

EUROPEAN TASK FORCE ON IRREGULAR MIGRATIONS

Country Report: Germany

Center for Migrations and Citizenship

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Contents

INTRODUCTION	3
THE POLITICS AND POLICIES OF IRREGULAR MIGRANTS IN GERMANY	4
General features of the irregular migrant population in Germany	4
The historical evolution of German migration policies	5
Important developments since the year 2000	9
General features of the national migration control regime	11
Stakeholders in the field of irregular migration: the role of civil society	13
Summary: The politics and policies of irregular migrants in Germany	14
IRREGULAR MIGRATION – THE INTERPLAY BETWEEN LOCAL, NATIONAL, AND EU POLICIES ADDRESSING UNDOCUMENTED MIGRANTS.....	15
EU policies on undocumented migration in the German context	15
The place of local policies concerning undocumented migrants.....	17
THE CASE OF BERLIN.....	19
The social and economic situation of irregular migrants in Berlin	20
The Berlin government’s policies on irregular migration.....	21
Education.....	22
Health care.....	23
Working conditions/labour rights	26
Conclusion: Berlin as an actor in the field of irregular migration	30
CONCLUSION	32
REFERENCES	34

Introduction

From a European comparative perspective, Germany represents the case of a highly restrictive migration control regime. Between 400,000 and 600,000 migrants live in the country without legal resident status. Their access to social rights such as health care and education is severely restricted, and individual or collective regularization channels do not exist. Against this background, this report analyses the role of the local level in addressing the issue of irregular migration in Germany. Within the context of a restrictive national migration control regime, which role does the local level play in addressing the situation of irregular migrants? What is the scope of (alternative) policy approaches that can be used by the local level? Which factors encourage specific and possibly “alternative” approaches on the local level? And what is the role of the local level in policies on irregular migration in the context of the specific institutional structure of the German political system, especially the federal state structure? Focusing on the case of Berlin, this report addresses these questions through an analysis of secondary literature, a document analysis of laws and administrative regulations and through expert interviews with key actors in the field of irregular migration in the city of Berlin.¹ The results show that, while in the German context the degree of politicization of the issue of irregular migration is low, the situation of irregular migrants is addressed in a pragmatic and rather depoliticized way on the local level. The city of Berlin and several other German cities play an important role as a space where civil society organizations and local political actors interact in negotiating and improving irregular migrants’ access to social rights, sometimes counteracting the provisions of the national migration control regime.

¹ Interviews were carried out with the following actors: Katholisches Forum Leben in der Illegalität, Berlin ;Senatsverwaltung für Integration, Arbeit und Soziales; Büro für medizinische Flüchtlingshilfe Berlin. Also, the Finanzkontrolle Schwarzarbeit was asked for an interview as well as for data on workplace controls. It sent a written statement containing the requested data and answers to a list of questions by e-mail.

The Politics and Policies of Irregular Migrants in Germany

General features of the irregular migrant population in Germany

Before the features of irregular migrants are described a definition of who is part of this group should be given. We consider the definition by Jörg Alt (2003) to be useful. Alt defines “illegal” migrants as follows:²

“Illegal” migrants [...] are persons who enter Germany or stay in Germany without permission. By the term “entry without permission” is meant that the person concerned does not possess or cannot possess any papers according to German or international law that would allow for this entry. In case of control they have/would have to expect the denial of entry [original: *Einreiseverweigerung*], repulsion at the border [*Rückschiebung*], expulsion [*Ausweisung*] or even imprisonment or deportation [*Abschiebung*]. By the term “stay without permission” is meant [...] the fact that the person concerned does not possess or cannot possess any papers according to German or international law [...], that allow this stay. Therefore they have/would have to expect imprisonment and deportation in case of control. If papers that once were obtained regularly and justified a permitted stay [...] become invalid their owners also fall back to an irregular status, especially if their stay cannot be regularised anymore. (Alt 2003: 20; translation by B.L./P.P.).

Migrants whose entry and stay in Germany is based on fake papers are in a similar situation as those covered by the given definition (ibid.: 21).

² In this report, we focus on migrants who have no form of a legal residence status. In order to denote this group, we use the term ‘irregular migrant’ since it has less negative connotations than the term ‘illegal migrant’.

It is estimated that between 400,000 and 600,000 migrants live in Germany without a legal residence status (Vogel 2009), while the number of children among them ranges from 8,000 to 30,000 (ibid.). Irregular migrants originate from countries as diverse as Turkey, Russia, Ukraine, Serbia and Montenegro, China, India, and South America (Cyrus 2008a). Gender composition among irregular migrants can be estimated based on police criminal statistics. In the category of offences against migration law the gender relation approximately is two thirds men to one third women (ibid.: 44). This however does not reflect the relation in the whole population if it is taken into account that the labour market for irregular migrants is segmented along the lines of gender and that women working in private households are less likely to be detected as men working on construction sites (ibid.: 46). According to Cyrus (ibid.: 56ff.) irregular migrants take up jobs in the following sectors: agriculture, construction sector, private households, care work, sex industry, hotels, and catering.

The historical evolution of German migration policies

In the 19th century, migration in Germany was characterised by emigration of Germans to the USA (Herbert 2003: 14). Since the 1880s migration started from Ostelbien (north-east of Prussia) to the western parts of Prussia, especially to the already industrialised Ruhr area. However, not only Prussian but also Polish migrants came to look for work in the fast growing industry. The remains of this historical wave of migration can still be observed in a high number of persons with Polish names in the Ruhr area.

During the Nazi-era and the Second World War, millions of refugees left Germany for political reasons or to escape from the industrialised mass murder of Jews in the holocaust. At the same time, a high number of foreign workers – civil population of occupied countries as well as war prisoners – were deported and forced to work in the German military industry where they replaced German workers who had been drafted into the army (ibid.: 124ff.). About 40 percent of these workers were forcibly recruited in the occupied territories of the Soviet Union, about 25 percent from France, about 15 percent from Poland and the rest from other countries. According to numbers presented in the Nuremberg war crimes tribunal, 14 million forced labourers worked in the German industry where about half of them died from malnutrition, disease, or mistreatment (Nuscheler 2004: 119f).

After the Second World War, the German economy experienced a boom phase, later known as the so-called “*Wirtschaftswunder*” (economic miracle), that led to an increased demand for work force. As the German labour force potential alone could not satisfy this demand, labour migrants moved to Germany to work in the booming economy. Italian seasonal workers came to Germany as early as 1952 (Karakayali 2008: 98). According to the definition of irregular migrants given above, these early “guest workers” must be understood to have been irregular migrants since they did not have work permits or any official documents to certify their legal residence in Germany. At that time, this was not perceived as a problem. On the contrary, the media discussed emigration of German skilled workers as a serious problem and the employer’s association, BDI (Bundesverband der Deutschen Industrie; Federal Association of the German Industry), recommended suspending workers’ freedom of movement and restricting the right of free choice of jobs laid down in the German constitution (ibid.: 101). The recruitment agreements set up to bring foreign workers to Germany were initiated following these discussions. In 1954, the Federal Ministry of the Economy supported the idea of labour recruitment (ibid.). One year later the first recruitment agreement was signed with Italy (1955), Spain and Greece (both 1960), Turkey (1961) and other countries followed (Herbert 2003: 208). In 1973, 2.595 million so-called “guest workers” were employed in Germany (ibid.: 224). Both migrants and the German state expected that these migration processes would be temporary and that the migrants would return to their countries of origin. In the 1950s and 1960s, when the demand for foreign labour was high, the German authorities did not consider irregular migration to be a problem and an unlawful entry to the country was not prosecuted. Migrants looking for work could enter the country as tourists and then later receive a residence and work permit (Schönwälder et al. 2006: 7). Furthermore, student visas allowed migrants to come to Germany with the intention of finding work (Karakayali 2008: 111). Once in the country, a valid employment contract was sufficient in order to be eligible for a work permit (ibid.: 113). The most important countries of origin for this type of migrant were Greece, Italy, Yugoslavia, Spain, Lebanon, Syria, and Morocco (ibid.: 112). Until approximately 1963/1964 this approach was not considered problematic, neither for the media nor for the state. In 1964, the media began to report on the phenomenon. In 1963, a report by the *Bundeskriminalamt* (Federal Criminal Police Office) summarised the information on this issue gathered by the German authorities and estimated that there was one undocumented migrant per ten or twenty migrants with papers (ibid.). But interestingly, the term “illegal migrant,” common today, was not used before

