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AND ALTERNATIVES TO  
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## Executive Summary

The FAiR (Finding Agreement in Return) project seeks to enhance the effectiveness and legitimacy of return and readmission policies in Europe by clarifying foundational concepts. The central thesis of FAiR emphasizes legitimacy as a critical element for both improving return policies and exploring alternatives for individuals who cannot be returned. This working paper aims to define key terms—enforced return, alternatives to return, and legitimacy—to foster precise communication and coordination among researchers and stakeholders, ultimately translating to impactful policy recommendations.

Key definitions:

- Enforced Return: Defined as situations where individuals are compelled to leave a country due to state actions, which may involve hard power (force) or soft power (encouragement or persuasion). This concept is integral to all FAiR work packages, particularly WP8, which measures instances of enforced return.
- Alternatives to Return: Refers to strategies implemented instead of enforced return, encompassing both positive and negative measures, such as detention or institutional abandonment. The relevance of this term spans multiple work packages, with a particular focus on WP6.
- Legitimacy: A multidimensional concept involving political, legal, and sociological aspects, assessed from the perspectives of various audiences, including intra-state (European citizens and deportable immigrants), inter-state (third states and their officials), and transboundary (returnees, NGOs, civil society organizations). Legitimacy is crucial across all work packages, influencing cooperation and compliance with return frameworks, as explored in WP3, WP4, WP5, WP6, WP7, and WP8.

The paper also addresses the ethical dilemmas inherent in return policies, advocating for strategies that balance effectiveness with humanity and justice. Ethical considerations are essential for creating policies that respect individual rights and dignity while addressing state concerns, ensuring long-term acceptance and success.

This working paper provides a foundational roadmap for FAiR, defining critical concepts to ensure coordinated research and impactful policy development. By clarifying terms and addressing ethical dilemmas, FAiR aims to promote legitimate, humane, and effective return and alternative policies, fostering cooperation and compliance among all stakeholders involved.



## Introduction

The goal of this working paper is to clarify the foundational concepts that are relevant for the Finding Agreement in Return (FAiR) project. The central thesis of the FAiR project is that legitimacy is a key component for improving the effectiveness of return and readmission policies and for opening the door for a greater scope of alternatives to return policies that European states can offer to those that cannot be returned. In order to coordinate the research in relation to this theme, it is important to have a roadmap regarding the meaning of a range of key concepts including legitimacy, the policy cycle, enforced return and alternatives to return. The purpose of defining terms is not to create a straitjacket for researchers but to enhance communication and coordination between research teams. The work of conceptual clarification is to ensure that when concepts are used in different ways, this occurs consciously and transparently.

The need for conceptual clarity is essential for precise communication among the research team and for translation to policy impact. It will allow us to facilitate dialogue with stakeholders, better position our recommendations, and promote consistent application and assessment of return and alternative policies. Conceptual clarity is particularly important for the field of return migration, where there is often a lack of consensus regarding what exactly this term entails, especially when referring to individuals who have never resided in the country to which they are being returned. Likewise, the term alternatives to return also requires delimitation to understand what counts as alternatives and what the different options are that states offer to irregular migrants. Legitimacy is also an important concept to define, particularly because of its multidimensionality and the varied perspectives stakeholders might have on what constitutes legitimate practices.

The paper is organized as follows. In the first part, we will define return migration and enforced return and explore the state's use of its soft and hard power (Nye 2004, 2014, Foucault 1977, Dean 2010, Crewe 2011) to enforce returns. In the second part, we will define alternatives to enforced return and explore its different forms: implicit, explicit and semi-explicit. In the third part, we will define the concept of legitimacy and place it within the policy cycle, reflecting the work of the various work packages (WPs) in FAiR. We will examine the different forms of legitimacy, primarily substantive and process legitimacy, and assess their relevance for return and alternatives to return policies, and for the sustainable cooperation of third states with return processes. In the fourth part, we will discuss the ethical dilemmas and challenges that policymakers and stakeholders face in the realm of return. Ethical discussions can contribute to the theoretical understanding of enforced return by integrating philosophical and moral perspectives. This provides a more holistic view of the terms under definition. Finally, we will conclude the paper by reiterating the relevance of these topics and concepts for the work of FAiR.

## Section 1: Conceptualizations of return and enforced return

### Return



Defining return migration proves challenging due to the dynamic nature of return and the multitude of factors influencing the return decision-making process (micro-, meso- and macro- level factors at the policy and non-policy dimensions).<sup>1</sup> Of special interest is the proposed definition of King (2000). King defines return migration as “the process whereby people return to their country or place of origin after a significant period in another country or region” (p. 8). This definition has two important dimensions: geographical/political (the country or place of origin) and temporal (the period spent in another country or region). Despite King’s efforts to keep the scope of the definition broad, these dimensions require additional nuanced considerations.

On the geographical/political dimension, the concept of return is commonly associated with the idea of coming back to one’s place of origin. This notion can be particularly problematic for migrants, especially children, who have never even been to the country commonly referred to as their place of origin. The concept of return presupposes that individuals do not belong to the place where they reside, but to their alleged country of origin (Cleton 2022). This disregards the social ties, their level of integration and the contributions that they have made to their place of residence. It perpetuates the belief that people naturally belong to specific geographical locations (e.g., French people belong to France) and that nations should be defined by geographic boundaries. These notions form the foundation of the modern international state system (Wimmer and Glick Schiller 2002).

When migrants conclude their journeys and return, they furthermore may not necessarily go back to their hometown, not even to their homeland. For instance, migrants originating from rural areas might choose to settle upon return in larger cities in search for more opportunities or to avoid stigmatization (Van Houte and Koning 2008). Alternatively, migrants might opt to return to the broader region they come from which encompasses a larger geographical area than a specific hometown or country (Junge et al. 2015, Graviano and Darbellay 2019). For practical purposes, migrants might simply return to a location they transited before reaching their final destination. Finally, migrants might also *return to their families* instead to a concrete geographical area (Battistella 2018). This happens when migrants’ families have relocated, in which case migrants *return to their families* regardless of where they are.

