as a specific policy obstacle for cooperative victims of human trafficking. Persons who fall under a general humanitarian obstacle to removal are not entitled to postponement or regularisation under EU law. But they are mentioned in the Return Directive in a provision on discretionary regularisation, which makes direct reference to them as potential candidates for such regularisation (as well as postponement-of-removal).⁴⁴⁶ Victims of trafficking, who are identified by Member State authorities, are entitled to legal toleration when they accept to be granted a reflection period in order to consider the option of cooperating with authorities in exchange for a residence permit.⁴⁴⁷ Legal toleration is granted as a result of a policy obstacle to removal, whereby victims are protected from removal for the purpose of potentially cooperating in dismantling trafficking networks.

446 Directive 2008/115/EC of the European Parliament and of the Council on the return of illegally staying third-country nationals [2008] OJ L 348/98, art 6 (4).

447 Council Directive 2004/81/EC on the residence permit for cooperative victims of human trafficking (2004) OJ L 261/19, art 6.

4. The chances of subjection to administrative detention

Under the Return Directive,⁴⁴⁸ Member States are in principle obliged to issue a return measure against irregular migrants, but are also obliged to grant a voluntary period of departure. They can however choose to not grant such a period if there is a risk of absconding, a security-related reason, or if there has been a fraudulent attempt to obtain legal residency in the past. The Return Directive allows Member States to coercively remove irregular migrants who are subject to a return measure, and who do not or no longer benefit from a voluntary period of departure. And for irregular migrants that Member States are allowed to coercively remove, they are additionally allowed to place them in administrative detention for up to six months, and a total of eighteen months in exceptional circumstances. There are no exhaustive grounds in the Return Directive for the placement and maintenance of irregular migrants in administrative detention. An important question for the purposes of this thesis is which categories of non-removable TCNs may be subjected to administrative detention, and by the same token which ones are the principal targets of administrative detention? Practical non-removables, especially non-cooperative practical non-removables, are the clear targets of (prolonged) placement in administrative detention.

Article 15 (1) of the Directive states that administrative detention is only to be “maintained as long as removal arrangements are in progress and executed with due diligence”.⁴⁴⁹ And article 15 (4) that detention ceases to be justified when “a reasonable prospect of removal no longer exists for legal or other considerations”.⁴⁵⁰ These paragraphs of article 15 indicate that there are strong

448 Directive 2008/115/EC of the European Parliament and of the Council on the return of illegally staying third-country nationals [2008] OJ L 348/98.

449 Ibid.

450 Ibid.

arguments against the lawfulness of administratively detaining persons whose removal is postponed (whether for legal, policy or practical obstacles to removal). For postponement of removal constitutes a legal barrier to removal and effectively prevents progress from being made with removal arrangements. However, the Directive is not crystal clear on whether or not postponed-returnees can be administratively detained or not, and this uncertainty has for example spilled over into French law.⁴⁵¹ And in both case-law and practice, there are plenty of examples of persons in administrative detention during periods of postponed-removal.⁴⁵² Furthermore, while asylum seekers are theoretically⁴⁵³ immune from subjection to administrative detention under the Return Directive (as the Directive's preamble explicitly states that they should not be regarded as illegally staying⁴⁵⁴), the fact that many asylum seekers need to resort to illegal entry or stay in order to seek asylum means that they can get caught up in the detention process as illegal residents. And beyond the Return Directive, EU asylum legislation allows Member States to administratively detain asylum seekers on a variety of grounds. Amongst asylum applicants, prime Europe-wide targets of administrative detention are those placed in a Dublin procedure⁴⁵⁵ or a derogatory accelerated procedure.⁴⁵⁶

451 For example see Karine Parrot, “Rétention d'un Étranger dans l'Attente d'une Décision de la CEDH” (2013) *Revue critique de droit international privé* 865.

452 For example, see the facts of the Kadzoev ruling delivered by the ECJ, in which the illegally staying TCN in question spent long periods of postponed-removal in administrative detention, a practice that was not interpreted as constituting a violation of the Return Directive by the ECJ : Case C-357/09 PPU *Kadzoev* (2009) ECR I-11189, paras 15 and 49-57.

453 Case C-357/09 PPU *Kadzoev* (2009) ECR I-11189, para 48; Case C-534/11 *Mehmet Arslan v Policie CR* (2013), para 49.

454 Directive 2008/115/EC of the European Parliament and of the Council on the return of illegally staying third-country nationals [2008] OJ L 348/98, recital 9.

455 With regard to Dublin asylum applicants, see Daniela Di Rado (ed) “Dubliners Project Report: “Dubliners - Research and Exchange of Experience and Practice on the Implementation of the Council Regulation Dublin II establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in one of the Member States by a Third-Country National”” (Project implemented under the ERF Community Actions 2007, April 2010), 31-39.

456 See Case C-534/11 *Mehmet Arslan v Policie CR* (2013), para 63. In the cited paragraph of this case, one can read that the EU asylum Directives “do not preclude a third-country national who has applied for international protection ... after having been detained under Article 15 of Directive 2008/115 from being kept in detention on the basis of a provision of national law, where it appears, after an assessment on a case-by-case basis of all the relevant circumstances, that the application was made solely to delay or jeopardise the enforcement of the return”

Nonetheless, the Directive's clearest targets for administrative detention are irregular migrants whose removal is not postponed, and who are deemed to be non-cooperative with the return process or to be potential absconders. These are irregular migrants for whom there are no legal impediments to removal, but who might turn out to not be removable for practical reasons. While the Directive does not provide exhaustive grounds for administratively detaining irregular migrants, it provides two examples of such grounds. The first is where there is a risk that the individual might abscond if not placed in detention, and the second is where “the third country national concerned avoids or hampers the preparation of return or the removal process”.⁴⁵⁷ The first corresponds to a situation of potential non-cooperation with the return process, and the second to a situation of actual non-cooperation. Actual non-cooperation may come in the form of a refusal to provide information on one's identity, to cooperate in the delivery of travel documentation by one's embassy, or to board transportation.

These elements of the Return Directive therefore suggest that the principal targets of administrative detention are practical non-removables, especially non-cooperative practical non-removables. Further elements highlight this point. In the Directive's provisions relating to the prolonging of administrative detention for up to eighteen months, Member States are only allowed to subject irregular migrants to prolonged detention on two exhaustive grounds.⁴⁵⁸ The first is lack of cooperation by the third country national, and the second is delays in obtaining necessary documentation from third countries. Both cases concern persons

decision and that it is objectively necessary to maintain detention to prevent the person concerned from permanently evading his return”. The solely-to-delay-or-jeopardise-return ground is one of the grounds in the EU Asylum Procedures Directive 2005/85/EC for placing an asylum applicant in a derogatory accelerated procedure.

⁴⁵⁷ Directive 2008/115/EC of the European Parliament and of the Council on the return of illegally staying third-country nationals [2008] OJ L 348/98, art 15 (1).

⁴⁵⁸ *Ibid*, art 15 (6).

who are not removable for practical reasons, as opposed to legal reasons. The first ground concerns practical reasons that are the result of non-cooperation, and the second ground concerns practical reasons that are caused by third countries. On top of these legal elements that clearly identify non-cooperative practical non-removables as prime targets of prolonged detention, some Member State practices also highlight this specific targeting.⁴⁵⁹

5. The chances of subjection to imprisonment for criminal offences related to illegal stay

Non-cooperative practical non-removables are not just increasingly targeted by administrative detention and exclusion from formal toleration/regularisation. In certain EU countries that criminalise illegal stay, they have become privileged targets of imprisonment for offences related to illegal stay, a trend which EU law has crystallised through two key judgments delivered by the CJEU. These are the judgments mentioned in section 2.

Recent decades have witnessed the increasing criminalisation of irregular migration in the European Union. A notable move in many EU States has been the transformation of illegal entry and stay of TCNs into a crime, involving possible imprisonment. In those States, imprisonment serves to reinforce the arsenal of repressive measures that are already used against irregular migrants.

But the CJEU paved the way for the partial decriminalisation of illegal stay in the 2011 *El Dridi* and *Achughbabian* rulings. In these rulings, the CJEU interpreted the Return Directive as prohibiting

459 For example, see European Parliament, “Prolongation of Detention by Member States of illegally staying Third-Country Nationals Beyond the 18-Month Time Limit in Violation of the Return Directive (Debate)” (2014/2701(RSP), Debates, Thursday, 17 April 2014, Strasbourg) < <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20140417+ITEM-006+DOC+XML+V0//EN&language=EN> > accessed 4 September 2014.

Member State legislation which provides for a sentence of imprisonment to be imposed on irregular migrants on the sole ground of their illegal stay. EU Member States have since been prohibited under EU law from imprisoning irregular migrants for the mere offence of illegal stay. Following the CJEU's interpretation of the Return Directive, irregular migrants, whose only criminal offence is that of illegal stay, may only be imprisoned if they have unsuccessfully been subjected to every stage of a coercive removal procedure (including administrative detention for the maximum period) and have no justified ground for non-return. The rationale is that effective return is the Return Directive's priority, and imprisonment under national law is mostly an obstacle to the effective return of illegally staying TCNs.⁴⁶⁰

The CJEU's case law on the relationship between the Return Directive and national criminal legislation did not end with these two rulings. Several have followed and many are pending. However, its interpretation of the Return Directive with regard to imprisonment for offences related to illegal stay remains unchanged. In the *Sagor*⁴⁶¹ and *Mbaye*⁴⁶² cases, the CJEU examined the compatibility of fines and home detention orders with the Return Directive. In the procedurally ill-fated case of *Da Silva*,⁴⁶³ the CJEU was to deliver a ruling on the compatibility of imprisonment for the offence of illegal *entry* (as opposed to illegal *stay*) with the Return Directive. I focus here solely on the sanction of imprisonment, and therefore on the *El Dridi* and *Achughbabian* cases.

When I mentioned these two rulings in section 2 above, I explained that the Court did not provide much guidance on what constitutes

460 This rationale was solidified in a subsequent case, in which the CJEU interpreted criminal fines for the offence of illegal stay (as opposed to criminal detention and home detention orders for the same offence) as being entirely compatible with the Return Directive's goal of effective return : Case C-430/11 *Sagor* (2012), para 47.

461 Case C-430/11 *Sagor* (2012).

462 Case-522/11 *Mbaye* (2013).

463 Case 189/13 *Da Silva* (2014).

a justified ground for non-return. But academic speculation suggests that the only category of irregular migrants that clearly have no justified ground for non-return are non-cooperative practical non-removables. This would mean that legal non-removables, policy non-removables, and cooperative practical non-removables all have a justified ground for non-return, and are thus immune from imprisonment for the crime of illegal stay, even after subjection to the maximum period of administrative detention.

The general impact and economy of these rulings have been thoroughly analysed in case comments and academic articles. Focus has mainly been on the positive ramifications of these rulings for irregular migrants. For example, Valsamis Mitsilegas has stressed the “protective function”⁴⁶⁴ of EU law, arguing that “the Court managed to use EU law ... in order to protect third-country nationals from extensive criminalisation in Member States”.⁴⁶⁵ While the two rulings have laudably restricted States' ability to imprison TCNs for the offence of illegal stay, these rulings also shined a repressive spotlight on a *residual* category of irregular migrants: non-cooperative exhausted-returnees. Most irregular migrants are now protected from imprisonment, but this comes to the detriment of a specific group.

This *residual* category is made up of irregular migrants who are not removable due to practical obstacles, who have been administratively detained (pending removal) for the maximum period under national law, and who are deemed responsible for the practical obstacles to their removal (due to non-cooperation on their part). They are non-cooperative exhausted-returnees. They are exhausted-returnees for they have been administratively detained for the maximum period, and therefore released as a

464 Valsamis Mitsilegas, “The Changing Landscape of the Criminalisation of Migration in Europe: The Protective Function of European Union Law”, in Maria Joao Guia, Maartje van der Woude and Joanne van der Leun (eds), *Social Control and Justice: Crimmigration in the Age of Fear* (Eleven International Publishing, 2013).

465 Ibid, 110.

result of the exhaustion of their return procedure. The situation of non-cooperative exhausted-returnees is a particularly precarious and exclusionary one, in comparison with other irregular migrants who are not removable by EU Member States, which makes their singling out by the CJEU all the more serious to ponder.

Building on Alessandro De Giorgi's⁴⁶⁶ notion of the selectivity and intensity of the criminalisation and control of irregular migrants in Europe, I argue in section 6 that the CJEU rulings actually confirmed (and legally entrenched) a policy trend in several EU Member States which was to limit the general criminalisation of irregular migrants, and to intensify control and criminalisation against select groups of irregular migrants, namely those who did not cooperate with their return procedures (and who today fall under the CJEU's *residual* category). In EU States that criminalise irregular migrants, individuals who find themselves within the *residual* category of irregular migrants face the risk of being bounced around between three exclusionary spaces: prison, administrative detention, and freedom-in-limbo. The freedom-in-limbo that I talk about is mainly a limbo of exhausted-removal, not postponed-removal.

6. The entrapment of non-cooperative exhausted-returnees between administrative detention, imprisonment, and freedom-in-limbo

The CJEU's rulings reflected (and legally entrenched) a policy trend in numerous EU Member States, which was to decrease imprisonment of irregular migrants on the sole ground of their illegal stay, and to reserve imprisonment for irregular migrants who had either committed other criminal offences or were non-cooperative with their return procedures. This trend could be

⁴⁶⁶ Alessandro De Giorgi, "A Materialist Critique of the Criminalization of Immigration across Europe" (2010) 12 *Punishment & Society*, 154 and 159.

described as a recent intensification and increasing selectiveness of control and criminalisation of irregular migrants. In certain of these Member States, non-cooperative exhausted-returnees were already singled out for criminalisation and bounced around between three exclusionary spaces: administrative detention, prison, and freedom-in-limbo. In these States, the position of non-cooperative exhausted-returnees has remained intact in the aftermath of the rulings delivered in 2011, since the CJEU singled them out as the sole permissible targets of imprisonment for offences related to illegal stay. In section 7, I use a French case-study to illustrate the entrapment of non-cooperative exhausted-returnees between the three exclusionary spaces, an entrapment that took place before the rulings in France and that remains intact in the aftermath of the rulings.

Illegal entry and stay are not criminal offences in all EU Member States. Even in States where they are, imprisonment is not always a possibility (fines being the alternative criminal penalty). They are however prison-worthy criminal offences in a slight majority of Member States.⁴⁶⁷ In EU countries where illegal entry and stay are prison-worthy offences, there are often additional prison-worthy offences of non-cooperation with return procedures. In these countries, an important number of *non-cooperative* persons have long been bounced around between three exclusionary spaces: administrative detention, prison, and freedom-in-limbo. This has namely been the case in France. Prime targets in France of these non-cooperation offences are exhausted-returnees. Many are sent from administrative detention to prison upon expiry of the maximum period during which they can be held in administrative detention. The CJEU's *El Dridi* and *Achughbadian* rulings improved the right to liberty of a large number of illegally staying TCNs by

467 European Union Agency for Fundamental Rights, *Fundamental Rights of Migrants in an Irregular Situation in the European Union: Comparative Report* (Publications Office of the European Union, 2011), 43; Commission, "Communication to the Council and the European Parliament on EU Return Policy" COM (2014) 199 final, 24-25.

prohibiting imprisonment on the sole ground of illegal stay. However, by singling out non-cooperative exhausted-returnees as the sole permissible targets of imprisonment for offences related to illegal stay, these rulings correspondingly shined a spot light on an already highly vulnerable group of irregular migrants in countries that criminalise illegal stay.

The CJEU's singling out of non-cooperative exhausted-returnees matched a trend in certain EU Member States that impose prison sentences for the offence of illegal stay and for non-cooperation offences. This trend was to decrease prosecutions for the general offence of illegal stay, and focus such prosecutions on irregular migrants who did not cooperate with authorities in ensuring their effective return. Several countries had developed particularly repressive practices towards those deemed to not be cooperating with their removal procedures. This was for example the case in France, but also in other EU countries such as Germany and the UK.⁴⁶⁸ But while this trend of singling out non-cooperative irregular migrants for criminalisation already existed in several EU States, it was a policy that was not set in the stone of hard law. Prior to the CJEU rulings, these EU states focused the tool of imprisonment on a select group of irregular migrants, but they also had the discretionary power to continue criminalising the totality of irregular migrants. This power was taken away from them by the CJEU rulings, and to that extent, these rulings were protective of irregular migrants. However, they also legitimised and reinforced the practice of singling out non-cooperative

468 With regard to the UK, see UK Legal Services Commission, "Simple cautions for foreign national offenders: pilot policy statement" (29 November 2010)

< http://www.legalservices.gov.uk/Simple_cautions_for_foreign_national_offenders_pilot_-_policy_statement.pdf > accessed 7 November 2011.

With regard to France, see Ministère de la Justice, "Circulaire relative aux Conditions de l'Interpellation d'un Étranger en Situation Irrégulière, Garde à Vue de l'Étranger en Situation Irrégulière, Réponse Pénales" (CRIM 2006 05 E1/21-02-2006); Ministère de la Justice et des Libertés, "Portée de l'Arrêt de la Cour de Justice de l'Union Européenne (CJUE) « Achughbabian » du 6 décembre 2011 portant sur la Compatibilité de l'Article L.621-1 du CESEDA avec la Directive 2008/115/CE dite « Directive Retour »" (11-04-C39 ,13 décembre 2011).

With regard to Germany, see European Migration Network, "Ad-hoc Query on Practices followed concerning Third Country Nationals whose Compulsory Removal is Impossible" (Compilation produced on 14 April 2010), 8.

irregular migrants for criminalisation.

In these countries, non-cooperative exhausted-returnees have not just been privileged targets of imprisonment. Upon release from either administrative detention and/or prison, they have also tended to be privileged targets of exclusion from any kind of security of residence, as well as from socio-economic rights reserved for legal residents or formally tolerated residents. At a general level, all non-removable persons who are excluded from legal residence find themselves in a legal limbo of protracted toleration or illegality of stay. However, persons who are not removable on practical grounds -and especially those deemed to not be cooperative - have generally suffered from greater socio-economic exclusion in comparison with other non-removable persons.⁴⁶⁹ This is either because practical non-removables are not always formally tolerated, or because those practical non-removables who are formally tolerated are granted a lower set of rights due to non-cooperative behaviour.

The trend in these countries, and the CJEU's crystallisation of this trend, displays an intensification and increasing selectiveness of the control and criminalisation of irregular migrants in Europe. Alessandro De Giorgi has noted that over the past decades, irregular migrants were overall already victims of the “selectivity ... (and) intensity”⁴⁷⁰ of penal practices in Europe. Irregular migrants in Europe have been particularly affected and targeted due to the multifarious crimes linked to their immigration status and to crimes which their immigration status compels them to commit. When talking about the selective control and criminalisation of irregular migrants, Alessandro De Giorgi has

469 For example, you can find information on Germany and the UK in European Migration Network, “Ad-hoc Query on Practices followed concerning Third Country Nationals whose Compulsory Removal is Impossible” (Compilation produced on 14 April 2010), 7-8 and 14-15.

470 Alessandro De Giorgi, “A Materialist Critique of the Criminalization of Immigration across Europe” (2010) 12 *Punishment & Society* 147, 154.

explained that their “limited access to civil, social, and political rights, hyper-incarceration, and the constant threat of deportation contribute to the creation of a grey area of legal vulnerability”,⁴⁷¹ as well as their “subordinate inclusion”⁴⁷² in the lowest levels and darkest corners of European economies.

Although irregular migrants as a whole have experienced what Alessandro De Giorgi has described as selective and intense control and criminalisation, the CJEU's rulings confirmed a more recent trend of further intensification and selectiveness of control and criminalisation against the *residual* category of irregular migrants. This trend has shielded a large number of irregular migrants from imprisonment for offences related to their illegal stay, but it has also intensified the exclusionary nightmare of all those left out by the protective side of this trend. It has reduced the legal vulnerability of most irregular migrants and amplified the legal vulnerability of a small group of irregular migrants.

I turn now to a French case-study on non-cooperative exhausted-returnees who have been bounced around between administrative detention, imprisonment, and freedom-in-limbo.

7. A French case-study on this entrapment

In France, a small but significant number of practical non-removables find themselves trapped between administrative detention, imprisonment, and freedom-in-limbo. These individuals are made up of both non-cooperative exhausted-returnees and persons who have committed criminal offences that are not immigration-related. The focus here is on non-cooperative exhausted-returnees. There are NGO reports with documented narratives of individuals who have experienced entrapment

471 Ibid, 159.

472 Ibid.

between administrative detention, imprisonment, and freedom-in-limbo. I restate one of these narratives at the end of this case study. This is the narrative of M.J (part of which I already shared in the previous chapter). My case-study builds up to the telling of M.J.'s story by examining how non-cooperative exhausted-returnees can end up in such a position of entrapment.

This portrait serves to highlight the position of many non-cooperative exhausted-returnees before the 2011 *El Dridi* and *Achughbabian* rulings, a position which remains unchanged in the aftermath of these rulings. I first provide contextual legal background on the administrative detention and imprisonment of irregular migrants in France, and the impact of the 2011 rulings on French law (7.1.). I move on to examine the law and data relating to exhausted-returnees who have been bounced around between administrative detention, imprisonment, and freedom-in-limbo (7.2.). I end with the narrative of M.J. as a practical illustration of the entrapment endured by the CJEU's *residual* category of irregular migrants in France (7.3.).

7.1. The administrative detention and imprisonment of irregular migrants in France

I provide a contextual overview of French law relating to the imprisonment and administrative detention of irregular migrants.

The imprisonment of irregular migrants in France

Until 31 December 2012, illegal stay was a free-standing criminal offence under French law. As well as being an immigration offence punishable by return, it was a criminal offence, punishable by imprisonment, and to a certain extent still is.⁴⁷³ This possibility

⁴⁷³ Code de l'entrée et du séjour des étrangers et du droit d'asile (Code on the Entry and Residence of Foreigners and on the Right of Asylum, consolidated version on 24 January 2014), art L 621-2.

dated back to 1938. Non-cooperation on the part of irregular migrants with their return procedures is currently, and has long been, a criminal offence under French law, punishable by a prison sentence and a fine.⁴⁷⁴ Non-cooperation offences essentially target individuals who obstruct their removal procedures either by refusing to embark on transportation to the destination country of removal, or by refusing to cooperate with State authorities in obtaining the necessary documentation for removal. Quantitative data is limited on the number of prosecutions and convictions for the sole offence of illegal stay over the past decades, as well as for offences of non-cooperation with return procedures. The data that is available provides figures on the number of persons imprisoned for a principal offence related to illegal stay without specifying the existence of other criminal offences. What this data does tell us is that there has been a decrease in the number of persons imprisoned for a principal offence related to illegal stay over the past two decades. The number of imprisoned irregular migrants peaked in 1993; an estimated 9,641 irregular migrants were incarcerated for a principal offence related to illegal stay that year.⁴⁷⁵ In 2001, an estimated 2,850 irregular migrants were incarcerated for a principal offence related to illegal stay.⁴⁷⁶ The number of yearly incarcerations for a principal offence related to illegal stay has remained relatively stable since 2001.⁴⁷⁷

The overall decrease in the number of persons imprisoned for a principal offence related to illegal stay is partly due to a shift in policy. Circulars⁴⁷⁸ adopted by competent ministries in 2006 and 2011 specified that imprisonment on the sole ground of illegal stay

474 Ibid, art L 624.

475 Le Contrôleur général des lieux de privation de liberté, *Rapport d'Activité 2009* (Editions Dalloz, 2010), 265.

476 Ibid.

477 Ibid.

478 Ministère de la Justice, "Circulaire relative aux Conditions de l'Interpellation d'un Étranger en Situation Irrégulière, Garde à Vue de l'Étranger en Situation Irrégulière, Réponse Pénales" (CRIM 2006 05 E1/21-02-2006); Ministère de la Justice et des Libertés, "Portée de l'Arrêt de la Cour de Justice de l'Union Européenne (CJUE) « Achughbadian » du 6 décembre 2011 portant sur la Compatibilité de l'article L.621-1 du CESEDA avec la Directive 2008/115/CE dite « Directive Retour »" (11-04-C39 ,13 décembre 2011).

was to be avoided ; the new priority was to *effectively remove* irregular migrants from France. These circulars however strongly encouraged the prosecution of non-cooperative irregular migrants as well as irregular migrants who had committed other criminal offences. Non-cooperation offences correspond to a wide range of actions and omissions that can take place at various stages of a return procedure. They range from absconding upon written notification of a return measure to non-cooperation with authorities following placement in administrative detention. Detained irregular migrants might be deemed non-cooperative if they for example hide or destroy their identity documents, refuse to disclose their identity and/or country of origin, refuse to be accompanied to their country of origin's embassy in order to obtain travel documentation, or refuse to embark on transportation to their country of origin.

A shift therefore occurred in French public policy before the CJEU delivered its two rulings in 2011. Prosecutions for offences related to illegal stay increasingly focused on non-cooperative irregular migrants as opposed to the totality of irregular migrants. To that extent, the CJEU's rulings confirmed a trend in France. However, the rulings set that trend in the stone of hard law (not mere policy guidelines) and pushed it further. In the aftermath of the 2011 rulings, non-cooperation with return procedures is no longer sufficient for French authorities to imprison irregular migrants. Non-cooperation offences, like the general offence of illegal stay, may only lead to imprisonment when non-cooperative irregular migrants have been administratively detained for the maximum period under French law (forty-five days), a requirement enforced and highlighted in recent French case-law.⁴⁷⁹ The majority of administratively detained irregular migrants are released from detention before the expiry of the maximum period ; this is largely

⁴⁷⁹ See Cour de cassation, 1^{ère} chambre civile, 30 avril 2014, n° 13-13.701, inédit ; Cour de cassation, 1^{ère} chambre civile, 12 juin 2014, n° 13-19.086, inédit.

the result of NGO and judicial activism.⁴⁸⁰ The CJEU's maximum-period criterion is therefore a constraint for States like France that wish to imprison non-cooperative irregular migrants. Prior to the CJEU rulings, placement in administrative detention for the maximum period was not a prerequisite for the successful prosecution and conviction of irregular migrants for non-cooperation offences. Now it is.

Administrative detention of irregular migrants in France

Irregular migrants can be placed in administrative detention if an enforceable return measure has been issued against them. The maximum period of administrative detention in France is quite short in comparison with the maximum period in other EU Member States (it is forty-five days). This period used to be shorter (thirty-two days), and was increased after the entry into force of the Return Directive. Placement in administrative detention is for an initial period of five days, which can be prolonged for an extra twenty days, and prolonged a second time for another twenty days.⁴⁸¹ Administrative authorities may only lawfully prolong detention following judicial oversight. Exhausted-returnees in France are irregular migrants who have been continuously detained for the maximum forty-five day period. There are no limits under French law on the number of times an irregular migrant can be placed in administrative detention, the only limit coming from EU law which sets out an absolute maximum of eighteen months.

To provide a recap of figures set out in chapter 1, Eurostat estimates suggest that there were respectively 88,565, 76,590, 83,440 TCNs who were ordered to leave *mainland* France in 2009,

480 Antoine de Ravnigan, "La Cimade, Grain de Sable dans la Machine à Expulser" (9/2010) 294 *Alternatives économiques*, 48.

481 Code de l'entrée et du séjour des étrangers et du droit d'asile (Code on the Entry and Residence of Foreigners and on the Right of Asylum, consolidated version on 24 January 2014), arts L 551-552.

2010 and 2011.⁴⁸² They also suggest that only 18,400, 17,045, and 20,425 returned following an order to leave in 2009, 2010, and 2011. The overwhelming majority were thus never returned. This trend persisted in 2012 (22,760 out of 77,600 orders to leave led to return) and 2013 (20,140 out of 84,890 orders to leave led to return).⁴⁸³ There are no precise figures on the number of placements in administrative detention following an order to leave. According to NGO reports, there were respectively at least 50,000, 60,282, 51,385, and 43,746 administratively detained irregular migrants in *mainland and overseas France* in 2009, 2010, 2011, and 2012.⁴⁸⁴ Thus, a large proportion of irregular migrants ordered to leave are subjected to administrative detention in France.