1971 when the category appeared in the police criminal statistics in the federal state of Niedersachsen (Lower Saxony) for the first time (ibid.: 96). Although these migrants were not yet labelled as “illegal,” the conference of ministers of the interior (*Innenministerkonferenz*) agreed in 1965 that labour migrants who entered the country with tourist visas should not receive residence and work permits but should be deported. The loophole for migrants who entered Germany outside of the official recruitment scheme was slowly closed (ibid.: 113).³

When the economy declined after the oil crisis of 1973, a recruitment stop was implemented to reduce migration from the former recruitment countries (Glorius 2008: 82). Sciortino (2004: 27f.), however, doubts that the recruitment stop policies introduced in several European countries were motivated by economic considerations only and suggests a more complex explanation. His central argument is that during this period of time “employers were hiring foreign workers by the busloads” and that “political reasons” like “the shifting perception of politicians on the costs and benefits of immigration” played a crucial role (ibid.). The unintended effect of the recruitment stop was that, contrarily, migration to Germany increased as migrant workers decided to stay permanently and to bring their families because they feared they would not be allowed to come back to Germany once they left (Hunn 2005: 343f.). Sciortino summarises the consequences of the recruitment stop for the question of irregular migration as follows: “Directly, a large segment of new entries has to proceed outside the established procedures. Indirectly [...] such decisions [the recruitment stop] made return unappealing. For many, in other words, the risk of being caught appeared less significant of the anticipated consequences of returning home and not being able to try the migratory option at a later stage” (Sciortino 2004: 28). Altogether, the channels for legal (labour) migration became rare after the recruitment stop; consequently irregular migration started to become more important.

A second consequence of the recruitment stop was that asylum migration increased rapidly. While in 1974 8,000 applications for asylum were filed, the number of asylum applications rose every

³ Due to the federal structure of the German state, every federal state has its own government and also its own minister of the interior. The *Innenministerkonferenz* is a coordinating body where the ministers of the interior from the federal states and the federal minister of the interior meet to discuss problems of interior policy. Cooperation within the *Innenministerkonferenz* is voluntary and the body has no decision capabilities of its own as it is not part of the official constitutional order.

year and reached its peak with 92,000 asylum applications in 1980. At the same time, the absolute number of approved applications decreased from 4,000 in 1973 to only 2,000 in 1977, although the number of applications was on the rise (Karakayali 2008: 169). An important buzzword of the media discourse on the issue was the so-called “Asylmissbrauch” (misuse of the right of asylum) (ibid.). Karakayali views the rise of asylum figures as a replacement for the former recruitment scheme and even assesses this development as the beginning of a new regime in German migration policy (ibid.: 169ff.). Also, Bade (2004) evaluates the increasing number of asylum applications as a consequence of the recruitment stop and states, “Where no legal ‘main gates’ or ‘front doors’ are open and even legal ‘side doors’ seem hardly accessible [...] apparently legal or illegal ‘back doors’ are being used more and more. After the recruitment ban and the immigration restrictions in the early to mid-1970s, there was a rise in asylum migration. After these were sharply limited in the 1980s and early 1990s, apparently legal or illegal immigration and employment rose all the more.” (Bade 2004: 350f.).

Other important factors that drove refugee migration to Germany in the 1980s and 1990s were wars and crises like the break-up of Yugoslavia and the Gulf War (ibid.). At the same time the break-down of the Soviet Union and the liberalisation in the Eastern block led to increased migration from Eastern Europe (ibid.: 339). In the 1990s, after the German reunification, the country experienced a wave of nationalism and xenophobia that had an important impact on migration policy (Herbert 2003: 308ff.). For the period between 1990 and 2005 the antifascist association Opferperspektive (victim perspective) lists 136 victims of right-wing violence, of whom 49 persons were killed because they were foreigners (Opferperspektive, without year: 3). Most well known are the arson attacks in Mölln (1992) and Solingen (1993), in which altogether eight Turkish migrants were killed (ibid.). At the same time, the public debate on the German asylum law intensified (Herbert 2003: 313). On May 26th, 1993, the German Bundestag amended article 16 of the *Grundgesetz* (German constitution) and de facto abolished the right of asylum. Asylum seekers now were not allowed eligible for asylum the country if they had passed a so-called “safe” third country on their way to Germany. All EU member states, as well as all states in which the regulations of the Geneva refugee convention are in force, were defined as safe third countries. Since all neighbouring countries of Germany fulfil these criteria, refugees are not allowed to enter Germany by land route if they want to be eligible for asylum (Article 16 Grundgesetz; Herbert 2003: 319). In the same year, the Bundestag passed the so-

called *Asylbewerberleistungsgesetz* (Law on benefits for asylum seekers) that reduced the benefits for asylum seekers under the level available for German citizens and legitimated this measure with the so-called “misuse of asylum” (ibid.). The de facto abolition of the right of asylum can be seen as one of the reasons for irregular migrants residing in Germany (Schönwälder et al. 2006: 31f.). Alt (2003: 195f.) points out that refugees increasingly have to face difficulties when applying for asylum and that many of them prefer not to apply but to choose the option of irregularity.

Important developments since the year 2000

Since the year 2000, a paradigm shift in German migration policy has taken place. In 1998, a coalition of the Social Democratic and Green Parties came into power. It planned and implemented several new laws on migration. A first landmark was the amendment of the German citizenship law, which before the reform was based on the *ius sanguinis* principle. The new law introduced the principle of *ius soli* to German citizenship legislation (for migrant children born in Germany whose parents have lived in the country for at least eight years with a legal residence status) and generally lowered the pre-conditions for naturalisation (Laubenthal 2008: 4). In the same year, an initiative for a so-called “Green Card” was started. Against the background of labour shortages in the highly skilled segment of the labour market the “Green Card” initiative contained a work permit scheme for highly skilled migrants who were expected to work in the IT sector of the German economy. This regulation, however, was not comparable with the Green Card programme in the USA but only allowed for a stay of five years (Kolb 2005).