On the temporal dimension used by King (2000) it may seem obvious that the term *return* presupposes that the individual has previously migrated. This is again problematic to those who were born in the country where their parents were residing, and never engaged in the process of migration. On the temporal dimension of the definition of return, policymakers and scholars delving into the concept of return highlight that the duration of the person’s residence abroad is an important factor in defining return (UN DESA 1998, King 2000, Kuschminder 2017). The United Nations Department of Economic and Social Affairs (UN DESA 1998) suggests a minimum absence of one year, a criterion accepted by some scholars (e.g., Erdal 2017). King (2000) has been more hesitant to quantify the time requirement and as seen above has referred generally to “a significant period in another country or region” (p.8). Kuschminder (2017) maintains that an absence of 3 months is sufficient to account for substantial exposure to a new culture. This ongoing debate shows that the temporal requirement is not settled but it is a relevant factor for defining return. Moreover, return implies a sense of temporal stability or permanence in one’s geographical place of belonging. Bovenkerk (1974) and Gmelch (1980) considered the intention to remain in the country of return an important element to define return migration. However, recent studies show that experiences of return, especially enforced ones, do not always lead to such permanence and may result in short stays and subsequent movements (Schuster and Majidi 2013).

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<sup>1</sup> A literature review on the factors explaining the outcomes of enforced return has been conducted in the framework of the FAiR project. See Torres Chedraui et al. (2024) “Factors explaining outcomes of enforced return and post-return experiences”, deliverable D2.2





While the intention to remain in the country of return can play a role in distinguishing visits from returns, it does not fully account for the constant move of people (Kuschminder 2017). Furthermore, the notion that people should not re-emigrate, as if migration is inherently negative, ignores the historical context. People have migrated for ages, and migration is a social phenomenon that has helped build many of the societies in which we currently live (de Haas et al. 2019).

FAiR will use the term *return* to refer to cases when someone enters a country where they hold nationality or have legal residence. We will adopt a critical stance in cases where the assumptions that return implies “re-entry” to a “home country” do not hold.

## Return Motivations

Various factors contribute to migrants’ return, ranging from personal accomplishment in the migration journey to circumstances shaped by policy and non-policy factors. While there are numerous and various reasons for return, Battistella (2018) suggests focusing on two main variables to categorize different types of return: the time for return and the (in)voluntariness of the decision to return. While the variable *time for return* considers whether the return happens at the end of the migration project or before its completion, the variable *voluntariness* assesses whether the person sees return as a desired outcome or not.

When migrants have achieved their goals and return voluntarily, their return is considered a *return of achievement* (Battistella 2018). If the migrants did not wish to return but have fulfilled the purpose for which they migrated, their return is termed as *return of completion* (Battistella 2018). A *return of setback* occurs when migrants decide to return voluntarily before completing their migration goals, indicating a step back from their original plans. Conversely, if migrants return involuntarily before finishing their migration project, it is called *return of crisis or forced return* (Battistella 2018).

The interplay of the timing of return and the voluntariness of the return decision is important for better understanding the complexities of return migration, particularly to highlight that it is not a simple nor a uniform process. If we accept that voluntariness is a crucial dimension on which returns differ, then the type of return that interests FAiR is primarily the last one, the return of crisis or forced return, especially if the reason for returning involves the presence of the state, which is either forcing or incentivizing both (positive or negative) return. However, as will be explained below, FAiR focuses on what we propose to call “enforced return”. We deliberately avoid strictly distinguishing between “voluntary” and “forced” returns because we are interested in the point at which state intervention occurs which renders voluntariness “void” in the “truest” sense of the word (Webber 2011).

## Enforced Return

In FAiR, we will use the term *enforced return* to describe situations where individuals are compelled to leave the country due to the actions and presence of the state. This compulsion can occur through hard measures (i.e. use of force), as well as through softer forms (i.e. encouragement or persuasion).<sup>2</sup>

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<sup>2</sup> We agree with Coutin (2010) that non-state actors, such as employers, also play a role in the deportation process. However, we believe they do so because the state has granted them the power to control the legal status of those they hire. By subjecting irregular migrants to the ever-present possibility of expulsion, their vulnerability increases, as they must hide and refrain from reporting crimes to the authorities to avoid expulsion (De Genova 2002). This lack of protection creates a situation where employers, landlords, and service providers in general can exploit vulnerable migrants, pushing them to return due to their oppressed conditions. Although the role of non-state actors is important, the role of the state in this process cannot be overlooked.



The modern state is responsible not only for deciding who must leave but also for ensuring their departure. As Birnie (2019) notes, the practice of banishment dates back to ancient Greek and Roman times, when individuals who acted against societal norms were expelled. This expulsion involved the temporary or permanent loss of civil and political rights, including property rights. However, in those eras, the state did not enforce banishment; it was assumed that individuals would comply on their own. It was not until the colonial period with the advancement of the transportation technology that the state assumed the responsibility to ensure that banished individuals were removed to locations far outside their community, often across seas to prevent them from returning.

In the late 19th and early 20th centuries, the authority to deport individuals became a fundamental aspect of national sovereignty. Nation-states gained exclusive control over the legitimate means of movement through the creation of the passport (Torpey 1998). The passport enabled states to unequivocally identify their citizens and distinguish them from non-citizens. As a result, citizenship became a means of group identification, with those not belonging to the group lacking protection against expulsion.<sup>3</sup> The Universal Declaration of Human Rights established that everyone has the right to leave and return to their own country. This right entails the prohibition on states to expel own citizens (art. 12 ICCPR, art. 2 ECHR), creating a clear distinction between nationals and non-nationals. Thus, the passport allows states to control who enters and leaves the country but also to identify those who can be subject to deportation.

Traditionally the state's power to enforce returns was primarily focused on deporting those who had committed a crime (Gibney 2013). However, with the rise of securitization of (irregular) migration and the need to justify the increasing expenditures on border control, we have seen a shift towards more frequent use of deportation to remove not only criminals, but also rejected asylum seekers, visa overstayers, and other categories of migrants such as dual citizens (Gibney 2013). We have experienced what Gibney (2008) calls the *deportation turn*.

All non-citizens are in a state of continuous deportability (De Genova 2002), always at risk of being expelled, possibly after their residence permit is not renewed or is withdrawn. For non-citizens, deportation is "an ever-present possibility" (Anderson et al. 2011, 551), making them the "eternal guest" of the state of residence (Kanstroom 2000, 1907). As deportation is being used as a tool to expel non-nationals, it is considered as "constitutive of citizenship" (Anderson et al. 2011, 548) in the sense that it defines and reinforces the boundaries of belonging and exclusion within the nation-state (Walters 2002, De Genova 2010).

Although all non-citizens are in a situation of deportability, the state's power to deport varies depending on their legal status, social deservingness (e.g., rootedness, integration), humanitarian grounds, and fundamental rights (e.g., non-refoulement) (Birnie 2019). In addition, the state also uses its power to deport individuals based on "contextually dependent markers of social difference", where the intersection of race, gender and class is visible in shaping our perception of the deportable subject or illegalized migrant (De Genova 2007, de Noronha 2020, Celbuko 2013). Thus, the power to deport is exercised to varying degrees, influenced by the legal protections available to the non-citizen, which make their susceptibility to deportation more or less likely.