7.2. From one exclusionary space to another

I now turn to examine the law and data relating to non-cooperative exhausted-returnees' entrapment between the three exclusionary spaces. My analysis examines movement from administrative detention to prison, from prison to administrative detention, from both to freedom-in-limbo, and from freedom-in-limbo back to either prison or administrative detention.

From administrative detention to prison

When the maximum period of administrative detention is reached for irregular migrants, French authorities might have one of two choices. They might effectively release them or they might try to

482 Eurostat, "Statistics : Population Database: Enforcement of Immigration Legislation » (available on Eurostat website) last accessed 6 September 2014.

483 Ibid.

484 La Cimade, "Centres et Locaux de Rétention Administrative: Rapport 2009" (6 octobre 2010), 17 ; Assfam, Forum Réfugiés, France terre d'asile, la Cimade, l'Ordre de Malte, "Centres et Locaux de Rétention Administrative: Rapport 2010" (13 décembre 2011), 9 ; Assfam, Forum Réfugiés, France terre d'asile, la Cimade, l'Ordre de Malte, "Centres et Locaux de Rétention Administrative: Rapport 2011" (20 novembre 2012), 9 ; Assfam, Forum Réfugiés, France terre d'asile, la Cimade, l'Ordre de Malte, "Centres et Locaux de Rétention Administrative: Rapport 2012" (3 décembre 2013), 9.

criminally prosecute them under a non-cooperation offence. Governmental statistics are lacking on the fates of administratively detained irregular migrants who have been detained for the maximum period. However, French NGOs have in recent years gathered quantitative data on the fates of numerous detainees.

In 2010, NGOs found that out of a sample of 24,018 administrative detainees, 13,333 were released and freed (55,5%), whereas 10,004 were effectively removed from France (41,7%).⁴⁸⁵ Amongst those who were released, only 2,803 were released following expiry of the maximum period of administrative detention (11% of the 24,018 detainees). Amongst those who were neither removed nor released, at least 634 were placed in police custody and prosecuted for a non-cooperation offence (2,6% of the 24,018 detainees).⁴⁸⁶ Data provided by the same NGOs in 2011 and 2012 show similar proportions of administrative detainees who were released, removed and imprisoned.⁴⁸⁷ The percentage of administrative detainees who were released upon expiry of the maximum period, and the percentage of those sent to prison, are both small but far from insignificant.

A legal adviser in a French administrative detention centre recently informed me that there were an increasing number of prosecutions of exhausted-returnees for non-cooperation offences.⁴⁸⁸ These exhausted-returnees are systematically held in police custody pending their trial. The legal adviser specified that the increase was in comparison with previous years. This indicates that in the aftermath of the CJEU rulings, more non-cooperative exhausted-returnees would seem to be prosecuted for non-

485 Assfam, Forum Réfugiés, France terre d'asile, la Cimade, l'Ordre de Malte, "Centres et Locaux de Rétention Administrative: Rapport 2010" (13 décembre 2011), 13.

486 Ibid.

487 Assfam, Forum Réfugiés, France terre d'asile, la Cimade, l'Ordre de Malte, "Centres et Locaux de Rétention Administrative: Rapport 2011" (20 novembre 2012), 11; Assfam, Forum Réfugiés, France terre d'asile, la Cimade, l'Ordre de Malte, "Centres et Locaux de Rétention Administrative: Rapport 2012" (3 décembre 2013), 13.

488 Discussion with Mr A.B., Legal Adviser at France terre d'asile's Department of Assistance for Detained Foreigners (Email correspondence, 1 August 2013).

cooperation offences and potentially sent to prison.

From prison to administrative detention

I now turn to estimates on the number of irregular migrants sent from prison to administrative detention centres. NGOs in recent years have suggested that exhausted-returnees were often bounced around between administrative detention and prison as a form of State harassment that aimed to deter non-cooperation.⁴⁸⁹ These NGOs estimated that at least 1,070 irregular migrants prisoners were sent to administrative detention centres in 2010.⁴⁹⁰ Exhausted-returnees probably represent an important percentage of the 1,070 prisoners sent to administrative detention in 2010, as it is known that at least 634 exhausted-returnees were sent to prison in 2010. However, an important percentage of these 1,070 prisoners was probably made up of individuals being sent to administrative detention for the first time. Irregular migrant prisoners are not all exhausted-returnees. Thousands of irregular migrants are imprisoned every year, either for a principal offence related to illegal stay or for a principal offence unrelated to illegal stay.⁴⁹¹

A distasteful feature of several prisons in France is the practice of telling irregular migrant prisoners that they have a fifty percent chance of being escorted to an administrative detention centre upon expiry of their prison sentence. In these prisons, irregular migrants prisoners have to deal with complete uncertainty over whether they will be freed or sent to administrative detention upon expiry of their prison sentence. This practice namely takes place in France's largest prison at Fleury Mérogis. I am aware of these practices as I provided voluntary legal aid there in 2010.

489 Assfam, Forum Réfugiés, France terre d'asile, la Cimade, l'Ordre de Malte, "Centres et Locaux de Rétention Administrative: Rapport 2011" (20 novembre 2012), 273.

490 Assfam, Forum Réfugiés, France terre d'asile, la Cimade, l'Ordre de Malte, "Centres et Locaux de Rétention Administrative: Rapport 2010" (13 décembre 2011), 60.

491 Secrétariat Générale du Ministère de la Justice, *Annuaire Statistique de la Justice : Edition 2011-2012* (La Documentation française – Direction de l'information légale et administrative, 2012), 199.

Release from prison and/or administrative detention in the worst form of legal limbo

Exhausted-returnees, if not sent to prison, and ex-prisoners, if not sent to administrative detention centres, are simply released. In such cases, they are often released in the worst form of legal limbo. Chances of seeing their status regularised or their removal administratively postponed are very thin. This is especially the case for exhausted-returnees who have been subjected to a period of imprisonment, as regularisation mechanisms and programmes tend to exclude ex-prisoners. Further, regularisation and postponement mechanisms tend to privilege illegally staying TCNs who cannot be removed on legal or policy grounds (as opposed to those who cannot be removed on practical grounds). This is a sorry state of affairs for exhausted-returnees who are usually not removable for practical reasons.

If release from administrative detention is not followed by regularisation of status or formal postponement- of-removal, those concerned are left in a limbo of exhausted-removal. They live in permanent fear of future administrative detention or imprisonment on the ground of their illegal stay. They often have to go into hiding because of the informal nature of their status ; they have virtually no socio-economic entitlements as most of these entitlements are tied to some kind of formal immigration status ; and, they are also deterred from exercising the few rights they have due to the risk and fear of being apprehended and sent to either administrative detention or prison.

*From freedom-in-limbo to prison or back into administrative
detention*

When exhausted-returnees are released and granted freedom, I have explained that this is a limbo-like freedom. It is characterised by exclusion from numerous socio-economic rights and benefits. But more frighteningly, exhausted-returnees face the palpable prospect of being either imprisoned or placed once again in an administrative detention centre. The CJEU's 2011 rulings allow Member States to imprison non-cooperative exhausted-returnees. These rulings do not require member states to prosecute these exhausted-returnees immediately following expiry of the maximum period of administrative detention. Exhausted-returnees can be released from administrative detention and imprisoned at some later stage if they are arrested and found to have no justified ground for non-return. This situation is expressly catered for in French legislation⁴⁹² and would appear to be compatible with the Return Directive as interpreted by the CJEU. While French NGOs have in recent years provided estimates on the number of irregular migrants sent directly from administrative detention to prison, estimates are not available on the number of exhausted-returnees sent to prison long after their release from administrative detention. The latter are swallowed up in overall figures on prosecutions and convictions for offences related to illegal stay. As seen earlier, there are thousands of individuals who are prosecuted every year for a principal offence related to illegal stay.

Freed exhausted-returnees do not just face the prospect of imprisonment. They can also be subjected to repeated placements in administrative detention. The maximum period during which irregular migrants can be placed in administrative detention is forty-five days in France. But this maximum period only applies to

⁴⁹² Code de l'entrée et du séjour des étrangers et du droit d'asile (Code on the Entry and Residence of Foreigners and on the Right of Asylum, consolidated version on 24 January 2014), art 624-1-1.

one placement in administrative detention. French law sets no explicit limit on the number of times an irregular migrant can be placed in administrative detention. The only limit on repeated placements in administrative detention comes from the Return Directive, as interpreted by the CJEU in *Kadzoev*,⁴⁹³ which prohibits repeated placements in administrative detention that add up to an overall period of more than eighteen months. For as long as exhausted-returnees have not been administratively detained for a cumulative period of eighteen months, they are *temporarily* exhausted-returnees and not *definitively* exhausted-returnees. Yearly NGO reports on administrative detention in France are ripe with narratives of irregular migrants who have experienced multiple placements in administrative detention. One of these reports states that numerous irregular migrants have suffered fifteen placements in detention; one irregular migrant was reported to have experienced twenty seven placements.⁴⁹⁴

To illustrate the fear of apprehension and detention that is experienced during limbo periods of exhausted-removal in France, I turn now to the narrative of an exhausted-returnee whom I quite recently interviewed.⁴⁹⁵ Mr F.S., a thirty year old man from Mali, has experienced multiple apprehensions and placements in police custody over the past decade, all linked to his illegal stay. He was placed in administrative detention on four occasions. The first placement in administrative detention lasted for the maximum period under national law. The subsequent placements in administrative detention ended before expiry of the maximum period due to procedural irregularities surrounding his apprehension. He was never imprisoned for the offence of illegal stay nor for the offence of non-cooperation with his return procedure but easily could have been. He was nearly deported

493 Case C-357/09 PPU *Kadzoev* (2009) ECR I-11189.

494 Assfam, Forum Réfugiés, France terre d'asile, la Cimade, l'Ordre de Malte, "Centres et Locaux de Rétention Administrative: Rapport 2010" (13 décembre 2011), 60.

495 Interview with Mr F.S. (France terre d'asile, Paris, France, 17 July 2013).

during his second placement in administrative detention. He was placed on a flight to Mali, but resisted and screamed on the plane. Passengers protested and he was escorted off the plane. The refusal to embark on a plane is sufficient to be prosecuted and convicted for not cooperating with a return procedure. He could easily have been sent to prison. But he wasn't. Nonetheless, being bounced around between administrative detention and freedom-in-limbo has tainted his periods of freedom with a gut-wrenching fear of apprehension and detention. He told me that he was terrified of being apprehended once again and placed a fifth time in administrative detention; that he did not know if he would be able to go through it again. This fear of apprehension and renewed placement in detention has led to various health problems including chronic insomnia. He has survived all these years thanks to illegal work carried out on various construction sites. He told me that his irregular status has allowed his various employers to coerce him into carrying out tasks and into working under conditions that he would otherwise never have accepted. Mr F.S. was not bounced around between administrative detention, imprisonment, and freedom-in-limbo. I turn now to the story of M.J., documented by an NGO, who was trapped between these three exclusionary spaces in France.

7.3. A narrative reported by the Cimade of a third country national bounced around between the three exclusionary spaces

The Cimade's report on administrative detention in 2007⁴⁹⁶ contains a narrative of a non-removable TCN who experienced entrapment between administrative detention, imprisonment, and freedom-in-limbo. It is the story of M.J., the son of a Moroccan mother and Algerian father, who was raised by neither parent and possessed neither of his parents' nationalities. Before summarising

⁴⁹⁶ La Cimade, "Centres et Locaux de Rétention Administrative: Rapport 2007" (23 avril 2008), 9.

his ordeal, it is important to specify that at the time of these events the maximum period of administrative detention under French law was thirty two days, not the current forty-five days. M.J.'s story took place before the 2011 rulings but it is the prototype story of irregular migrants who were singled out by the CJEU as permissible targets of imprisonment. Stories like his persist to this day in the aftermath of the two rulings.

M.J first experienced administrative detention in Toulouse for seventeen days in 2006, following which he was released. He was thus released before expiry of the maximum thirty-two day period. A few months later, he was re-apprehended and administratively detained again. After having been detained for thirty-two days this time round, he was successfully returned to Algeria. However, lacking the necessary documentation in Algeria, he was held in the basement of a police station in Algiers for forty-five days. French police officers then escorted him back to France (Marseille) where he was sent to prison for three months. Upon release from prison, he was directly sent to an administrative detention centre again. He was administratively detained for seventeen days, following which he was prosecuted, convicted, and sentenced to three months imprisonment. Upon release from prison, he experienced freedom-in-limbo for two months. This freedom ended when he got caught up in a new removal procedure, which led to his placement in another administrative detention centre. He was eventually released, then shortly again apprehended and administratively detained, and lastly released!

Would M.J.'s entrapment be any different today in the aftermath of the CJEU's two rulings? No. Under the post-*Achughbabian* state of EU law, the imprisonment of irregular migrants on grounds related to illegal stay may take place after they have been subjected to every stage of a coercive removal procedure, and if they have no

justified ground for non-return. M.J. was subjected to the maximum period of administrative detention, was returned to Algeria, but was escorted back to France due to the lack of necessary documentation. M.J.'s position clearly falls under the CJEU's *residual* category of irregular migrants who can be imprisoned as long as his non-removal can be attributed to his non-cooperation. Even if he hadn't been detained for the maximum period, the fact that he was administratively detained and removed would probably suffice as he was subjected to every stage of a coercive removal procedure and effectively removed, even if only for a short period of time.

Conclusion

In this chapter, I have built on elements of the liminality, legal dichotomy, and criminology literatures in order to examine the implications and impact of EU toleration governance on TCN membership patterns in the EU. I first attempted to show, with the use of analytical tools from the liminality literature, that toleration spaces have developed and been formalised in order to preserve the sanctity and purity of the legal/illegal immigration divide. Protracted non-removability has been managed with toleration tools so as to preserve the selective nature of the legal/illegal divide, and to keep tolerated TCNs at a safe distance from the sacrosanct sphere of legality. This has led to the creation and development of statuses and rights that lie in between illegal and legal stay, adding new layers to an already hierarchical TCN membership system. I further showed that EU governance of non-removable persons and toleration positions has led to the development of new hierarchies of desirability, that are more complex than the desirable/non-desirable dichotomy traditionally reflected in the legal/illegal immigration dichotomy. Non-removable persons are increasingly hierarchised in accordance

with the type of non-removability (legal, policy, or practical) and their role in that non-removability. This emerging hierarchal construct is based on the perceived degree of validity of grounds to remain, with legal non-removables at the top, policy non-removables further down, followed by cooperative practical non-removables, and with non-cooperative practical non-removables at the very bottom. My analysis of shifts in membership statuses, as well as of shifting hierarchies of desirability, may be of comparative value in further research on membership and liminal phenomena.

Building on Alessandro De Giorgi's concept of the selectivity and intensity of criminalisation and immigration control, I examined the manner in which non-cooperative practical non-removables have becoming increasingly singled out (amongst non-removable persons) as targets of exclusion from regularisation/formal-toleration, administrative detention, and imprisonment under EU law. This singling out has led to the entrapment of non-cooperative exhausted-returnees in certain EU Member States between administrative detention, imprisonment, and freedom-in-limbo. I illustrated this entrapment with a French case-study, in which I examined quantitative data on this entrapment, and the role performed by EU law in crystallising it. This case-study served to show the darker side of a seemingly protective set of rulings delivered by the CJEU, the laudable side of these rulings being that they shielded a large number of irregular migrants from imprisonment in the EU. My case-study sought to show who was left out by these rulings, and the repressive spotlight shined by these rulings on those left out. While the number of irregular migrants entrapped in France is relatively small when compared with the overall number of irregular migrants, the severity of this entrapment deserves to be noted and analysed. I ended with a narrative of the entrapment endured by a non-cooperative

exhausted-returnee, named M.J.. A broader theme on the intersectionality of exclusionary practices could be extrapolated from the particular set of narratives of M.J. and many others. This entrapment further begs the question of what functions it performs. What are the functions of the three exclusionary spaces in their use against non-cooperative exhausted-returnees? And getting back to the broader topic of this thesis, what are the functions of limbo-like toleration positions?

Part III/ The functions of limbo spaces of toleration

In part II, I showed the political nature of issues of non-removability and legal toleration, despite the fact that they are also technically complex issues. Intra-institutional and inter-institutional disagreements have surrounded the governance of limbo spaces of legal toleration. Some institutional actors have fought for the power of Member States to leave various groups of non-removable TCNs in limbo spaces of legal toleration. I argue that numerous EU institutional actors wish to preserve Member States' power to exclude certain categories of non-removable persons from legal residence because such exclusion may be believed to perform a range of functions akin to deportation and imprisonment. These actors are not always Right-wing Council delegations defending a sovereign national power of exclusion from legal residence. Toleration is sometimes seen as desirable by actors on the side of Europeanisation as well as by Centre-Left wing actors.

Chapter 5 is dedicated to an analysis of the functions of limbo spaces of toleration. In chapter 6, I provide a French case-study of one of these functions: deterrence. On the basis of interview-based qualitative research, I examine the deterrent function and impact of toleration positions in France. The content of the preceding chapters is taken for granted in these two final chapters.

Chapter 5. The functions of limbo spaces of toleration

I argue that limbo spaces of toleration may be viewed as derivative sanctions, tied to mother sanctions that are imposed against illegal residents. Illegal stay in all EU Member States is subjected to two broad types of sanction. There is first of all an *immigration sanction of return/removal*, which often involves administrative detention pending removal. There are secondly *collateral sanctions*, which correspond to *exclusion from core membership rights and benefits* that are reserved for legal residents, namely labour market access and basic welfare rights. In a majority of EU Member States, there is also a third set of sanctions, which encompasses *criminal sanctions* that may be imposed on grounds related to illegal residency, the most drastic criminal sanction being *imprisonment*.

The various toleration statuses can all be viewed as derivative sanctions, as they are intricately tied to the immigration sanction of removal and the collateral sanction of exclusion from legal residence rights. Postponed-removal, as a status of exclusion from regularisation, is a postponed-sanction status. Other legal toleration positions that resemble that of postponed-removal can similarly be seen as a postponed-sanction status. Exhausted-removal, as a status of exclusion from regularisation and formal toleration, is also a position that is stained by a failed return procedure, as those concerned suffer from the consequences of their failed return procedures by not receiving any form of documented status. Further, all of these statuses are accompanied by collateral sanctions of exclusion from the rights and benefits reserved for legal residents, even if this exclusion varies from one form of toleration to another, and from one Member State to another.

Toleration statuses do not solely have to be viewed as sanctions of membership exclusion, as they are part of a myriad of complex membership positions that lie on a scale between illegal and legal stay, and many offer something better than pure illegality of stay. However, the logic behind toleration is often a sanction-based logic and toleration is perceived by many of its holders as a sanction.

Juliet Stumpf⁴⁹⁷ has noted the increasing convergence between immigration and criminal law in the American legal system, and a parallel convergence of harsh ideological motivations behind immigration and criminal sanctions: punishment, deterrence and incapacitation etc. Other authors have further analysed the functions of administrative detention by reference to political theories of criminal punishment.⁴⁹⁸ Building on Juliet Stumpf's convergence-of-motivations idea, I argue that toleration statuses, viewed as derivative sanctions, may perform similar functions to administrative detention and imprisonment, as all serve to internally exclude non-legal residents from membership.

Very few institutional actors have defended the complete closure or preservation of the gap between *all forms* of non-removability and regularisation. Most institutional actors have pushed for the preservation of the gap for some groups of non-removable persons and the closure of the gap for others. Some actors have however found themselves more on the side of preservation than closure, which has namely been the case of the Council's German delegation. And the opposite is true for other actors, namely the FRA and the European Commission. But when an institutional actor is in favour of a gap for some groups of non-removable persons, no

497 Juliet Stumpf, "The Crimmigration Crisis: Immigrants, Crime and Sovereign Power" (December 2006) 56 *American University Law Review* 367.

498 For example, see Arjen Leerkes and Dennis Broeders, "A Case of Mixed Motives? Formal and Informal Functions of Administrative Immigration Detention" (2010) 50 *British Journal of Criminology* 830. See also Claire Rodier and Isabelle Saint-Saëns, "Contrôler et Filtrer : les Camps au Service des Politiques Migratoires de l'Europe" in M-C Caloz-Tshopf and V. Chetail (eds), *Mondialisation, Migrations, Droits de l'homme*, (Bruylant, 2007), 6 ; Patrick Henriot, "Les Formes Multiples de l'Enfermement : une Nouvelle Forme de Punitivité ?" in GISTI (ed), *Immigration, un Régime Pénal d'Exception* (juin 2012), 60-71.

matter how big or small that group is, the question is why?

Why preserve the power of Member States under EU law to exclude certain non-removable persons from legal residence and leave them in positions of toleration? In other words, why preserve the power of States to use the sanction of toleration against certain groups of non-removable persons? Because exclusion from legal residence may be believed by certain institutional actors to perform a range of formal and informal functions that protect the *integrity of immigration and asylum systems* and their goals.⁴⁹⁹ These are functions of retribution (section 1), expressing the power of the State (section 2), deterring abuse of non-removability strategies (section 4), enhancing removability (section 5), curbing public expenditure (section 6), and preserving selective regularisation in accordance with a range of goals (section 7). I thoroughly examine these functions on the basis of desk research, as well as phone interviews that I carried out with key EU actors involved in the Return Directive negotiations (the same actors mentioned in chapter 3).⁵⁰⁰ I also include a thorough critical analysis of the legitimising role that retribution and expressive State power rationales can play with regard to disadvantageous power relations that non-legal residents may be subjected to (section 3). Michael Speiser, a key parliamentary adviser in the negotiations behind the Return Directive, confirmed that postponed-removal positions were seen by many European parliamentarians and Council delegations as performing all of these functions, when postponement is viewed as an exclusionary alternative to

499 William Walters provides a fascinating historical take on the rationalisations of deportation practices, from practices purely designed to protect territorial sovereignty from politically undesirable persons, to governmental practices designed to control socially undesirable persons, all the way to the modern day goal of protecting the integrity of immigration and asylum systems : William Walters, "Deportation, Expulsion, and the International Police of Aliens" (2002) 6 (3) *Citizenship Studies* 265. This genealogy is more than relevant with regard to practices of exclusion from legal residence, as the system integrity rationale is omni-present here too.

500 These key actors are Fabian Lutz, the drafter of the European Commission's Return Directive proposal, and Michael Speiser, who was a political adviser of the European Parliament LIBE Committee's Rapporteur in the Return Directive negotiations. I also interviewed Manfred Hähnel, who is currently working in the Commission on the issue of non-removable TCNs.

regularisation of status.⁵⁰¹ He also stated that these functions were especially important to Right-wing European parliamentarians involved in the Return Directive negotiations. Although Michael Speiser's comments are limited to the status of postponed-removal, these functions are applicable to most toleration positions, and not just the Return Directive's postponed-removal position.

There are not just exclusionary functions, and some of the above-mentioned exclusionary functions have an inclusionary side. For example, the function of selective-regularisation has both an inclusionary and exclusionary side. Toleration serves to temporarily exclude all concerned from legal residence, but it also serves to allow discretionary decisions to be made on who should eventually be included within - or definitively excluded from - the sphere of legal residence. Furthermore, the status of formal postponement-of-removal may be viewed by some institutional actors as performing certain inclusionary functions, akin to those of regularisation, and that sit side-by-side with exclusionary functions (section 8). This paradoxically includes an inclusionary set of *deterrent* functions.

1. The function of retribution

Limbo positions of toleration first of all correspond to derivative sanctions that may aim to maintain the retributive function of removal. Retribution is about making the punishment fit the crime, by taking account of individuals' level of culpability in the design of a fair sanction/response. Unlike a function like deterrence, which is about the future effects of a sanction, retribution is about the backward-looking qualities of a sanction. This is a well-known function of imprisonment, namely with respect to sentencing laws and guidelines. Removal, in itself, is an immigration sanction that serves a retributive purpose. It serves to restore a balance that has

501 Interview with Michael Speiser, EPP Adviser, European Parliament (phone interview, 16 and 22 April 2013).

been upset by a TCN's rule-violation and unauthorised presence, by removing that individual from the host territory. Removal is also the harshest of administrative sanctions, as an alternative to removal could be imposed in the form of a fine.⁵⁰² That removal has acquired an increasingly retributive quality can be seen through its increasing use in EU States against foreigners, not just for purely immigration offences, but additionally for criminal offences that are unrelated to entry and residence rules.

Administrative detention, when ordered to prepare or implement removal, is part-and-parcel of an immigration sanction which performs a function of retribution. The FRA, as well as numerous NGOs and academics, have described administrative detention as being *punitive* when it ceases to fulfil its primary function of ensuring removal.⁵⁰³ Once removal is no longer feasible, continued administrative detention simply serves a punitive purpose. But I would argue that it fulfils a punitive purpose independently of the feasibility of removal, since it is the most coercive option for handling the removal of illegal residents, it is strongly geared towards illegal residents deemed to be non-cooperative or to pose public order threats, and it mimics criminal detention through physical seclusion from society. Many administrative detainees have shared their perception of administrative detention as a prison-like experience.⁵⁰⁴

Toleration statuses or positions, when viewed as derivative sanctions, may also be seen as performing a function of retribution against those concerned. Retribution is an idea that pervades EU

502 Although the option of fining as an alternative to return and removal seemingly disappeared with the adoption of the Return Directive.

503 See European Union Agency for Fundamental Rights, *Detention of Third-Country Nationals in Return Procedures* (Thematic Report, European Union Agency for Fundamental Rights, 2010), 42; Patrick Henriot, "Les Formes Multiples de l'Enfermement : une Nouvelle Forme de Punitivité ?" in GISTI (ed), *Immigration, un Régime Pénal d'Exception* (juin 2012); Assfam, Forum Réfugiés, France terre d'asile, la Cimade, l'Ordre de Malte, "Centres et Locaux de Réception Administrative: Rapport 2011" (20 novembre 2012), 38.

504 See Jesuit Refugee Service Europe, "Human Cost of Detention" < http://detention-in-europe.org/index.php?option=com_content&view=article&id=170&Itemid=206 > accessed 31 January 2014.

migration law, through the notion of justice as fairness. There is general consensus amongst EU institutions that legally resident TCNs are entitled to *fair treatment*, which implies that non-legal residents are not and should not be entitled to fair treatment. This conditions the fairness of one's treatment to one's past actions, namely one's compliance or non-compliance with immigration rules. This, allied with the principled position of the EU against wide-scale regularisation, translates into the idea that illegal residency should not be “rewarded”⁵⁰⁵ with either legal residence status or the rights and benefits attached to legality of residence. Fabian Lutz,⁵⁰⁶ the drafter of the Return Directive proposal, expressed the view that a key institutional motivation behind the postponed-removal limbo was that of not wanting to reward irregular migrants with regularisation and increased rights.

When illegally resident TCNs are not removable, the rationale behind not regularising their status or granting enhanced rights is linked to the general retributive quality of the legal/illegal immigration divide's impact on one's entitlements. Even though they are not removable, their residence status and treatment remain tainted by their past violations of immigration rules. But retribution is not simply limited to past violations of conditions of entry and residence. The retribution of toleration limbos is additionally due to not being removable, and the degree of past responsibility in that non-removability.

Most situations of non-removability are to a certain extent the result of a fight put up by a non-removable person (this is however not always the case). This is a fight against their removal, and it might involve legal strategising or practical strategising. When a person is not removable on legal grounds, namely human rights

505 European Union Agency for Fundamental Rights, *Detention of Third-Country Nationals in Return Procedures* (Thematic Report, European Union Agency for Fundamental Rights, 2010), 37.