In 2005, the “Law for Managing and Containing Immigration and for the Regulation of the Residence and Integration of EU citizens and Foreigners” (*Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern*), called *Zuwanderungsgesetz* (Immigration Law) for short, came into force. It was the first attempt in German history at a comprehensive law on permitting and managing migration (Laubenthal 2008: 4). The reforms of migration legislation were paralleled by a public debate on migration and integration of migrants. After decades of perceiving Germany as a non-immigration country, politicians and media were now ready to acknowledge that immigration was part of the German reality (ibid.: 3). The focus shifted from the prevention of migration to the need to “integrate” those

already living in Germany. At the same time, migration and the management of migration flows are discussed more and more as a means to solve the challenges of an ageing society and shortages of highly skilled work force (see exemplary: Angenendt 2008). The political and public debate remained, however, in the framework of distinguishing between wanted and unwanted migration. While migration was made easier for those migrants considered useful for Germany and its economy, several regulations that were restrictive towards the “unwanted” were implemented. This includes the fact that no significant improvements for irregular migrants were reached during the Social democrat/Green party government. For example, the so-called *Übermittlungsparagraf* (data transmission paragraph), a regulation that obliges state authorities to transmit data on irregular migrants to the foreigners’ office,⁴ remained untouched during the reign of the Social democrat/Green party coalition.

Important changes also occurred for those migrants with the migratory status of a so-called “*Duldung*” (toleration). The case of tolerated migrants is of major importance for the analysis of irregular migration in Germany because the new legislation concerning toleration is occasionally misunderstood as an equivalent to legalisation schemes common in some other European countries. According to the definition of irregular migrants given above, migrants with toleration status are not considered as irregular migrants here because they have a - however precarious - residence status. Still, tolerated migrants are permanently in danger of falling into illegality if their toleration is not extended. On the other hand there are a few limited opportunities for irregular migrants to obtain a toleration status that will be discussed below.

Principally, tolerated migrants are obliged to leave Germany. Most of them are rejected asylum seekers whose request for asylum was denied following the principles of the restrictive provisions concerning asylum described above. The status as “tolerated foreigners” is very precarious as the migrants concerned usually have to go to the foreigners’ office on a monthly basis to extend their toleration and can never be sure that this will not be denied. At the same time, labour market access for this group is very restricted. Although they are formally registered at the foreigners’ office, their status is somewhere between legality and illegality. In 2007, however, restrictions for labour market access for this group were suspended.

⁴ The regulation will be described and evaluated below in more detail.

At the same time, a residence permit was offered to those who would be able to find a job within the period of one year. Eligible for this programme were “tolerated” migrants who had lived in Germany for eight years, or for six years if they have children (Pieper: 2007: 311). In December 2009, the regulation was extended for two more years to prevent those with a residence permit on probation from falling back to “toleration”. Pro-migrant organisations, such as Pro Asyl e.V. and the left-wing opposition in the German parliament are not satisfied with these regulations for they do not offer a solution for the problem of “chain toleration.”⁵ According to the federal government’s answer to a parliamentary inquiry of the Left Party (*Die Linke*), 87,191 migrants with a toleration status were still living in Germany in November 2010, 60 per cent of whom had a length of stay that exceeded six years.⁶ These figures show that the described backlog regulation failed in giving these people the opportunity for a safe residence status. The regulation is another example of the principle of linking residence status to labour market participation, although it is extremely difficult to find a job for those who have been excluded by law from access to the labour market and vocational training for a number of years. It has to be kept in mind, however, that irregular migrants, according to the definition used in this article, do not even benefit from the limited opportunities within this scheme.

General features of the national migration control regime

In a European comparative perspective, Germany represents the case of a highly restrictive national migration control regime with a highly developed system of surveillance and internal controls. External and internal controls have been intensified during the last years, and irregular migrants are facing a sophisticated control system (Glorius 2008). Public institutions have the possibility to access each other’s data, and a central register of non-nationals exists that facilitates the checking of a migrants’ residence status (Schönwälder et al. 2006: 39). Mandatory registration is requested

⁵ http://www.migration-info.de/mub_artikel.php?ld=091001 (last access: 26 March 2011).

⁶ German Bundestag, 17th legislative period, Bundestagsdrucksache 17/4631.

from all residents, and access to accommodation is made particularly difficult due to the obligation to prove one's identity and compliance with the requirement of mandatory official registration. The request of personal identification by public authorities is considered to be normal and is socially accepted (ibid.) "Practically in every place in which migrants have contact with official authorities, their residence status is controlled" (Sinn et al. 2005). Consequently, migrants "who do not have the necessary identity documents are considerably restricted in their scope for movement" (Schönwälder 2006: 39).

Another element of the German migration control system with far-reaching consequences for the social situation of irregular migrants is the provision of the German Residence Act on the duties of transmission of public institutions (§ 87.2 Residence Act). All public institutions, schools, and hospitals are obliged to inform the foreigner's office about the presence of an irregular migrant. Thus national law contains, as a central element, a provision that impedes irregular migrants' access to social rights. In 2007, the Federal Ministry of the Interior re-stated that § 87.2 Residence Act is "a useful instrument of migration control that will not be subject to revisions" (Bundesministerium des Innern 2007). As a result, "(...) the lives and situations of non-nationals who live and possibly work in the Federal Republic of Germany without the necessary official documents are fundamentally characterized by their fear of discovery and sanction" (Schönwälder et al. 2006: 61). Furthermore, according to paragraph § 96 Residence Act, helping in an illegal entry to Germany can be punished with a fine or imprisonment up to five years.

As opposed to other European countries such as France, Spain, Italy, Greece, and the United Kingdom, individual or collective ways of transforming an irregular into a legal status do not exist, and instruments such as collective regularization programmes are not considered to be a viable option in the German political context (Bielefeld, 2006, p. 82; Bommers, 2006, p. 108). Individual regularization channels such as the so-called "*Härtefallregelungen*" (hardship regulation) are with very few exceptions only available for migrants who have an – albeit precarious – residence right (Sinn et al. 2005: 39). However, since the year 2009, a certain dynamic in the negotiation of social rights of irregular migrants is notable on the federal level. In 2009, the administrative regulations on § 96 Residence Act were changed. A new administrative regulation regarding the Residence Act (*Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz vom 18. September 2009; Drucksache 669/09*) was introduced that exempts hospitals administrations from the obligation of data transmission in emergency cases. At the same time it rules

that NGOs and their members cannot be criminalized for humanitarian aid. Moreover, the coalition agreement of the Christian-democratic/liberal government (2009) states that the government is willing to provide irregular children with access to education: “We are going to change the duty of transmission of public institutions in order to enable children to attend school” (Coalition Agreement of CDU and FDP, 26 October 2009, p. 80; translation by B.L./P.P.). In March 2010, the state secretary for integration urged federal states to change their school laws and/or administrative regulations in order to enable irregular migrants’ children to attend school. In July 2011, the German Bundestag amended the national administrative regulation concerning the Residence Act and abandoned the duty of data transmission of schools also at the national level.⁷ However, these intentions and activities on the national level are limited to the field of educational rights, and so far the Christian-democratic/liberal government has not taken any initiative to completely abolish the data transmission paragraph.

Stakeholders in the field of irregular migration: the role of civil society

Civil society organizations’ activities in the field of migration control policies are characterized by a low degree of politicization of the issue of migrants without a legal residence status. Most often, political campaigns of immigration and anti-racism NGOs focus on German asylum policies and on the situation of tolerated refugees, or they concentrate on the situation of irregular migrants at the EU borders and criticise the common EU policy on unwanted migration. Although a few instances of self-organisation of irregular migrants exist,⁸ they are not visible in the public sphere, and pro-regularization movements that exist in other European countries have not emerged in Germany (see Laubenthal 2007). However, civil society organisations play a central role in compensating for the restricted access of irregular migrants to social rights. Thus, state-funded welfare organizations such as the Deutscher Caritas-Verband, Diakonisches Werk, and

⁷ See

http://www.bundesregierung.de/nn_774/Content/DE/Pressemitteilungen/BPA/2011/07/2011-07-11-ib-statuslose-kinder.html (last access: 26th September 2011).

