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## Undocumented vs. Illegal Migrant: Towards Terminological Coherence

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### ABSTRACT

This article offers a terminological reflection on the expression “illegal immigrant.” In particular, it argues against the arbitrary choice of terminology used to refer to undocumented migration in academic and scientific texts. On the basis of certain legal, linguistic, and sociopolitical concerns, it suggests that the use of “illegal migrant/alien” should be seriously reconsidered and replaced with alternative terms, such as “undocumented” or “irregular immigrant,” which are both terminologically correct and lack the negative social implications of the phrase “illegal immigrant/alien” or “clandestine alien”.

*Keywords:* 1. undocumented migrants, 2. irregular migrants, 3. terminology, 4. conceptual analysis, 5. “illegal migrants”.

### RESUMEN

El propósito de este artículo es ofrecer una reflexión terminológica acerca de la expresión “migrantes ilegales”. En particular, trata sobre el uso arbitrario de la terminología empleada para referirse a la migración indocumentada en textos académicos y científicos. Tomando en consideración argumentos jurídicos, lingüísticos y sociopolíticos, se señala que expresiones como “migrante ilegal” o “migrante clandestino” deben considerarse seriamente y sustituirse con términos alternativos, tales como “migrante irregular” o “migrante indocumentado”, los que, además de ser conceptualmente correctos, son términos que evitan las implicaciones sociales negativas que tienen las otras expresiones.

*Palabras clave:* 1. migrantes indocumentados, 2. migrantes irregulares, 3. terminología, 4. análisis conceptual, 5. “migrantes ilegales”.





Even though the phenomenon of undocumented migration has existed for over a century, there is still no standard or uniformly accepted term to refer to undocumented migrants. The terminology adopted by migration researchers, governments and journalists differs substantially (*e.g.* illegal migrants, illegals, undocumented migrants, etc.) and is rarely based on a substantive conceptual justification of the selection of one term over another.

The impact of the media in promoting a predominant terminology cannot be underestimated. A brief review of the U.S. press, which can be regarded as one of the most powerful instruments for promoting popular terminology in the English language, reveals that newspapers consistently adopt and advocate the expression “illegal immigrant or alien” over “undocumented migrant”. For example, since 1981, in *The New York Times* articles, the term “undocumented migrant” has been used 168 times, “illegal migrant” 896 times and “illegal alien/s” 5 635 times.<sup>1</sup>

However, the media or government’s choice of one type of expression to describe migrants without possession of legal residence and/or working documents does not imply the conceptual correctness of the latter. Nevertheless, the media and political bodies have the power to institutionalize certain terminology, even if it is incorrect. This article therefore seeks to elaborate on the conceptual analysis of the terms “illegal” *vs* “undocumented/irregular” migrant and defend the adoption of the term “undocumented/irregular migrant” at least in academic literature.

Having witnessed and foreseen the terminological problems outlined above and subsequently addressed in the text, in 1975 the UN General Assembly recommended that all UN bodies use the term “non-documented or irregular migrants/workers” as a standard (UN, 1975). Likewise, in its 1998 Recommendations on Statistics of International Migration, the United Nations defines “...foreigners who violate the rules of admission of the receiving country and are deportable, as well as foreign persons attempting to seek asylum but who are not allowed to file an application and are not permitted to stay in the receiving country on any other grounds” as “Citizens departing without the admission documents required by the country of destination” and “Foreigners whose entry or stay is not sanctioned” (UN, 1998:23). Within this same publication, the UN only uses

<sup>1</sup> Similarly, over the past two months, *The Washington Post* has included 41 references to undocumented migrants, 13 to “illegal aliens” and 176 to “illegal immigrants”, whereas in *The Daily Herald* (Chicago) the term “undocumented migrants” does not appear at all. Since 2005, *The New York Daily News* has used the term “undocumented migrant” 76 times, “illegal immigrant” 104 times and “illegal aliens” 31 times.



the terms “undocumented migrants” (p. 94) or foreigners in an irregular situation (*e.g.*, pp. 24, 32, 62, and 93).