506 Interview with Fabian Lutz, European Commission, DG Home Affairs (phone interview, 7 January 2014).

grounds, it is often because that person has sought review of a return measure, or some other form of review. NGOs play a particularly important part in helping migrants with legal strategies to remain.⁵⁰⁷ Even though a migrant can hardly be blamed for seeking to remain on human rights grounds, executive branches of governments sometimes treat such strategising as a form of abuse. When migrants, judiciaries, and/or NGOs successfully use legal strategies to neutralise the power of States to remove those migrants, States sometimes retaliate by leaving those concerned in limbo. Migrants here are left in limbo as a form of retribution for the past actions of migrants, NGOs, and judiciaries. Here, retribution is an informal and extra-legal function, as the actions of the three sets of actors do not correspond to offences under either administrative or criminal laws. They are not wrongs from a legal point of view.

With regard to asylum applicants, the use of toleration by certain States may also have a retributive quality. In France, asylum applicants who are left in a position of legal toleration are priority procedure applicants, Dublin applicants, and often subsequent applicants.⁵⁰⁸ Their exclusion from legal residency is accompanied by lower socio-economic rights, in comparison with rights granted to legalised asylum applicants. Given that these various non-regular procedures target presumptive abusers of asylum systems, the use of toleration could be seen as a form of retribution against presumed abusers of asylum procedures. It may be deemed unfair to grant presumptively undeserving and abusive asylum applicants the same status and rights as presumptively deserving and bona fide applicants. It must be borne in mind that not all Member States divide asylum applicants into legally and tolerated applicants. However, focusing for a moment on Dublin applicants,

507 For example, with regard to the situation in France, see Antoine de Ravignan, "La Cimade, Grain de Sable dans la Machine à Expulser" (9/2010) 294 *Alternatives économiques*, 48.

508 This was examined at length in section 1.3. of chapter 1, section 1.4. of chapter 2, and section 2.2. of chapter 3.

the Dubliners Project Report notes that Dublin asylum applicants in the EU “are often discriminated with respect to the treatment other applicants receive regarding accommodation, right to work, health care and education”.⁵⁰⁹ And JRS Europe has noted that the Dublin applicants they have helped feel “that they are being punished for seeking protection in Europe”.⁵¹⁰

Tolerated asylum applicants that I interviewed in France mostly expressed a feeling of injustice at the lower set of rights they possessed in comparison with the rights possessed by legally staying asylum seekers.⁵¹¹ The message they conveyed to me is that asylum applicants should all be treated equally, irrespective of procedural type or stage. To most of these tolerated asylum applicants, there was no perception of fairness at all in their ordeal.

Retribution for a migrant's responsibility in not being removable makes a little more sense when talking about persons who are not removable on practical grounds. Non-removability on practical grounds may be due to a deliberate strategy of non-cooperation on the part of a migrant, or it may be due to circumstances beyond the migrant's power. For example, third countries may be uncooperative, or transportation to a certain country may be technically impossible for reasons of security. However, irregular migrants might deliberately not cooperate with authorities in the removal process, by for example burning their papers, refusing to disclose their identity, refusing to attend a meeting at an embassy, or refusing to embark on transportation. Not all EU States's legal systems contain mechanisms for postponing the removal of

509 Daniela Di Rado (ed) “Dubliners Project Report: “Dubliners - Research and Exchange of Experience and Practice on the Implementation of the Council Regulation Dublin II establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in one of the Member States by a Third-country national”” (Project implemented under the ERF Community Actions 2007, April 2010), 32.

510 Jesuit Refugee Service Europe, “Dublin II: A Summary of JRS Experiences in Europe” (October 2008), 6.

511 See chapters 2 and 6.

persons on practical grounds. But in EU States that do have such mechanisms, postponement-of-removal and regularisation of status are often modulated in accordance with how cooperative such persons have been. German law and practice provide a good illustration of this. Persons who are not removable for practical reasons, and who are not administratively detained, are in principle granted a toleration certificate in Germany. But a distinction is made between those who are cooperative and non-cooperative. Holders of a toleration certificate are eligible for a work permit after twelve months, for regularisation of status after eighteen months, and for higher social benefits after forty-eight months. But they are only eligible for these enhanced rights if they are deemed to have been cooperative with State authorities.⁵¹² The allocation of rights to tolerated persons is therefore made in accordance with notions of merit and fairness based on irregular migrants' cooperation or lack of. One can also find traces of this retributive approach at EU level. At a JHA Ministerial meeting relating to the Return Directive which was held in 2007, the Dutch delegation, supported by the Czech and Swedish delegations, argued that the rights of postponed-returnees contained in the Directive should not apply if “the postponement of the removal is due to lack of co-operation by the third-country national subject to removal”.⁵¹³ This therefore reflects the retributive idea of granting lower rights to non-cooperative returnees.

Many Member States's legal systems do not contain mechanisms for postponing the removal of irregular migrants on practical grounds. And in States where such mechanisms exist, postponement is rarely mandatory; it is usually an option. Many persons who are not removable for practical reasons are subjected to every effort to remove them, including prolonged placement in

512 European Migration Network, “Ad-hoc Query on Practices followed concerning Third Country Nationals whose Compulsory Removal is Impossible” (Compilation produced on 14 April 2010), 7-8.

513 Council Document 14783/07, 34.

administrative detention, until they are either effectively removed or end up in a position of exhausted-removal. The Return Directive's principal targets for prolonged administrative detention (of up to eighteen months) are persons who cannot be removed for practical reasons due to non-cooperation; but prolonged detention also targets irregular migrants who are not removed due to delays on the part of third countries. As I explained in section 1.4. of chapter 1, exhausted-removal is the most precarious toleration position in terms of both formal status rights; EU legislation is frightfully silent on this position. In sections 6 and 7 of chapter 4, I also explained that non-cooperative exhausted-returnees have become the sole permissible targets of imprisonment in the EU for the criminal offence of illegal stay, as a result of the CJEU's 2011 *El Dridi* and *Achughbadian* rulings.⁵¹⁴ And as a result, in EU countries like France that criminalise illegal stay, non-cooperative exhausted-returnees often find themselves bounced around between prison, administrative detention and freedom-in-limbo.

With regard to non-cooperative irregular migrants, exhausted-removal is an extremely passive aggressive form of retribution in response to non-cooperative behaviour. With regard to irregular migrants who have played no part in delaying or hampering removal, exhausted-removal is a misguided form of retribution against those concerned for obstacles that lie beyond their control.

2. The function of expressive State power

In an area where a State's territorial sovereignty is at stake, toleration sanctions also perform an expressive function of State power. This is about how comfortable Member States are with formalising the failures and weaknesses of their removal

⁵¹⁴ Case C-61/11 PPU *El Dridi*, alias *Karim Soufi* (2011) ECR I-03015; Case C-329/11 *Alexandre Achughbadian v Préfet du Val-de-Marne* (2011).

procedures, in other words the ineffectiveness of their territorial sovereignty. Regularisation, and to a certain extent formal toleration, may be perceived as formalisations of such failures and weaknesses. Public debates on irregular migrant populations generally revolve around two mainstream policy options: return and regularisation. At a policy level, the European Pact on Immigration and Asylum, adopted by the European Council in 2008, established the principle that “illegal immigrants on Member States' territory must leave that territory”, subject only to the exception of “case-by-case regularisation”.⁵¹⁵ Hard EU law reflects that principle as article 6 of the Return Directive imposes an obligation on Member States to issue a return measure against illegally staying TCNs. This obligation is subject only to a limited number of exceptions, the most notable exception being discretionary regularisation. Thus, the balance clearly lies on the side of return in EU law and policy. Further, there is no hard EU law which sets standards for discretionary regularisation mechanisms or programmes.

Public opinion in the Union has been polarised around the options of regularisation and deportation since illegal immigration became a hot topic, but there has always been a higher percentage in favour of removal than of regularisation. Back in 1997, a Eurobarometer Poll on “Racism and Xenophobia in Europe” showed that amongst the EU citizens of the time, “nearly 66% agreed that “all illegal immigrants should be sent back to their country of origin with- out exception””.⁵¹⁶ In 2010, Transatlantic Trends⁵¹⁷ found that forty-eight percent of respondents from the six EU countries favoured removal, third-seven percent preferred regularisation opportunities, and thirteen percent believed in a

515 European Council, “European Pact on Immigration and Asylum” (Presidency Conclusions, 15 and 16 October 2008), 7.

516 Eurobarometer, “Racism and Xenophobia in Europe”, (Opinion Poll 47.1, 18 and 19 December 1997), 7.

517 Transatlantic Trends⁵¹⁷ found that forty-eight percent of respondents from the six EU countries favoured removal, third-seven percent preferred regularisation opportunities, and thirteen percent believed in a

< <http://trends.gmfus.org/archives/immigration-archive/immigration-2010/> > accessed 31 January 2014.

case-by-case approach. This division is often thought to separate the Left (partial to regularisation) from the Right (partial to deportation). While it is true that in the European Parliament, and in many countries such as France, the Left/Right spectrum provides quite an accurate marker for positions on regularisation-versus-deportation, the reality can be more complex. There are countries like Germany and the UK where, with the exception of the extreme Left, mainstream political parties (including the Left-leaning ones) do not favour regularisation as a general tool for managing irregular migration.

For EU Member States with majorities that attach great importance to national territorial sovereignty, effective deportation practices are partly about expressing society's moral disapprobation of territorial transgressions. The overt inability of a State to remove illegal residents weakens the image of that State's territorial sovereignty for portions of public opinion that attach importance to border control and removal of illegal residents. When illegal residents turn out to not be removable, regularisation constitutes a further sign of weakness for the pro-deportation portion of public opinion; the State is seen as rewarding those who break the rules and violate territorial sovereignty.

Limiting regularisations of non-removable persons, and leaving them in limbo spaces of toleration, partially shields EU States' expressive power from negative public attention. While regularisation is a highly politicised tool of immigration management, formal postponement-of-removal is a more recent and low-profile tool. And States are quite keen to not over-advertise practices of formal toleration. Their reluctance to formalise is quite clear in light of the secrecy that has generally characterised exchanges of practices on formal-toleration policies. In a recent Council document⁵¹⁸ on the practices of certain Member

518 Council Document 8980/11 (*Compilation of the common elements and best practices of Member States on the status of*

States with regard to formal toleration statuses, there were numerous redactions of the names of countries associated with specific toleration practices, as if the information were so sensitive that it could not be shared with the public. A concern for States' expressive power could partly explain the position of Council delegations who were against the obligation under the Return Directive for Member States to formalise postponement-of-removal. According to Fabian Lutz, the drafter of the Return Directive proposal, the German Council delegation was against Europeanising the governance of formal postponement-of-removal, preferring such governance to continue “at national level, discreetly, in accordance with practical needs”.⁵¹⁹ Exhaustion-of-removal could also be perceived as damaging for States' expressive power, as it symbolises the impotence of return procedures against those who end up in a position of exhausted-removal.

The importance and impact of public opinion on Member States' approaches towards non-removable TCNs is not to be underestimated. According to the Ramboll/Eurasylum study, in most EU Member States, there is “a low level of awareness amongst the general population concerning the particular issue of legislation pertaining to”⁵²⁰ non-removable TCNs. However, the study also found that in many EU Member States “where the public opinion on migration and asylum issues tended to be negative, policy in the area was observed to be relatively responsive to the sentiments, and policy measures had a distinctly restrictive character”.⁵²¹ A great illustration was provided with the example of Belgium, in which there is a fear on the part of State authorities

illegally staying third-country nationals who, although subject to a return decision, cannot be removed from the territory of the Member State concerned by application of the principle of non-refoulement).

519 Interview with Fabian Lutz, European Commission, DG Home Affairs (phone interview, 7 January 2014).

520 Ramboll and Eurasylum, “Study on the Situation of Third-Country Nationals pending Return/Removal in the EU Member States and the Schengen Associated Countries: Final Report” (Study commissioned by the European Commission, 11 March 2013), 79.

521 Ibid, 81.

that “any policy measure which would make it 'easier' for third-country nationals to reside in the country would be perceived very negatively and meet resistance”⁵²² due to an overwhelming majority of the general population's perception that there is an overpopulation of immigrants in the country.

3. How retribution and expressive State power may legitimise disadvantageous power relations

Legality of residence, like illegal residence, is not an objective and value neutral construct, but a social construct.⁵²³ This seems obvious but it is a reality that is often purposely overshadowed by ideas of retribution and expressive State power. The idea that legal residents are deserving of fair treatment (and illegal residents undeserving of fair treatment) serves to distract from what the legal/illegal immigration divide actually means, and to legitimise the disadvantageous power relations that non-legal residents may be subjected to. The deconstruction literature on the public/private dichotomy generally aims to display the grey areas that exist between public and private domains, and/or demonstrate the role of such a dichotomy in legitimating power structures that exist in the untouchable private domain.⁵²⁴ Paul Schiff Berman has gone so far as to suggest that “the public/private distinction in international law is difficult to maintain in light of the extensive critique of *all* public/private distinctions that has been mounted by legal realists, critical legal studies scholars, and feminist theorists”.⁵²⁵ The legal/illegal

522 Ibid.

523 See Dora Kostakopoulou, “Irregular Migration and Migration Theory: Making State Authorisation Less Relevant”, in Barbara Bogusz, Ryszard Cholewinski, Adam Cygan, and Erika Szyszczak (eds), *Irregular Migration and Human Rights: Theoretical, European and International perspectives* (Martinus Nijhoff Publishers, 2004); Clandestino, “Pathways into Irregularity: The Social Construction of Irregular Migration” (Comparative Policy Brief, October 2009), 3 < http://clandestino.eliamep.gr/wp-content/uploads/2009/12/clandestino_policy_brief_comparative_pathways.pdf > accessed 31 January 2014.

524 Michael D A Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell LTD 2001), 1130-1132 ; Paul Schiff Berman, “From International Law to Law and Globalization” (2005) 43 *Columbia Journal of Transnational Law*, 518-523.

525 Paul Schiff Berman, “From International Law to Law and Globalization” (2005) 43 *Columbia Journal of*

immigration dichotomy may be as frail as the public/private dichotomy, and should be critically analysed along the same lines, especially with regard to the power structure critique.⁵²⁶

It is a well established fact that migrants who fall outside the sphere of legality are more vulnerable to exploitation and marginalisation as a result of their precarious migration status and their socio-economic exclusion. Non-legal migrants are in a precarious position both vis-à-vis public actors and private actors. They live in fear of deportation, administrative detention, and prison vis-à-vis immigration enforcement officers. They are often locked out of numerous mainstream socio-economic rights, such as comprehensive healthcare, social assistance, as well as certain levels of educational and vocational training. With respect to private actors, the starting point in EU law is that non-legal residents are not entitled to labour market access, that employers are prohibited from employing them, and that landlords may be subjected to sanctions for renting their property to them. Exceptions do however exist.

Illegal residents, and non-removable persons with precarious toleration statuses, are often forced to live in a shadow and clandestine economy to survive; their basic subsistence frequently depends on it. While the mainstream approach in EU law is to tackle those who exploit non-legal residents, namely by prohibiting the employment of non-legal residents, this approach pushes those private relations further underground for as long as non-legal residents remain in the EU.

The retributive rationale plays an important role in justifying the

Transnational Law, 519.

526 A small note of caution is that the criticism and deconstruction of a dichotomy should not solely focus on the dichotomy itself (with the goal of annihilating it), but on how that dichotomy is used within specific structures and settings. This is a very useful piece of advice by Ruth Gavison with regard to the feminist critique of the public/private distinction: Ruth Gavison, "Feminism and the Public/Private Distinction" (November 1992) 45 *Stanford Law Review* 1.

reservation of fair treatment for legal residents but it simultaneously legitimises highly disadvantageous power relations between State authorities and non-legal migrants, as well as potentially very dangerous underground private relations between private actors and non-legal migrants. Their lack of an entitlement to fair treatment is justified by the fact that their presence is not legal. And for many citizens, this provides enough of a reason to turn a blind eye to their disadvantageous position, a position that is in great part caused by their status.

And yet, certain academics and institutional actors have highlighted the frail nature of the legal/illegal immigration divide. The remaining passages of this paragraph restate my detailed explanation of this frail nature in section 5.4. of chapter 1. A Clandestino report noted that in the 2000s, millions of TCNs moved between illegal and legal status, and vice versa.⁵²⁷ In other words, these millions fell in and out of legal residency over long periods of time. There are many ways of becoming an irregular migrant. It can happen through illegal entry. But it can also happen after an initial period of legal entry and residence which is followed by the loss of legal residence. According to findings of the Clandestino research project, many irregular migrants find themselves in a position of illegality due to small changes in immigration regulations over time, as well as administrative delays and errors. Furthermore, Ellie Vasta⁵²⁸ has carried out empirical research which reveals a phenomenon of immigrants who, with the help of tight networks of family and friends, carefully and strategically navigate their way in between illegal and legal statuses. They do so through the buying and borrowing of important documentation, such as passports and residence permits, which allows them to

527 Clandestino, "Size and Development of Irregular Migration to the EU" (October 2009), 6-7 <<http://clandestino.eliamep.gr/category/irregular-migration-in-the-eu/comparative-analysis/>> accessed 31 January 2014.

528 Ellie Vasta, "The Paper Market: "Borrowing" and "Renting" of Identity Documents" (2008) Centre on Migration, Policy and Society Working Paper 61.

move in and out of legal statuses over time, in order to alleviate the difficulties associated with inevitable periods of illegal stay. A significant result of the research for Ellie Vasta is “the fluidity between irregular and regular statuses”.⁵²⁹

The legal/illegal immigration dichotomy does not have any kind of objective and neutral value. Critical race theorist Kevin Johnson has called on immigration scholars around the world to pay more attention to the disparate impacts of immigration law towards marginalized groups, namely those made up of non-caucasian individuals and lower socio-economic households. He has highlighted the importance of the critical race concept of *intersectionality* as “an important tool for understanding how membership in more than one marginalised group can increase the magnitude of the disadvantage facing particular subgroups.”⁵³⁰ Marginalised groups can be defined in terms of race, wealth, culture, gender, and more.

While conditions of entry and residence in EU Member States vary over time, a glimpse at minimum EU standards shows a general picture of profiles that are disadvantaged by the EU's legal migration system, and that are consequently over-represented in non-legal immigration populations. For short stays in a Schengen Member State, TCNs from a black list of countries are required to apply and successfully obtain a visa; TCNs from all remaining countries are exempt from visa requirements. The black list is largely made up of countries with non-caucasian and muslim majorities.⁵³¹ National visas are also imposed by Member States for longer stays, and these visas similarly have a disparate impact on non-caucasians and muslims. For both short and long stays, there

529 Ibid, 12.

530 Kevin Johnson, “The Intersection of Race and Class in US Immigration Law and Enforcement” (2009 Fall) 72 *Law and Contemporary Problems*, 4.

531 Elspeth Guild, “Citizens Without a Constitution, Borders Without a State: EU Free Movement of Persons” in Anneliese Baldaccini, Elspeth Guild, and Helen Toner (eds), *Whose Freedom, Security and Justice?: EU Immigration and Asylum Law and Policy* (Hart Publishing, 2007), 52.

are also typically conditions linked to minimum financial resources and social status, which make legality of stay to a large extent dependent on wealth and employment. Poorer sociological profiles are therefore also disparately affected by the dichotomy, and are by consequence over-represented in non-legal immigrant populations. This already shows how groups of individuals who are not caucasian, are muslim, and/or are not in economically advantageous positions, may be disparately affected by the legal/illegal immigration dichotomy as a result of their membership in several marginalised groups.

The legal/illegal immigration dichotomy in the EU is a highly complex one. The line that separates the regular from the irregular migrant can be the result of complex regulation changes as well as administrative delays and errors. In cases where the line is not the result of a Kafkaesque bureaucratic system, the deliberate distinction between regular and irregular migrants is often linked to highly discriminatory distinctions between individuals on the basis of their country of origin, social status, employment status, and indirectly of their ethnicity and religion. While all of these elements do not in themselves destroy the rationales of retribution and expressive State power, they at least provide a broader background against which ideas of fairness and moral indignation need to be critically examined.

4. The function of deterrence

It is especially the function of deterrence that is most widely and explicitly used by institutional actors to justify non-regularisation. Maintaining a person who cannot be removed for legal, practical, or policy reasons, in a position of legal toleration or indirect toleration, outside the security provided by legal residence, and with a weak set of rights and benefits, is often viewed as a manner

of deterring abuse of non-removability strategies. This is a function of *specific* deterrence, which seeks to deter non-removable TCNs from abusing non-removability strategies and therefore deter their continued stay in the host country.

There is also a possible function of *general* deterrence, which seeks to deter potential irregular migration candidates from whatever lure might be provided by the ease of obtaining a residence document (or even postponement-of-removal for those not entitled to postponement). This more general function is about reducing the pull factor for irregular migration by reducing the overall appeal of non-removability strategies, insofar as such strategies might be rewarded in the long run by regularisation of status and/or enhanced socio-economic rights. The goal is to protect the overall integrity of immigration control and selective immigration systems, by encouraging compliance with formal channels of legal entry and residence. It is both secure immigration statuses, and the rights attached to secure immigration statuses, that are believed by many State actors to constitute a potential pull factor. The notion that regularisation practices and access to socio-economic benefits may constitute a pull factor is not limited to the specific context of non-removability. When concerns are raised by State actors, they tend to be raised with regard to migrants and asylum seekers in general.⁵³² But concerns about such a pull factor have sometimes been raised with regard to non-removable TCNs. For example, in the Ramboll/Eurasylum Study, “(t)he possibility of regularisation for third-country nationals pending return was ... reported to be an important pull factor in the Czech Republic”.⁵³³

532 EU States' concern with a pull factor must not be overstated or generalised. In the 2009 REGINE Study on Regularisation in Europe, not all Member States expressed an immense fear of regularisation as being a pull factor for illegal immigration. The REGINE Study concluded that it was a small minority of Member States who expressed “extreme reservations about regularisation policy, only four (Austria, Belgium, France, Germany)” claiming “that programmes constitute a pull-factor for future illegal migration” (citation from ICMPD, “REGINE: Regularisations in Europe: Study on Practices in the Area of Regularisation of Illegally Staying Third-Country Nationals in the Member States of the EU: Final Report” (Study commissioned by the European Commission, Ref. JLS/B4/2007/05, Vienna, January 2009), 57).

533 Ramboll and Eurasylum, “Study on the Situation of Third-Country Nationals pending Return/Removal in the EU Member States and the Schengen Associated Countries: Final Report” (Study commissioned by the European

This was not the case for respondents from all countries, but it shows the application of the pull factor theory by some EU Member State actors to the context of non-removable TCNs.

I move on now to discussing the specific and general deterrent motivation behind the various toleration positions governed under EU law.

The European Commission and the Council of the EU used the deterrence-of-abuse rationale to justify the choice of legally tolerating (as opposed to regularising the status of) potentially cooperative victims of trafficking during periods of reflection in the CVHT Directive. The Commission's CVHT Directive proposal explained that the reflection “period is merely a temporary respite, during which victims' residence in the territory of a Member State is *tolerated*”, and which “allows victims enough time to recover physically and psychologically, without providing an incentive likely to encourage *abuse*”.⁵³⁴ This is a logic that the European Parliament's LIBE Committee also endorsed; its final report on the Commission's CVHT Directive proposal stated that cooperation mechanisms for obtaining residence permits were susceptible to “procedure shopping” which “is an abuse that can be exploited not only by the victims, but especially by traffickers”.⁵³⁵

While it is not at EU level that the toleration or regularisation of asylum seekers is established, States such as France that choose to tolerate certain asylum seekers tend to reserve toleration for presumptively abusive applicants, namely those whose asylum claims are treated as manifestly unfounded and those subjected to

Commission, 11 March 2013), 82.

534 Commission, “Proposal for a Council Directive on the Short-Term Residence Permit issued to Victims of Actions to Facilitate Illegal Immigration or Trafficking in Human Beings who Cooperate with the Competent Authorities” COM(2002) 71 final, 12.

535 European Parliament LIBE Committee, “Report on a proposal for a Council Directive on the Short-term Residence Permit issued to Victims of Actions to Facilitate Illegal Immigration or Trafficking in Human Beings who Cooperate with the Competent Authorities” A5-0397/2002, 26.

a Dublin procedure. Toleration here serves to deter presumptively abusive asylum applicants from abusing asylum procedures for the sole purpose of remaining in their host States; it does so by offering a weaker immigration status and a weaker set of rights than those bestowed upon legally resident asylum applicants. And these asylum procedures themselves, as governed under EU law, serve to deter abuses of asylum procedures and more generally to deter the phenomenon of asylum shopping around Europe.⁵³⁶ The general deterrent motivation behind the toleration of some groups of asylum applicants is largely derived from the notion in many EU Member States that asylum reception conditions can act as a pull factor.⁵³⁷

With regard to the specific and general deterrent function of keeping individuals in a limbo of postponed-removal, interviews with key actors in the Return Directive negotiations provided clear testimonies of this all-pervasive deterrent motivation. Fabian Lutz, the drafter of the Return Directive proposal, stated that most Member States in the Council were opposed to closing the postponed-removal gap between human rights protection from removal, on the one hand, and regularisation, on the other. They were opposed to such closure because they “want(ed) to avoid sending a signal that irregularity will be rewarded, that there is a perspective of being regularised”.⁵³⁸ Michael Speiser, a key European Parliamentary adviser in the Return Directive negotiations, indicated that for his Centre-Right political party, granting secure legal stay to all persons protected from removal on human rights or humanitarian grounds “might create a pull factor”.⁵³⁹ Thus, excluding certain categories of persons protected

536 With regard to accelerated procedures, see Cathryn Costello, “The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?” (2005) 7 *European Journal of Migration and Law* 35-69.

537 Ramboll and Eurasyllum, “Study on the Situation of Third-Country Nationals pending Return/Removal in the EU Member States and the Schengen Associated Countries: Final Report” (Study commissioned by the European Commission, 11 March 2013), 83.

538 Interview with Fabian Lutz, European Commission, DG Home Affairs (phone interview, 7 January 2014).

539 Interview with Michael Speiser, European Parliament, EPP group adviser (phone interview, 16 April 2013).

from removal on human rights grounds was about deterring the lure of human rights protection from removal as an avenue into legality of stay.

With regard to the Return Directive's actual postponed-removal status, certain Council Working Party delegations, namely the British and Maltese delegations, explicitly stated during negotiations that the Directive's postponed-removal status and rights should preserve the specific deterrent effect of deportation.⁵⁴⁰ They wished to avoid creating a postponed-removal status that would make postponed-returnees too secure and comfortable. They were in particular against the European Commission's proposal of imposing an obligation on Member States to specify the period of postponement in the written certification issued to postponed-returnees.⁵⁴¹ This idea of an obligation to specify the period of postponement was dropped in the final version of the Directive, and the aim of not specifying this period was to make postponement-of-removal an insecure position, and therefore not encourage individuals to seek or prolong postponement of their removal.