⁸ See

<http://www.internationalepolitik.de/2011/01/05/ohne-hilfe-zur-selbsthilfe/>.

Deutscher Paritätischer Wohlfahrtsverband, as well as churches and voluntary organizations support irregular migrants in matters of health problems and the schooling of children. Local initiatives and welfare organizations organize school attendance in informal ways, through private contacts with schools (Bommers/Wilmes 2007: 1010), and voluntary networks of doctors and medical students provide health care to irregular migrants (Sinn et al. 2005).

Summary: The politics and policies of irregular migrants in Germany

The politics and policies of irregular migrants in Germany can be summarised as follows: Apart from a short phase of a permissive migration control regime during the high time of foreign labour recruitment in the 1960s, the German migration regime has been characterized by a lack of channels for legal labour migration and by the introduction of a restrictive asylum regime. As a result, irregular migration gained importance and, from the 1990s onwards, has been perceived as a major problem for German migration policies (Bade 2001; Bade 2004). As a consequence, external control mechanisms have been increased during the last fifteen years. However, as opposed to the fields of legal migration and refugee policies where significant policy changes have taken place since the year 2000, the legal framework on irregular stay has remained static. Although the German residence law (*Aufenthaltsgesetz*) has been changed several times, its central provisions on illegal entry and stay have remained untouched.

Irregular Migration – The Interplay between Local, National, and EU Policies Addressing Undocumented Migrants

EU policies on undocumented migration in the German context

As is the case for other European countries, the German national migration control regime is influenced by EU policies on undocumented migration that have been or are being transposed into German law. At the same time, Germany is an actor – and sometimes a motor – for common European activities in the field of undocumented migration and in the harmonization of national approaches towards unwanted migration. During the 1990s, Germany played an active role in developing a common EU policy on unwanted immigration and asylum (Prümm/Alscher 2007). Germany “(...) was keen to upload its national policy approach in this policy area to the European level” (Ette/Kreienbrink 2007: 13), especially in the field of return migration. The German policy approach corresponds to the common EU activities in the field of unwanted and return migration that were introduced at the Tampere summit in 1999 (ibid.: 13). EU directives on return and removal such as *Council Decision 2004/573/EC on the organisation of joint flights for removals of third country nationals who are subjects of individual removal orders* and *Council Decision 2005/267/EC establishing a secure web-based Information and Coordination Network for Member States’ Migration Management Services*, that have been transposed into German law, support and complement the existing migration control policies: “The possibility for joined removal flights was already common practice on behalf of the Federal Police and the German *Länder* on a bi- and trilateral basis. Nevertheless, Germany clearly benefits from both decisions because it makes it much easier to get and distribute information on such flights among member states” (Ette/Kreienbrink 2007: 17). Another

directive, the *Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air*, that was introduced in 2003, was initiated by Germany (Jahn et al. 2006: 18). Furthermore, Germany complies with European soft law provisions in the field of return policy; in 2007, Germany had bilateral readmission agreements with 28 states. To summarize, Ette/Kreienbrink (2007) diagnose an almost complete compliance of Germany with European measures in the field of unwanted and return migration (Ette/Kreienbrink 2007: 20).

Currently, in 2011, two directives are in the process of being transposed into German national law: the directive 2008/115/EC on common standards and procedures in member states for returning illegally-staying third country-nationals, and the directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals. In 2010, the federal government issued a draft bill aiming at transposing these directives into national law (Entwurf eines Gesetzes zur Umsetzung aufenthaltsrechtlicher Richtlinien der Europäischen Union und zur Anpassung nationaler Rechtsvorschriften an den EU-Visakodex, 15.10.2010). In the case of the so-called “returns directive,” the new EU legislation corresponds to the already existing German national legislation, that allows an 18 months maximum detention period for migrants who are facing deportation. The federal government’s draft bill has been criticized by pro-immigration NGOs such as Pro Asyl for falling short of the minimum human rights standards laid down in the directive (Pro Asyl 2010). The second directive addressed in the draft bill aims at combating illegal immigration by sanctions for employers of migrants without a legal residence status and by strengthening labour rights of illegal migrants, especially concerning unpaid wages. On this issue, the government’s draft bill has been criticized for merely formally transposing the employer sanctions directive into German law, and pro-immigration NGOs and human rights actors are demanding the suspension of §87.2 Residence Law in labour trials and a right for corporate actors such as trade unions to act as claimants (Deutsches Institut für Menschenrechte 2010). The EU directive on employer sanctions thus represents an opportunity to put forward demands for a liberalization of the German migration control regime (interview Katholisches Forum Leben in der Illegalität 08.03.2011).

The place of local policies concerning undocumented migrants

In the German federalist political system, the federal states set the legal and administrative framework for cities and municipalities and attribute competences to them (Kost/Wehling 2003: 7). The German constitution rules that administrative matters are to a large extent the responsibility of federal states and municipalities. Consequently the administration of health services and education, the police, measures to protect the environment, infrastructural measures and many social services such as housing benefits are responsibilities of the Länder and the local level. Municipalities are responsible in the fields of internal administration, social affairs, health care, the administration of educational institutions, and the promotion of the economy and traffic (Bogumil/Holtkamp 2006: 51): “Thus the largest part of administrative tasks is in the responsibility of the German municipalities” (ibid.: 51; translation by B.L./P.P.).

Against this background, several German cities have addressed the issue of migrants without a legal residence status, focusing on the social dimensions of an irregular status. During the last decade, several city councils have commissioned expert reports by civil society actors such as welfare organizations, research institutions, and individual experts, aiming at analyzing the social situation of irregular migrants in their cities and investigating the (problematic) situation of illegal migrants in the fields of health care, education and work. In 2004, based on an expert report (Anderson 2003), the city of Munich adopted a resolution that demanded improved access to health care for irregular migrants, the establishment of a public fund for covering the costs of irregular migrants’ medical treatment, and the exclusion of companies that employ irregular migrants from the allocation of public funds. Also, all schools in Munich were to be informed that irregular migrants’ school attendance was compulsory and that schools were not obliged to inform the foreigner’s office about irregular stayers. Furthermore, the mayor of Munich was asked to request the federal government to clarify that school attendance was compulsory for irregular children (Sozialreferat der Stadt München 2004).

In 2006, the city council of Cologne commissioned a report by a migration research institution on the social situation of irregular migrants living in Cologne.⁹ The initiative for the commissioning of this expert report came from the so called “Round Table for Refugee Matters” (*Runder Tisch für Flüchtlingsfragen*), a consultative body established by the council of the city of Cologne and comprising local politicians, representatives of churches and welfare organizations, and departments of the city administration and local police. The council of the city of Cologne adopted the recommendations of this report. However, some of them have not been implemented yet due to lack of funding.¹⁰

Furthermore, in the context of the federal structure of the German state with its regionally differing laws on education, the cities of Freiburg (in 2001) and Munich (in 2004) introduced new regulations aiming at enforcing irregular migrants’ right to education. These policy changes, aiming at enabling children without a legal residence status to attend school, took place through administrative procedures and interpretations of regional legal and administrative regulations (Laubenthal 2011). Other cities offer anonymous medical treatment, such as the city of Frankfurt’s “international humanitarian consultation hours” (*Internationale humanitäre Sprechstunde*). In Hamburg, welfare organizations have commissioned reports on the situation of undocumented migrants in the city (see Mitrovic 2009a and 2009b). Also, in 2005, the mayors of the cities of Bonn, Leipzig, München, Nürnberg, Augsburg, Stuttgart, and Gelsenkirchen signed a manifesto by the Katholisches Forum Leben in der Illegalität, a working group of the German Bishop’s conference, demanding improved access to social and human rights for irregular migrants.¹¹

9 Bommers, Michael/Wilmes, Maren (2007): Menschen ohne Papiere in Köln. Eine Studie zur Lebenssituation irregulärer Migranten. Institut für Migrationsforschung und Interkulturelle Studien, Osnabrück.