The above recommendations, however, have a limited influence outside the UN and have only been adopted by certain international organizations and NGOs. Moreover, these recommendations are not strictly respected even in the academic contributions made by members of UN bodies. For example, in an article on the policy responses to irregular migration in Africa and Asia, Ellen Brenan, (United Nations Population Division), specifying that the views contained in the article are hers alone and do not reflect necessarily those of the United Nations, mentions in a footnote that the terms used to refer to foreigners residing or working in a third country in contravention of its national laws are “undocumented worker”, “illegal migrant” or “illegal immigrant”. Nevertheless, in the body text of the article the author only uses the term “illegal migrant” (Brenan, 1984).

The most frequently adopted designations in non-UN publications of an academic nature include “illegal (im)migrant”, “illegal”, “illegal alien”, “clandestine”, “irregular (im)migrant”, “irregular alien”, “undocumented immigrant”, “without papers”, and “wetbacks” or *mojados* the latter referring to certain cases of undocumented Mexican-U.S. migration.

The arbitrary use of these terms and the lack of agreement regarding terminological coherence are exemplified in numerous scientific publications in the field of irregular migration. A review of two major periodicals for disseminating research results on international migration: *Journal of Ethnic and Migration Studies* and *International Migration Review*, shows that most of the publications on irregular migration denominated the respective group of migrants “illegal migrants” or “illegal aliens” (in over 45% of cases). Approximately 30% of the authors classify migrants as “undocumented” and finally, on average, 14% of the authors use “illegal” and “undocumented” migrant synonyms.

Very rarely does an author justify the use of one term over another. Usually the terms are used synonymously, although there is a tendency never to use the terms “illegal” and “alien” in the same text with “undocumented” or “without papers”.

One trend, however, has attracted attention: migrants are always categorized as “illegal” in contexts relating migration to criminality, irregular working practices, and drug dealing (*e.g.* Friman, 2001) or in contexts relating to migration control and providing assistance to undocumented migrants (*e.g.* Pantoja, 2006).



For a case study exploring this tendency, the reader could refer to the work of Fabio Quassoli (2004), who shows how in Italy, police use the category of ‘illegal/criminal immigrant’ as a categorisation device both for administrative purposes, to check the formal requirements of immigrants requesting residence permits — and for crime prevention and repression.

This article argues against the use of “illegal” and “alien” or any combination involving one of these words, firstly because when used to refer to people they are devoid of meaning from a legal and a linguistic perspective, in other words, they are inaccurate.

Secondly, the use of these terms is criticized because of their negative social and political connotations.

Thirdly, these words serve as powerful tools for manipulating public opinion because these concepts construct what Charles Stevenson (1969:33) calls “persuasive definitions,” where the emotive meaning of the word has the power to displace the descriptive meaning;<sup>2</sup> and in extreme cases, can equate the human right to migration<sup>3</sup> with a criminal act.

The main criticism of “illegal” and “alien” is based on the fact that only an act can be illegal whereas a person cannot be “illegal” or “criminal”. It is the act that falls under the provisions of the penal (in the case of criminal offences) or administrative (in the case of non-criminal offences) code of a country and it is respectively punished, rather than the person per se. This legal reasoning is one of the elements that distinguishes democratic constitutional states (which have a democratic penal law derived from the act) from totalitarian regimes (which have an author-driven penal law), such as the national socialist regime in Germany, or the Stalinist regime in Russia, where individuals, rather than acts, were prosecuted (Ferrajoli, 2001; Roxin, 1992).

Another argument against the use of “illegal immigrant” could be formulated through an examination of the definition of “illegal”. According to Webster’s Dictionary (1943) “illegal” means “contrary to law, unlawful” and similarly the most recent edition of the Merriam Webster Dictionary (2005), defines “illegal” as “not according to or

<sup>2</sup>The emotive meanings of ethical judgments are normally constructed with high levels of irrationality.