As so far defined, enforced return refers to all returns that occur because the state is in some way behind them, and actively exerts effort to ensure said return occurs. This includes situations where the

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<sup>3</sup> With the emergence of human rights, we concur with Anderson et al. (2011) that human rights are now applicable to all individuals under the jurisdiction of the state, regardless of their nationality or legal status. Therefore, the few protections reserved exclusively for nationals are political rights (the right to vote and be elected) and the right not to be expelled from the state.



state has assessed that certain individuals do not have a right to stay and issues then an order to leave, rejects asylum applications, or withdraws residence permits, and subsequently exposes the individual to its return infrastructure. In the past, as discussed by Birnie (2019), states would often issue return decisions without actively enforcing them, merely instructing individuals to leave. Today, enforced return involves a more proactive approach, where the state not only issues the decision but also takes steps to ensure compliance (imprisonment, encampment, exclusion from the welfare state) or facilitate the departure of those that are not authorized to stay (AVR counselling and “reintegration” programmes). We therefore call enforced returns those that are actively orchestrated by the state over deportable individuals. Returns that occur without active state orchestration, such as international students returning when their residence permit ends, are considered non-enforced returns, as the state has a more passive role in the causal chain of return. The distinction between active and passive enforcement is not always straightforward and can overlap. This is especially evident when the state is involved but does not directly enforce the return in a specific case, making its role in the causation chain somewhat indirect.

Here it is important to clarify that the deportation of citizens who hold dual nationality and have committed a crime falls under the scope of enforced return. Although these citizens are in principle non-deportable, the state renders them deportable through denationalization (Gibney 2013).

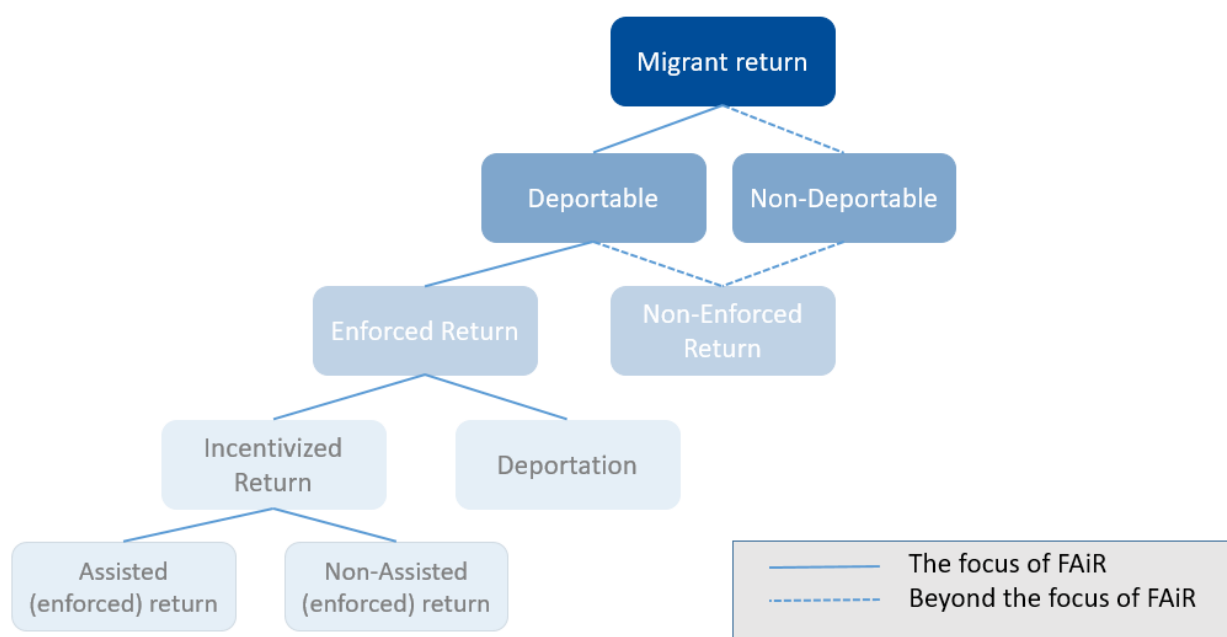
Besides state enforcement, returns can also occur for reasons that are not attributable to the state of residence.<sup>4</sup> For instance, returns may happen when the migration journey has been completed due to the accumulation of wealth or is interrupted for personal or family reasons (Battistella 2018). Additionally, return can occur due to policies in the origin country that encourage migrants to come back (i.e. in White 2014). Since the state of residence does not use its enforcement power in any of these cases, we call these *non-enforced returns*. It is important to note that non-enforced returns are more likely to be seen among non-deportable individuals. For deportable individuals, the state is typically involved in some capacity to ensure these returns occur. However, there are instances where deportable individuals may leave without state pressure, such as temporary residents returning due to the completion of their goals or being encouraged by policies in their country of origin.

The figure below provides a taxonomy of migrant return and the focus of FAiR.

Figure 1. The Taxonomy of migrant return and the focus of FAiR

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<sup>4</sup> We consider that all migrants, regardless of their legal status, are residing in the state where they live. The term “residence” is used in a factual sense, as these migrants are physically living in that country.



## The hard and the soft power to enforce returns

In order to enforce returns, the state uses its hard and soft powers. Hard power refers to the use of force, most visible in the use of police and military forces, but not necessary excluding other alternatives. As observed by Weber (1978, 1994) the modern state has successfully monopolize the legitimate means of violence. Hard power can be seen in the physical manifestations of border control, such as the creation of walls and fences, patrolling, push backs by armed forces, and physically enforced deportations.

Conversely, soft power, a concept developed in international relations by theorists like Nye (2004, 2014), operates through persuasion rather than force. It is defined as “the ability to get what you want through attraction rather than coercion or payments” (Nye 2014, 256), it “rests on the ability to shape the preferences of others”, of “getting others to want the outcomes that you want”, it “co-opts people rather than coerces them” (Nye 2004, 5).

Soft power is a more efficient means for the state to achieve its policy goals, without the material and moral costs of deploying hard power (Nye 2004). It is essential to acknowledge the significant role of the state apparatus in inducing migrants to comply with a return decision, even without the use of physical force. Current state practices in European countries indicate significant investments of time and resources in coaching and persuading irregular migrants to comply with return decisions (Cleton and Chauvin 2020, Lietaert 2022, Khosravi 2009). For example, coaches are hired in order persuade migrants that it is in their best interests to leave the country. From an analytical point of view, enforced returns should not solely refer to cases where the state uses direct force, but also include scenarios where it employs its soft power to influence and encourage returns after a return decision has been issued.