10 Information obtained in a phone conversation with the integration office of the city of Cologne (Integrationsrat der Stadt Köln), 25.03.2011.

¹¹ (<http://www.joerg-alt.de/Politisches/Kommunen/kommunen.html>).

The Case of Berlin

This chapter addresses the situation of irregular migrants in Berlin and the role and activities of Berlin in the field of irregular migration. A specificity of Berlin is its status both as a municipality and a federal state. Thus apart from its competences as a municipality, Berlin has the competences of the German federal states.

Berlin has 3,450,900 inhabitants (Amt für Statistik Berlin-Brandenburg – statistical office Berlin-Brandenburg – Pressemitteilung Nr. 28, 27 January 2011). On the 31st of October, 2010, 457,806 foreigners were officially registered in Berlin (i.e. 13.5 percent of the total population) (Amt für Statistik Berlin-Brandenburg, Pressemitteilung 36, 04 February 2011). Estimations on the number of irregular migrants living in Berlin range from 100,000 to 250,000.¹² The city government and welfare organisations such as *Deutscher Caritas-Verband*¹³ estimate that the number amounts to 150,000 (interview Senatsverwaltung für Integration, Arbeit und Soziales – administration of the senate for integration, work, and social affairs – 11 March 2011). Regarding the national composition of the irregular population in Berlin, reliable data is not available. However, it is assumed that before the EU enlargements in 2004 and 2007, migrants from Eastern European countries represented a significant, if not the largest portion of the irregular population in Berlin (ibid.). Some studies assume that before Poland's accession to the European Union, Polish migrants represented the largest group of irregular migrants in Berlin (Alscher et al. 2001; Cyrus 1998). It can be assumed that, due to the EU enlargements, the irregular population in Berlin has decreased during the last years (interview *Senatsverwaltung für Integration, Arbeit und Soziales* 11 March 2011).

12 Stocks of irregular migrants. Estimates for Germany. Version 22.12.2010. Available at <http://irregular-migration.hwwwi.de>.

¹³ The Deutscher Caritas-Verband is a catholic welfare organisation.

The social and economic situation of irregular migrants in Berlin

In general, it is very likely that the economic and social situation of irregular migrants in Berlin corresponds to that of the situation of irregular migrants in Germany. Irregular migrants in Berlin work in those segments of the labour markets in which irregular migrants in general are present: construction, hotels and catering, cleaning, services in private households, and prostitution (interview *Senatsverwaltung für Integration, Arbeit und Soziales* 11.03.2011; Alscher et al. 2001: 23). Within the context of the restrictive provisions of the German migration control regime, the social rights situation of migrants in Germany is problematic: “The problems of an illegal life appear when the pregnant woman does not want to go to the hospital for fear of being deported, when children remain illiterate because the school administration might transmit information or if riding a bus without a ticket can threaten the whole existence” (Leggewie 2001; translation by B.L/P.P.). Empirical studies stress that irregular migrants in their daily lives try not to be noticed and avoid central places: “As a consequence of internal controls, the access to social resources is factually very restricted, despite partially existing legitimate claims” (Sinn et al. 2005: 62). Regarding issues of health care and education, irregular migrants try to avoid contact with official authorities or institutions (Alt/Fodor 2001). Although formally irregular migrants have a right to emergency health care (as part of regulations on the access to emergency health care of rejected asylum-seekers), attempts to treat health problems without professional medical care is frequent (Sinn et al 2005: 85), since “(...) in principle, health services are available; however, only at the cost of discovery and deportation” (Düvell 2006: 13).

Regarding the issue of education, legal provisions that explicitly clarify irregular migrants’ right to school attendance do not exist. In all federal states children must, at their enrolment in school, submit a certificate of residence showing that they have an official place of residence in Germany. Empirical studies on local approaches to irregular migration have found that irregular migrants are reluctant to send their children to school, and it is assumed that the large majority of undocumented children do not attend school (Bommes/Wilmes 2007; Alt/Fodor 2001). While an “alarmingly high number of children” (Sinn et al. 2005: 62) lives in Germany, they generally “(...) stay at home” (ibid.: 64). Studies on the specific situation in Berlin have confirmed these findings (Alscher et al. 2001).

The Berlin government's policies on irregular migration

Since the year 2002, Berlin is governed by a left-wing coalition of the social-democratic party (*Sozialdemokratische Partei Deutschlands (SPD)*) and the socialist party (*Die Linke*). In its first coalition agreement, the new government explicitly addressed the issue of irregular migration: "People without a legal residence right (sans papiers): We want to improve the situation of people without a legal residence right by granting them humanitarian minimum standards" (*Koalitionsvereinbarung zwischen der SPD [Landesverband Berlin] und der PDS [Landesverband Berlin] 2001-2006*, p. 16; coalition agreement between SPD – regional association Berlin – and the PDS¹⁴ – regional association Berlin). However, in the current coalition agreement (2006-2011) the issue of irregular migration is not mentioned. The general political aims of the "red-red" coalition in the field of irregular migration have been laid out in the government of Berlin's answer to an inquiry by the Green party on the city government's policy on migrants without a legal residence status. In its answer, the senate of Berlin stated that it aimed at improving the social and economic situation of irregular migrants by supporting the activities of civil society actors: "The senate holds the view that the counselling and the welfare of people without a residence right is a genuine task of churches and NGOs. Counselling and welfare of this group of persons can only in exceptions be a task of the state (...) however the senate can encourage welfare organisations to become active (...)." (Senatsverwaltung für Arbeit, Integration und Soziales 2008). This is in sharp contrast to the position of some NGOs who explicitly reject the idea that NGOs are an adequate replacement for regular and state-funded welfare structures (interview with Büro für medizinische Flüchtlingshilfe Berlin – 11 March 2011).

In 2010, the senator of the Interior Ehrhart Körting proposed to carry out a temporary collective regularization process in Germany. Irregular migrants should be able to get a residence permit for one or two years. If within this time frame, they can find employment, they should be allowed to stay in Germany (Stiftung Mercator 2010). This proposition has some similarities to a recent regulation that has

¹⁴ The PDS (Partei des Demokratischen Sozialismus; Party of Democratic Socialism) was the predecessor organisation of the socialist party Die Linke (The Left) that exists today.

granted residence rights to so-called tolerated refugees (see chapter 2.3). Most recently, the senator of the Interior re-issued his proposition in a press statement on German integration policies (rbb online 04 March 2011). It is the first time that the demand for a collective regularization campaign has been put forward by a German politician, and the demand is highly unusual in the German political context where the overwhelming majority of non-state and state actors in the field of irregular migration do not put forward demands for collective regularisation.

Education

In Germany, the field of education is in the responsibility of the German federal states. The school laws of the German federal states regulate educational rights of children without a legal residence status. Regional laws on compulsory school attendance and on the prerequisites of school attendance of migrant children differ from region to region. While no school law explicitly addresses the issue of irregular migration, some school laws, for example those of North Rhine-Westphalia and Bavaria, lay down a compulsory school attendance for foreign minors who are obliged to leave the country (Sinn et al. 2005: 23). Others state that children who are obliged to leave the country have a right to attend school. Some federal states neither grant a duty nor a right to attend school to children without a residence status (Kössler et al. 2010: 22/23).