<sup>3</sup>The right to migration has been recognized and codified in Article 13 of the Universal Declaration of Human Rights (UN, 1948) according to which (1) Everyone has the right to freedom of movement and residence within the borders of each state; and (2) Everyone has the right to leave any country, including his own, and to return to his country.





authorized by law; contrary to or forbidden by law.” The synonyms of “illegal” are the adjectives “illicit”, “unlawful”, “criminal”, “illegitimate”, and “wrongful”. Obviously none of these could be used to refer to a person. The widely adopted usage of “illegal migrant” has somehow been institutionalized by the U.S. legal tradition, in which the term “illegal immigrant” is used to denote “an alien (non-citizen) who has entered The United States without government permission or stayed beyond the termination date of a visa” (Law Dictionary, 2006).

On the other hand, the term “illegal” has two meanings, the second of which refers to the “status of a person residing in a country of which he/she is not a citizen and who has no official permission to be there” (Law Dictionary, 2006).

Since the purpose here is not to analyze the creation of legal terminology in the United States, this section will conclude by illustrating an extreme by pointing to the fact that, strictly speaking, only an immigration judge in the United States can determine “illegality” (Flores, 1984). In short, this article argues in favor of reconsidering the terminology used to describe foreigners without legal status in a country; instead of labeling people “illegal immigrants”, as is done by many authors and public figures who are not legal practitioners, the term “undocumented im/migrant” or “irregular immigrant” should be used.

Similar remarks could also be made about the term “illegal alien.” The literal meaning of “alien”, according to *Merriam Webster’s Dictionary of Law* (1996) is “relating, belonging, or owing allegiance to another country or government”. Similarly, in *The Encyclopedia Britannica* (2006), “alien” is defined as “in national and international law, a foreign-born resident who is not a citizen by virtue of parentage or naturalization and who is still a citizen or subject of another country”. The problem with the word “alien” arises when it is combined with “illegal”; the term “illegal alien” could be criticized using the same arguments advanced against the use of “illegal immigrant”.

Setting aside the linguistic and the legal meanings of “illegal immigrant”, the issue of how this term is used to address the larger public remains. The media and political figures, as powerful actors who influence public opinion, create prejudices, and shape uninformed opinions (especially in the case of socially sensitive issues), are most likely to use the most negatively charged terms when referring to undocumented migrants or issues related to irregular migration. It is a well-known fact that the issue of undocumented migration





is one of the main weapons used in the political campaigns of extreme right-wing parties across the world, particularly in Europe.

We are all also aware of the fact that undocumented immigrants are like a disposable “tool”, since they are the best and easiest scapegoat at times of national economic recession, yet they are greatly in demand (and respectively tolerated, not prosecuted and even actively recruited) during periods of industrial and agricultural boom when there is a need to supplement the work force (Stoddard, 1976). In this context, labeling the undocumented migrant in a derogatory way, which implies criminality, has negative consequences, primarily for the migrant and particularly when society experiences anti-immigrant sentiments.

For the first and, unfortunately, only time, this fact was explicitly addressed in Europe by Claude-Valentine Marie (2003) who condemns the use of the word “clandestine” to refer to foreigners living illegally in a country not just for reasons of “nice semantics”, but because the words used to refer to a given population or situation influence the way the latter are regarded and, most importantly, the political philosophy governing the way they are dealt with. The author stresses that: “...the term “clandestine” has the major effect of strengthening the public perception that migrants themselves generate crime and are a potential “threat,” thus seeming to justify their situation being dealt with by policing alone, and a policy in which a *rationale of security* prevails over all others” (Marie, 2003:9, emphasis added).

By intentionally using words such as “illegal” or “clandestine” to refer to people, political attention in Europe has shifted from unbiased observation, description, and subsequent management of undocumented migration, to a strongly biased redefinition of a major part of international migration. This redefinition depicts immigrants as a threat to the European Union and as criminals, not because of their nature per se but because of the mechanisms introduced to protect Europe against them.