Perceived legitimacy is a necessary condition to be able to exercise soft power (Nye 2004, Armitage and Nye 2007). As will be further discussed in section 3, legitimacy ensures that commands and objectives are seen as justified. In this way, states have an interest in protecting their legitimacy



because it opens a pathway for them to achieve their policy outcomes without the costs associated with hard power.

While political science literature often presents soft power in a positive light as a less costly alternative to hard power, the research of Foucault (1977) and others (Dean 2010) portrays soft power more negatively. In their view, power has become a pervasive form of governmentality where individuals accept freedoms within state-imposed limits and must discipline their own behaviour and power becomes internalized in people’s relationships. For instance, Crewe (2011) explains how soft power is exercised in the context of prisons under neoliberal governments, where guards befriend prisoners to achieve a more secure prison environment. Similarly, return counsellors build “trusting relationships” deportable individuals to facilitate their return (Cleton and Chauvin 2020).

Both hard and soft power can be employed through direct or indirect means. Hard power is used directly when force targets an individual, such as in forced return operations. It is used indirectly when it has a broader effect, such as deterring individuals from approaching a border due to the presence of walls, fences, armed patrols, or social exclusion policies (Walters 2002). In the latter case, power is exercised without targeting any specific individual.

Soft power is used directly when persuasive measures target an individual, for example, when they are assigned a return counsellor or cultural mediator to persuade them to leave the country for their benefit. Soft power is used indirectly when the state creates facilitation programs for individuals to leave the country, accompanied by discursive pressures and propaganda, such as painting an idealized picture of the country of return (Cleton and Schweitzer 2021) or the moral need to rebuild it. These measures do not target specific individuals but expect some to respond positively and choose to leave. This type of indirect soft power strategy was used by several European states to encourage the voluntary return of guest workers who came to Europe in the post-war period (Black et al. 2011).

The table below exemplifies the interactions between the type of state power (hard and soft) and their targeting (direct and indirect).

Table 1. The state’s means of enforced return

<b>The state’s means of enforcement</b>	<b>Direct</b> (individualization)	<b>Indirect</b> (diffuse)
<b>Hard</b> (force)	<i>Forced return operations Pushbacks</i>	<i>Social exclusion policies Wall/fences Patrolling borders</i>
<b>Soft</b> (persuasion)	<i>Return counselling/cultural mediators assigned to those with a return decision</i>	<i>AVR programmes with certain group characteristics or nationalities as a target Return campaigns</i>

Assisted voluntary returns are seen as different from enforced returns in the legal sense, as the person is not forced to return (Art. 3(8) EU Return Directive, Majcher 2019). However, this distinction is problematic because it fails to capture the intervention of the state common in this type of returns. In addition, we can hardly speak of voluntary returns when the alternative is deportation (Noll 1999). To avoid using euphemisms and referring to voluntary returns in situations where the person has no other option, the literature has proposed other terms, such as soft deportation (Leerkes et al. 2017, Kalir



2017), accepted return (Danish Refugee Council 2015), mandatory return (ECRE 2005, Beltman 2012, ECRE 2018), obliged voluntariness (Dünnwald 2008), constraint-choice return (Lietaert 2016), pay-to-go schemes or incentivized return (Black et al. 2011, Collyer 2018). We prefer the latter term among the available ones because it emphasizes the mixture of encouragement and pressure involved in these returns. Soft deportation would be more in line with the idea of soft power developed above, but the term deportation carries a negative connotation that may not fully capture the nuances of this type of return situations. Accepted return, on the other hand, has the problem that not many people who return truly accept it; rather, they feel forced to do so (Erdal and Oeppen 2017). Mandatory return lacks the incentive element that characterizes these returns, making it less suitable. Obligated voluntariness captures the coercive elements but can be seen as contradictory. Constraint-choice return highlights the limited options available but may not fully encompass the state's role in incentivizing return. The term incentivized return is preferable, as it captures the soft power of enforced returns and acknowledges the incentives and pressures placed on individuals to leave.

The distinction between incentivized return and deportation is meant as an ideal-typical distinction that serves heuristic purposes. This framework helps to clarify the varying degrees of voluntariness and coercion involved in return migration.

### The enforcement spectrum

Both the use of the hard and the soft power of the state varies in degrees. The hard power of the state could consist of putting migrants in detention, in a plane or using physical force to counter their resistance to the act of return. Likewise, the soft power of the state could consist of using persuasion, native counselling, dialogue or empathy to influence the migrant's return (Cleton and Chauvin 2020).

As enforcement encompasses a broad spectrum of physical force (with different levels) and a more nuanced use of state authority (with different soft mechanisms), enforcement should be viewed as varying in degrees, with higher and lower levels of enforcement, depending on the mechanisms employed.

Equally, enforcement can also take visible forms, such as when a formal return order is issued, but it can also manifest in subtler ways. For instance, the implementation of policies in the country of residence that affects migrant populations can impact their willingness to return. For instance, policies that make it more challenging for irregular migrants to cope in the country of residence, can prompt migrants to consider returning, even in the absence of any official return procedure (Ataç and Rosenberger 2019, Kuschminder and Dubow 2023). This aligns with De Genova's notion of migrant deportability: the precarious situation migrants face upon entering Europe, where the possibility of deportation looms despite the actual enforcement power of the state (De Genova 2010). Here, the enforcing state employs a form of semi-enforcement by affecting migrant conditions, prompting returns without directly mandating them.

## Section 2: Conceptualizations of alternatives to return

It is well known that there is a deportation gap in the management of irregular migration: only a few percent of those who receive a return order are actually returned to their country of origin or to a third country. Furthermore, while the EU Return Directive provides detailed regulations for the deportation



process, including what force can be used, by whom, and at what stage of the return process, it does not address what should happen if no return occurs for various reasons. The Directive only states that the deportation order will be suspended (Article 9), but it does not specify what will happen to those migrants afterward, nor does it require states to temporarily regularize their status, leading to situations of protracted irregularity, where migrants remain in prolonged limbo (Majcher 2020).

In this context, European states, depending on their political orientation and the needs and characteristics of their labour markets, formulate targeted policy responses to irregular migrants, sometimes explicitly and sometimes more implicitly and tacitly. We call them, broadly, alternative to return policies. Within these policies, the possibility of being visible in the public space through enrolment in municipal registers and enjoying certain services (e.g., Spain), being regularized through employment (Italy), and track switching (e.g., Germany, Sweden) can be placed among inclusive ones. On the other hand, in the grey zones where neither regularisation nor return is provided for, institutional abandonment (e.g., Netherlands, Austria) and prolonged and repeated detention (e.g., Greece) become emblematic examples of segregation policies.