It is not just the Return Directive's postponed-removal position that has a deterrent function, as a position of exclusion from regularisation. The position of exhausted-removal (and of released-detainee *stricto sensu*) also has a deterrent function, as a position of exclusion from formal postponement-of-removal. Under the Return Directive, postponement-of-removal is optional with regard to persons who cannot be removed on practical grounds. When removal is not discretionarily postponed, those concerned might effectively be removed one day or they might end up in a position of released-detainee *stricto sensu* or exhausted-returnee. In the Return Directive negotiations, most Member States were opposed

540 Council Document 13025/06, 7, footnote 6.

541 See section 1.3. of chapter 3.

to creating any kind of entitlement to postponement-of-removal for persons who cannot be removed for practical reasons, even for those who are cooperative. Fabian Lutz explained Member States' opposition by reference to the rationale that “whenever you grant rights to this category of persons (who cannot be removed for practical reasons), you also provide a potential stimulus of somehow not cooperating or trying to avoid, by different strategies, efficient return”.⁵⁴² Exhausted-removal, as a position of exclusion from the position of postponed-removal, serves to deter non-cooperative behaviour and to correspondingly incentivise cooperation with the return procedure. With regard to the meagre rights of exhausted-returnees, a good illustration of the deterrent motivation lies in a quote that predates the Return Directive negotiations, but that is very insightful. This quote can be found in the Swedish State's response to the 2002 European Commission consultation on a Community Return policy. In its response, the Swedish State stated that when faced with a failed return procedure against an “alien”, “the only sanctions we can use to persuade the alien to co-operate in obtaining adequate documents for return, are to make restrictions in the allowances, the social benefits”.⁵⁴³

The specific and general deterrent functions discussed here are often predicated on a notion that non-removable persons make abusive use of non-removability strategies to curtail immigration enforcement. Great weight here is attached to the importance of territorial sovereignty, as well as to the agency of migrants concerned. The ideological attachment to – or detachment from – territorial sovereignty undoubtedly plays an important part in one's perception of non-removable persons as abusive or not abusive. Without delving into the ideological and technical

542 Interview with Fabian Lutz, European Commission, DG Home Affairs (phone interview, 7 January 2014).

543 Kerstin I. Eriksson on behalf of The Swedish Migration Board, “Removal – Enforcement of Return Decisions” (Paper prepared for the European Commission hearing on a community return policy on illegal residents, 16 July 2002), 3.

intricacies of it all, I wish to add a few words about the actual existence of a pull factor of regularisation practices, on the one hand, and of a deterrent effect of restrictive immigration practices, on the other. The REGINE Study on regularisation practices in Europe found that there was little to no evidence of regularisation actually constituting a pull factor for illegal immigration.⁵⁴⁴ According to the Ramboll/Eurasylum study, contentions by State actors that a pull factor exists tend to be based on contenders' "knowledge, experience and personal opinions, without any factual evidence to support them".⁵⁴⁵ More specific academic studies suggest that restrictive immigration policies have little to no deterrent effect on actual and potential migrants. Writing about asylum seekers' choice of destination country, Eiko Thielemann's research suggests that "structural factors are indeed more important than policy related factors ... (and that) wealth differentials and differences in employment opportunities" are more important than strict migration policies.⁵⁴⁶ There have also been qualitative enquiries, based on interview-based research with irregular migrants and/or asylum seekers, that strongly suggest the very weak deterrent effect of migration control policies and practices in numerous EU Member States.⁵⁴⁷ Chapter 6 of this thesis builds on this qualitative literature, by examining the deterrent effect of exclusion from legal residence and rights of tolerated TCNs in France.

544 ICMPD, "REGINE: Regularisations in Europe: Study on Practices in the Area of Regularisation of Illegally Staying Third-Country Nationals in the Member States of the EU: Final Report" (Study commissioned by the European Commission, Ref. JLS/B4/2007/05, Vienna, January 2009), 131.

545 Ramboll and Eurasylum, "Study on the Situation of Third-Country Nationals pending Return/Removal in the EU Member States and the Schengen Associated Countries: Final Report" (Study commissioned by the European Commission, 11 March 2013), 82.

546 Eiko R. Thielemann, "Why Asylum Policy Harmonisation Undermines Refugee Burden-Sharing" (2004) 6 *European Journal of Migration and Law*, 60 and 64.

547 For example, see Vaughan Robinson and Jeremy Segrott, "Understanding the Decision-Making of Asylum Seekers" (Home Office Research Study 243, Home Office Research, Development and Statistics Directorate, July 2002); Richard Black, Michael Collyer, Ronald Skeldon, Clare Waddington, "Routes to Illegal Residence : A Case Study of Immigration Detainees in the United Kingdom" (2006) 37 *Geoforum* 552-564 ; Tetty Havinga and Anita Böcker, "Country of Asylum by Choice or by Chance : Asylum-Seekers in Belgium, the Netherlands and the UK" (January 2009) 25 (1) *Journal of Ethnic and Migration Studies* 43-61.

5. The function of enhanced-removability

The specific deterrent function of toleration sanctions is allied (and practically synonymous) with a function of enhanced removability, which may seem to be an obvious function. Toleration aims to deter abuse of non-removability strategies and to correspondingly encourage departure. The removability function is however a lot more subtle and cynical than would seem. Toleration, namely in the form of postponed-removal statuses, is generally supposed to be temporary, but often turns out to not be temporary at all. Nonetheless, the aim of merely tolerating and not regularising may be to enhance chances of future removal or departure. Enhancement may work in one of two ways - gradual erosion of the obstacles to removal and encouragement of self-repatriation through negative incentives.

Regarding the obstacle-erosion side of the removability function, non-removable persons are rarely completely passive actors in their non-removability. They often fight to stay by for example entering into heavy asylum procedures, seeking review of return measures, hiding their true identity etc. Leaving persons in precarious positions of insecure residence and bare subsistence makes it very hard for them to be in a material position to procedurally defend themselves against State authorities. For example, the UNHCR⁵⁴⁸ has noted that the exclusion in France of tolerated asylum seekers from basic social and housing rights has an adverse impact on their procedural chances of obtaining asylum. Being in a position of destitution and insecure residence makes it difficult to put up a procedural fight against a host EU Member State. That may well be the aim with regard to tolerated asylum seekers, tolerated victims of trafficking who turn out to not be cooperative, persons with postponed-removal status, and persons with exhausted-removal

548 UNHCR, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice", (March 2010), 250.

status. According to Michael Speiser, the postponed-removal gap between human rights protection from removal, on the one hand, and regularisation, on the other, serves to ensure the temporary nature of this protection for those concerned. While he deemed this protection to be important, he also thought that there “should always be a sort of margin of manoeuvre for Member States to send”⁵⁴⁹ at least certain groups of protected TCNs back. Thus, by not granting a residence permit, the aim is to be able to return those concerned once their human rights protection from removal has run out. Michael Speiser also stated that a reason for this postponed-removal gap is that “care must be taken to not encourage permanent settlement”.⁵⁵⁰ This rationale corresponds to the negative-incentive side of the enhanced-removability function, which I turn to now.

Regarding the negative-incentive side of the removability function, precarious toleration positions may serve to provide incentives for non-removable persons to leave or self-repatriate. A passage from an article by Matthew Gibney on a related topic perfectly sums up this side of the removability function of precarious toleration statuses:

“Host States must be like a cheap hotel room—decent enough to consider spending a night, but not the kind of place one would want to call home”.⁵⁵¹

If TCNs cannot be removed through coercive State means, then they can be encouraged to leave through their own means. This negative-incentive side to the removability function is synonymous with the function of specific deterrence, for the ultimate aim is to positively deter non-removable persons from remaining.

⁵⁴⁹ Interview with Michael Speiser, European Parliament, EPP group adviser (phone interview, 16 April 2013).

⁵⁵⁰ Ibid.

⁵⁵¹ Matthew Gibney, “Between Control and Humanitarianism: Temporary Protection in Contemporary Europe” (Spring 2000) 14 *Georgetown Immigration Law Journal* 689, 705.

In chapter 6, I will show that many of the tolerated TCNs I interviewed in France have a clear understanding of the specific deterrent function of their position – they understand that the aim is to encourage them to leave.

6. The function of curbing public expenditure

Since toleration positions are generally allied with exclusion from numerous rights and benefits, a very straightforward function of toleration positions is to curb public expenditure. Michael Speiser, a key parliamentary political adviser in the Return Directive negotiations, told me “that no reasonable person could deny this”.⁵⁵² The low set of socio-economic entitlements possessed by tolerated persons limits States' socio-economic obligations towards them. Compared with the cost of detaining an illegal resident in a prison⁵⁵³ and in an administrative detention centre,⁵⁵⁴ freedom-in-limbo is cheap for States (from a very short-term perspective). A comparison between the rights of beneficiaries of international protection under the International Protection Directive⁵⁵⁵ and the rights of persons protected from refoulement whose removal is merely postponed under the Return Directive⁵⁵⁶ shows a clear short-term difference in potential public expenditure. This is undoubtedly a motivating factor for preserving the power to exclude some groups of non-removable persons from legal residence. Persons in a position of exhausted-removal generally have even less entitlements than persons whose removal is postponed. I have already showed how EU legislation is silent on exhausted-returnees' rights.

552 Interview with Michael Speiser, European Parliament, EPP group adviser (phone interview, 16 April 2013)

553 See Marcelo F Aebi and Natalia Delgrande “Council of Europe Annual Penal Statistics - SPACE 1: 2010 Survey on Prison Populations” (PC-CP (2012) 1, 28 March 2012), 127-128.

554 See Jesuit Refugee Service Europe's “Detention in Europe” website: < http://www.detention-in-europe.org/index.php?option=com_content&view=article&id=176&Itemid=210 > last accessed 4 September 2014.

555 Council Directive 2004/83/EC on qualification for international protection (2004) OJ L 304/12, ch VII.

556 Directive 2008/115/EC of the European Parliament and of the Council on the return of illegally staying third-country nationals [2008] OJ L 348/98, art 14.

Similarly, the rights of tolerated victims of trafficking under the CVHT Directive are significantly less costly for host States in comparison with the rights of regularised victims. And in countries like France that make a strong distinction between tolerated and regularised asylum seekers, reception costs are much lower for tolerated asylum applicants (than for regularised applicants) as they are not eligible for housing in asylum reception centres and are excluded from mainstream healthcare services.

EU Member States are generally very wary of the consequences of granting residence documents of any sort to illegal residents who turn out to not be removable. In a Council Working Party meeting relating to the Return Directive's postponed-removal status, Polish and Irish delegations expressed particular concern over the consequences and rights that flow from “giving a document to an illegal third-country national”.⁵⁵⁷ Many EU governments claim to fear the potential public expenditure that can flow from regularisation and even from formal toleration; this fear echoes a certain portion of public opinion's views in several EU countries, where “overall, large majorities ... (believe) that immigrants benefit more from health and welfare services than they contribute in taxes”.⁵⁵⁸ This fear and belief have become increasingly dispelled and disproved by the growing empirical literature on the subject, which suggests that migration has very little effect on the public purse (in either positive or negative terms).⁵⁵⁹

While leaving non-removable persons in positions of toleration

⁵⁵⁷ Council Document 13025/06, 7, footnote 5.

⁵⁵⁸ Transatlantic Trends, “Immigration : Key Findings 2010”, 14. Also see: Eurobarometer, “Racism and Xenophobia in Europe” (Opinion Poll 47.1, 18 and 19 December 1997), 5.

⁵⁵⁹ A very recent and highly publicised report by the OECD confirmed the absence of a burden posed by migrants on the public purse : OECD, *International Migration Outlook 2013* (OECD Publishing, 2013), 161. Within the US context, and more specifically on the issue of irregular migrants' impact on public expenditure, the following paper suggests that irregular migration has a limited overall impact on the US economy: Gordon H. Hanson, “The Economics and Policy of Illegal Immigration in the United States” (Migration Policy Institute, 2009).

may perform a short-term function of curbed expenditure, this has to be offset against what the European Commission has described as the negative impact of large populations of non-removable persons on social cohesion and European labour markets, “as a source of cheap labour, liable to exploitation and in the long-term preventing necessary structural reform and thereby contributing to the inefficiency of the labour market”.⁵⁶⁰ And it also has to be offset against the costs associated with non-removable persons getting caught up in the criminal justice system due to the necessity to resort to criminality in order to survive as non-legal residents.

7. The function of selective-regularisation

There is last of all a possible function of selective-regularisation. It corresponds to the desire of Member States to preserve the possibility of regularising certain non-removable persons by applying selective criteria. Toleration here can be viewed as a sanction which performs a selective and rehabilitative function. EU and national immigration systems overtly seek to manage legal migration so that it provides overall socio-economic benefits to EU societies and is as risk-free as possible in security terms. Criteria for legal entry and residence for example discriminate against the most disadvantaged socio-economic households and individuals from third countries. There are also always public order and security criteria involved in selecting legal migrants. National systems often contain criteria other than socio-economic and security ones, an example being cultural criteria.

Persons excluded from legal residence, if not due to administrative delays/mistakes, tend to fall short of one or more of the various

⁵⁶⁰ Commission, “Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee, and the Committee of the Regions, on Integration, Immigration and Employment” COM (2003) 0336 final, 26.

socio-economic and security criteria. A perfect illustration of security-related selection is the situation of persons protected from refoulement but who are excluded from international protection for security-related reasons.

The fact that many persons excluded from legal residence are not removable constitutes a challenge for selective immigration systems. An entitlement to legal residence for certain categories of non-removable persons (e.g. beneficiaries of international protection) robs States of their selective power with regard to those categories. This may very plausibly be why EU States wish to preserve the power to exclude other categories of non-removable persons. Those who are not entitled to regularisation might have access to legal residence through either a national regularisation programme or regularisation mechanism, depending on their host EU State.⁵⁶¹ The REGINE Study on Regularisations in Europe shows that most regularisation mechanisms and programmes across the European Union impose a variety of socio-economic and security criteria such as a “lack of a criminal record”⁵⁶² and some form of employment.

Subjecting certain non-removable persons to these mechanisms and programmes enables States to exercise discretion in selecting those that will gain access to legal residence. Borrowing analytical tools and concepts from the liminality literature, toleration spaces could be seen as performing a function of ritual cleansing, “to contain those who are in”⁵⁶³ between illegal and legal stay, and “to

561 I do not delve into the complex typology of regularisation practices in Europe. One set of authors makes a distinction “between five types of regularisation: permanent or one-off (A), *fait accompli* or for protection (B), individual or collective (C), out of expedience or obligation (D) and finally an organised or an informal procedure (E)”: Joanna Apap, Philippe De Bruycker and Catherine Schmitter, “Regularisation of Illegal Aliens in the European Union. Summary Report of a Comparative Study” (2000) 2 *European Journal of Migration and Law*, 266.

562 ICMPD, “REGINE: Regularisations in Europe: Study on Practices in the Area of Regularisation of Illegally Staying Third-Country Nationals in the Member States of the EU: Final Report” (Study commissioned by the European Commission, Ref. JLS/B4/2007/05, Vienna, January 2009), 33 and 35.

563 Jennifer Riggan, “In Between Nations : Ethiopian-born Eritrians, Liminality, and War” (May 2011) 34 *Political and Legal Anthropology Review* 131, 135.

provide for a clear re-entry⁵⁶⁴ into either legal or illegal stay.

This ritualistic selection can reintroduce socio-economic and security elements. It can also allow States to create meritocratic distinctions between various groups of non-removable persons: cooperative versus non-cooperative persons, persons in genuine need of protection versus persons who are less deserving of protection etc. For example, in Germany, TCNs who possess a formal toleration certificate are only eligible for regularisation of status if they are deemed to have been cooperative with State authorities.⁵⁶⁵ Those who are deemed to have deliberately hampered removal are not eligible. This selective regularisation logic also applies to victims of trafficking. When victims of trafficking are identified and granted a reflection period during which they are tolerated under the CVHT Directive, the future grant of a residence permit is conditional upon their effective and good faith cooperation with State authorities against their traffickers.

In France, where no formal toleration permit exists akin to the German *Duldung*, a report commissioned by the Prime Minister in 2013 contained a proposal to introduce a toleration permit which would be granted to all non-removable irregular migrants.⁵⁶⁶ And the aim of this toleration permit would be to insert those concerned into a five-year integration process, the ultimate goal being regularisation of status after years of progressive integration. Toleration holders falling astray of this integration process (for socio-economic or security-related reasons) would not make it to the regularisation stage, and would potentially lose their toleration permit. This proposal was explicitly rejected, but the

564 Ibid.

565 European Migration Network, "Ad-hoc Query on Practices followed concerning Third Country Nationals whose Compulsory Removal is Impossible" (Compilation produced on 14 April 2010), 7-8.

566 Thierry Tuot, "La Grande Nation: Pour une Société Inclusive" (Rapport au Premier Ministre sur la refondation des politiques d'intégration, 1 février 2013), 38-39.

seed has been planted in the minds of French immigration policy-makers, and the rationale of selective-regularisation is clearly attached to it.

Exhausted-returnees are in a particularly difficult position in terms of selection, especially in countries that criminalise illegal stay since they are privileged targets of imprisonment. Imprisonment of exhausted-returnees may perform an informal function of ensuring long-term exclusion from regularisation of status. Whether or not this is a deliberate function, it is in any case a consequence of imprisonment. I stated above that most EU States' regularisation programmes and mechanisms contain eligibility requirements that exclude TCNs with "criminal records".⁵⁶⁷ Imprisoning exhausted-returnees thus makes it harder for them to obtain a legal resident status upon release from either prison or administrative detention, thereby frustrating potential plans to obtain legal residence through a strategy of non-cooperation. A criminal record strongly disqualifies one's chance of getting through selective regularisation procedures.

8. The inclusionary functions of formal postponement-of-removal

Within the broad group of toleration statuses, formal postponement-of-removal is not always a purely exclusionary tool. For persons who cannot be removed on practical grounds (as opposed to legal grounds), formal postponement of removal is optional; it is therefore a State measure that improves the position of illegal residents who cannot be removed for practical reasons. Member States may impose obligations on persons concerned, such as regular reporting to authorities. But the European Commission

⁵⁶⁷ ICMPD, "REGINE: Regularisations in Europe: Study on Practices in the Area of Regularisation of Illegally Staying Third-Country Nationals in the Member States of the EU: Final Report" (Study commissioned by the European Commission, Ref. JLS/B4/2007/05, Vienna, January 2009), 33 and 35.

has noted that the “power to impose certain obligations may be an advantage for the third-country national concerned, since it may allow the grant of a postponement of the enforcement of the return decision in cases which would not normally otherwise qualify for such treatment”.⁵⁶⁸

For persons who cannot be removed on legal grounds, postponement-of-removal is the default position, but *formalised* postponement-of-removal has not always been so. The early move in certain EU Member States such as Germany, and the more recent move in the Return Directive, towards formalisation of postponed-removal, has partly inclusionary motivations. With regard to potentially cooperative victims of trafficking, a reflection period, during which enforcement or removal is prohibited, is also seen as a positive measure by many international organisations and NGOs.⁵⁶⁹

While formal postponement-of-removal remains a sanction with the exclusionary functions mentioned in the previous section, it may at the same time be viewed as a semi-inclusionary measure which performs some of the functions of regularisation. Functions of regularisation are numerous and vary enormously from one Member State to the next. Each Member State has a distinctive immigration history and culture, and ideological considerations play an important part in the rationales behind regularisation. Nevertheless, according to the REGINE Study on regularisations in Europe,⁵⁷⁰ discretionary regularisation programmes and mechanisms usually perform at least one of two broad functions. First, there is an economic management function, which namely

568 Commission, “Staff Working Document: Detailed comments on Proposal for a European Parliament and Council Directive on Common Standards on Procedures in Member States for Returning Illegally Staying Third Country Nationals” SEC(2005) 1175, 7.

569 See UNODC, “Toolkit to Combat Trafficking in Persons” < http://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_7-1.pdf > accessed 31 January 2014.

570 ICMPD, “REGINE: Regularisations in Europe: Study on Practices in the Area of Regularisation of Illegally Staying Third-Country Nationals in the Member States of the EU: Final Report” (Study commissioned by the European Commission, Ref. JLS/B4/2007/05, Vienna, January 2009).

aims to take irregular migrants out of the informal economy, increase tax and social security contributions, and protect the formal economy from the negative impact of the informal economy. Secondly, there is a humanitarian function which seeks to address protection gaps for persons in need of humanitarian protection who are not entitled to regularisation of status.

Other possible functions and aims of regularisation (whether discretionary or mandatory) may be added to the two broad functions mentioned in the previous paragraph. There may be an altruistic motivation in favour of protecting migrants from alienation and exploitation by taking them out of illegality. There may also be a public order function which seeks to limit the potentially detrimental consequences of large irregular migrant populations on public order, safety and social cohesion. There is last of all a deterrence-related function that may be performed by discretionary and mandatory regularisation. This can be illustrated by taking a look at the International Protection Directive, adopted in 2004 by the Council of the EU. In chapter 3, I examined the manner in which this Directive narrowed the gap between non-refoulement and regularisation, by conferring an entitlement to regularisation to numerous persons who were not so entitled before its adoption. One of the dominant rationales advanced by the European Commission for narrowing this gap,⁵⁷¹ and which was reiterated by the Council in the Directive's preamble, was that of deterring secondary movements in the EU. It was believed that asylum seekers and irregular migrants moved around the EU in search of the best chances of regularisation and of obtaining socio-economic rights. Reducing disparities between Member States' international protection systems was thought to perform a function of limiting secondary movements in the EU, as well as a

571 Commission, "Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons who Otherwise Need International Protection" COM(2001) 510 final, 4.

function of discouraging the pursuit of a variety of non-removability strategies. An important aim was therefore to deter both secondary movements in the EU, and to deter the pursuit of non-removability strategies such as the lodging of an application for asylum. These strangely enough correspond to inclusionary deterrent functions.

While formal postponement-of-removal, viewed in a semi-inclusionary light, does not whole-heartedly perform the inclusionary functions that regularisation may perform, some of these inclusionary functions may sit side-by-side with exclusionary functions of toleration. For example, formal postponement-of-removal might seek to provide certain non-removable persons with protection in an EU Member State (inclusionary function), while at the same time deter them from remaining for a long period time (exclusionary function). An inclusionary function of humanitarian protection is blended here with an exclusionary function of enhanced removability. The possible mix of exclusionary/inclusionary functions is not purely hypothetical, and Michael Speiser confirmed the existence of my illustrated mix with regard to the Return Directive's postponed-removal status.⁵⁷²

I would like to end this section by taking a look at the inclusionary deterrent functions mentioned in the before-last paragraph. Traces of such inclusionary deterrent motivations can be found in institutional documents. First, there is the inclusionary function of deterring the pursuit of non-removability strategies, namely deterring undue recourse to the asylum procedure. One of the European Commission representatives involved in the Return Directive negotiations argued in favour of a solid postponed-removal status, with an adequate set of rights attached.⁵⁷³ The representative suggested that a weak set of rights attached to the

⁵⁷² Interview with Michael Speiser, EPP Adviser, European Parliament (phone interview, 16 and 22 April 2013).

⁵⁷³ Council Document 14783/07, 34, footnote 52.

postponed-removal status in the Return Directive would encourage persons with a postponed-removal status to apply for asylum in order to benefit from a better set of rights. The representative argued in favour of an inclusionary toleration status in order to deter postponed-returnees from feeling the need to pursue other non-removability strategies. Secondly, there is the EU-specific inclusionary function of deterring secondary movements in the EU. Back in 2001, the European Commission released a working document in which it addressed the “unsatisfactory”⁵⁷⁴ status and rights of persons who are protected from refoulement but who are disqualified from refugee status due to a security-related exclusionary clause. The Commission noted that the rights granted to such persons varied enormously from one Member State to the next, and called for a “harmonised approach at European level in order to take away potential “pull factors” for persons not deserving international protection”.⁵⁷⁵ The idea was to enhance their rights, but more importantly to harmonise this enhancement at EU level so as to not encourage rights-shopping or asylum-shopping within the EU for such persons.

Conclusion

In the inter and intra-institutional disputes behind EU governance of non-removability and toleration, many institutional actors have expressed a wish to preserve the power to exclude at least some non-removable TCNs from regularisation, and maintain them in toleration spaces. Building on the crimmigration literature, this chapter has explored the functions that certain EU institutional actors have assigned to toleration spaces, many of these functions being similar to those performed by the other exclusionary spaces such as imprisonment and administrative detention. I have

574 Commission, “Working Document: The Relationship Between Safeguarding Internal Security and Complying with International Protection Obligations and Instruments” COM (2001) 743 final, 14.

575 Ibid, 15.

suggested that the following functions have been assigned to toleration spaces by at least some EU institutional actors: retribution, expressive State power, deterrence of non-removability strategies, enhanced-removability, curbing public expenditure, and selective-regularisation. I have also suggested that the position of formally postponed-removal may also be viewed in a semi-inclusionary light, under which it could be viewed as performing a blend of exclusionary and inclusionary functions. I have presented evidential elements which suggest that such functions are indeed assigned to toleration spaces, through a mix of desk research and interviews with key institutional actors involved in the Return Directive negotiations. There is no claim that all EU institutional actors assign the totality of functions mentioned, but simply a claim that each of these functions have been assigned by at least some actors in favour of the power to exclude non-removable TCNs within toleration limbos. This has served to answer the question of why EU governance has led to the development of limbo spaces of toleration, as the sequel to my examination of how the EU has governed these spaces. This answer may be of analogical value in further research on the motivational complexity behind EU institutional actors' positions, especially when these positions relate to exclusionary practices. My thorough analysis of the possible functions of exclusionary practices vis-à-vis non-removable TCNs may more generally provide a useful conceptual starting point for research on exclusionary practices vis-à-vis citizens and other groups of migrants. Furthermore, each function may be singled out as a worthy theme research, in the same manner that the deterrent function has been widely analysed in its own right.

My examination of the multifarious functions was not limited to finding evidence that they were indeed attributed by institutional actors. I subjected most of these functions to a critical analysis of

their ideological foundations as well as their effectiveness. Building on the critical deconstruction literature, I have for example argued that the functions of retribution and expressive State power serve to legitimate disadvantageous power relations between non-legal residents, on the one hand, and a range of public and private actors, on the other. And with regard to the deterrent and enhanced-removability functions, I have provided some insight into the evidence (or lack of) that toleration limbos actually deter (and enhance the removability of) those concerned. The deterrent function has become one of the most popular functions to be assigned to most immigration control measures in the EU. And amongst the functions assigned to toleration limbos, the deterrent function stands out as the most important and strongest one for many EU institutional actors. This is why I dedicate the last chapter of this thesis to the presentation of interview-based empirical research that I carried out on the deterrent function and impact of toleration positions in France, as a case-study of the EU-wide deterrent function assigned to EU-governed toleration positions.

Chapter 6. A French case-study on the deterrent function and effect of toleration positions

The most important motivation behind the existence of protracted limbos of toleration is specific deterrence of continued stay. It is hoped that long-term exclusion from legal residence will act as a push factor away from the hosting European State. Some EU Member State authorities are a lot more explicit about the deterrent motivation than others.

The deliberate instrumentalisation of limbo positions to deter non-removable TCNs from remaining in France implies a belief that non-removability is often the result of a strategy. There is a notion that some non-removable TCNs are not removable because they use legal and/or practical tools at their disposal in order to make themselves non-removable. Applying for asylum and seeking review of return measures on human rights grounds, which can lead to legal obstacles to removal, are sometimes viewed simply as strategies by some irregular migrants to remain. Problems of identification and/or delivery of travel documentation, which are practical obstacles to removal, are also sometimes viewed as the result of deliberate strategies by some irregular migrants to remain. For TCNs who are perceived as strategically delaying removal via legal or practical obstacles, legal limbos are viewed as tools to counter the desire to pursue such strategies. The aim is to specifically deter continued stay and strategic actions to that effect. But the aim is also to send a signal to potential migrants about the futility of coming to Europe with the hope of finding a loophole to stay (an aim of general deterrence).

This chapter constitutes a continuation of the French case-study which started in chapter 2 (and several links are made between the findings in both chapters). With the same sample of thirty-four

interviewees (see section 2 of chapter 2), I first sought to discover if tolerated persons perceived their position to serve a deterrent purpose, and secondly if their position actually had a deterrent impact on them. My main focus was on legal toleration. Details on the sample of tolerated TCNs can be found in section 2 of chapter 2.

I first sought to discover whether interviewees perceived their exclusion from legal residence during toleration periods as a sanction (section 1), and if so, whether they perceived this as a sanction with a deterrent function (section 2). I then sought to discover whether interviewees had a desire to leave as a result of their exclusion from legal residence and the rights associated with legal stay (section 3), and whether there were factors that might have made departure impossible or encouraged continued stay (section 4). I subsequently moved on to a broader enquiry into the general deterrent effect that policies on non-removable TCNs might have had on them when they left their country of origin, and the extended specific deterrent effect these policies would have today if they were back in their country of origin (section 5). In this broader enquiry, I sought to discover interviewees' initial choice of European country and the factors that were important in making that choice. I compared this with the choice of European country that interviewees would hypothetically make today in the event that they were back in their country of origin, as well as the factors that would be important today in light of their experience. I also asked questions on communications interviewees had with family and friends in France and back home on the deterrent impact of exclusionary policies (section 6). The aim of the latter line of enquiry was to expand the scope of deterrence beyond the confines of my interviewees' individual experiences. I lastly sought to ascertain the extent to which non-removability was perceived as a strategy by interviewees (section 7).