Some academics, however (*e.g.* Polinard *et al.*, 1984:782), ironically justify their preference for the term “illegal aliens” precisely “because of its widespread use in the media in the coverage of immigration issues”. Such an argument hardly reflects the media’s reliability or its capacity to institute unbiased terminology, nor does it consider the consequences of allowing the media’s preferences, as stimulated by public opinion, to determine linguistic usage in academia.

Here we will use one example to illustrate how easily and tenuously derogatory terms referring to undocumented migrants are promoted





by the European Union, whether due to linguistic negligence or as part of an intentional strategy to inappropriately equate undocumented migration with criminal acts. The following words by the former Commissioner for Justice and Home Affairs illustrate the reasoning of the highest echelons of migration management in the European Union and also indicate the way in which policies formulated to cope with irregular migration can be intrinsically biased precisely because of this perception of undocumented migration:

The fight against trafficking in human beings and illegal immigration can only be effective if we set objectives and apply legal and administrative instruments at European Union level. The *criminals* who commit these *hateful* acts are organized in transnational networks and we must not allow them to exploit the differences between – or indeed the inadequacies in – national legislation in order to escape justice (emphasis added).

This statement by Antonio Vitorino has been eagerly adopted by the press and was also presented to the public in the Commission's press release on February 12, 2002 (Reference IP/02/224) entitled "Combating illegal immigration and trafficking in human beings: the Commission's proposal for residence permits for victims who cooperate with the authorities reminds the Member States that the phenomenon cannot be tackled at the national level alone", a press release designed to disseminate the Community's efforts to fight irregular migration. The press release provides a neat summary of the traditional thinking on migration issues upheld by the Commission and the Council and requires some explanatory comments.

In the first place, there is an indisputable tendency to use the term "illegal" as the only correct term for addressing all forms of irregular migration (the European Commission has institutionalized the expression "illegal resident" as the only way to refer to: "Any person who does not, or no longer, fulfill the conditions for presence in, or residence on the territory of a Member State of the European Union" (EC, 2002:24), without providing any rationale for selecting this expression over other possible alternatives). The outcome of this linguistic preference is that all cases in which people deliberately or unwillingly remain in an irregular situation in the destination country (such as, for example, remaining in the EU despite the country's denial of asylum, when conditions in the country of origin are unsafe) are regarded as a criminal act. Since this is the case in the vast majority of EU texts where the issue of illegal





migration is discussed, one can see the tendency to criminalize the act of residing in a state without the necessary documentation.

Moreover, this is done without considering provisional measures for assessing the cases in which an undocumented migrant has indeed broken an immigration law as opposed to the cases where the migrant has been a victim of a sluggish reception system that has, de facto, transformed him or her into either an undocumented worker during the asylum application's processing or into an irregular migrant after the application was rejected. The latter case refers to the fact that undocumented work is a natural response to the length of time required for assessing an asylum application, which can last up to five or even seven years, during which time asylum seekers in most countries have no formal right to work.

Consequently, after residing in a destination country for such a long time without obtaining refugee status, many former asylum seekers tend to remain in the country illegally. In other words, the intentional or non-intentional attempt by the EU to equate undocumented migration with crime is clear because the different forms of undocumented migration are collapsed into one. To use the EU's vocabulary, while documented migration is "managed", undocumented migration "should be combated".

The EU's inability to separate criminal and non-criminal acts is also evident from the fact that the terms "illegal immigration" and "trafficking" go hand in hand in all Council and Commission texts. However, regarding trafficking as a form of illegal immigration (in the cases where a person is transported from one country to another by traffickers) is conceptually inaccurate, since immigration is a willful and conscious act of rational agents while trafficking is not the result of free, rational decision-making by the person who has been the subject of trafficking. This is explicit in Article 3 (a) and Article 3 (b)<sup>4</sup> of the United Nations "Supplemental Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children" of the "Convention against Transnational Organized Crime", according to which the definition of trafficking is as follows:

*a)* "Trafficking in persons" shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or

<sup>4</sup> Article 3 (c) and (d) specify that the recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) and that "child" is any person under eighteen years of age.



use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.