In this paper, we have divided alternative to return policies into three categories according to how they are implemented: explicitly, semi-explicitly, and implicitly. Specifically, we look at how alternatives occur, and why different (stratified) alternatives exist for different groups of irregular migrants.

It should be emphasized, however, that the overview of alternatives may not be complete since our aim here is not to make an exhaustive list of policies but rather to explore the explicit/implicit and stratified nature of alternatives.

### **Explicit alternatives: Regularization through employment and humanitarian reasons**

Regularization is an act of legal integration through which irregular migrants are included in mainstream social and legal structures by means of a legal status (Kraler 2019).

In irregular migration, the policy and political debate generally evolve around prevention, border controls, surveillance, and return, rendering regularization problematic (Kraler 2009). Still, in the last decades, the EU member states have repeatedly implemented regularization policies to address the rising numbers of irregular migrants within their territories (Mc Govern 2014). Depending on the characteristics of both migrants' and receiving states' economies and policymaking, such policy options can be motivated by different reasons, such as employment or human rights. Indeed, as well as employment-related regularizations, states may decide to regularize irregular migrants on humanitarian grounds. Vulnerable persons such as women (pregnant or with minor children), unaccompanied minors, persons with serious illnesses, and victims of trafficking and/or sexual exploitation may be targeted for regularization possibilities.

Empirical evidence (Bansak 2016) showed that, in the last decades, northern and southern European countries differed in the requirements of regularization: while northern ones included rejected asylum seekers in the regularization process basically for humanitarian reasons, southern countries amplified the target, considering, in particular, work-related aspects and the needs of labour markets.

Member states apply a variety of policies for granting regularized status to irregular migrants present in their territory, and these policies can generally be divided into two macro-categories (Baldwin-Edwards and Kraler 2009):



- Programs: a time-limited procedure often involving a large number of applicants.
- Mechanisms: an open-ended policy usually aimed at individual applications with large room for discretion by authorities, often involving fewer applicants

In addition to the application method and requirements, the entitlements that regularizations grant change. Especially in the case of employment-based regularizations, the status granted may be revoked if residence and income requirements are no longer met (Kraler 2019).

Motivations for implementing regularization policies vary. The first one is employment-related needs, where a substantial informal economy exists. An emblematic example of this is the COVID-19 pandemic and related problems in certain labour sectors due to lockdowns, triggering large amnesties for irregular immigrants in some European countries, notably Portugal and Italy (Ambrosini and Hajer 2023). As well as employment and humanitarian reasons, presence in the territory, length of residence, and family ties are also important criteria for eligibility for regularization (Baldwin-Edwards and Kraler 2009).

It is important to emphasize that regularization programs and mechanisms differ in their degree of public visibility and political resonance and, consequently, their social acceptability: while regularization programs are politically and media-sensitive and raise much more public and political debate, mechanisms based on individual demands are less politically charged and allow authorities to manoeuvre over decisions (Ambrosini and Hajer 2023). This would be, in particular, the case of *arraigo* procedure (regularization under exceptional circumstances) in Spain and 9bis/9ter in Belgium.

### **Semi-explicit alternatives: Quota decrees and toleration status**

In some cases, complementary policies to regularizations semi-explicitly promote the employment-related regularization of irregular migrants. An example of such a policy is the quota decrees implemented in Italy and Greece. In this system, governments assign migration quotas to specific countries to include the workforce in unskilled labour sectors, For instance, seasonal agricultural work. The request starts with the employer who wants to hire a foreign worker.

In the Italian case, the decree, published annually, determines the number of non-EU workers from countries that have signed cooperation agreements or arrangements with Italy, especially in the area of controlling irregular migration flows. According to the official statements, for the three-year period 2023-2025, a total of 452,000 foreign nationals will be admitted to Italy for seasonal and non-seasonal employment and self-employment purposes.<sup>5</sup> Initially, three different entry paths were created: dependent work, self-employed, and foreign work-seekers, with a clear priority for seasonal workers. While the first two paths are still active, the last one is substituted with a channel for those who have received specific training under programs established in partnership with public and private bodies (Bonizzoni 2018).

Formally, this system is based on a match between Italian employers and foreign workers outside of Europe, and it aims to promote regular workforce entries through work permits. Yet, the immigration field reflects the overlapping interests of political will and labour market needs, and what is said may differ from what is being done. In line with this, the yearly quota mechanism often semi-explicitly acted as a regularization scheme for those already present in the labour market since, on the one hand, regular entries were slowed down due to administrative obstacles, and on the other hand, employers

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<sup>5</sup> For more information (in Italian) see: <https://integrazionemigranti.gov.it/it-it/Altre-info/e/2/o/54/id/128/Decreto-flussi-2023-25-Le-quote-in-dettaglio-#:~:text=Attualmente%20i%20Paesi%20con%20cui,Kosovo%2C%20Mali%2C%20Marocco%2C%20Mauritius>





are reluctant to hire workers with whom they were not familiar with (Cuttitta 2008). This is also called informal regularization (Kraler and Ahrens 2023). In Greece, too, this system is often used to regularize irregular migrants who are already working informally.<sup>6</sup>

As mentioned above, regularization pathways are not always explicitly defined. There are also grey areas between regularity and irregularity, where people are regularized in a very precarious way, without protection from deportation and without access to services.

In this category, we also include official tolerance, commonly implemented in Germany (Duldung). In its “targeted return enforcement regime,” Germany, while deporting some migrants, officially tolerates others (Leerkes and Van Houte 2020). People whose asylum applications have been rejected but who cannot be deported for various reasons are granted this status. It is not a legally valid residence permit and does not protect from deportability. While some tolerated people may have access to employment routes that offer more security and stability, others risk being trapped at the bottom of the civic hierarchy (Jonitz and Leerkes 2022).

### **Implicit alternatives**

Irregularity does not always and easily lead to regularisation and return, resulting in migrants living irregularly, sometimes for long periods. In this section, we explore what makes such permanence possible.

#### *Informal economy, informal tolerance and selectivity*

Practices and approaches to irregular migration evolve around views on migration, perceptions of employability, and ideas of national identities, and the presence of one does not always exclude the other (Düvell 2011). People and policies can simultaneously have a strong sense of national identity, as opposed to irregular migration in general, while being comfortable with the informal economy and the presence of (some) irregular migrants within it, especially when personally known and appreciated. It is within the implicitly implemented policies and practices that all these contradictions take place.

The first case would be the practices carried out with a degree of informal tolerance and (implicit) public acceptance.