How this empirical research fits within the current literature

There is a very interesting European literature on the deterrent effect of policies towards non-removable TCNs, namely failed asylum seekers. Not all of it is empirically grounded. Most allusions to the deterrent effect of limbo-like positions are speculations. And most of the empirically grounded deterrence literature in the field of immigration has been on the deterrent effect of migration and asylum policies vis-à-vis broad groups of asylum seekers and/or irregular migrants (not specific groups such as failed asylum seekers).

I would first like to highlight Eiko Thielemann's quantitative research on the overall deterrent effect of restrictive policies vis-à-vis asylum seekers in Western European countries. Deterrent policies examined by Eiko Thielemann include those relating to the “rights and benefits given to asylum seekers inside a country of destination (e.g. work and housing conditions, rules on freedom of movement, welfare provisions, educational opportunities etc.)”.⁵⁷⁶ But they also include deterrent external policies. He assesses the relative importance of deterrent policy-related determinants in comparison with structural determinants (economic, historical, political, geographic), and comes to the conclusion that “structural factors are ... more important than policy-related factors in determining how asylum applications are distributed among countries”.⁵⁷⁷ His research therefore suggests that deterrent policies, taken as a whole (not just those relating to internal rights and benefits, but also policies relating to territorial access and asylum procedures), do not have a decisive impact on asylum seekers' choices to migrate and remain within a given Western European country. While his conclusion concerns deterrent

⁵⁷⁶ Eiko Thielemann, “Why Asylum Policy Harmonisation Undermines Refugee Burden-Sharing” (2004) 6 *European Journal of Migration and Law* 47-65, 54.

⁵⁷⁷ *Ibid.*, 64.

policies as a whole, it does not provide detailed insight into the deterrent effect of specific policies. And his work does not make a distinction between the specific and general deterrent effect of policies, but draws conclusions on the overall (specific and general) deterrent effect of these policies. He assessed the link between relative asylum burdens in Western European countries, on the one hand, and a variety of policy and structural determinants, on the other.

Eiko Theilemann's research related to asylum applicants. It is therefore relevant for some of the categories of persons in this thesis (tolerated asylum applicants who are particularly targeted in terms rights and benefits), but not for many others, namely failed asylum applicants. Furthermore, it is quantitative research based on data relating to policy and structural factors, not on questions posed to asylum applicants. There is however interview-based qualitative research which has been carried out with asylum seekers and/or irregular migrants,⁵⁷⁸ as well as with key informants,⁵⁷⁹ with the aim of assessing the determinant factors in migration-decisions. This research usually seeks to place deterrent policy factors within the broader context of factors at play. There is notably a key study which was carried out on behalf of the UK Home Office by Vaughan Robinson and Jeremy Segrott. On the basis of interviews with a purposive (non-representative) sample of sixty-five asylum seekers in the UK, these two authors sought to gain a deep understanding of why and how asylum seekers chose to migrate to the UK, as well as of the knowledge and perceptions at their disposal. The results of their research were vast, but they provided a synthesis of their findings which is that asylum seekers “are guided more by agents, the presence or absence of family and

578 For example, see Vaughan Robinson and Jeremy Segrott, “Understanding the Decision-Making of Asylum Seekers” (Home Office Research Study 243, Home Office Research, Development and Statistics Directorate, July 2002).

579 For example, see Tetty Havinga and Anita Böcker, “Country of Asylum by Choice or by Chance : Asylum-Seekers in Belgium, the Netherlands and the UK” (January 2009) 25 (1) *Journal of Ethnic and Migration Studies* 43-61.

friends, language, and perceived cultural affinities than by scrutiny of asylum policies or rational evaluation of the welfare benefits on offer”.⁵⁸⁰

The two sets of authors mentioned above adopted two very different research methods in order to assess the deterrent impact of policy factors on asylum seekers. One adopted a quantitative method, and the other a qualitative one. In my research, I adopted a qualitative model, very close to that followed by Vaughan Robinson and Jeremy Segrott. Like them, I worked with a non-representative purposive sample of interviewees, and delved into the complexity of the decision-making process of migrants. Unlike them, my research was not on asylum seekers, but on a variety of tolerated TCNs, including failed asylum seekers and tolerated asylum applicants. And my research was not limited to examining the general deterrent impact of restrictive policies on interviewees when they left their country of origin. I examined both the specific and general deterrent impact from as many angles as possible. Something else I borrowed from Vaughan Robinson and Jeremy Segrott, from Eiko Thielemann, and many other authors on migration-policy deterrence, was a contextualising of deterrent policies within a broader framework of relevant factors in migration-decisions, such as work opportunities (legal or illegal), social and housing benefits, family ties, historical ties etc.

The afore-mentioned empirical research projects were on broad groups of migrants (and not specific ones like in my research). But there are also elements of empirical research that exist with regard to tolerated TCNs. Where such elements exist, they tend to be with regard to failed asylum seekers and the deterrent impact of destitution policies on their decision to stay or leave, as well as the more general deterrent impact of such policies on potential

580 Vaughan Robinson and Jeremy Segrott, “Understanding the Decision-Making of Asylum Seekers” (Home Office Research Study 243, Home Office Research, Development and Statistics Directorate, July 2002), 63.

migrants. These elements can namely be found in empirical research studies carried out in the UK. Such empirically grounded elements are pretty absent in other EU Member States. A common view in the UK-based research is that the destitution of failed asylum seekers is “a deliberate policy designed to encourage asylum seekers whose claims are considered by the Home Office as being at the end of the process, to return to their countries of origin rather than remaining in the UK”.⁵⁸¹ Qualitative and quantitative research has been carried out on the basis of interviews/surveys with destitute failed asylum seekers as well as with key informants. The goals of these projects have been focused on the multiple facets, causes, coping-strategies, and experiences of this destitution, as well as on its consequences on the health of those concerned. Assessing the deterrent effect of this destitution has not been a primary goal. But empirical elements of this research have allowed fact-based observations to be made on the deterrent impact of destitution. The overall conclusion has generally been that “(t)here is no evidence that destitution discourages people from entering the UK to claim asylum, or that destitution encourages those already here to leave”.⁵⁸² This is mainly derived from information on the number of failed asylum seekers who do not return, on the obstacles to return, as well as on the long periods during which failed asylum seekers remain in a state of destitution. The data on the duration of destitution thus “strongly indicates that refused asylum seekers are prepared to face destitution in the UK for long periods without returning to their country of origin”.⁵⁸³

This research in the latter paragraph makes fact-based

581 Heaven Crawley, Joanne Hemmings and Neil Price, “Coping with Destitution : Survival and Livelihood Strategies of Refused Asylum Seekers Living in the UK” (Centre for Migration Policy Research, Swansea University, February 2011), 44.

582 Hannah Lewis, “Still Destitute : a Worsening Problem for Refused Asylum Seekers” (Joseph Rowntree Charitable Trust, 2009), 23.

583 Kate Smart, “The Second Destitution Tally: An Indication of the Extent of Destitution among Asylum Seekers, Refused Asylum Seekers and Refugees” (Policy Report, Asylum Support Partnership, January 2009), 17.

observations on the lack of evidence of a deterrent impact. However, the questions posed to failed asylum seekers in these projects were not directly on the deterrent effect of their limbo-like position. The questions in my research were directly related to the deterrent impact of toleration limbos on interviewees. And I examined deterrence from a variety of angles (namely past, present, and future deterrence), and within the broader context of decision-making factors (e.g. work opportunities, historical ties etc.). Furthermore, my research accounts for a wide variety of tolerated TCN profiles, and does not lump them all into one broad family of non-removable TCNs or refused asylum seekers. In this manner, I contribute to the migration-deterrence literature with interview-based qualitative research on the deterrent impact of exclusionary laws and practices with regard to *specific categories of tolerated TCNs* in France. And this serves as a national case-study of the deterrent function assigned to various toleration positions governed at the level of EU law.

In France, there have been many speculative comments on the pull factor constituted by regularisation and asylum reception conditions, and the deterrent effect of restrictive policies relating to the return and limited socio-economic rights of irregular migrants. There is huge political disagreement. Speculation on pull factors and deterrent effects is sometimes based on interpretations of statistical elements (e.g. an increase or decrease in the number of asylum seekers following a reform). In the French-speaking world, there have notably been discussions on whether it is even ethical to design policies with a deterrent motivation.⁵⁸⁴ However, to my knowledge, and according to EU-wide reports, there are no empirically-based studies providing evidence of a pull factor due to regularisation practices⁵⁸⁵ nor of a deterrent effect of harsher

584 For example, see CIRE, “Les Politiques Migratoires et le Concept de « l'Appel d'Air »” (mars 2009).

585 ICMPD, “REGINE: Regularisations in Europe: Study on Practices in the Area of Regularisation of Illegally Staying Third-Country Nationals in the Member States of the EU: Appendix A Country Studies” (Study commissioned by the European Commission, Ref. JLS/B4/2007/05, Vienna, January 2009), 32.

return practices and lowered socio-economic entitlements.⁵⁸⁶ However, deterrence is a key motivation behind the political agenda of lowering of irregular migrants' (including failed asylum seekers') socio-economic rights, of harshening return practices, and of sanctioning illegal employment.⁵⁸⁷ It is also a motivation behind limiting regularisations as well as the asylum reception conditions of presumptively fraudulent asylum applicants.

In this research, I partly address this deterrent motivation, by assessing the deterrent impact of exclusion of a purposive sample of tolerated TCNs from legal residence. This of course does not address the issue of deterrence with regard to all irregular migrants and asylum seekers. But a large number of tolerated TCNs are failed asylum seekers, and the French literature sees failed asylum seekers who remain in France for a long time as the product of a gap in French law between rules on international protection, rules on return, and rules on legal residency.⁵⁸⁸ The refusal to close up this gap is very deliberate. For failed asylum seekers have been expressly targeted by several regularisation programmes and mechanisms in the past.⁵⁸⁹ And a prevalent view amongst politicians and policy-makers in France is that failed asylum seekers must leave for the sake of the asylum system's integrity, and that regularisation mechanisms/programmes should not serve to regularise all failed asylum seekers. Since regularisation is seen as a potential pull factor, and since harsh policies relating to irregular migrants (including failed asylum seekers) are motivated by a deterrent objective, my research on the deterrent impact of toleration positions in France can provide a small empirical contribution to discussions on the deterrent

586 Sénat, "Rapport de la Commission d'Enquête sur l'Immigration Clandestine" (Journal officiel, 7 avril 2006), 167.

587 See the discussions on these key issues in Sénat, "Rapport de la commission d'enquête sur l'immigration clandestine" (Journal officiel, 7 avril 2006).

588 ICMPD, "REGINE: Regularisations in Europe: Study on Practices in the Area of Regularisation of Illegally Staying Third-Country Nationals in the Member States of the EU: Appendix A Country Studies" (Study commissioned by the European Commission, Ref. JLS/B4/2007/05, Vienna, January 2009), 8.

589 Ibid, 7-8.

impact of policies and practices vis-à-vis failed asylum seekers.

Preliminary comments on the limits of this research

There are several limits to this research that need to be addressed. First, the sample size is small and not representative of legally and indirectly tolerated TCNs in France. The depth of information and qualitative goals minimise the importance of this drawback, as there is often a tradeoff between quality of information and sample size/representativity. And although the sample is not representative, I sought to show in chapter 2 that the sample is not miles away from representing the general population of the targeted TCN categories.

A second limit, still related to the sample, is that interviewees were in France. In research that seeks to ascertain the extent to which toleration positions trigger a desire to leave (or deter potential migrants from choosing France), one could assume that those who have such a desire would effectively leave, and would not remain to be interviewed by someone like me. However, I interviewed persons whose presence in France ranged from a few weeks to several years. Those who had not been in France for very long time might thus have had a desire to leave due to their toleration position, a desire which they could share with me and which could lead to effective departure in the near future. Even when a desire to leave exists, a variety of obstacles can block effective departure. And more generally, most illegally staying TCNs in France do not return, voluntarily or by force.

So my small and not-quite-representative sample of tolerated TCNs remains a valid sample for extracting qualitative information on the positions under examination. Furthermore, I expanded my research beyond the confines of the deterrent effect on

interviewees, and sought to gather information on discussions interviewees had had with their surroundings on the deterrent impact of exclusion from legal stay.

A third limit is that such interview-based research comes with a risk of inaccurate responses, for a variety of reasons also discussed in chapter 2. However, the questions were designed with hidden repetitions that allowed me to detect inconsistencies. Further, NGO partners provided me with some background information on many interviewees beforehand (as well as after). This allowed me to check the accuracy of certain responses, and the overall propensity of interviewees to provide accurate responses. But a key ingredient for accurate responses was a relaxed and trusting atmosphere, which is something I strived to create in each and every interview. However, even with all possible precautions being taken, it is impossible to guarantee 100% accuracy of responses. This is nonetheless a risk worth taking in order to obtain a certain depth of information from the source.

1. The perception of exclusion from legal residence status and rights as a sanction

Exactly half of all interviewees (legally and indirectly tolerated) perceived long-term exclusion from legal residence as a sanction (Table 14). A large number were also uncertain about whether to qualify it as a sanction, and a minority of four interviewees did not perceive it as a sanction. Amongst those who perceived it is a sanction, there were interviewees who had experienced positions of postponed-returnee, cancelled-returnee, tolerated asylum applicant, released-detainee, and exhausted-returnee. So there does not seem to be one toleration position that was experienced as a sanction more than any other.

Amongst the four interviewees who did not perceive it as a sanction, one stated that she saw it more as a form of negligence and neglect on the part of State authorities, two simply stated that they didn't perceive it as a sanction, and the last of the four stated that his position was the result of a fair application of rules.

Table 14: Interviewees' perception of exclusion from legal residence as a sanction

Perception of exclusion from legal residence as a sanction	Number of interviewees
Yes	17
No	4
Uncertain	13

2. The perception of exclusion from legal residence status and rights as an instrument of deterrence

An interesting issue is whether interviewees themselves think that State authorities exclude them from legal residence status and rights in order to encourage them to leave. I broached this topic with all interviewees, but not all of them understood it. Nineteen clearly understood the notions of deterrence and deterrent policies (Table 15). Amongst these nineteen interviewees, sixteen believed that their long-term exclusion from legal residence served the purpose of encouraging them to leave, while three did not believe this to be the purpose. Amongst the sixteen who believed in the existence of a deterrent motivation, a wide variety of legal and indirect toleration profiles were represented, once again indicating the lack of a meaningful difference between diverse toleration positions.

Table 15: Interviewees' perception of exclusion from legal residence as a deterrent instrument

Perception of exclusion from legal residence as a deterrent instrument	Number of interviewees
Yes	16
No	3
Uncertain	15

Amongst the three who did not perceive their position as the result of a deterrent strategy, one of them had a deep-seated faith in the goodness and fairness of French State authorities, another believed that State authorities were simply overwhelmed, and a third didn't think them smart enough to actually have a strategy.

Many more interviewees expressed a belief in the existence of a deterrent motivation. Mr O.S., a Ugandan man who had been a tolerated asylum applicant for over a year, expressed his understanding of the deterrent function of his legal toleration position in the following manner:

“Once you are being hard pressed and your social entitlements are not being availed, well you'd have to just think out and maybe leave, because once you are not being facilitated, that in any way means someone is no longer interested in your stay ... that would be a strategy, that is ... an informal strategy in a way ... 'cause once it is something they have done to you and you are expected to leave as a human being ... you have to seek out ... **they are politely diplomatically encouraging you that you had better leave**”.⁵⁹⁰

Here are two more quotes of interviewees' perception of a deterrent motivation:

“In my opinion, the goal is to encourage me to go back to Angola, but I don't want to go back because if I did I would be putting my

⁵⁹⁰ Interview with Mr O.S. (France terre d'asile, Paris, France, 30 April 2013).

life in danger ... my husband is already dead as a result of the problems I fled from”.⁵⁹¹

(Mrs K., 24 year old postponed-returnee and failed asylum applicant from Angola, excerpt translated from French into English).

“I tell myself that they think 'they'll have troubles ... maybe they'll leave' ... I'm scared of going back, I have no home, I'm in a hard place, trapped”.⁵⁹²

(Mrs S., 29 year old cancelled-returnee and tolerated asylum applicant from Mauritania, interviewed on 19 June 2013, excerpt translated from French into English).

3. The desire to leave France due to exclusion from legal residence status and rights

The key question in terms of specific deterrence is as follows: does the exclusion of tolerated TCNs from legal residence status and rights trigger a desire to leave and lead to effective departure? The short answer is that for my interviewees, most did not have a desire to leave, and the minority who did have such a desire did not have the will to leave, or had a will to leave France for another European country (not a third country) that was marred with obstacles to effective departure. Any specific deterrent effect was thus very limited, and there was no net specific deterrent effect.

The interview process revealed a spectrum of positions between yes and no with regard to the desire to leave (or absence thereof) triggered by the long-term exclusion from legal residence status and rights (Table 16). Exclusion from legal residence never triggered a desire to leave France for the majority of interviewees who experienced legal toleration or indirect toleration.

Twenty interviewees indicated that they had no desire to leave and

⁵⁹¹ Interview with Mrs K. (Gisti, Paris, France, 5 June 2013).

⁵⁹² Interview with Mrs S. (Home of a friend of the interviewee, Paris, France, 19 June 2013).

never had any hesitations about this position. Four had no desire to leave despite the odd hesitation and desire to do so. Five interviewees expressed that they did not have clear and certain feelings about their desire to leave or not. Amongst these five uncertain interviewees, two veered towards a desire to leave and three veered towards no desire.

Four interviewees had a desire to leave France for another European country, but not for their country of origin nor any other third country. Only one interviewee had a clear desire to leave France for any country, including his country of origin. This one interviewee had a clear desire to leave, but stated that leaving was impossible due to risks of maltreatment awaiting him at home. Amongst the four interviewees who had a desire to leave for another European country, none were actually able to leave France for any one or combination of the following reasons: financial constraints, administrative constraints, and/or protection-related constraints.

Table 16: Interviewees' desire to leave France as a result of exclusion from legal residence

Desire to leave France as a result of exclusion from legal residence status and rights	Number of interviewees
No	20
No despite occasional desire	4
Uncertain veering towards no	3
Uncertain veering towards yes	2
Yes for another European country	4
Yes	1

An overwhelming majority of interviewees thus had no desire to leave (whether clearcut or with some hesitation). And yet a huge majority also experienced protracted fear of expulsion, as well as a

negative experience and perception of their socio-economic exclusion (as seen in chapter 2). So for this sample of interviewees, there was no clear link between such fears and negative experiences, on the one hand, and a desire to leave, on the other.

For the minority of five interviewees who had a desire to leave, despite constraints that prevented them from doing so, that desire to leave was essentially linked to the socio-economic exclusion resulting from the absence of socio-economic rights reserved for legal residents. The socio-economic exclusion complained about mainly related to social and housing benefits as well as healthcare access. Only two mentioned the absence of a right to access the labour market. As well as socio-economic exclusion, some of them additionally stated that the fear of expulsion was another factor behind their desire to leave, but that it ranked second after social marginalisation. And so social exclusion, linked to immigration status, was the key factor behind the desire to leave of the five, not fear of expulsion. These five were amongst the interviewees with the most traumatic perceptions of their socio-economic exclusion. One of them described this exclusion as being akin to *hell*. And these five interviewees included the only two interviewees of the entire sample to have emphatically talked about being suicidal, as well as the only two interviewees to have talked about a propensity to commit violent acts as a result of their limbo-like and socio-economically marginalised positions.

Indirectly tolerated TCN interviewees were practically unanimous in answering that they had absolutely no desire to leave despite their long-term exclusion from legal residence status and rights (Table 18). By contrast, the legally tolerated TCN interviewees were much more scattered throughout the no-yes spectrum (Table 17). More interestingly, the interviewees who had positions ranging from *uncertain-veering-towards-yes* to *yes* were all TCNs with asylum-

related needs. This range of yes-positions did not include a single one of the interviewees without asylum-related needs. So none of the purely economic migrants had any discernible desire to leave. Even the indirectly tolerated TCN who was the only one to unequivocally answer yes, was a failed asylum applicant who asserted that his asylum needs were very real. Mr G.H.⁵⁹³ had been a legally staying asylum applicant for two years. His asylum application was rejected, and on the day of our interview, he had resided illegally in France for a year and a half. After a year as an illegal resident, he was apprehended at an airport where he had dropped off his niece, and was subsequently sent to an administrative detention centre for three days. He was released due to a procedural irregularity, and has since lived as a released-detainee *stricto sensu* in clandestinity. Despite his unequivocal desire to leave France due to his exclusion from legal residence, he also expressed tremendous fear at the idea of being sent home for asylum-related reasons.

Table 17: Interviewees' desire to leave France as a result of legal toleration

Desire of legally tolerated TCNs to leave France as a result of exclusion from legal residence status and rights	Number of interviewees (amongst those who experienced periods of legal toleration)
No	13
No despite occasional desire	4
Uncertain veering towards no	3
Uncertain veering towards yes	2
Yes for another European country	4
Yes	0

⁵⁹³ Interview with Mr G.H. (France terre d'asile, Paris, France, 7 May 2013).

Table 18: Interviewees' desire to leave France as a result of indirect toleration

Desire of indirectly tolerated TCNs to leave France as a result of exclusion from legal residence status and rights	Number of interviewees (amongst those who only experienced periods of indirect toleration)
No	7
No despite occasional desire	0
Uncertain veering towards no	0
Uncertain veering towards yes	0
Yes for another European country	0
Yes	1

Interviewees with positions ranging from *uncertain-veering-towards-yes* to *yes* generally did not have any other particularly demarcating traits, whether in terms of age, gender, country of origin, education, wealth, profession, current immigration status, specific type of legal toleration experienced, duration of legal toleration, or duration of presence in France. One trait that did separate them from the pack was their lack of personal and familial anchorage in France. They were amongst the few interviewees who had no family, friends, or country-of-origin networks at all, or practically none.

So amongst my sample of interviewees, exclusion from legal residence was more likely to trigger a desire to leave for: those who migrated for partially protection-related reasons (as opposed to purely economic reasons), those with particularly traumatic experiences of socio-economic exclusion, those with no family/friends/networks, and/or those with a stronger right to remain (due to legal toleration as opposed to indirect toleration). The greater right to remain of legally tolerated TCNs might create a greater expectation and sense of entitlement to socio-economic rights. And those in need of international protection have needs that go beyond legal protection from removal. These needs very much extend to adequate reception conditions. This is due to their

particular vulnerability as asylum seekers. And their particular reception conditions needs might trigger a greater sense of indignation towards their socio-economic exclusion and the host State responsible for that exclusion.

4. The factors that make departure impossible and/or that encourage continued stay

There is no actual deterrent effect if the *desire* to leave (as a result of exclusion from legal residence) does not lead to *actual departure*. A desire to leave requires the *will* to leave, and the will to leave may be hindered by the existence of various types of obstacles.

Mr G.H., the one interviewee who had a desire to leave, not only for another European country, but equally for his country of origin, did not have the will to leave. He did not have the will to leave because his protection-related need to remain in France was stronger than his desire to leave.

The four interviewees who had a desire to leave France for another European country, but not a third country and certainly not their country of origin, indicated that they had a very real will to leave which was hindered by the existence of obstacles. These obstacles were mainly of a financial and/or administrative nature.

Financial obstacles were generally linked to the fact that intra-European travel requires a minimum of financial resources to pay for transportation, fake identity documentation (as TCNs without a residence card are not authorised to move around the Schengen area), and/or a smuggler to facilitate travel around the EU. The absence of financial resources is linked to a position of destitution brought on by a mix of social-rights exclusion, the inability to find even illegal work, and the absence of financial support from family

members or networks. Some interviewees had a much stronger extra-State support system than others.

But financial obstacles may also correspond to vested financial interests in France. While some illegally resident and legally tolerated resident TCNs are trapped in a web of destitution, others manage to find stable and declared work, and more crucially to save money and acquire real and personal property. This was the case of one of the interviewees. Voluntarily leaving or being forcibly deported would mean the loss of years of accumulated financial wealth, however big or small that accumulation might seem to an external observer.

As well as financial obstacles, administrative obstacles and rights-related obstacles were mentioned. Administrative and protection-related obstacles corresponded to a variety of situations and constraints. These included:

- the absence of travel documentation or any form of identification that would allow them to travel to another EU country;
- knowledge by tolerated asylum applicants that attempts to seek asylum in other countries would trigger a Dublin procedure and lead to their return to France;
- a pending judicial procedure, either against their return measure, or regarding a non-immigration related issue e.g. work-related, family-related, crime-related.

On top of obstacles that prevent TCNs from leaving when they so desire, there are factors that make tolerated TCNs wish to stay, independently of the desire or not to leave. Whether or not a tolerated TCN has a desire to leave due to exclusion from legal residence, one or more of the following factors may constitute a

reason deemed important enough to stay (Table 19): the need for protection, the hope of regularisation, work opportunities (legal or illegal), access to social rights and benefits (however small), family and personal ties, home country networks, the host country's political reputation, language affinity, and education opportunities (for the individual or for children), pending review procedures, and distant political activism. All of these factors, barring the last three, were part of the pre-determined and semi-structured themes of discussion. The other factors were added to the discussion by a handful of interviewees.

The need for protection was an important factor for twenty-five interviewees. Closely linked to this need, political reputation was an important factor for twenty-six interviewees. The most popular factor was the hope of regularisation, with twenty-nine interviewees being driven by this long-term hope, no matter how small the odds. So it was not actual regularisation practices that encouraged continued stay but the hope of regularisation.

For a majority of interviewees, other important factors were work opportunities (twenty-one), language (twenty), family and personal ties (nine-teen), as well as access to social rights and benefits (eighteen). Factors that a very small minority of interviewees attached importance to were the following: home country networks, education opportunities, pending review procedures, and distant political activism (for those who were political opponents back home and who wanted to keep up the fight in any way possible).

Table 19: Factors that encouraged interviewees to stay in France

Factors that encouraged continued stay in France	Number of interviewees (out of 34 for each factor)
Need for protection/asylum/security	25
Hope of regularisation	29
Work opportunities	21
Access to social rights and benefits	18
Family and personal ties	19
Country of origin networks	6
Political reputation	26
Language	20
Education opportunities	4
Distant political activism	1
Pending review procedure	1

Amongst the seven interviewees who had a desire to leave ranging from *uncertain-veering-towards-yes* to *yes*, all indicated that their need for asylum was a factor that encouraged continued stay. Each of the seven had a range of other important factors that encouraged continued stay. The hope of regularisation and the French language were encouraging factors for four of the seven. Other encouraging factors for a minority of the seven were France's political reputation, social benefits, and the hope of accessing education.

5. The initial choice of European country and hypothetical choice of European country if the migration journey were to start all over again

A manner of digging deeper into the specific deterrent effect of toleration limbos is to examine not only the impact of these limbos on a desire to leave, but to examine the impact on future strategic choices if interviewees were to find themselves in their countries of origin again. And it is interesting to compare this with strategic

choices made when interviewees initially left their countries of origin. A key finding was that practices related to exclusion from legal residence had practically no general deterrent effect on interviewees when they were merely potential migrants. Another is that in a hypothetical future where interviewees would find themselves back in their countries of origin (a likely probability for only a small number), such exclusionary practices might have a little more of a deterrent effect on interviewees' choice of country, but still only a limited one.

When interviewees left their countries to embark on a migration journey, they had varying levels of agency. For those who had some level of agency, they had varying levels of knowledge about what would await them in Europe and on the way. They also had varying choices of destination countries, as well as varying factors that entered the equation of why they chose one country over another.

Out of the thirty-four interviewees, only thirteen made a clear choice from the start to leave their country for France (Table 20). Four chose France in the middle of their migration journey. The remaining seventeen did not choose France. Amongst these remaining seventeen, four wished to reach another European country and one wished to reach a non European country. Two were uncertain about what their thoughts were at the time. And interestingly, ten deferred all strategic judgment to other agents, usually smugglers but sometimes family members and friends.