*b)* The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used (UN, 2000a).

Thus, in the case of genuine trafficking, according to the above definition, the deeds of the trafficker rather than the deeds of the person who has been subject to trafficking may be considered a crime. One outcome of trafficking is the de facto “creation” of undocumented status, which has not been rationally chosen by the person involved. Even though trafficking is a form of irregular migration, the actions of the undocumented migrant cannot be viewed as failure to abide by the law.

Nevertheless, traffickers are only rarely punished whereas their victims are systematically prosecuted (IOM, 2005). Moreover, regularization campaigns and programs for the protection of the victims of trafficking result in granting regular migratory status to foreigners who have been subjected to trafficking, which in turn is an additional argument against equating trafficking with illegal migration at a political level.

The case of smuggling is different, as defined in Article 3(a) of the “Protocol against Smuggling of Migrants by Land, Sea and Air”, which supplements the “Convention against Transnational Organized Crime” according to which: “Smuggling of Migrants” shall mean the procurement, for financial or material gain, of the illegal entry into a state of which that person is neither a citizen nor a permanent resident (UN, 2000b).

In the case of smuggling, no element of force, deception, or abuse of power is present and the immigrant has consciously chosen to employ the services of a smuggler, by personally requesting smuggling services or at the smuggler’s suggestion. The main difference between smuggling and trafficking is therefore the migrant’s consent. In the case of smuggling, the migrant has consented to the operation which ends with his or her



arrival at the destination, whereas in the case of trafficking the person has either never consented or, if there was initial consent, that consent has been rendered meaningless by the coercive, deceptive, or abusive actions of the trafficker; the person's exploitation is an ongoing process that continues after arrival at a given destination (IOM, 2005).

This presentation of the internationally accepted definitions of smuggling and trafficking has been introduced to stress the need to highlight the distinction between trafficking, illegal immigration, and smuggling, especially when policies for managing migration in the European Union are being formulated. Failure to do so and adopting the standard way of addressing the issue of "illegal migration" as equivalent to trafficking and labeling it a "hateful act" will only lead to the misperception of the phenomenon, which will subsequently be presented to the public in an erroneous way.

Moreover, the lack of conceptual clarity hinders the proper management of undocumented migrations.

### *Conclusion*

The purpose of this contribution was to raise general academic awareness of certain linguistic, legal and social-political arguments against the widespread use of the expression "illegal immigrant/alien".

By citing the fact that a person per se cannot be illegal, the adjective "illegal" cannot be used to refer to a human being and the power of the media and political figures to manipulate public opinion for or against social issues involving the phenomena of migration, the text advocates the use of the terms "undocumented migrant" or "irregular migrant" to refer to foreigners who have entered a country without authorization or are not in possession of residence papers.

The terms are viewed as synonymous insofar as both refer to the fact that a migrant is not of possession of short or long term residence documents<sup>5</sup>, his or her entry into the host country fails to comply with the norms for accessing national territory and that his access to, residence

<sup>5</sup> The term "undocumented" as used in the academic literature, UN recommendations and the current text refers to the fact that a migrant has not been (and cannot be) documented/registered by the host country's system of recording foreigners' entry or residence in national territory and is not of possession of documentation provided to migrants as stipulated by the receiving country's legislation. It does not refer to the fact that a migrant does not possess personal documents such as a passport or birth certificate which do not replace the documents provided to migrants by the receiving country.



and settlement in the host country cannot be recorded by the national system of recording migration stocks and flows.

These two terms are free of the negative political and social connotations of the expression “illegal im/migrant” and, if adopted, in addition to being conceptually accurate, could also contribute to the analysis of the issue of irregular migration in an emotionally neutral way.

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