Irregular migration governance is highly selective (Ambrosini and Hajer 2023). Indeed, the empirical evidence highlighted that not all unauthorized immigrants are the same and are treated equally before the law or by public opinion. From this perspective, some irregular migrants might be better socially accepted than others if employed in sectors with a real need, such as female domestic workers responding to the shortage of public assistance (Bonizzoni 2018). In this, gender-based selectivity is also performed. These are exposed, in general, to a rather passive control mechanism (Triandafyllidou and Ambrosini 2011) and generally become the first target of regularization schemes.

There are other characteristics that are conducive to tolerance and social acceptance of irregular migrants, such as having a family and interactions with citizens.

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<sup>6</sup> <https://www.infomigrants.net/en/post/50511/greece-how-to-apply-for-a-seasonal-work-visa>



The selective nature of irregular immigration policies also has practical reasons. State resources for regulating this area (identification, detention, deportation) are limited, and specific groups need to be identified for tighter controls to maximize resources (Ambrosini and Hajer 2023).

### *Institutional abandonment and solidarity networks*

Institutional abandonment and exclusion from the labor market and social services is an implicit policy to force irregular immigrants to leave the country without the intervention of state measures. Indeed, in the grey areas where no return occurs due to various reasons, there are institutionally abandoned people who have succeeded in migrating to the Global North but who do not have (sufficient) labor income, do not receive (sufficient) support from their direct social networks, and cannot or do not want to return to their country of citizenship (Leerkes 2016).

However, political authorities and market forces are not the only actors in managing irregular migration; different non-public actors, networks, and their interactions also play an active role in managing this phenomenon (Ambrosini 2015). Indeed, the fact that irregular migrants may continue to live in the host countries means that they have access to some basic services that are not publicly available to them through other channels. This occurs especially at local levels.

In some cases, national and local policies are pitted against each other in the provision of services and in the politicization of issues related to irregular migration, recalling the concept of “battleground” (Ambrosini 2021), particularly in the case of rejected asylum seekers, i.e., where no return takes place. The empirical evidence showed that in such a clash, the commitment of NGOs and solidarity networks is essential (Ataç et al. 2020). The various forms of solidarity provided by religious institutions, humanitarian and pro-migration actors, and other components of civil society make up the complex context that allows irregular migrants to escape the worst consequences of exclusionary policies (Ambrosini and Hajer 2023). From the organizational point of view, complexity lies in the impracticality of return policies. Thus, in managing this particular flow, tensions and contradictions emerge as part of the actions and interactions (Putnam et al. 2016) despite the political rhetoric of the return of migrants as the main goal. In line with this, local authorities with negative attitudes towards immigration may implicitly collaborate with solidarity networks (with which they do not share ideals and methods) because repatriation policies are not successful and other policies cannot be implemented in response to irregularities (Dimitriadis and Ambrosini 2023).

The concept of sanctuary cities, which “ignores or does not enforce national immigration law and, as a consequence, does not cooperate with national immigration authorities” (Kaufmann 2019, 444) also is a good example of the conflicting management of immigration policies between different levels of governance. These cities, where local authorities, civil society groups and activists challenge national immigration laws, policies, and practices towards undocumented<sup>7</sup> migrants (Bauder 2016) are found mainly in the USA, while in the EU context Madrid can also be considered as such (Kaufmann 2019).

### *Detention*

Legally, immigrant detention should be administrative and not imprison-like.<sup>8</sup> Furthermore, it is formally considered as a bureaucratic measure allowing for the implementation of national border control measures in the pre-admission and pre-deportation phases (Leerkes and Broeders 2010). Thus, immigrants can only be detained if they are in imminent deportation (Ambrosini and Hajer 2023). Nevertheless, the formal function of detention is often challenged because, in some cases, the

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<sup>7</sup> Undocumented is used as an umbrella term including irregular migrants and rejected asylum seekers.

<sup>8</sup> <https://picum.org/work-area/detention-and-deportations/>



duration of detention may take longer than expected in very unfavourable conditions (Dow 2007), and while formally existing for administrative reasons, detention centres may resemble a prison in all respects.

Thus, although detention is formally intended to be a step before forced return, it can also be used as a deterrent similar to institutional abandonment, especially in the case of repeated detention. In fact, in the management of irregular migration, in some contexts (such as the Netherlands), this practice serves three informal functions in addition to its formal function to precede and prepare for expulsion: (1) to deter irregular migration; (2) to control pauperism; and (3) to demonstrate state authority to counter popular fears (Leerkes and Broeders 2010).

Although the effectiveness of the use of detention as a deterrent is not fully verified, empirical evidence shows that in some cases the experience of detention increases the desire to intensify efforts to repair the (mainly economic) damage suffered during detention once the person is released (Leerkes and Kox 2017). This is also because perceived legitimacy and deterrence appear to go hand in hand. Thus, such a triggering process is partly due to the low perceived legitimacy of the detention. This observation confirms the fact that migration decisions are shaped not only by state policies but also by migrants' perceptions of the (in)adequacy of immigration enforcement and that a perceived lack of legitimacy leads to resistance to compliance with immigration enforcement (Van Houte et al. 2021).

Another form of detention would be criminal detention, which is an indirect effect of social exclusion and restrictive internal migration policies that reduce the possibility of regularization. This thesis argues that irregular migrants are at risk of being pushed into various forms of criminal activity, which can lead to criminal imprisonment if they find themselves in a very marginalized position in society (de Noronha 2019, Leerkes et al. 2012).

#### *Transit to other countries*

While some alternatives are implemented *a posteriori* (e.g. regularisation), others constitute an alternative *a priori*, before irregularity becomes a risk of deportation in a specific context. Facilitating transit to other European countries is one example of this category. If we wanted to rank the level of explicitness of the policies analysed here, this can be considered the most implicit one.

It can be implemented through the “non-monitoring” of passages to other countries, particularly at the borders of the countries that are the gateways to Europe (such as Italy and Greece). Particularly until 2015 and the establishment of hotspots, asylum-seekers from conflict-affected countries did not lodge their asylum claims in Italy and Greece but continued on to destinations where they thought they would have better chances (Fargues 2017). In this policy line, then, arrivals can become passages, given the margin of privilege and the power of street-level bureaucrats in interpreting and applying the regulations. However, as the characteristics of the flows change, so does the nature of the transits. Indeed, despite pressure from the EU, secondary migration is continuing, whereby migrants who first sought asylum in Italy, then moved irregularly to other Member States in search of employment, return to Italy to renew their residence permits (Hatziprokopiou et al. 2021).

Just as irregular migration should be seen as a continuum between regularity and irregularity (Triandafyllidou and Bartolini 2020) alternative to return policies scrutinized in this paper should also be understood as a spectrum, with fluid transitions between one and another, and also with a concurrent presence of several policies, with different degrees of inclusion and exclusion. Indeed, some alternatives emphasize inclusivity and participation, while others might lean towards segregation



and isolation. At the aggregate level, alternatives to return policies constitute *complements to return policies* that can exist in addition to return policies.