Table 20: Interviewees' initial choice of country of destination

Initial choice of country	Number of interviewees
France	13
France in middle of migration journey	4
Another European country	4
A non European country	1
No specific choice or choice made by someone else	10
Uncertain	2

Would these choices be any different today? Without delving straight away into push and pull factors, it is interesting to note that twenty of the thirty-four interviewees would choose France today if they were back in their country of origin (for example due to deportation), and seven would include France amongst a group of potential countries of destination (Table 21). An overwhelming majority of twenty-seven would therefore at least consider France, and a clear majority of twenty would choose only France. Thus, many more of the interviewees would choose or consider France today. However unattractive and difficult long-term exclusion from legal residence in France might have been, its future deterrent impact would appear to be very limited on this sample of tolerated TCNs in light of the increase of interviewees' attraction to France over other European countries.

Table 21: Interviewees' hypothetical choice of country of destination if they were back in their countries of origin

Hypothetical choice of country today	Number of interviewees
France	20
Hesitations between several European countries including France	7
Another European country	3
A non European country	1
No specific choice or choice would be left to someone else	1
Uncertain	2

Simply looking at the initial and hypothetical choice of country however provides an incomplete picture of the deterrent impact of French policies of exclusion. It is important to dig into the factors of attraction and deterrence behind such a choice.

Fifteen interviewees entered Europe legally and nineteen illegally. A pivotal role was played by a smuggler or helper for twenty interviewees. Those who were smuggled illegally were not necessarily devoid of all agency in the choice of destination country, just as those who entered legally were not necessarily exclusive agents. A general deterrent effect of exclusionary policies would not exist with regard to those who had little to no agency. A deterrent effect would in such cases only exist with regard to helpers or smugglers.

When interviewees left their countries of origin to come to Europe, an overwhelming majority knew nothing about actual immigration control, regularisation, asylum systems, and social rights practices in European countries. So actual policies and practices could not have had much if any general deterrent impact on my interviewees when they were simply potential migrants, even for those with a great deal of agency. Despite their lack of knowledge, interviewees

still had factors that were important to them, and these were factors that could determine whether one country was deemed attractive and another unattractive. But ultimately, at the stage of departure, they knew little to nothing about the factors that influenced their choice of destination country.

A wide range of factors were discussed, some being of prime importance for basic security and survival, others relating more to historical-cultural preferences. The factors discussed, and that were planned for discussion, were access to asylum, access to legal residency, work opportunities (both legal and illegal), social rights and benefits, geographical proximity or distance, historical ties (namely relating to a colonial past), detention and deportation practices, the presence of family and friends, country of origin networks, political reputation, and language. Access to education and the host country's national culture were factors that some interviewees added to the discussion.

Twenty-seven interviewees left their country of origin for protection-related reasons, and it is unsurprising that they all listed access to asylum as an important factor in the choice of destination country, even if they knew little or nothing about actual asylum systems (Table 22). Some wished to obtain protection without being aware of the existence of asylum systems. Only seven interviewees left their country solely for economic reasons. But although a majority of interviewees left for protection-related reasons, many of the protection-seeking interviewees also left for economic reasons.

Independently of access to asylum in Europe, seventeen interviewees attributed importance to the following factors in their choice of destination country: work opportunities, political reputation, and language. Fifteen attributed importance to access

to legal residency. Factors that were important to a small minority were geographical proximity or distance, historical ties, family and friends, country of origin networks, access to education, and the destination State's national culture. A factor that was of no importance at all was that of detention and deportation practices, mainly due to the absence of knowledge about their existence. Only four interviewees were aware of the existence of detention and deportation practices, and this awareness was of no consequence.

Table 22: Important factors in interviewees' initial choice of country of destination

Important factors in the initial choice of destination country	Number of interviewees (out of 34 for each factor)
Access to asylum	27
Access to legal residency	15
Work opportunities	17
Social rights and benefits	7
Geographical proximity or distance	4
Historical ties	9
Return and detention practices	0
Family and friends	9
Country of origin network	5
Political reputation	17
Language	17
Access to education	5
National culture	2

Interviewees were asked about the factors that would be important to them today if they were back in their home country, for example due to a successful deportation procedure. By contrast with the day they left their home countries, interviewees would today have first-hand knowledge of life in France as migrants with a precarious immigration status. Some additionally had knowledge of other European countries, either because they had lived in other countries, or following discussions with other migrants in France

who had.

From a better informed position, it is interesting to see what factors would be important today with this first-hand experience (see table below). While a majority of illegally staying TCNs are not removable, a significant minority are, and it is illuminating to see what factors would be important to interviewees in the event that deportation took place.

Less interviewees would attach importance to asylum today (Table 23). A simple reason for the drop is that certain interviewees' protection-related needs have ceased to exist over the long years they have lived in France. More interviewees would attach importance to work opportunities, access to legal residency, as well as friend and family ties. A significantly larger number of interviewees would attach importance to social rights and benefits, as well as detention and deportation practices. So it would seem that while the various facets of exclusion from legal residence do not generally trigger a desire to leave nor lead to effective departure, these facets might have a longer-term deterrent effect for interviewees who end up back in their country of origin and who contemplate returning to Europe. And it would seem that the most influential policies and practices would be those relating to social rights and return procedures. The harsh reality of irregular migrants and asylum seekers' lives in France (and other European countries) made many interviewees attach a great deal more importance to factors they did not necessarily attach much importance to initially, and those factors were linked to residence security and basic standards of living.

Although various factors linked to exclusion from legal residence would enter the equation of future country-of-destination choices, the deterrent effect of these now-important factors would appear

to be limited as more interviewees would explicitly choose France today than the number of interviewees who initially chose France.

Table 23: Important factors in interviewees' hypothetical choice of country of destination if they were back in their countries of origin

Important factors in hypothetical choice of country in the event that they were back in their country of origin	Number of interviewees (out of 34 for each factor)
Access to asylum	22
Access to legal residency	20
Work opportunities	23
Social rights and benefits	19
Geographical proximity or distance	4
Historical ties	9
Return and detention practices	14
Family and friends	13
Country of origin network	9
Political reputation	18
Language	16
Access to education	4
National culture	1

In order to get further into the minds of interviewees, it was interesting to not only identify factors of importance, but to also identify the order of importance of these factors. Below is a table in which abbreviations of factors of initial importance are placed in order of importance (Table 24). It is directly followed by a table on what the order of importance of factors would be today if interviewees were back in their countries of origin (Table 25).

What insight do these tables provide? They first of all show the complexity of migration decision-making, and how unique each individual's approach is to the myriad of relevant factors. While two people might attribute importance to the same factors in

choosing a country like France, the order of importance of those factors (and the deeper meaning of those factors to them) inevitably vary. Some individuals were more prone to hierarchising than others, and would be more so than others in a hypothetical rebooting of their migration experience. But there were interviewees who did not hierarchise before, and others who would not hierarchise (or even strategise at all) in the future. Nonetheless, most interviewees would hierarchise the decision-making factors a lot more than they initially did.

The tables secondly show that in a hypothetical future, many interviewees would attach importance to a greater number of factors, would take better account of factors linked to socio-economic survival and security of residence (and less account of historical-cultural factors such as historical ties, political reputation, and language⁵⁹⁴), would have a clearer picture of which factors take priority over others, and would push the socio-economic and security-of-residence factors up the hierarchical ladder of importance. Two factors that would become important where they weren't always before, and that climbed up the ladder of many interviewees' hierarchies, were work opportunities and social benefits. A factor that climbed down the ladder for many interviewees was that of country-of-origin networks.

Any factor that is important in a choice of country decision, including social benefits and work opportunities, is going to be part of a complex process of reflection in which that importance will be very relative and not absolute. And even when a well-informed migrant has a list of factors deemed to be important, the choice of country may be limited by the visa lottery, by imperatives to leave immediately for certain asylum seekers, by dependency on helpers or smugglers, and other such

594 Although language is a factor that can correspond to both a historical-cultural factor and a survival factor, as access to socio-economic rights is greatly enhanced when linguistic barriers are minimal.

incapacitating circumstances.

Abbreviations of factors

A = need for - or access to - asylum

C = country of origin network

CULT : national culture

DD = detention and deportation practices

DP = distant political activism

EDU = access to education

F = presence of family and friends

G = geographical proximity or distance

H = historical ties

L = hope of access to legal residence

LAN = language affinities

N/A = not applicable because the interviewee did/could not provide a hierarchy of factors

P = political reputation

PROC = pending judicial or administrative procedures

S = access to social rights and benefits

W = work opportunities (illegal and legal)

Table 24: Order of importance of factors in interviewees' initial choice of country of destination

Initial order of importance of factors	1	2	3	4	5	6	7	8	9	10	11
Interviewees											
Mr A.Z.	A, L, W										
Mr A.A.	A										
Mr J-P H.	A, EDU										
Mrs A.K.	A, S										
Mrs K.	A										
Mr R.S.	A, P										
Mrs S	A, G										
Mr D.A.	L, W, F, H, LAN										
Mr I.A.	A, W, C, EDU										
Béatrice (alias)	A, LAN, EDU,										
Mrs A.B.	P	W	L	A							
Mr B.Y.	A	H	P	LAN	C	G	S	F	L		
Mr M.C.	L	W	S	LAN	A	H	F	P			
Mr G.H.	A, LAN										
Mr P.T.	W	F	C/ CULT	LAN	H						

Mrs D.S.	A										
Mrs H.L.	A, P, LAN										
Mr B.M.	P	L, W	C	LAN	H						
Mr L.	W	G, P, LAN, EDU									
Mrs M.B.N.	A	LAN									
Mr O.S.	A, L	P, H	G	W							
Mr S.	P	W	A	F	S	L	C, CULT				
Mr F.Z.	A, L W, P, LAN										
Mr C.A.	A	L, W, P, H, LAN									
Mr S.I.	A, P										
Mr H-J. K.	L	EDU	W	A	P	LAN					
Mr T.	A, W										
Mr N.T.	A, L	W	P, LAN								
Mr M. M.	A	P	LAN	S	L						
Mr L.D.	L, W	S, F									
Mr B.	A	P	F								
Mr F.S.	H	L	LAN	W	F						
Mr G.M.A.	A										
Mr V.T.	LAN	H	P	F	S						

Table 25: Order of importance of factors in interviewees' hypothetical future choice of country of destination

Hypothetical order of importance of factors today	1	2	3	4	5	6	7	8	9	10	11
Interviewees											
Mr A.Z.	S	W	L	DD	A						
Mr A.A.	A, L, W, S, P,										
Mr J-P H.	A, P	LAN	EDU, W	H	C	F					
Mrs A.K.	A	L	F	P	W	S	DD				
Mr R.S.	A	DD	L, W	S	P	G	F	C			
Mrs K.	N/A										
Mrs S	N/A										
Mr D.A.	W	F	H	LAN							
Mr I.A.	A	W	C	EDU							
Béatrice (alias)	A	DD	EDU	LAN	S						
Mrs A.B.	L	A	DD	S	P						
Mr B.Y.	A	S	P	W	L	LAN	F	C	H	G	DD
Mr M.C.	N/A										
Mr G.H.	A	S	P	DD							
Mr P.T.	W	S	L	F	DD						
Mrs D.S.	A	W	C	S	L	F	LAN	DD			
Mrs H.L.	A	L	P	S	F						
Mr B.M.	W	P	L	LAN	S	C					
Mr L.	L, W, G, LAN										
Mrs M.B.N.	A	L	P	LAN							

Mr O.S.	A, L, P	S	DD	W	H	G					
Mr S.	A	L	W	P	S						
Mr F.Z.	A	L,W	P	S	LAN	C	DD				
Mr C.A.	A	L, W, S, P, F, H, LAN									
Mr S.I.	W, S	C, DD									
Mr H-J. K.	DD	L	A	EDU	W	S	LAN	P	F	H	
Mr T.	N/A										
Mr N.T.	A,L,W	P, LAN, DD									
Mr M. M.	A	L	W,S	LAN	P						
Mr L.D.	W,F, C, H, LAN										
Mr B.	A	L	P	F	W	S					
Mr F.S.	H	W	LAN								
Mr G.M.A.	A										
Mr V.T.	F	LAN, CULT	H								

6. Communication with other migrants or potential migrants on difficulties experienced in France

Processing hardships is easier when those hardships are shared with others through conversation. It wasn't much of a surprise to find out that most interviewees had shared their immigration-related difficulties with at least some of their family and friends. To be precise, twenty-six out of thirty four interviewees engaged in such discussions.

The objective of my discussions with interviewees on these

communications was to catch a glimpse of the general deterrent effect of exclusionary practices with regard to interviewees' network of friends and family back home (or even in other parts of Europe). To what extent did the exclusion of interviewees from legal residence impact the future migration choices of their family, friends, and networks back home?

I cannot answer that question with any kind of scientific precision, but can provide a glimpse of the picture that exists via the eyes of my small sample of interviewees. And through these eyes, the key finding was that only a tiny number of interviewees' communications had tarnished France's attractiveness in the eyes of the wider circles of friends and families.

Eight out of the thirty-four interviewees had never discussed any of their immigration-related troubles with anyone, family or friends. The remaining twenty-six had. Why did eight interviewees keep their troubles to themselves? Some indicated that these issues were deeply personal and appeared to have a loner philosophy. Three indicated that they were too traumatised to share or that sharing was pointless. Others expressed altruistic motivations for their secrecy – they did not wish their troubles to in any way cause emotional suffering to those that they loved.

A majority (twenty-six) of interviewees had discussed immigration-related troubles with either family or friends. Nine had only talked to family or friends in Europe, four had only talked to family or friends in their home country, ten had talked to family and friends in both Europe and their home country, and three did not specify the location of persons they had talked to. Detailed discussions were mostly limited to friendship groups, as there was a prevalent desire to spare family members from emotional distress. Amongst the twenty-six communicators, nineteen had discussed the issue of

return and detention practices. Twelve had discussed social exclusion. And only five had talked about asylum procedures, namely the specifics of Dublin and priority procedures.

Only thirteen interviewees' discussions had led to the topic of whether or not France remained an attractive country of destination. Four of the thirteen indicated that France was deemed to be less attractive in their wider circle. Six of the thirteen indicated that France's good reputation had remained intact, and three that the verdict on France's reputation was a nuanced one with positives and negatives.

So only four out of the thirty-four interviewees had discussions with their surroundings that indicated a potential general deterrent effect of exclusion-from-legal-residence practices in France. These four include two tolerated asylum applicants, one cancelled-returnee, and one exhausted-returnee. Three of the four had discussed return and detention practices with their circles, and two of the four had discussed social exclusion. None of the four had talked about asylum procedures. And amongst the four, only two had talked to friends/family residing in their country of origin. The general deterrent effect of toleration limbos, resulting from interviewees' sharing of experiences of these limbos, would therefore seem to have been very limited. As stressed earlier, my research sample was not representative. However, the great diversity of migrant profiles provides a small measure of insight into the overall weak general deterrent effect of exclusionary practices towards tolerated TCNs, in terms of the effect of these practices on the wider circles of these TCNs.

7. Is non-removability a strategy?

In various parts of this thesis, I have mentioned that there is

always some element of strategy in non-removability, as non-removable TCNs are rarely completely passive in their non-removability. However, this should not necessarily be construed as a strategy of abuse of non-removability loopholes. Such notions of abuse are highly contingent on the ideological importance one attaches to territorial sovereignty and the integrity of legal migration management systems. Further, it is interesting to see whether or not non-removable persons perceive themselves as strategists or not.

The interviewees who experienced legal toleration periods did not perceive themselves as strategists using legal tools to remain. And most interviewees viewed the plight experienced by themselves and other tolerated TCNs with solidarity. On the other hand, a minority of interviewees who experienced legal toleration perceived other legally tolerated and/or indirectly tolerated TCNs as strategists. Amongst this minority, some pointed fingers at other asylum applicants (for supposedly having bogus stories). Others criticised some of the irregular migrants they had encountered in administrative detention, on the ground that these other persons had no need of protection and adopted practical strategies for preventing effective deportation. Here is one such critical perspective shared by an interviewee:

“Some are asylum seekers, others have come as immigrants posing as asylum seekers, so they ditch their passports ... I heard over there (in administrative detention) a lot of versions, some told me ... 'even if they take you to your embassy, you mustn't speak to them in your language ... speak another language that they won't know ... they won't know you are from their country ... they will say that you belong to another embassy ... in the end, they'll be sick of the situation ... they will release you' ... others told me 'if you are taken to the airport, you mustn't accept to board the flight ... they

will call the flight attendant, he will ask you if want to go or not ... because there are some who threaten fellow passengers' ... I said why? ... why would you want to do all that? ... if I didn't have problems in my country, I would return ... if I had no troubles, I wouldn't have come"⁵⁹⁵ (excerpt translated from French into English).

Conclusion

In this chapter, I provided some qualitative insight into the deterrent function and impact of toleration positions in France, as a case-study of the EU-wide deterrent function assigned by numerous EU institutional actors to legal and indirect toleration positions. With a purposive sample of thirty-four interviewees who experienced positions of legal toleration and indirect toleration in France, this research led to the general conclusion that toleration positions, as positions of exclusion from legal residence, had very little to no deterrent effect on those who experienced them, as well as on their country-of-origin networks. This research builds on - and contributes to - the qualitative literature on the deterrent effect of migration and asylum policies in Europe, by offering insight: on the situation in France, on a greater number of deterrent angles, as well as on more specific groups of TCNs.

Approximately half of the interviewees perceived their toleration positions as a sanction, insofar as these positions were the result of exclusion from legal stay. Similarly, about half perceived their protracted exclusion from legal stay to have been a deliberate policy with a deterrent function. Whether or not this exclusion had a deterrent effect was another issue. Regarding the question of whether or not their toleration positions triggered a desire to leave, there was a spectrum of responses that ranged from a clear no to a clear yes, with intermediate responses of: no despite a

⁵⁹⁵ Interview with Mr G.H. (France terre d'asile, Paris, France, 7 May 2013).

passing desire, uncertain veering towards no, uncertain veering towards yes, and yes for another European country but not a third country. A significant majority answered no, one answered yes, and the rest were scattered in-between. So responses were complex, but most interviewees' toleration positions did not trigger a desire to leave. And for those who had some measure of desire to leave, this desire did not translate into a will to leave, or it was hindered by obstacles of a financial, administrative, or protection-related nature. But if such obstacles had not existed, the four who had a will to leave would have travelled to another European country, and would not have left within the framework of a return procedure. There was thus no actual specific deterrent effect on this small sample of interviewees in terms of returning to their countries of origin or transit, but there might have been a side-effect of secondary movements within the EU for a tiny minority.

For the minority of interviewees who had some measure of desire to leave, this desire was mostly linked to their exclusion from socio-economic rights, rather than fear of deportation. But most of the thirty-four interviewees had experienced protracted fear of detention and deportation, as well as a negative experience of their socio-economic exclusion. So the link between these negative experiences and a desire to leave was weak at best.

With regard to this sample of thirty-four interviewees, a key finding was that exclusion from legal residence during toleration periods was more likely to trigger a desire to leave for: those who had migrated for partially protection-related reasons (as opposed to purely economic reasons), those with particularly traumatic experiences of socio-economic exclusion, those with no family/friends/networks in France, and those with a stronger right to remain (due to legal toleration as opposed to indirect

toleration). No other factors or variables (such as duration of toleration, gender etc.) accounted for the different levels of desire to leave.

Independently of the degree of desire to leave or not to leave, all interviewees were encouraged to stay by a variety of factors. For a majority of interviewees, factors of importance were the: need for protection, hope of regularisation, work opportunities, access to social benefits, family and personal ties, language, and political reputation. Some of the factors that were important for a minority were: home country networks, education opportunities, and pending judicial procedures.

Moving beyond the issue of whether or not the experience of legal and indirect toleration triggered a desire to leave, there was the key issue of whether or not immigration and asylum policies had had any impact whatsoever on interviewees' initial choice of European country-of-destination, and whether their experience of toleration positions in France might have an impact on future choices.

When interviewees left their countries of origin, most had little to no knowledge of immigration and asylum policies, and a many were aided by a smuggler or helper. Their agency was thus very limited in the best of cases, and non-existent in others. Nonetheless, most interviewees also attached importance to certain factors in their choice of country, but these factors were not informed by knowledge of actual practices. Therefore, real-life internal deterrent policies could not have had much of an effect (I am of course not talking about deterrent policies at and beyond France's borders, such as visa policy).

While most interviewees did not choose France as their initial

country-of-destination, a significant majority of them would today. This provides a first indication that however harshly exclusion from legal residence might have been experienced, its long term deterrent effect would appear to be weak.

But moving beyond this preliminary indication of a weak long-term deterrent effect, I compared the factors that were important when interviewees left their countries of origin with the factors that would be important today if interviewees were hypothetically back in their countries of origin. This was relevant for two reasons. First, some irregular migrants and asylum seekers end up back in their countries of origin, either due to a successful return procedure against them, or because they decide to leave. Secondly, their hypothetical future choices would be made with first-hand knowledge of the relevant factors, something which most lacked when they initially left their home countries.

When they left their home lands, a majority of interviewees initially attached importance to access to asylum (this wasn't the case for the interviewees who weren't in need of asylum). Half of the interviewees also initially attached importance to work opportunities, political reputation, and language. A significant minority attached importance to access to legal residency. And a minority attached importance to social rights and benefits, geographical proximity, family and friends, country of origin networks, access to education, and the host country's culture. Not a single interviewee attached importance to return and detention practices.

In a hypothetical future, and from a better informed position, interviewees would first of all place more factors into the mix, and more would attach importance to survival-related factors (as opposed to historical-cultural factors). More interviewees would

attach importance to work opportunities, access to legal residency, friend and family ties, and country-of-origin networks. A significantly larger number of interviewees would attach importance to social rights and benefits, as well as detention and deportation practices (but still an overall minority of interviewees). The harsh reality of experiencing illegal stay and tolerated stay would therefore seem to have upped the importance of residence-security and standards of living for quite a few.

Without going into detail here, I also showed the order of importance of the factors behind interviewees' initial choice of country-of-destination, as well as the order of importance in a future choice. This allowed greater insight to be provided into the complexity of migration decision-making. In a hypothetical future in which interviewees would be back in their countries of origin, they would be more discriminating with regard to these factors, have a clearer picture of which factors take priority over others, and would push the socio-economic and security-of-residence factors up the hierarchical ladder of importance. Two factors that would become important for more interviewees, and that climbed up the ladder of many interviewees' hierarchies, were work opportunities and social benefits. An example of a factor that would climb down the ladder was country-of-origin networks.

Policies and practices related to exclusion from legal residence had no deterrent effect on interviewees' initial choice of country-of-destination. But interviewees' communications with their networks of family and friends about their experiences in France might deter others from wanting to come to France. I attempted to show that most interviewees talked about their negative experiences to friends and family who were either in their home country or in Europe. Without going into detail, the principal

finding is that only four out of the thirty-four interviewees had discussions which led to the conclusion that France was not an attractive country of destination, and only two of those discussions were with persons living in the home country (the other discussions having been with friends and family in Europe). Therefore, with regard to the wider net of potential migrants linked to interviewees' family, friends, and networks, the general deterrent effect of exclusionary practices would appear to be very limited.

I ended this chapter with some words on whether or not tolerated TCNs had played a strategic role in their non-removability. The principal finding was that while most interviewees did not perceive themselves as having strategised, some interviewees perceived others to have strategised. Some tolerated asylum applicant interviewees pointed fingers towards other asylum applicants. And some interviewees who experienced administrative detention suggested that several of the persons they had encountered in administrative detention had been very strategic in creating practical obstacles to removal. But this pointing of fingers must be contrasted with the fact that most interviewees had a positive perception of others in similar situations, and expressed feelings of solidarity with regard to all those who had shared similar experiences of exclusion from legal residence.

What are the policy implications, if any, of the findings in this chapter? It is important to re-emphasise that findings in this chapter are based on a relatively small and unrepresentative (although purposive) sample. And while there is nothing abnormal about this in light of my qualitative goals, it means that these findings are not generalisable to the point of authoritatively mandating a particular set of solutions. However, this chapter contributes to a growing literature on the marginal (or absence of

a) deterrent effect of harsh migration policies and practices. And in the French context, my findings provide indications that exclusion of certain groups of asylum seekers and irregular migrants from legal stay is a very weak deterrent at best. Asylum seekers in the *normal* procedure are granted temporary legal stay, but those in derogatory procedures (namely the Dublin and accelerated procedures) are excluded from legal stay. This exclusion is due to the perception that their applications are presumptively fraudulent, and it serves a number of purposes, namely retributive and deterrent purposes. The stigma of fraud or abuse which is cast on these asylum seekers is highly criticised by numerous academics and NGOs,⁵⁹⁶ which suggests that their exclusion from legal stay may not be fair. NGOs⁵⁹⁷ and certain political parties⁵⁹⁸ have long called for legal stay to be granted to all asylum applicants. And if one adds empirical elements which suggest the absence of a deterrent effect on most of them, this would provide further weight to the importance of providing them with legal stay. This decades-old exclusion from legal stay, endured by Dublin and accelerated applicants, may come to an end if a current bill introduced in the French Parliament in July 2014 were to be adopted.⁵⁹⁹ The introduction of this bill is the result of relentless NGO lobbying, as well as the favourable context of a Left-leaning government.

With regard to postponed-returnees and released-detainees, their exclusion from legal stay is also very much premised on the assumption that it deters their continued stay and limits the pull factor that might ensue from regularising their stay. Empirical elements on the absence or weakness of a deterrent effect and pull

596 See Coordination Française pour le Droit d'Asile, "Les Demandeurs d'Asile Sans Papiers: les Procédures Dublin II et Prioritaires" (avril 2006).

597 For example see La Cimade, "40 propositions pour une Politique d'Hospitalité" (janvier 2012) < http://hospitalite.lacimade.org/files/brochure_propositions.pdf > last accessed 4 September 2014.

598 For example, see questions and answers at: < <http://www.lacimade.org/nouvelles/3824-R-ponses-des-candidats-sur-les-propositions-de-La-Cimade> > last accessed 4 September 2014.

599 Ministère de l'Intérieur, "Projet de Loi relatif à la Réforme de l'Asile" (n° 2182, déposé le 23 juillet 2014). It is especially article 14 that is relevant.

factor might provide the impetus for granting legal stay to these non-removable migrants, or at the very least for granting them a toleration permit with greater socio-economic rights than they currently have. A report commissioned by the Prime Minister in 2013, mentioned above in section 7 of chapter 5, contained a proposal to introduce a toleration permit which would be granted to all non-removable irregular migrants, akin to the toleration permit granted in Germany.⁶⁰⁰ This toleration permit would be expressly embedded within a five-year integration process, the ultimate goal being regularisation of status after years of progressive integration. Toleration holders falling astray of this integration process (for socio-economic or security-related reasons) would not make it to the regularisation stage, and would potentially lose their toleration permit. This proposal was explicitly rejected, but the seed has been planted in the minds of French immigration policy-makers. And there are tangible plans to introduce open centres in France as a tool for governing failed asylum applicants who are not removable, plans that are scorned by NGOs.⁶⁰¹ Furthermore, a bill introduced in French Parliament proposes to increase the use of administrative postponement-of-removal (in the form of compulsory-residence-orders) as an alternative to administrative detention.⁶⁰²

In the mean time, what might help to move things forward is a piece-meal approach. A distinction could be made between those whose removal is postponed, on the one hand, and those who are released from administrative detention for reasons other than cancellation or postponement of removal, on the other. French law could be reformed so that postponed-returnees (judicial and administrative) would be entitled to a toleration permit (like in

600 Thierry Tuot, "La Grande Nation: pour une Société Inclusive" (Rapport au Premier Ministre sur la refondation des politiques d'intégration", 1 février 2013), 38-39.

601 See Coordination Française pour le Droit d'Asile, "Droit d'Asile: Suspicion et Contrôle sont les Maîtres Mots de la Réforme" (Communiqué de presse, 23 juillet 2014).