In the case of Berlin, children without a legal residence status are exempted from compulsory school attendance, but they have the right to attend school (§ 2 Abs. 1 und § 41 Abs. 1 u. 2 Schulgesetz für das Land Berlin). The city of Berlin has reaffirmed this right in an administrative regulation, the *Ausführungsvorschriften über Beurlaubung und Befreiung vom Unterricht (AV Schulpflicht)* of December 3rd, 2008. Also in the city's publications on the rights and duties of foreigners in Berlin, this administrative regulation is referred to and the government of Berlin states that "(...) at the enrolment at school the residence status must not be investigated" (Beauftragter des Berliner Senats für Migration und Integration 2010: 6). Furthermore, an informal agreement between the commissioner for foreigners, educational authorities and primary schools exists stating that school should not investigate the residence status of pupils (Alscher et al. 2001: 44).

Health care

As generally in Germany, access to health care is a serious problem for irregular migrants in Berlin. The German health care system is organised as a social insurance model linked to formal employment. Migrants who are not formally registered at state authorities and work in the informal sector are excluded from social insurance, a situation that makes access to health care difficult for them.

Apart from the exclusion from social insurance, the above described paragraph 87 AufenthG which obliges state agencies to transmit data on irregular migrants to the foreigners' office is the biggest problem concerning health care for irregular migrants. Although irregular migrants are, in principal, eligible for medical treatment according to the rules of the *Asylbewerberleistungsgesetz* (law on benefits for asylum seekers), which offers health care in emergency cases to rejected asylum seekers, they cannot make use of this right without risking being caught and deported (Deutsches Institut für Menschenrechte 2007: 10). The reason for this is that the local social welfare offices process the accounting of these cases. As public authorities, social welfare offices are subject to the regulations of paragraph 87 AufenthG and have to transfer data on irregular migrants to the foreigners office (ibid.). Recently, the implementation of paragraph 87 AufenthG was partly restricted by a new national administrative regulation that explicitly rules that irregular migrants who are brought to hospital in an emergency case need not be reported to the foreigners' office, as such cases are subject to medical confidentiality regulations. In emergency cases medical confidentiality is extended to the social welfare offices that finance medical treatment, according to the law on benefits for asylum seekers (*Asylbewerberleistungsgesetz*) (interview with *Büro für medizinische Flüchtlingshilfe Berlin* – 11 March 2011; see also: Knickenberg 2009). But only emergency treatment is covered by this improved regulation whereas ambulatory treatment is still not possible within this scheme. Additionally, health care services based on the law on benefits for asylum seekers is generally limited compared to the opportunities of the regular social insurance system.

For these reasons, medical treatment for irregular migrants in Berlin is provided by NGOs. The *Büro für medizinische Flüchtlingshilfe Berlin* (Office for medical aid for refugees) and the *Malteser Migranten Medizin Berlin* are important actors in this field. The *Büro für medizinische Flüchtlingshilfe* was founded in 1996 by activists of antiracist groups and medical students. It combines political lobbying for irregular migrants with practical help in the field of access to health

care. All its members work on a voluntary basis and consultation hours for irregular migrants are offered twice a week. The *Büro für medizinische Flüchtlingshilfe* cooperates with a network of about 40 to 50 doctors who treat irregular migrants voluntarily and usually for free (interview with *Büro für Medizinische Flüchtlingshilfe* – 11 March 2011). The *Malteser Migranten Medizin* is a service provided by the catholic relief organisation Malteser. It was founded in 2001 to help persons without access to health insurance, mainly refugees and irregular migrants, but is also open to Germans without health insurance. The *Malteser Migranten Medizin* employs its own doctor and offers regular consultation hours three times a week. Additionally, a gynaecologist offers consultation hours twice a week and a neurologist every two weeks. An offer for dental treatment is planned.¹⁵

The *Büro für medizinische Flüchtlingshilfe* arranges medical treatment for about 1,000 people per year, and the *Malteser Migranten Medizin* had 3,000 patients in 2009 (Hey et al. 2011: 28). This does not, however, allow for an estimation of the number of irregular migrants present in Berlin. A recent study conducted among doctors in Berlin shows that irregular migrants go to the doctor only if it is really unavoidable. Doctors reported that irregular migrants usually consult them for complicated and severe illnesses and often come when their health has already worsened dramatically (ibid.: 29).

Against this background, NGOs like *Büro für medizinische Flüchtlingshilfe* and *Malteser Migranten Medizin* lobby for the improvement of irregular migrants' access to health care. Since 2010, an institutionalised Round Table tries to find solutions for the problem of health care for irregular migrants. Already about one year before the initiation of the Round Table, the *Büro für medizinische Flüchtlingshilfe* was involved in talks with the *Senatsverwaltung für Gesundheit, Umwelt und Verbraucherschutz* (senate administration for health, environment and consumer protection) and achieved several smaller improvements. These talks then were institutionalised as a Round Table in 2010 (interview *Büro für Medizinische Flüchtlingshilfe* – 11 March 2011). Apart from the two NGOs, *Büro für medizinische Flüchtlingshilfe* and *Malteser Migranten Medizin*, and representatives of the medical association (*Ärztekammer*), several state actors participate in the Round Table. These include the *Senatsverwaltung für Gesundheit, Umwelt und Verbraucherschutz*, the *Senats-*

¹⁵ <http://www.malteser-berlin.de/index.php?lan=site&loc=2X6> (last access: 11 Juni 2011)

verwaltung für Integration, Arbeit und Soziales (senate administration for integration, labour and social affairs), the public health services, as well as the *Senatsverwaltung für Inneres und Sport* (senate administration for the interior and sports) (ibid.). The latter is an important veto player within the Round Table and is able to block improvements for health care access for irregular migrants (ibid.).

One of the major fields of work of the Round Table was a concept for an anonymous health insurance voucher introduced by *Büro für medizinische Flüchtlingshilfe*. The idea behind the concept is that a special office under the leadership of doctors and on behalf of social welfare offices should issue anonymous health insurance vouchers to irregular migrants in need of medical treatment. Thus the examination of eligibility according to the law on benefits for asylum seekers would be in the hands of doctors and thus be covered by medical confidentiality, and would not be subject to data transmission according to paragraph 87 AufenthG. (ibid.; see also: Büro für medizinische Flüchtlingshilfe Berlin 2009). In February 2009, the *Senatsverwaltung für Gesundheit, Umwelt und Verbraucherschutz* announced an initiative of the federal state Berlin in the Bundesrat (second chamber of the German parliament which represents the federal states) to bring the anonymous health voucher to the federal level.¹⁶ In the Round Table talks, however, the *Senatsverwaltung für Inneres und Sport* blocked a positive decision concerning this issue and argued that public funds could not be spent on irregular migrants who are not willing to disclose their identity to the foreigners' office (interview with *Büro für medizinische Flüchtlingshilfe* – 11 March 2011). Because of the resistance of the *Senatsverwaltung für Inneres und Sport*, the concept for an anonymous health insurance voucher has not been realised.

Other topics discussed at the Round Table were the improvement of communication between hospitals and social welfare offices concerning the handling of financing emergency treatment and the possibility of obtaining the residence status of “toleration” during pregnancy. Small improvements were reached concerning these issues. Still in the process of discussion in March 2011 was the idea of a state-controlled legal advice centre for irregular migrants with health problems that would offer anonymous advice linked to illness, medical treatment and residence status (ibid.).