In addition to the differentiated rights these policies grant, the purpose and manner in which they are provided also change. Some are implemented explicitly with precise application conditions and guidelines, and some are activated *ad hoc*, e.g., more implicitly and silently, also due to difficulties related to their legitimacy. Some instead can be categorized between these two opposite directions. Since policies must be adapted to the demands of the public, these differences can be seen as a litmus test of the degree of legitimacy of the policies.

## Section 3: Conceptualizations of legitimacy and the policy cycle

### Legitimacy

In FAiR, we will use the term legitimacy. Legitimacy has been defined in the context of state politics. Weber (1978), for instance, defined legitimacy as the belief in the rightfulness of a rule or authority, meaning that people accept and recognize the authority of those in power as legitimate. For Weber, legitimacy is fundamentally about the belief in the rightfulness of authority. People obey authority because they believe it is the right thing to do, irrespective of their own personal interests.

The work of Weber was later expanded by political theorists (Beetham 1991, Coicaud 2002). Unlike Weber, Beetham emphasizes that legitimacy is not just about the belief but also about the actual conformity of the authority with legal and moral standards, and the alignment of the authority with the community's shared values. By adopting a more integrated perspective, Beetham (1991) and Coicaud (2002) define legitimacy through the presence of three elements:

- (1) Consent: This refers to the voluntary acceptance and support of authority, implying that legitimacy is rooted in the approval and acceptance of the people. Those who consented to the authority cannot object to it once it applies to them. This element highlights the political/moral dimension of legitimacy.
- (2) Conformity to established norms: This means that actions taken by those in power must adhere to preexisting legal norms, ensuring that authority operates within a legal framework. This element highlights the legal dimension of legitimacy.
- (3) Justification by reference to shared values: This indicates that authority must be justified by values and beliefs shared by society, aligning with the moral and ethical standards of the community. This element highlights the sociological dimension of legitimacy.

These three elements highlight the importance of an integrated approach to understanding legitimacy, where political, legal and sociological elements play a key role. Similarly, legal scholars have emphasized this integrated approach to legitimacy. For instance, Fallon (2005) emphasizes that legal legitimacy understood in terms of its conformity with a higher legal norm (e.g. Constitution) cannot be seen in isolation from its social acceptance and its moral insights. Therefore, a comprehensive understanding of legal legitimacy requires considering not only the formal adherence to legal norms but also the extent to which these norms are accepted by society and reflect underlying moral principles.



The theories of legitimacy outlined so far have been developed in the context of discussions surrounding the grounding of state authority in relation to its subjects (citizens). However, FAiR only partially addresses this issue. It also focuses on legitimacy in relation to other states and individuals who are not directly subjects of state authority, such as third country polities. However, the concept of legitimacy, as outlined above, has been successfully applied to contexts outside the traditional relationship between states and their citizens.

For instance, in connection to international relations, we find the work of “liberal” authors such as Nye (1990), Bodansky (1999, 2013), Buchanan and Keohane (2006) that emphasize the power of legitimacy and norms to influence state behaviour and create compliance. For example, according to Nye (1990), legitimacy plays a critical role in fostering international cooperation, as it helps to build trust and encourages states to adhere to international agreements and norms voluntarily. This is relevant for FAiR, as it is interested in state cooperation in immigration policy and the implementation of return and readmission frameworks.

In relation to legal legitimacy, the work of Frank (1991) highlights the importance of norms in understanding legitimacy in the international context. He emphasizes that in an anarchic international environment, lacking centralized enforcement agencies, the power of legal norms cannot derive solely from their formal status as binding laws. Instead, it must come from their ability to generate a compliance pull, which is influenced by factors beyond purely legal analysis, such as the pedigree of the norm, its coherence, and its symbolic validation. Thus, Frank underscores, as Fallon (2005) that a narrowly legal approach to legitimacy is inadequate.

In the context of FAiR, we contend that assessing return and alternatives to return policies requires an integrated approach, where political, sociological, and legal aspects play key roles. The need for such an approach to legitimacy aligns with the idea that legal validity, social acceptance, and adherence to social norms and values are interrelated concepts. Even if a non-EU+ country gives its consent, the framework may still lack social acceptance if it is perceived as unfair by its constituency (i.e., Cham and Adam 2021, Zanker 2023). Social acceptance depends on the conformity of the exercise of authority with social norms and values and with the established legal rules on state sovereignty and human rights law. Therefore, a comprehensive approach that integrates legal validity, social acceptance, and adherence to social values and expectations is essential.

### Legitimacy Audiences

Weber conceived legitimacy primarily from the perspective of those that authority is exercised against, which Bottoms and Tankebe (2012) call *audience legitimacy*. Return and alternatives to return policies have multiple audiences, each with different perspectives, priorities, conflicting interests, and legitimacy considerations. This complexity is not unique to return policies; states also grapple internally with various audiences whose interests are not always aligned (Bottoms and Tankebe 2012). Our discussion of audience legitimacy focuses on three distinct groups, which are relevant for the work of FAiR: intra-state, inter-state, and transboundary audiences. Legitimacy is not a static quality but one that must be continuously renewed and validated. We agree with Bottoms and Tankebe (2012) that legitimacy is dialogic and requires constant justification and maintenance. This ongoing process, which we later refer to as “legitimation work” will also consider these audiences.



First, we have intra-state audiences. These are individuals within the territory or under the jurisdiction<sup>9</sup> of the state and directly subject to state power. Since return and readmission policies, as well as alternatives to return, are framed from the European perspective, including both national states and the EU, we will consider intra-state audiences to be those located in Europe regardless of their legal residency status. The intra-state audience includes deportable immigrants who, although lacking voting rights, reside within the state's boundaries. Along these lines, Benhabib (1999) argues that the social contract that states have with its citizens should extend also to non-citizens, advocating for their inclusion in democratic processes and rights recognition. Those immigrants can challenge the legitimacy of deportation and immigration policies in ways that complicate the deportation process and influence public opinion about such practices (van Houte et al. 2021). These dynamics can affect the role of administrations and bureaucracies in implementing return policies. Janmyr (2015) for instance illustrates this with the refusal of the Ethiopian Embassy to issue travel documents for rejected asylum seekers in Europe. The intra-state audience includes also own citizens, residents and the public in general as return and alternatives to return policies cannot be developed without considering public support. The perception of EU citizens regarding these policies can significantly influence their implementation. When voters and citizens perceive return and alternatives to return policies as just and reasonable, it strengthens social and political acceptance, facilitating government enforcement. Conversely, if the public views these policies as unjust or overly harsh, it can lead to resistance, protests, and political backlash, undermining their effectiveness (Rosenberger and Winkler 2014, Hasselberg 2015).