602 Ministère de l'Intérieur, "Projet de Loi Relatif au Droit des Étrangers en France" (n°2183, déposé le 23 juillet 2014), art 19.

Germany), which could be called a *titre de tolérance*. This toleration permit could be issued for a renewable six-month or one-year period, much like the duration of the existing administrative postponement-of-removal status examined in the empirical chapters of this thesis. Furthermore, holders of this permit could be entitled to the *couverture maladie universelle* (universal health coverage) and to the temporary tide-over allowance that asylum seekers are entitled to. At the moment, administrative postponed-returnees are eligible for (although not entitled to) the grant of work permits. Holders of the proposed toleration permit could be entitled to a work permit (or at least eligible for one), and there could be a diversity of work permits which would offer different levels of access to the French labour market. The freedom of movement of these toleration permit holders could be restricted on a limited set of grounds, based namely on the risk of absconding and security-related grounds.

A different path could be envisaged for illegal residents who are released from detention for reasons other than cancellation/postponement of removal. These individuals are released from detention, either due to expiry of the maximum (forty-five-day) period of detention, or before expiry of this maximum period because of procedural irregularities or the absence of a reasonable prospect of removal. The obstacles to their removal are not of a legal or policy nature, but of a practical nature. They can furthermore be subjected to multiple placements in detention, but benefit from a seven-day toleration/grace period, following each release from detention, during which they cannot be placed in detention. French law could be reformed in such a way as to limit the number of placements in detention, so that only one or two placements would be legally permissible.⁶⁰³ It could also be reformed so as to prolong the grace period following each release

603 Although such a limitation would be desirable for irregular migrants, there is a risk that such a limitation would be accompanied by an extension of the current forty-five day maximum period of detention.

from detention. There could be a grace period of for example one or three months, during which released-detainees would be put in possession of a safe-conduit document, ideally in the form of a short-term toleration permit. Holders of this short-term toleration permit could be eligible to apply for the longer-term toleration permit mentioned in the previous paragraph. And they could in the interim be entitled to universal healthcare and a temporary tide-over allowance. They could also be eligible (if not entitled) to a restricted work permit, and their freedom of movement could also be restricted.

If French law were to be reformed so as to create the proposed long-term and short-term toleration permits, pathways towards regularisation could concomitantly be created, which is what the report commissioned by the Prime Minister in 2013 proposed. Holders of a short-term toleration permit could be eligible for the grant of a long-term toleration permit upon expiry of the short-term permit. Holders of the long-term toleration permit could be eligible for the grant of temporary legal stay (the same status granted to asylum seekers: *autorisation provisoire de séjour*) after for example six months, and eligible for the grant of a full-fledged residence permit (*carte de séjour temporaire*) after for example two years. The access of short-term toleration permit holders to long-term toleration permits, of long-term toleration permit holders to temporary legal stay, and those with temporary legal stay to full-fledged residence permits, could be subjected to compliance with certain requirements. These requirements could namely be that they be cooperative with State authorities and that they not have a serious criminal record. The cooperation requirement would solely apply to those who cannot be removed for practical reasons. It is however important to note that the cooperative/non-cooperative dichotomy is not always clear cut in practice, and should be strictly defined, as well as potentially subject to tight judicial review

procedures, in order to ensure some kind of fair application of the concept.

The power of ideology is such that French policy and law makers are likely to resist even these pragmatic proposals in the name of immigration control, deterrence of irregular immigration, and the other rationales examined in chapter 5. However, if they were inclined to privilege the integration and human rights imperatives that stem from large populations of non-removable migrants, these proposals could provide a starting point for possible reforms, alongside recommendations that have already been made at EU and national levels.

Concluding chapter

In this thesis, I have attempted to draw attention to certain limbos, between illegal and legal stay, that hundreds of thousands of non-removable TCNs can end up in. My contention is that there are limbo spaces of unrecognised legal residence and limbo spaces of toleration. The focus has been on toleration spaces. My aim has been to examine the nature and consequences of these spaces, as well as to examine how and why EU management of non-removable persons has contributed to their development.

I have **firstly** argued that these positions lie on a scale between illegal and legal stay and that they have limbo-like qualities. I have done so by reference to legal concepts and definitions, as well as by reference to perceptions of these positions by those concerned. These perceptions were partly gathered through interview-based research that I carried out with tolerated TCNs in France. I have attempted to provide conceptual clarification and sociological depth to a good but conceptually narrow and divided literature on non-removability and toleration, and I have also taken a firm stance in the midst of this division. Going beyond the literature on non-removability and toleration, I have borrowed theoretical elements from the liminality literature, and empirical research methods from the qualitative migration research literature.

I have **secondly** argued that the European Union has played an increasingly important role since the 2000s in the management of these limbo positions of toleration. This management has impacted the nexus between non-removability and toleration by taking some TCN categories out of limbo and leaving others in limbo. It has also contributed to a process of formalisation of toleration positions which has had a transformative effect on membership patterns in the EU. Using analytical tools from the European Public Policy

literature, I have argued that the European Union's management of tolerated TCN positions has evolved from a seemingly accidental and technical governance into an increasingly deliberate and politicised one. This governance has mainly taken place in lower technical echelons of EU institutions. This is however not due to toleration being a technical issue, but due its being a technically complex political issue. Various forms of toleration can be viewed as tools for managing non-removable TCNs, alongside other tools such as regularisation and administrative detention. There have been inter-institutional and intra-institutional disagreements with regard to how this toleration tool and gap should be used; the nature and specificities of these disagreements were highlighted (e.g. in terms of a Left/Right divide).

What has emerged from this governance is the creation of new membership statuses within the overall hierarchy of TCN statuses. I have argued that these new membership statuses threaten the legal/illegal immigration divide, but that their development was also encouraged in order to protect the sanctity of that divide. I lastly and more crucially argued that new hierarchies of desirability have emerged within the overall group of non-removable TCNs, and that these new hierarchies have serious implications in terms of administrative detention, imprisonment, and exclusion from legal residence rights. Building on elements of the theories-of-punishment literature, I have argued that a specific group of non-removable TCNs (non-cooperative exhausted-returnees) has become increasingly singled out by the EU and its Member States for a particularly severe mix of immigration, criminal, and collateral sanctions. I illustrated this with a French case-study on the entrapment of non-cooperative exhausted-returnees between administrative detention, imprisonment, and freedom-in-limbo.

Building and expanding on the literature relating to regularisation, toleration, and crimmigration, I have **thirdly** argued that limbo spaces of toleration may be viewed as sanctions of membership exclusion, akin to administrative detention and imprisonment. Viewed in this light, I have provided a critical analysis of the exclusionary functions that certain EU institutional actors have assigned to various toleration positions. I have done so through a mix of desk research and interviews with key EU institutional actors. The dominant functions of all toleration positions are deterrence of non-removability strategies and enhancement of removability. Toleration namely serves to deter abuse of various types of non-removability strategies, as well as to encourage self-repatriation through a variety of negative incentives. I provided insight, through interview-based qualitative research, on the deterrent function and impact of toleration positions in France, as a national case-study of an EU-wide function. This insight was based on interviews with a small and purposive sample of tolerated TCNs. The results do not provide a representative picture of the deterrent function and impact of toleration positions in France, and they do not have any direct bearing on the same function and impact in other EU Member States. But they do provide some local empirical insight on the perception and effectiveness of an EU-wide function assigned to toleration positions.

Other exclusionary functions of toleration that I have critically examined are retribution, expressive State power, curbing public expenditure, and selection. Although toleration positions can predominantly be viewed as sanctions, the position of formally postponed-removal can alternately be viewed in a more inclusionary light. For example, some groups of non-removable TCNs are not entitled to postponement of their removal; postponement of removal improves their immigration position and often improves their rights. I have examined the possible

inclusionary functions that may be performed by formal postponement-of-removal. I have tried to show that formal postponement-of-removal can simultaneously perform both exclusionary and inclusionary functions. However, the predominant logic behind toleration positions is an exclusionary one. The development of limbo spaces of toleration is directly tied to Member States' determination to exclude many non-removable persons from legal residence. These spaces serve to fill an exclusionary void.

Where do we go from here? Limbo spaces between illegal and legal stay reveal a strain in a dichotomy that pervades EU immigration and asylum law and policy, as well as public opinion in this area of law and policy. These spaces are largely the product of limits on deportation, and the refusal to re-align regularisation laws and practices in light of these limits, as well as a refusal to re-align the relationship between immigration status and rights. The motivations for refusing to proceed to such re-alignment are largely the result of a strong attachment to the integrity of the selective power to include and exclude from the territory, as well as a belief in the notion that non-removability is a strategic move to undermine that power.

Migrants have varying levels of agency, but there is undoubtedly a minimal level of agency that most migrants have, especially in the steps they take to arrive and remain in their host country. But their background story and profile, past migratory motivations, and present motivations for remaining in their host country, all provide the context within which any such agency plays out. When non-removability is viewed as part of a strategy, this strategy must be viewed within the context of a broader strategy of economic accumulation, survival, family unity, or for any number of other broad types of strategy.⁶⁰⁴

⁶⁰⁴ The conceptual frameworks and empirical elements in this thesis could be of use in further research on the

Non-removability could be perceived as a TCN's claim to emplacement in a host EU State. EU Member States' immigration policies rest on the foundations of an international legal order, territorially divided into Nation States, which allocates the emplacement of individuals in accordance with their nationality, and entitles States to emplace or displace non-nationals. It, therefore, entitles EU Member States to determine the "emplacement" or "misplacement"⁶⁰⁵ of TCNs within their countries. Strategies for curtailing State claims of misplacement may be looked at as competing claims of emplacement under what could be described as a European heteropia. Hans Lindahl⁶⁰⁶ uses this concept of countervailing claims to emplacement and misplacement with regard to squatters in a building who transgress private property rights, "laying claim to a place for which there is no place in the legal order".⁶⁰⁷ The parallels are strong because concepts of private property ownership and Nation State territorial sovereignty share an exclusionary trait with regard to place.⁶⁰⁸

The international legal order's allocation of populations exists

reasons why some TCNs return and others don't, as well as in comparative research on the differences between two or more countries' non-removability phenomena.

605 Concepts borrowed from Hans Lindahl, "Finding a Place for Freedom, Security and Justice: the European Union's Claim to Territorial Unity" (2004) 29 (4) *European Law Review*, 461.

606 *Ibid*, 471-472.

607 *Ibid*, 471.

608 Furthermore, the position of non-removable persons in immigration law may strongly resemble that of protected squatters in the property laws of some States. The conceptual frameworks developed in this thesis may be of use in further research on deconstructing the legal/illegal immigration dichotomy, as well as on tolerated immigration and limbo-like immigration phenomena. But it might more generally serve an analogical purpose in more general research on dichotomy deconstruction and on toleration phenomena in non-immigration areas like property law. For example, English property law has known a particular category of individuals called tolerated trespassers. Susan Bright's description of the tolerated trespasser status bears a striking resemblance with my explanations of why certain non-removable persons' statuses are limbo-like and lie between illegal and legal stay: "Broadly speaking, a tolerated trespasser is a public sector tenant whose tenancy has been brought to an end by a possession order but who remains in possession of his or her home, paying for occupation, without the local authority taking any active steps to evict him or her. This situation can persist for many years. During this period, the occupier has no status as a tenant and enjoys none of the usual tenancy rights. It is thought that there are now many thousands of tolerated trespassers in council housing, and given the rising number of possession orders this represents a social, and legal, issue of considerable concern". See Susan Bright, "The Concept of the Tolerated Trespasser: an Analysis" (2003) 119 *Law Quarterly Review* 495-515.

within a context characterised by strong socio-economic disparities, as well as other complex dynamics, between and within Nation States. Strategising TCNs could be perceived as contesting their misplacement under the international legal order's allocation of populations into territorially divided Nation States in a complex and imperfect world. To quote the Swedish's State's response to the 2002 Commission Consultation on a Community Return Policy, the “issue is where a person really belongs”,⁶⁰⁹ and that issue is what lies at the centre of the battle between EU Member States and non-removable TCNs.

Strategies for curtailing State claims of misplacement could be viewed as enactments of citizenship, through the lens of Engin Isin's conception of citizenship as a social and political enactment, within which all individuals (not just those with the legal status of citizen) can become activist citizens by struggling for justice, for rights that they don't have, and for the right to have rights.⁶¹⁰ This is a particular understanding of citizenship as political activity, and more specifically of citizenship as political activism. According to Engin Isin, TCNs “transition from strangers, outsiders and aliens to European citizens ... by making claims and staging acts to demonstrate collective political subjectivity and assert or extend those rights that are constituted as European citizenship rights”.⁶¹¹ With regard to non-removable TCNs who are excluded from legal stay, they could be seen as contesting their exclusion from legal stay by using legal and practical tools at their disposal in order to stop Member States from effectively exercising the power of deportation against them. They could thus be seen as claiming the right to stay and to have their status regularised in the long run, a

609 Kerstin I. Eriksson on behalf of The Swedish Migration Board “Removal – enforcement of return decisions” (Paper prepared for the European Commission hearing on a community return policy on illegal residents, 16 July 2002), 2 < http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2002/pdf/contributions/sweden_en.pdf > last accessed 4 September 2014.

610 Engin Isin, “Claiming European Citizenship” in Engin Isin and Michael Saward (eds), *Enacting European Citizenship* (Cambridge University Press, 2013), 22.

611 Ibid, 31.

right that they do not have in any full-fledged sense. And since a greater bundle of rights is possessed by legal residents, they are ultimately claiming a right to have rights. By doing so, they become European citizens who enact citizenship despite the fact that they do not possess the legal status of citizen.

Some would describe tolerated TNCs as informal citizens (following this political understanding of citizenship), much like illegal residents have been described by some authors as informal citizens through citizen-like enactments.⁶¹² However, neither illegally present nor tolerated TCNs need necessarily be described as informal citizens since many of the citizen-like acts that they perform with a view to future regularisation are both formal and documented. Whether it's the gathering of proof of long-term residence and employment,⁶¹³ or the seeking of judicial review of return measures, such acts are often of a formal and documented nature vis-à-vis State authorities. Furthermore, the statuses of tolerated TCNs have become increasingly formalised across the EU, and sometimes come in the form of a toleration permit/certificate. And in some EU countries, illegal stay is a status which can be a documented status in the eyes of State authorities.⁶¹⁴

Coming back to the State-centred side of the equation, the national and European power of territorial exclusion is not absolute nor immutable. It is not absolute because the EU and its Member States are constrained by international human rights norms, many of which lie at the root of non-removability phenomena. And under EU law, some groups of TCNs have a right to stay irrespective of State authorisation. This is the case of TCN family members of EU citizens, who, as I showed in chapter 1, can end up in positions of

612 Saskia Sassen, "Towards Post-National and Denationalized Citizenship" in Engin Isin and Bryan Turner (eds), *Handbook of Citizenship Studies* (Sage, 2003), 282-283.

613 See Sébastien Chauvin and Blanca Garcés-Mascareñas, "Beyond Informal Citizenship: The New Moral Economy of Migrant Illegality" (2012) 6 *International Political Sociology* 241-259.

614 Ibid, 245 ; Ellie Vasta, "The Paper Market: "Borrowing" and "Renting" of Identity Documents" (2008) Centre on Migration, Policy and Society Working Paper 61.

unrecognised legal residence. The power of territorial exclusion is also not immutable, neutral, or natural.⁶¹⁵ Dora Kostakopoulou⁶¹⁶ has shown how contingent such power is on time, place, and ideology. The national power to territorially exclude, which entails a right and power to set conditions of authorised entry and residence for TCNs, is very much linked to the history of the Nation State, as well to the concept of private ownership. This contingent history and the influence of the private ownership concept has led to something most of us take for granted, which is that Nation States have exclusive ownership over delineated territories, this exclusive ownership providing the legitimacy for the right and power to include/exclude non-nationals. However, this power has become weaker, partly as a result of the exceptions mentioned at the beginning of this paragraph. Dora Kostakopoulou has envisaged three utopic alternatives to this “ownership oriented territoriality”.⁶¹⁷ One of these envisages the continuing growth of constraints on - and exceptions to - the power of territorial exclusion, to such a degree that most TCNs would have a right to enter and reside, akin to the residence rights possessed by today's TCN family members of EU citizens. This would correspond to what Kevin Johnson has defined as a “presumptively open border”⁶¹⁸ system, under which a TCN's presence in the EU would be presumed to be authorised, unless this presumption were to be rebutted by the host Member State on grounds of strictly defined exceptions (for example on security grounds).⁶¹⁹ A second utopia envisages a border-free world. And a third envisages a system Dora

615 Paul Schiff Berman, “From International Law to Law and Globalization” (2005) 43 *Columbia Journal of Transnational Law* 485, 511-518.

616 Dora Kostakopoulou, “Irregular Migration and Migration Theory: Making State Authorisation Less Relevant”, in Barbara Bogusz, Ryszard Cholewinski, Adam Cygan, and Erika Szyszczak (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Martinus Nijhoff Publishers, 2004).

617 *Ibid.*, 51.

618 Kevin Johnson, “Open Borders?” (October 2003) 51 *UCLA Law Review* 193, 213.

619 To a certain extent, this is the system that EU citizens and their TCN family members benefit from within the territory of the EU. Most TCNs, on the other hand, live under a presumptively closed border system, whereby their presence in the EU is presumed to not be authorised unless they can establish that it is, namely by showing residence documentation.

Kostakopoulou has described as “focal territoriality”,⁶²⁰ in which territorial space would be reduced to a “dwelling place”,⁶²¹ with mainly cultural significance and little political significance. Membership would be defined by criteria unrelated to territorial delimitations. She has further explained that in this focal territoriality utopia, territorial spaces would not be owned by residents, but would be enjoyed by resident usufructaries. And “(w)hat would tie the community together ... would not be the idea that 'we are not the stranger', but the need to nurture dwelling and to improve co-existence by excluding particularistic nationalist ideas, racist and xenophobic narratives from the public sphere”.⁶²²

In any of these three utopias, the power of territorial exclusion would either become obsolete or substantially weakened. This would in turn weaken the importance attached to the integrity of selective legal migration management systems, and the far-reaching consequences for TCNs of falling on either side of the legal/illegal immigration dichotomy. Talking about her own original utopia of focal territoriality, Dora Kostakopoulou has suggested that there would be a de-accentuation of tight territorial control, of the removal of irregular migrants, as well as of deterrent migration policies.⁶²³ The ideological motivations of institutional actors in favour of limbo spaces between illegal and legal stay, as spaces of exclusion from legal stay for non-removable TCNs, would therefore have a lot less of a reason to exist. The legal/illegal immigration dichotomy would become less relevant, and in turn so would the limbo spaces between illegal and legal stay that have developed in order to protect the integrity of that dichotomy. Today, these are simply utopias. But the challenges to ownership oriented territoriality, which growing obstacles to

620 Dora Kostakopoulou, “Irregular Migration and Migration Theory: Making State Authorisation Less Relevant”, in Barbara Bogusz, Ryszard Cholewinski, Adam Cygan, and Erika Szyszczak (eds), *Irregular Migration and Human Rights: Theoretical, European and International perspectives* (Martinus Nijhoff Publishers, 2004), 50-57.

621 Ibid, 51.

622 Ibid.

623 Ibid, 54.

removal represent, suggest that the reality of such territoriality is on a long winding road to a state of utopia. However, the foreseeable future does not look too bright for the immigration status and rights of many non-removable TCNs, as the legal/illegal immigration remains a construct which EU and national decision-makers are determined to protect at great cost for those excluded from legal stay. But the growing presence of non-removable TCNs has sown the long-term seeds of uncertainty for the strength of this dichotomy.

Appendix 1: Future paradigms and policies

This appendix is a follow-up to the concluding chapter in which several possible futures were envisaged for the State power of territorial exclusion and non-removable TCNs. Where can institutional actors go from the current state of EU law on non-removable TCNs? The current direction is one in which these legal limbos remain important, but in which distinctions are increasingly made between non-removable persons in accordance with the type of obstacle to removal, as well as the role of these persons in preventing removal. The institutional forces in favour of the status quo are still strong, and they exist within both the Council and European Parliament. Beyond the importance attached to territorial exclusion and to the exclusionary functions examined in chapter 5, a number of institutional actors also have qualms about EU harmonisation in this area,⁶²⁴ something which was well documented in chapter 3 on the governance of toleration spaces. Others are however very open to such harmonisation, and it is thus worth pondering what this could look like.

In the recommendations for EU reform formulated in the Ramboll/Eurasylum study,⁶²⁵ a key distinction lies between persons who cannot be removed for legal/policy reasons, on the one hand, and practical reasons, on the other. And when obstacles to removal are of a practical nature, a further distinction lies between cooperative and non-cooperative persons. With regard to those who cannot be removed for legal/policy reasons, the study recommends that they be temporarily regularised. With regard to those who cannot be removed for practical reasons, it recommends two different paths, one for cooperative persons and another for non-cooperative persons. Both groups of individuals would receive

624 For example, see Ramboll and Eurasylum, “Study on the Situation of Third-Country Nationals pending Return/Removal in the EU Member States and the Schengen Associated Countries: Final Report” (Study commissioned by the European Commission, 11 March 2013), 84.

625 Ibid, 93-97.

a toleration status after a certain period of time. However, the toleration status bestowed upon cooperative individuals would be superior, presumably in terms of security of residence and rights. Furthermore, cooperative individuals with a toleration status would be eligible in the long run for regularisation of status. This would not be the case for non-cooperative individuals. The study does however stress the importance of clearly defining the cooperation/non-cooperation distinction.

Moving on from this very useful and pragmatic blueprint provided by the Ramboll/Eurasyllum study, I turn now to further explore the possibilities that lie ahead. The future of these legal limbos depends on the importance attached to the power to territorially exclude. In my examination of possible futures, I make a distinction between a framework in which this power remains important, on the one hand, and a framework in which it has become less politically relevant, on the other.

Framework within which the power to territorially exclude remains important

If the power to territorially exclude non-legal residents remains important, there will always be feelings of discomfort towards non-removable TCNs. On the one hand, resources will continue to be deployed in order to limit the number of non-removable irregular migrants within the EU, namely by making pre-border controls, border controls, and the execution of return measures more effective.⁶²⁶ On the other, the status and rights of non-removable

626 Future EU policy on non-removable TCNs would appear to be far more tilted to the side of prevention of non-removability than to the side of governing the status of non-removable persons. See for example: Commission, “Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: An Open and Secure Europe: Making it Happen” COM (2014) 154 final, 5-6. Furthermore, the forthcoming multi-annual programme (2014-2019) on Freedom, Security, and Justice, which will soon replace the current Stockholm Programme (2009-2014), is in the midst of being negotiated. These programmes are crucial as they set the political framework and goals within which immigration legislation is proposed, negotiated, and adopted. Elements of the negotiations on the forthcoming multi-annual programme clearly show that there is a consensus over preventing non-removability, and no consensus at all on governing the status and rights of non-removable persons: Council Document 9531/14 (*Future development of the area of Freedom,*

persons will still need to be governed as these individuals will not disappear over night. This internal governance could either remain static or it could for example move in the direction recommended by the Ramboll/Eurasylum study.

The specific direction followed would depend on how institutional actors were inclined to respond to the following questions. How is the reinforcement of deportation effectiveness to be balanced with the inevitable limits of deportation? Should all obstacles to deportation be tackled, or should they be accepted? To what extent should administrative detention policies be re-aligned with deportation reality? To what extent should regularisation policies be re-aligned with deportation reality? Should toleration positions be maintained simply to *inter alia* deter continued stay, or should they be improved to facilitate integration pending removal? To what extent should toleration statuses be improved? Without exploring each question in succession, I instead opt to explore some of the pragmatic pathways that EU institutional actors could follow with these balancing questions in mind.

The reinforcement of deportation effectiveness should theoretically and legally only be sought with regard to persons who cannot be removed for practical reasons. It should however not affect persons who cannot be removed for legal reasons, and yet the latter are often caught up in the deportation process.⁶²⁷ Some institutional actors will continue to oppose the regularisation of all illegally staying TCNs who turn out to not be removable, such opposition being for the reasons examined in chapter 5 of this thesis. But for those institutional actors who favour some form of re-alignment of regularisation policies with deportation reality, the place to start is with a complete (or quasi-

Security and Justice), 5-7.

⁶²⁷ For example, see Commission, "Communication from the Commission to the European Parliament and the Council: Evaluation of EU Readmission Agreements" COM (2011) 76 final, 12.

complete) re-alignment between legal obstacles to removal, on the one hand, and regularisation, on the other. If the legal system mandates that an individual remain, then that individual should be granted some form of legal stay, no matter how temporary or weak that legal stay might be. This is especially the case when the obstacles to removal stem from human rights norms. There should be no political discretion to punish and deter individuals whose continued stay is justified on human rights grounds.

The re-alignment between legal obstacles to removal, on the one hand, and regularisation, on the other, could take place following one of three routes. First, re-alignment could be an automatic obligation imposed on Member States. Secondly, there could be an obligation to regularise after a certain period of time. Thirdly, regularisation could remain discretionary, but with strong political guidelines in favour of such regularisation after a certain period of time. Bearing those three routes in mind, re-alignment routes could be different for diverse types of legal obstacles to removal. For example, there could be an immediate obligation to regularise when substantive human rights obstacles to removal are at play, and there could be an obligation to regularise after a certain period of time when suspensive judicial procedures prevent removal.

Such hard-law re-alignments could be adopted within the framework of a recast of the Return Directive, or alternatively in a specific piece of legislation dedicated to the governance of non-removable TCNs. If the EU was to opt instead for political guidelines over legal obligations, the post-Stockholm multi-annual Programme (on Freedom, Security, and Justice) or a new European Pact (similar to the European Pact on Immigration and Asylum) could include strong guidelines in favour of regularisation after a certain period of time, Member States' implementation of such guidelines being subject to annual reports.

Going down the recast route, article 6 of the Return Directive, which imposes an obligation on Member States to issue return measures against illegally staying TCNs (subject to exceptions), could for example include a new paragraph in a recast Directive such as the following:

“Member States shall grant a temporary residence permit to third-country nationals who cannot be returned due to obligations derived from fundamental rights as resulting, in particular, from the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union, such as the right to non-refoulement, the right to education, and the right to family unity. No return decision shall be issued under these circumstances. Where a return decision has already been issued, it shall be withdrawn”.

This new paragraph builds on what the European Commission proposed in its 2005 Return Directive proposal,⁶²⁸ but makes the regularisation obligation more explicit.

Re-alignment could become automatic with regard to all asylum applicants in all EU Member States, an asylum application corresponding to a procedural legal obstacle to removal. The practice in countries like France of merely tolerating certain categories of asylum applicants, namely Dubliners, could be outlawed via a European reform. Article 6 (1) of the Recast Asylum Reception Conditions Directive -

“Member States shall ensure that, within three days of the lodging of an application for international protection, the applicant is provided with a document issued in his or her own name certifying

628 Commission, “Proposal for a Directive of the European Parliament and of the Council on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals” COM (2005) 391 final, art 6 (4).

his or her status as an applicant or testifying that he or she is allowed to stay on the territory of the Member State while his or her application is pending or being examined”⁶²⁹

- could be amended as follows in a further and future recast of the Directive:

“Member States shall ensure that, within three days of the lodging of an application for international protection, the applicant is provided with a document issued in his or her own name certifying his or her status as an applicant *and that the holder is **legally** in the territory of the Member State in which the application has been lodged or is being examined*”.

This would be in line with what the European Commission proposed in its original Asylum Reception Conditions Directive proposal,⁶³⁰ but which it has since dropped. All other pieces of EU asylum and immigration legislation could be similarly amended. There is namely the Return Directive which could, in a recast, explicitly state that asylum seekers shall never be considered to be illegally staying from the moment they express an intent to apply for asylum.⁶³¹ Such a reform at EU level might no longer be strictly necessary with regard to France, as a very recent bill introduced in French Parliament proposes to mostly do away with the distinction between asylum applicants who are granted and refused legal stay.⁶³²

Re-alignment could also be sought in a recast of the CVHT Directive⁶³³ with regard to victims of trafficking who consider cooperating with State authorities against their traffickers. When

629 Directive 2013/33/EU of the European Parliament and of the Council on asylum reception conditions (recast) (2013) OJ L 180/96.