16 <http://www.tagesspiegel.de/politik/deutschland/berlin-will-illegalen-einwanderern-helfen/1452916.html>.

Finally, it can be stated that the Berlin government is comparatively open to suggestions by NGOs concerning the improvement of access to health care for irregular migrants. Some representatives of several departments of the senate administration are very committed to the issue. On the other hand, the senate administration for the interior and sports could successfully block the initiative for an anonymous health insurance voucher. This shows that also within the Berlin government and administration, support for a non-restrictive approach towards irregular migrants is limited. Additionally, the government's openness towards NGOs providing health care for irregular migrants includes the danger of establishing a parallel health care structure for irregular migrants with a lower standard instead of including them in the regular health care system which contradicts the human rights related maxim that access to health care should be independent from a person's nationality or residence status.

Working conditions/labour rights

The field of working conditions and labour rights currently represents the most important field of action on irregular migration of the city of Berlin (interview *Senatsverwaltung für Integration, Arbeit und Soziales* – 11 March, 2011). The existence of a large informal labour market in the city, especially in the construction and private service sector, is considered to be the most problematic aspect of the issue of irregular migration (interview *Senatsverwaltung für Integration, Arbeit und Soziales* 11 March, 2011). Besides the construction sector and private households, typical fields of work for irregular migrants are – among others – gastronomy, agriculture, cooking, transportation, gardening, trade, house keeping, and sex work (Alt 2003: 113). In most cases they work below their level of qualification, for low wages, and often in areas which can be described as “dirty, dangerous [and] demeaning” (ibid. 113f.). It can be assumed that at least some of the mentioned fields of work play an important role for irregular migrants in Berlin.

To find out more about the characteristics of irregular migrants working in Berlin from a quantitative perspective, the *Finanzkontrolle Schwarzarbeit* (FKS; Finance Control for Illicit Work), a department of the *Hauptzollamt Berlin* (Main Customs Office Berlin), was contacted and asked for data on workplace controls. As this authority is concerned with combating illicit work and illegal employment as well as with supervising the adherence to legal minimum wages, it is authorised to conduct workplace controls without necessarily acting on a suspicion. According the above-mentioned § 87.2 AufenthG, the

FKS is obliged to inform the foreigners' office if it obtains knowledge of the presence of an irregular migrant, an act which can lead to imprisonment and deportation for that person. The following data and information on the work of the FKS are based on a written statement from an FKS employee answering (by email) a request by the authors of this report in which data on workplace controls are presented and several questions are answered (Statement of the FKS: 14 March 2011; date of the request: 8 March 2011). The statement comments on the number of initiated proceedings in cases of violation of §§ 95 and 96 AufenthG (*Aufenthaltsgesetz*, Residence Act) that deal with entry or residence without papers and with the smuggling in of foreigners. The period covered is from 2008 to 2010. According to these data, 70 such proceedings were initiated in 2008, followed by 90 in 2009 and 92 in 2010 which is considered a "constantly low level" (ibid.). In the same period, 303 employees without valid work permits were registered in 2008, followed by 249 in 2009 and 248 in 2010. The statement assumes that these data will further decrease because of the opening of the German labour market for citizens of the new member states that joined the European Union in 2007 (ibid.). An estimation of the number of irregular migrants working in Berlin based on these data is not given by the FKS. It can be assumed that the number of irregular migrants and persons without valid work permits working in Berlin is much higher and many cases remain undetected. A reasonable multiplication factor to estimate the total number of irregular workers in Berlin based on these data by the FKS is not available as the relation between the number of cases detected by the FKS and the basis population of irregular workers is unknown. The FKS statement offers, however, information on branches, countries of origin, age, and gender ratios in the presented cases. Proceedings because of the violation of §§ 95 and 96 AufenthG were initiated against – among others – citizens from Vietnam, Turkey, the Balkans, and some also from diverse African and Asian states (ibid.). This does not necessarily mean that these nationalities are those with the highest number of irregular migrants. It has to be taken into consideration that some groups of irregular migrants are more visible than others and therefore more likely to be detected. The ratio of men to women is about 2:1 (ibid.). This can probably be explained by the existence of labour markets divided along the line of gender. As women more often work in private households where workplace controls are not possible, they are less likely to be detected (see Cyrus et al. 2010: 64). The age of suspected irregular workers was spread over almost all age categories, however, most of the suspected were aged between 20 and 50 years, and teenagers and persons older than 60 years were seldom

reported (ibid.). Branches often affected by irregular work were hotels and gastronomy, construction, building cleaning services, and transportation which is consistent with evidence from other studies (Alt 2003; Cyrus 2010; Schönwälder 2006).

Two other important fields of work – private households and sex work – are not covered in this list. TAMPEP (2007: 6) estimates that 60 per cent of sex workers in Germany are migrants. The same report describes “repressive migration policy, that leads to ‘illegality’, lack of rights and marginalisation” as one of three main factors for the vulnerability of migrant sex workers (ibid.: 8). It can be assumed that also in Berlin a high number of irregular migrants work in the sex industry. However data on this is not available. Cyrus (2008b) describes in detail the mobility patterns of irregular migrants from Poland who work in private households in Berlin. The sample included eight women between 21 and 49 years. The period of time in which they worked in Berlin illegally ranged from three months to twelve years. Their income was between 500 and 1,000 Euros per month (ibid.).

One of the main problems for irregular migrants is that they can be easily betrayed by their employers. Since March 2009, an information centre operated by the trade union Ver.di (*Vereinte Dienstleistungsgewerkschaft*, United Trade Union for Services) therefore offers advice and legal support to irregular migrants who have conflicts with their employers.¹⁷ The information centre is based on the concept of a similar institution in Hamburg.¹⁸ It aims at supporting workers with an irregular residence status in enforcing their rights as employees which they at least theoretically enjoy independent from their residence status. In practice, and analogous to the problems in the field of health care, paragraph 87 AufenthG prevents

¹⁷ An information leaflet for irregular migrants is available on the internet: http://besondere-dienste.bb.verdi.de/lbzfg_sonstige_dienstleistungen/verdi_ak_undokumentierte_arbeit/verdi_ak_undokumentierte_arbeit/data/ak_flyer_deutsch1.pdf (last access: 11 June 2011)

The press release concerning the opening of the information centre can be found under the following address:

http://besondere-dienste.bb.verdi.de/lbzfg_sonstige_dienstleistungen/verdi_ak_undokumentierte_arbeit/eroeffnung_der_anlaufstelle/data/erak11032009.pdf (last access: 11 June 2011)

¹⁸ The concept can be found here:

https://besondere-dienste-hamburg.verdi.de/docs/migration/data/Anlaufstelle_Hintergrund_Konzept.pdf (last access: 11 June 2011).

irregular migrants from enforcing their employee rights. The trade union information centre supports irregular migrants in judicial settlement proceeding. In this type of legal procedure irregular migrants need not appear in court themselves but the trade union can act in his or her place. The information centre is used as an official address for the irregular migrant to be available for the court (Migrar 2010). In several cases the trade union information centre was successful in forcing employers to pay outstanding wages.

Recently, the Berlin government has become active in the field of irregular work, too. In 2009, the “*Berliner Bündnis gegen Menschenhandel zum Zweck der Arbeitsausbeutung*” (Berlin Alliance against Human Trafficking for the Purpose of Labour Exploitation) was founded. Members of the alliance are the *Senatsverwaltung für Integration, Arbeit und Soziales* (SenIAS; Senate Administration for Integration, Labour and Social Affairs),¹⁹ the International Labour Organisation (ILO) and the *Deutscher Gewerkschaftsbund* (DGB; Federation of German Trade Unions),²⁰ as well as several other senate administrations, welfare organisations, and advice centres for victims of human trafficking (Cyrus et al. 2010: 5). The alliance aims at combating exploitative working conditions in the informal sector and successfully claiming minimum wages. It is currently preparing a large information campaign on workers’ rights. Also, the alliance has commissioned a report (Cyrus et al. 2010) on human trafficking for the purpose of labour exploitation in Berlin and Brandenburg that has been prepared by academics well known for their work on irregular migration. The report is mainly based on media analysis and expert interviews with representatives of advise centres for victims of human trafficking and provides information on cases of human trafficking for the purpose of work exploitation within diverse branches (ibid.: 50ff.). Human trafficking for the purpose of prostitution was excluded from the sample. The report is interesting for this study as there are intersections with the issue of irregular migration. However, as the authors of the report clearly point out, human trafficking, human smuggling, and irregular migration must not be confused. A major point of criticism is that the perspective of human trafficking suggests that the migrants concerned have little scope of action and are defenceless victims (ibid: 24). Some works therefore suspect that the framing of irregular migration as human trafficking follows the

¹⁹ The SenIAS is the Berlin equivalent to a ministry in other federal states of Germany.

²⁰ The DGB is the umbrella organisation for most trade unions in Germany.

necessity to legitimate measures that are rather designed to combat irregular migration (ibid.). Cyrus et al. argue that the images of the “helpless victim” as well as the “autonomous migrant” both are only a small part of a continuum that lies behind these extremes (ibid.). Nevertheless, they criticize the fact that human trafficking is not a neutral term but rather constructs the objects that shall be described by it and reduces the available options to measures combating criminality (ibid.: 26). Another problem is that the criminal offence of human trafficking is intransparent so that migrants concerned as well as advise centres often cannot be sure that the single case will be sufficient for a conviction on the grounds of human trafficking. If a migrant decides to function as a witness and it turns out that the case is not sufficient for a conviction according to the human trafficking paragraph, the migrant himself or herself is in danger to be treated as a normal irregular migrant that can be imprisoned and deported and is not eligible for the shelter reserved for victims of human trafficking. Many persons concerned therefore prefer not to file a complaint (ibid.: 91ff.). This might be a reason that the police criminal statistics for Berlin report only fourteen cases of human trafficking for the period between 2006 and 2009 (ibid.: 42).

In summary, the Berlin government is very active concerning the issue of labour exploitation in the informal sector and is willing to improve the situation of victims of human trafficking. There is, however, a problematic tendency to frame irregular work mainly in the perspective of human trafficking and forced labour which does not cover solutions for the problems of irregular workers who are not victims of human trafficking.

Conclusion: Berlin as an actor in the field of irregular migration

Within the context of the legal (restrictive) regulations of the German national migration control regime, the city of Berlin displays a rather progressive approach in the field of irregular migration. Several policy initiatives have been enacted to encourage the access of irregular migrants to social rights. These policies and attempts at an improvement of the access to social rights of irregular migrants have taken place in the context of party cleavages between the local and the national level (i.e. the left-wing city government of Berlin versus a conservative-liberal national government). Also, the city government shows a rather high degree of responsiveness to claims by civil society actors and has, as have other German cities, established

cooperative structures with non-state actors in the field of irregular migration. In theory, the city of Berlin has a higher potential for action in the field of irregular migration than other German cities because of its status as a federal state. However, up until now, Berlin has not used its competence as a federal state in order to bring new policy initiatives in the field of irregular migration to the federal level, despite announcements to do so, as in the case of the introduction of an anonymous health care voucher. The reasons for this are conflicts between state-centred regulatory approaches and human rights based approaches. Thus, the fundamental conflict of the issue of irregular migration (i.e. the right of the state to control access to its territory versus the existence of universal human rights norms and laws) becomes empirically visible in conflicts between the senate administrations of health and of the interior.

On September the 18th 2011, elections for the Berlin Abgeordnetenhaus (house of representatives; parliament for the federal state of Berlin) took place and the coalition of Social-democrats and Left Party lost its majority. The Social-democrats who remained the strongest group in the Abgeordnetenhaus have to choose between a coalition with the Green Party or with the Christian democrats. The consequences of this change of government in the policy field of irregular migration cannot be predicted yet.

Conclusion

Germany's handling of irregular migration is characterized by its restrictive approach in the field of irregular migration. A sophisticated migration control regime is paralleled by the absence of a public discussion on irregular migrants' social rights situation and/or on possible policy approaches. German migration policies aim at preventing irregular migration, and otherwise largely ignore its existence. Apart from the issue of educational rights for irregular children that was addressed by the federal government in its coalition agreement in 2010 and that is currently being debated at the national level, a restrictive migration control policy appears to be a stable characteristic of German migration policy. At the same time, the German political context regarding irregular migration is characterized by a low degree of politicization of the issue of irregular migration. Demands by civil society or political actors focus on an improvement of irregular migrants' social rights and do not address the (more fundamental) question of transforming an irregular into a legal status. Also, the main supporters of irregular migrants are organizations with social (rather than political) profiles, such as welfare organizations, churches, and voluntary organizations.

Against this background, the local level plays an important role in the field of irregular migration. Several German cities, Berlin among them, have become active in the field of irregular migration. They are generally larger cities with high proportions of legal immigrants, and it can be assumed that they are also characterized by significant irregular migrant populations. In some, though albeit not in all cases, the cities are or were governed by left-wing (social-democratic/green or social-democratic/socialist) local governments with higher degrees of openness for a more liberalized approach towards irregular migration than (conservative-liberal) federal state or national governments. In the case of Berlin, the progressive approach on the issue of social rights of irregular migrants can certainly to some extent be attributed to the fact that a left-wing coalition governs the city. However, more important than party cleavages between the local and the national level may be the fact that social rights problems in the field of irregular migration are practically experienced on the local level by state and non-state actors (interview *Katholisches Forum Leben in*

der Illegalität 08.03.2011), and that, in their counselling activities, welfare organizations are confronted with the specific problems faced by irregular migrants (interview with Caritas in *Kölner Stadt-Anzeiger* 18.02.2008). Also, already existing civil society networks in the field of immigration and existing lobbying capacities of NGOs and welfare organizations seem to encourage local initiatives in the field of irregular migration. Generally, initiatives in the field of irregular migration on the local level reflect the corporatist nature of the German political system; they are characterized by the interaction of state and non-state actors, an involvement of administrative departments, welfare organizations, and pro-immigration NGOs in the decision-making process, and by the use of expert knowledge in legitimizing and bringing about policy change.

The “German way” of dealing with irregular migration consists, in a rather depoliticized and pragmatic approach, of finding solutions for social rights problems of irregular migrants. Here, the local level plays a crucial role. Municipalities use their competences in the fields of education and health care in order to improve irregular migrants’ access to social rights, sometimes implicitly or explicitly counteracting the provisions of the national migration control regime. However, it must also be noted that only a few German cities have adopted measures in the field of irregular migration and that the majority of German cities have not (yet?) become active on the issue of irregular migration. Still, the examples of various cities such as Berlin, Munich and Cologne show that the local level can play an important role in improving the situations of migrants without legal residence statuses.

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