630 Commission, “Proposal for a Council Directive laying down Minimum Standards on the Reception of Applicants for Asylum in Member States” COM(2001) 181 final, 11 and 32.

631 The Return Directive only contains a preamble recital which timidly states that asylum seekers *should* not be regarded as illegally present: Directive 2008/115/EC of the European Parliament and of the Council on the return of illegally staying third-country nationals [2008] OJ L 348/98, recital 9.

632 Ministère de l'Intérieur, “Projet de Loi relatif à la Réforme de l'Asile” (n° 2182, déposé le 23 juillet 2014), especially see art 14.

633 Council Directive 2004/81/EC on the residence permit for cooperative victims of human trafficking (2004) OJ L 261/19.

victims are identified, they are offered a reflection period during which they are merely tolerated. A temporary residence permit is only granted to them if they decide to effectively cooperate in good faith and are useful to State authorities. A recast of the CVHT Directive could require that this same temporary residence permit be granted to them from the start of the reflection period. To alleviate concerns that institutional actors might have about abuse of the cooperation procedure, a clear maximum period could be set for this reflection period (there is currently no such maximum period under EU law). This would ensure that any abuse was short-lived. Victims would either remain legally present within the framework of a good-faith cooperation process or quickly fall back into illegality of stay on any one of the grounds that Member States currently rely on to revoke their residence permits. Toleration is not a strictly necessary tool for States to deter perceived abuse, as strictly-timed reflection periods and the easy revocation of residence permits are amply sufficient to this end. There is furthermore the rare example of Italy as a Member State in which the grant of a residence permit is not subject to the victim's cooperation.⁶³⁴ The reflection (and toleration) period is altogether skipped.

If seeking a balance between enhancing the effectiveness of EU return policy and accepting the limits to return policy has any kind of legitimacy, it is with regard to TCNs who cannot be removed on practical grounds. Member States wish to tackle practical obstacles to removal, namely by facilitating the swift identification of those concerned, the delivery of travel documentation by third countries, and ultimately the acceptance by these third countries of their nationals (as well as TCNs who transited via their countries). Readmission agreements represent one of the key

⁶³⁴ European Migration Network, "Ad-hoc Query on Trafficking in Human Beings" (Compilation produced on 6 February 2013), 16. See also the synthesis report by the Italian National Contact Point of the European Migration Network within the framework of: European Migration Network, "Identification of Victims of Trafficking in Human Beings in International Protection and Forced Return Procedures" (Study produced in March 2014), 2.

instruments that serve to tackle practical obstacles and enhance the effectiveness of return procedures. However, these instruments have their limits and many third countries are resistant to the adoption and implementation of these types of agreements. And so EU Member States have to accept that there will always be a number of irregular migrants who cannot be removed for practical reasons, and whose status and rights necessitate governance.

I showed in chapter 3 that it is the spectre of the non-cooperative migrant which haunts many institutional actors in the governance of practical obstacles to removal, as these actors do not want generous policies to encourage deliberate practical sabotaging of return procedures. The line separating cooperative and non-cooperative migrants is not perfectly clear,⁶³⁵ as I shall come to in a moment. However, assuming that such a line is clear, this distinction could serve to improve the position of many TCNs who cannot be removed for practical reasons.

Future governance of persons who cannot be removed on practical grounds could go down a hard-law law approach or a political-guidelines approach, as mentioned above with regard to the future governance of persons who cannot be removed on legal grounds. If EU institutions were to go down the route of hard-law reforms, a recast of the Return Directive could include an amendment of the paragraph on postponement-of-removal for practical reasons.⁶³⁶ Currently, persons who cannot be removed for practical reasons are never entitled to postponement-of-removal in the Directive – Member States merely have the option of postponing their removal. A reformed paragraph could create an entitlement to

635 Maaïke Vanderbruggen, Jerome Phelps, Nadia Sebtaoui, Andras Kovats, and Kris Pollet, “Point of No Return: The Futile Detention of Unreturnable Migrants” (Collaboration between Flemish Refugee Action (Belgium), Detention Action (UK), France terre d’asile (France), Menedék – Hungarian Association for Migrants, and The European Council on Refugees and Exiles (ECRE), project supported by EPIM, January 2014), 23-24.

636 Directive 2008/115/EC of the European Parliament and of the Council on the return of illegally staying third-country nationals [2008] OJ L 348/98, art 9 (2).

formal postponement-of-removal for TCNs who cannot be removed for practical reasons beyond their control. Postponement-of-removal for TCNs who cannot be removed for practical reasons due to non-cooperation could remain entirely discretionary as it currently is, or it could become an entitlement after a certain period of time, namely upon exhaustion of the return procedure. An entitlement to regularisation could be created for cooperative TCNs after a certain period of postponement-of-removal has elapsed. The same could exist for non-cooperative TCNs after an even longer period of postponement, although it is highly unlikely that most Member State representatives in the Council would agree to such a reform.

The classification of a TCN as being (or having been) non-cooperative should be clearly set out (and made subject to review procedures) in any EU reform, especially if it becomes a key criterion for EU-governed discrimination in terms of detention, formal toleration, and regularisation. NGOs have documented State practices of arbitrarily classifying returnees as non-cooperative. A report by a group of European NGOs, based on qualitative research carried out from September 2012 to February 2014, suggests that “(w)hile some migrants do obstruct the identification process ... , others are wrongly accused when they are actively seeking to cooperate”.⁶³⁷ It furthermore “appears that many migrants do cooperate but are refused documentation for reasons outside their control ... (and) yet they experience great difficulty in proving their cooperation and refuting accusations of obstruction”.⁶³⁸ This is a serious problem in light of the fact that many EU Member States's legal systems do not explicitly contain the words *a lack of cooperation by the third-country national*, and that those that do

⁶³⁷ Maaïke Vanderbruggen, Jerome Phelps, Nadia Sebtaoui, Andras Kovats, and Kris Pollet, “Point of No Return: The Futile Detention of Unreturnable Migrants” (Collaboration between Flemish Refugee Action (Belgium), Detention Action (UK), France terre d’asile (France), Menedék – Hungarian Association for Migrants, and The European Council on Refugees and Exiles (ECRE), project supported by EPIM, January 2014), 23.

⁶³⁸ Ibid, 24.

contain the words have no – or no adequate – definitions of these words.⁶³⁹ On a positive note, the often arbitrary classification of TCNs as non-cooperative in return procedures is likely to be subjected to increasing judicial constraints and oversight. In the recent Mahdi ruling,⁶⁴⁰ the CJEU interpreted the *lack of cooperation* concept (in the Return Directive provisions on administrative detention) as requiring a causal link between a TCN's conduct, on the one hand, and the duration of the removal process, on the other.⁶⁴¹ Non-cooperation may no longer be deduced from the sole fact that a TCN has no identity documents, and a lack of cooperation may only be determined following “a detailed examination of the factual matters”.⁶⁴² Furthermore, in the context of detention, the burden of proof lies on Member States to establish that they have made all reasonable efforts to secure the issue of identity documents,⁶⁴³ preliminarily to classifying a TCN as non-cooperative.

Institutional actors against the regularisation of non-removable TCNs have numerous rationales, which include the importance of deterring these TCNs and not unfairly rewarding them. But there is especially a fear that even mere temporary legal stay could provide a gateway to long-term legal stay. Offering temporary legal stay to individuals who are temporarily not removable facilitates their legal and socio-economic integration within the host Member State. Furthermore, periods of legal stay and of enhanced socio-economic integration can improve chances of more permanent forms of legal stay, due to improved eligibility for more permanent forms of regularisation. However, such concerns are not entirely justified, and they can furthermore be taken into account in EU

639 European Migration Network, “Ad-hoc Query on the Return Directive (2008/115/EC) Article 15(6) Extension of Period for Voluntary Departure upon Specific Circumstances” (Compilation produced on 25 October 2013).

640 Case C-146/14 PPU *Bashir Mohamed Ali Mahdi v Director of the Directorate for Migration at the Ministry of the Interior* (2014).

641 *Ibid.*, para 82.

642 *Ibid.*, paras 73 and 84.

643 *Ibid.*, para 83.

reforms. The reason that such concerns are not entirely justified is that a number of legal resident categories are already excluded from eligibility for acquisition of long-term legal residency⁶⁴⁴ and of the EU Blue Card.⁶⁴⁵ Furthermore, any reform which would entitle non-removable TCNs to a temporary residence permit could include explicit limitations, namely that periods during which such TCNs possess this permit would not count as periods of legal residence for the purpose of acquiring the status of long-term resident, nor other legal statuses such as the highly qualified worker status. Such limitations would not necessarily be desirable, but they would arguably be preferable to no reform at all.

There is a risk that if Member States were to become obliged to regularise the status of many more non-removable TCNs, immigration control would become a lot fiercer. If non-removability (practical as well as legal) becomes an easy ticket to legal stay, then States are likely to step up efforts to prevent as many individuals as possible from becoming non-removable TCNs. Readmission agreements are already becoming an increasingly important feature of EU return policy and law, and are likely to develop further. As a reminder, such agreements serve to facilitate the identification of illegally staying TCNs, and to impose an obligation on signatory third countries to take back their own nationals as well as all other TCNs who transited through their territory immediately before reaching EU shores. Furthermore, joint return operations, which have already enabled Member States to return large numbers of TCNs in a short amount of time, are also likely to develop a lot more in years to come. According to the Commission, “(b)etween 2006 and December 2013, FRONTEX coordinated 209 Joint Return Operations (JROs) returning 10855

644 Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents (2003) OJ L16/44, art 3.

645 Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment (2009) OJ L155/17, art 3.

people”.⁶⁴⁶ Those already big figures are likely to get bigger.

Since toleration is likely to remain a feature of the EU's immigration landscape, it could be improved, both in terms of legal status and rights. Rationales against the improvement of toleration statuses are similar to the rationales against regularisation. However, the negative human rights and integration impact that stems from precarious toleration statuses and rights cannot be justified at all cost in the name of deterrence, retribution, reduced public expenditure, and other such exclusionary goals.

While political guidelines and exchanges of practices are not without value, meaningful improvements to the status and rights of tolerated TCNs are only likely to result from hard-law reforms. A recast of the Return Directive could require that Member States grant a toleration permit (like in Germany) to postponed-returnees, which would specify the period of toleration and would have a decent set of socio-economic rights attached. Such a toleration permit would not in itself constitute an immutable obstacle to removal, but would merely be a manner of improving the human rights position of TCNs who cannot be removed for the foreseeable future. This toleration permit could be designed so as to open up the possibility of obtaining a temporary residence permit (like the one mentioned above for persons who cannot be removed on legal grounds). Both this toleration permit and the temporary residence permit could be legally designed in a manner that would exclude eligibility for other legal resident statuses for a set period of time, and that would prioritise removal in the event that an obstacle to removal ceases to exist. Such eligibility-exclusion would only be necessary if these positive reforms would not otherwise be adopted due to political resistance.

⁶⁴⁶ Commission, “Communication to the Council and the European Parliament on EU Return Policy” COM (2014) 199 final, 5.

Article 14 of the Return Directive -

“1. Member States shall, with the exception of the situation covered in Articles 16 and 17, ensure that the following principles are taken into account as far as possible in relation to third-country nationals during the period for voluntary departure granted in accordance with Article 7 and during periods for which removal has been postponed in accordance with Article 9:

(a) family unity with family members present in their territory is maintained; (b) emergency health care and essential treatment of illness are provided; (c) minors are granted access to the basic education system subject to the length of their stay; (d) special needs of vulnerable persons are taken into account.

2. Member States shall provide the persons referred to in paragraph 1 with a written confirmation in accordance with national legislation that the period for voluntary departure has been extended in accordance with Article 7(2) or that the return decision will temporarily not be enforced”⁶⁴⁷

- could for example be recast as follows:

“1. Member States shall, with the exception of the situation covered in Articles 16 and 17, *grant* the following rights to third-country nationals during the period for voluntary departure granted in accordance with Article 7 and during periods for which removal has been postponed in accordance with Article 9:

(a) family unity with family members present in their territory; (b) *primary and emergency healthcare*; (c) *access to the labour market no longer than six months after possession of the toleration permit referred to in paragraph 2* (d) *access to social assistance capable of ensuring their subsistence no longer than one month after possession of the toleration permit mentioned in paragraph 2* (e) access to the basic education system for minors; (f) *eligibility of adults for university programmes*; (g) *necessary medical or other assistance for vulnerable persons with*

⁶⁴⁷ Directive 2008/115/EC of the European Parliament and of the Council on the return of illegally staying third-country nationals [2008] OJ L 348/98.

special needs.

2. Member States shall provide the persons referred to in paragraph 1 with a renewable **toleration permit** which specifies the period during which the return decision will not be enforced. This period shall be no shorter than three months. The permit shall contain all necessary information for the purposes of administrative controls or checks.

3. Holders of the toleration permit referred to in paragraph 2 shall be eligible to apply for a temporary residence permit after six months, and entitled to this permit after eighteen months. Holders of this residence permit may be excluded from the scope of Directive 2003/109/EC (of 25 November 2003 concerning the status of third-country nationals who are long-term residents) for no longer than two years.

The status of released-detainees, particularly of exhausted-returnees, is unsatisfactory in terms of legal status and rights, this unsatisfactory quality being a desired state of the law for many institutional actors. As a reminder, Member States are compelled to release administrative detainees upon expiry of the maximum period of detention. The Return Directive sets a lower maximum period of six months, and an absolute maximum period of eighteen months. Member States are also compelled to release detainees before expiry of the maximum period due to the absence of a reasonable prospect of removal, and can be compelled to release them due to procedural irregularities. The CJEU very recently interpreted the Return Directive as requiring that those released from administrative detention, due to the absence of a reasonable prospect of removal, be issued with written confirmation of their release.⁶⁴⁸ However, an explicit and more general right to written confirmation of release would greatly enhance the status of exhausted-returnees and released-detainees *stricto sensu*. A recast Return Directive could introduce such an explicit right for all those released from administrative detention, as well as a catalogue of

⁶⁴⁸ See Case C-146/14 PPU *Bashir Mohamed Ali Mahdi v Director of the Directorate for Migration at the Ministry of the Interior* (2014).

rights similar to that of postponed-returnees.

Furthermore, the issue of repeated placements in administrative detention could be addressed. Such repeated placements are common in Member States like France with national maximum periods that are far lower than the European Union's eighteen-month maximum. In such countries, illegally staying TCNs can be subjected to repeated placements in administrative detention for a cumulative period which can only add up to eighteen months. A recast of the Return Directive could set legal limits on the number of placements in administrative detention, as well as impose a mandatory grace period in-between placements in detention. Placements in administrative detention for any given illegally staying TCN could be limited to an absolute maximum of two or three placements (which could for example be modulated in accordance with the duration of each placement). And all TCNs released from detention could be legally immune from detention for a certain period of time (for example one month). Some could also be entitled to the above-mentioned toleration permit under certain circumstances, namely following expiry of the maximum period of detention, as well as in the absence of a reasonable prospect of removal.

The potential hard law reforms discussed here, with regard to all types of non-removable persons, are unlikely to see the light of day in the near future. A Recast Return Directive proposal is not currently on the Commission's table, nor is a proposal for a more specific piece of legislation on non-removable persons.⁶⁴⁹ It is however not completely off the table in the long run. And the very recently recast Asylum Reception Conditions Directive is unlikely to undergo a new recast process any time soon. Moving beyond hard law, political guidelines look more probable in the near

⁶⁴⁹ Interview with Manfred Hähnel, European Commission, DG Home Affairs (phone interview, 26 November 2013); Interview with Fabian Lutz, European Commission, DG Home Affairs (phone interview, 7 January 2014).

future, as do exchanges of practices. However, even the adoption of solid political guidelines is uncertain, as the issue of non-removability is quite absent from the current institutional process of elaborating the post-Stockholm multi-annual programme on freedom, security, and justice.⁶⁵⁰

While the piece-meal reforms discussed here are the only feasible reforms for as long as the current paradigm of territorial exclusion prevails, alternative paradigms do exist and it is worth pondering what place non-removability would have in such alternate systems.

Framework within which the power to territorially exclude is less politically relevant

Dora Kostakopoulou has suggested that there are three alternatives to a Europe in which the power to territorially exclude is important. These are a system with a right to free movement for all (not just EU citizens), a border-free world, and a system she coined as one of focal territoriality. An overview of these systems was provided in the concluding chapter of this thesis.

The issues of non-removability and toleration would become completely irrelevant in a border-free world, as distinctions between citizens and non-citizens would cease to be of any relevance, and deportation would correspondingly cease to be a legitimate and lawful tool at States' disposal. These issues might however continue to be of some relevance in systems of free movement for all and of focal territoriality, although they would be a lot more marginal than they are today.

In a system of free movement rights for all, TCNs would have a

⁶⁵⁰ See Council Document 9531/14 (*Future development of the area of Freedom, Security and Justice*). See also Commission, "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: An Open and Secure Europe: Making it Happen" COM (2014) 154 final.

presumptive right of entry and residence in the EU. Their entry and residence would be presumed to be legal, unless they were to fall under a limited set of exceptions to the right of entry and residence, namely security and socio-economic exceptions. This is the regime which currently applies to EU citizens within the EU, and it would be extended to all TCNs. Exceptions to free movement rights tend to be very restrictive and subject to strict standards of proportionality, which means that the socio-economic bar would be quite low, and the threat-to-security bar very high. In order to be illegally present, and potentially tolerated, TCNs would have to fall under strictly defined exceptions. There would therefore be many less illegal residents in the EU. However, those illegal residents might similarly be non-removable for legal or practical reasons. Protection from refoulement (and other human rights standards) would still apply, even with regard to individuals who present a security risk. And practical obstacles to removal, whether within or beyond the control of returnees, would no doubt continue to exist for a while, no matter how sophisticated the return machinery would get. However, the smaller number of returnees might free up the bureaucratic resources necessary to tackle practical obstacles to removal. This would greatly reduce the perceived necessity to administratively detain and/or tolerate the few non-removable persons that remain.

Dora Kostakopoulou's system of focal territoriality is more difficult to flesh out in terms of the specifics of membership and membership control, although she provides many preliminary clues. In this system, the importance of territoriality would diminish in terms of membership in EU Member States, and would essentially be relegated to cultural significance. Individual members, whom we could call denizens or resident dwellers, would not be exclusive owners of the territory of EU Member States, but would be usufructuaries of the territory. These dwellers would not

have the power to territorially include and exclude fellow/new dwellers by reference to territorially contingent notions of membership. Membership criteria would however presumably still exist, namely by reference to standards of care towards common goods/dwellings and to standards of peaceful pluralistic cultural co-existence, within whatever new territorial delimitations might exist in a dweller's world.

On the one hand, Dora Kostakopoulou explains that “no group or individual would have more spatial power than others, or feel more entitled than others, to have a view about who should dwell in cities and towns, how they should dwell and how they ought to be positioned within the territory”.⁶⁵¹ On the other, she writes that all residents would “have the right of possession, use and enjoyment of the territory and its resources, without causing damage to it or prejudicing its future use and enjoyment”.⁶⁵² This strongly implies that rules and principles would exist to ensure that resident dwellers do not damage or prejudice the territory and resources shared by a given political community.

There would therefore be some sort of membership criteria, and such criteria might imply the possibility of a hierarchy of membership and even exclusion from membership. There would at the very least be criteria of possession, use and enjoyment, which entail potential exclusion from (or subordinate access to) possession, use, and enjoyment of specific resources or portions of territory (and one could also imagine the infliction of financial and criminal penalties). It could be argued that this sits uncomfortably with the premise that no individual or group would be entitled to tell another individual or group how they should dwell and be positioned. For where would the legitimacy to determine rules of

651 Dora Kostakopoulou, “Irregular Migration and Migration Theory: Making State Authorisation Less Relevant”, in Barbara Bogusz, Ryszard Cholewinski, Adam Cygan, and Erika Szyszczak (eds), *Irregular Migration and Human Rights: Theoretical, European and International perspectives* (Martinus Nijhoff Publishers, 2004), 51-52.

652 Ibid, 51.

proper possession, use, and enjoyment be derived from, and who would legitimately enforce them? Yet some system would need to be devised in order to prevent damage and long-term prejudices to resources and shared territory.

If I am not wrong in suggesting that resident dwellers could theoretically be excluded from (or have subordinate access to) resources and portions of territory, this raises the question of how irrelevant territory would be with regard to the consequences for transgressing basic rules and principles of care and co-existence. Territory would be mostly irrelevant (and a lot less relevant than it is today), but it is hard to imagine that it would lose all relevance. Dora Kostakopoulou explains that it is the “value and weight”⁶⁵³ attached to territory that would diminish, not territory itself. If territory were to have any relevance in the sanctions imposed on transgressors of rules and principles relating to proper dwelling, then limited forms of removal might exist. And if such territorial exclusion were possible, however small the territorial scale might be, the practice of removing non-members or sub-members from some kind of territorial space would thus not necessarily disappear, even though it would presumably be a lot less prevalent. And with the practice of removal comes the possibility of obstacles to removal.

This conceptual fleshing out of focal territoriality is consistent with Dora Kostakopoulou's practical depiction of her utopia within a contemporary and familiar institutional and political context.⁶⁵⁴ She explains that Member States would still have the power to adopt rules of entry and residence (and these rules would presumably be designed by reference to the aforementioned standards of care). She however specifies that the power to punish transgressors by territorially removing them would disappear and

653 Ibid, 51.

654 Ibid, 52.

be replaced by a mere power to fine. She nonetheless adds a proviso - there would be a limited power of removal with regard to individual transgressors who represent a serious public policy/security threat, much like in a free-movement system. Territorially contingent criteria of membership would disappear, but other criteria would continue to be of relevance, namely those related to criminal laws (and presumably to standards of care). It is such criteria that would provide the normative foundations of a limited power of removal, which might in turn lead to a marginal phenomenon of non-removable persons in a system of focal territoriality.

Focal territoriality could take multiple forms, and some of these forms might not be able to completely eschew the issue of territorial exclusion and non-removable individuals. The diverse forms which such a utopia could take merit detailed analyses and explorations with tools of political philosophy and political economy. For now, I wish to highlight that in a system of focal territoriality, membership criteria (or criteria for using territory and resources) would be a lot more inclusive due to the absence of criteria linked to national territorial boundaries, and so exclusionary membership practices would be marginal. Moreover, the practical value of a utopia like that of focal territoriality truly lies in the benchmark it can provide in order to assess current immigration and asylum systems. As a progressive benchmark that calls for a “de-accentuation of tighter control over borders and territory, of deterrence of entry, detention and removal”,⁶⁵⁵ and a corresponding shift in focus towards “protecting and preserving dwelling”,⁶⁵⁶ it provides a very valuable tool to radically critique the plight of non-removable TCNs that is largely the result of the importance attributed to the Nation State power of territorial exclusion. If EU citizens and their EU and Member State

655 Ibid, 54.

656 Ibid, 51.

representatives were to no longer consider this power to be of primordial importance, then they would be unlikely to have the exclusionary motivations (namely that of deterrence) that warrant the maintenance of certain TCNs in limbo spaces between illegal and legal stay. And if such motivations were to fade away, then the necessity to manage non-removable persons with tools other than regularisation would also fade into the abyss. Any use for tools of administrative detention and toleration would become exceptional, and reserved for particularly pressing cases where individuals pose a particularly serious threat to the political community. Focus would instead be on including, regularising, and being hospitable towards TCNs who cannot be removed for legal, policy, and practical reasons. The general phenomenon of non-removable residents, left in a state of suspension and neglect, would thus greatly diminish or wither away. The focal territoriality benchmark is probably too out-of-the-box and progressive to capture a large audience in the current immigration-hostile climate that pervades public opinion and mainstream political parties, but ideas have the potential to travel far and wide over time.

Appendix 2 : List of migrant interviewees who experienced periods of legal or indirect toleration (with their initials or aliases)

- Interview with Mr A.A. (Gisti, Paris, France, 25 April 2013).
- Interview with Mrs A.B. (France terre d'asile, Paris, France, 5 July 2013).
- Interview with Mrs A.K. (France terre d'asile, Paris, France, 7 May 2013).
- Interview with Mr A.Z. (France terre d'asile, Paris, France, 15 and 24 May 2013).
- Interview with Mr B. (France terre d'asile, Paris, France, 17 July 2013).
- Interview with Mr B.M. (France terre d'asile, Paris, France, 15 May 2013).
- Interview with Mr B.Y. (France terre d'asile, Paris, France, 21 May 2013).
- Interview with Béatrice (alias) (France terre d'asile, Paris, France, 5 July 2013).
- Interview with Mr C.A. (France terre d'asile, Paris, France, 24 June 2013).
- Interview with Mr D.A. (France terre d'asile, Paris, France, 21 May 2013).
- Interview with Mrs D.S. (France terre d'asile, Paris, France, 5 July 2013).
- Interview with Mr F.S. (France terre d'asile, Paris, France, 17 July 2013).
- Interview with Mr F.Z. (France terre d'asile, Paris, France, 24 June 2013).
- Interview with Mr G.H. (France terre d'asile, Paris, France, 7 May 2013).
- Interview with Mr G.M.A. (France terre d'asile, Paris, France, 17 July 2013).
- Interview with Mr H-J. K. (France terre d'asile, Paris, France, 24 June 2013).
- Interview with Mrs H.L. (France terre d'asile, Paris, France, 7 May 2013).
- Interview with Mr I.A. (France terre d'asile, Paris, France, 7 June 2013).
- Interview with Mr J-P. H. (France terre d'asile, Paris, France, 17 May 2013).
- Interview with Mrs K. (Gisti, Paris, France, 5 June 2013).
- Interview with Mr L. (Café near the North Station, Paris, France, 25 June 2013).
- Interview with Mr L.D. (France terre d'asile, Paris, France, 10 July 2013).
- Interview with Mrs M.B.N. (France terre d'asile, Paris, France, 8 July 2013).
- Interview with Mr M.C. (France terre d'asile, Paris, France, 24 May 2013).
- Interview with Mr M.M. (France terre d'asile, Paris, France, 27 June 2013).
- Interview with Mr N.T. (France terre d'asile, Paris, France, 14 May 2013).
- Interview with Mr O.S. (France terre d'asile, Paris, France, 30 April and 23 July 2013).
- Interview with Mr P.T. (France terre d'asile, Paris, France, 4 July 2013).
- Interview with Mr R.S. (Gisti, Paris, France, 6 May 2013).
- Interview with Mrs S. (Home of a friend of the interviewee, Paris, France, 19 June 2013).
- Interview with Mr S. (France terre d'asile, Paris, France, 14 May 2013).

- Interview with Mr S.I. (France terre d'asile, Paris, France, 10 July 2013).
- Interview with Mr T. (Gisti, Paris, France, 10 June 2013).
- Interview with Mr V.T. (France terre d'asile, Paris, France, 19 et 23 July 2013).

Appendix 3 : List of institutional interviewees

- Interview with Manfred Hähnel, European Commission, DG Home Affairs (phone interview, 26 November 2013).
- Interview with Fabian Lutz, European Commission, DG Home Affairs (phone interview, 7 January 2014).
- Interview with Michael Speiser, European Parliament, EPP Group Adviser (phone interview, 16 and 22 April 2013).

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- UN Convention against Torture and Other Cruel, Inhuman or Degrading Punishment (adopted on 10 December 1984, entered into force on 26 June 1987) A/RES/39/46.

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- Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast) (2013) OJ L 180/60.
- Directive 2013/33/EU of the European Parliament and of the Council on asylum reception conditions (recast) (2013) OJ L 180/96.
- Regulation (EU) 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or stateless person (recast) OJ L 180/31.

French legislation

- Code de l'entrée et du séjour des étrangers et du droit d'asile (Code on the Entry and Residence of Foreigners and on the Right of Asylum, consolidated version on 24 January 2014).
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