Second, inter-state audiences refer to the relations between two states or group of states, commonly involving an EU+ state or the EU on one side and a third country on the other. The dynamics of these relationships often shape the negotiation and implementation of return and readmission agreements. States aim to align their policies with each other while balancing domestic and international legitimacy considerations. This is particularly relevant when the third country relies heavily on remittances (Olakpe 2022), or when diaspora groups have voting power, as in Senegal, where diasporas are considered the '*grands électeurs*' and can influence election outcomes (Mouthaan 2019). Additionally, the narratives of state officials are significant, as research shows that Senegalese officials question the EU's approach on migration, criticize the use of charter flights as dehumanizing and view the use of *laissez-passer* as an affront to their sovereignty (Mouthaan 2019).

Third, transnational audiences refer to the interactions between EU+ states or the EU and non-state actors outside of their territory or jurisdiction. These actors can include returnees, civil society organizations, NGOs, and other stakeholders operating outside of Europe. Research has shown that they play a crucial role in shaping the discourse and practices surrounding migration and return policies. For instance, Mouthaan (2019) found that the Senegalese and Ghanaian officials reported that media pressures against cooperation in returns with European countries. Similar findings were observed in Iraq, where media criticism of readmission agreements potentially influenced the Iraqi government's decision not to cooperate (Janmyr 2016). Additionally, the narratives of third-country nationals are also important. Ryo's (2013) study shows that the perceived legitimacy of U.S. authorities and the immigration system plays a crucial role in potential migrants' decisions to migrate illegally.

## Legitimation work

Legitimacy is not a quality that is gained automatically by simply fulfilling certain criteria, but arises from an ongoing process of legitimation (Bottoms and Tankebe 2012). In such "legitimation work"

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<sup>9</sup> Although territory and jurisdiction coincide for the most part, there are instances in which they do not. That is why we mention both. That would be the case of pushbacks or even the externalization of border control, where the state acts outside of its territory, or through intermediaries.



(Abrams 1988) those that seek to be recognized as legitimate engage with their audiences offering justifications of their authority. Such justifications can be accepted, but they can also be questioned or contested leading to a dynamic “dialogic process” of legitimation (Bottoms and Tankebe 2012). This means that legitimation goes in two directions, “a top-down and a bottom-up direction” (Martin Rojo and van Dijk 1997, 528), where those seeking legitimation look for the approval of the audience, and the audience reacts through explicit or tacit forms of acceptance or rejection, leading to further revision of the legitimation work. Since the legitimacy of the return and alternatives to return policies engage different audiences, the legitimation work must adapt to the expectations of different audiences.

Strategies of legitimation are varied, and some can be seen as more “rational” than others. Van Leeuwen (2007) identifies four categories of legitimation based on the form of justification: (1) Justification based on custom and tradition. For example, it is taken for granted that states have a right to control their borders because we have experienced such control throughout our lifetimes as normal; (2) Justification based on morals. For example, migration controls can be justified by the idea of protecting migrants from the risks of the migration journey; (3) Justification in terms of the goals of individuals and society. For example, migration controls can be used to maintain social stability and economic balance; (4) Justification based on frames and narratives. For example, the narrative of a “migration crisis” in Europe, even when the numbers of migrants are not significant, serves to legitimize stricter migration controls.

Legitimation work can operate at various levels. The justification and strategies used to legitimize policies may vary depending on the level at which the person or institution functions—top or bottom levels—and on the specific audience being addressed. Strategies employed in backstage politics, such as by caseworkers who seek to legitimize their work to potential returnees and to themselves, differ from those used in the frontstage of politics by policymakers who must legitimize their work to the broader public (Wittcock et al. 2021).

From previous research, we know that return and readmission agreements are formally framed as being mutually beneficial for both countries (Trauner 2018). Additionally, cooperation on return and readmission is portrayed as a strategy to ensure safe and orderly migration (as reflected in the Preamble of some EURAs). By presenting these agreements as advantageous for all parties involved, the EU and EU+ states aim to secure support and legitimacy from third states.

At the implementation level, the legitimation work seems more personalized, focusing on building good relationships. The importance of face-to-face contact for building trust has proved to be a key factor in the Dutch context (Leerkes et al. 2022a). Framing is also essential; the Dutch government and IOM, for instance, ensures to emphasize their role and interest in assisting with reintegration and not solely in the return of migrants. This underscores the need for nuanced messaging to effectively engage stakeholders and foster cooperation.

Legitimation work needs to be adapted and tailored to the institutional norms and values of the audience. For instance, states have to take into account that when negotiating and seeking return collaboration with Iran, the Constitution in Iran recognizes the right to reside in any country of the world, regardless of what the regulations of that country say (Leerkes et al. 2022a). Similarly, the Constitution of Senegal and Nigeria contemplate the right to migrate (Zanker 2023). Those values and norms put limits on what can be expected to be accepted by third-country authorities.

## **The importance of legitimacy and the sustainability of returns**



Our focus on legitimacy is justified for both intrinsic and instrumental reasons, which are closely related. Intrinsically, legitimacy is crucial because it points towards the social acceptance of policies and programs. This fosters an inclusive environment where stakeholders feel valued, seeing their values and norms reflected in these policies and agreements. Instrumentally, legitimacy promotes compliance. When laws and authorities are perceived as legitimate, people are more inclined to adhere to rules, thereby reducing the need for ‘hard power’ and coercive enforcement. As Hannah Arendt (1961) famously stated, “where force is used, authority itself has failed” (p. 93), highlighting the critical role of legitimacy in maintaining authority.

The emphasis on legitimacy becomes particularly relevant in the context of return policies, where the use of force – at the interstate level – is not an option and intergovernmental incentives have proven ineffective. The EU and EU+ countries lack coercive powers to compel third states to comply with agreements, and few agreements offer effective incentives (such as visa facilitation or EU accession) that sway cooperation. Evidence suggests that even these incentives have not significantly improved third-state cooperation on return<sup>10</sup> (Leerkes et al. 2022b, Stutz and Trauner 2021).

The unique characteristic of return and readmission frameworks further justify the focus on legitimacy. Return and readmission frameworks are of successive tract, meaning that compliance is ongoing rather than achieved in a single instance. These frameworks require continuous adherence every time an EU+ state needs to readmit an irregular migrant. To ensure effective and sustainable cooperation with returns, it is important to focus on legitimacy, which involves the acceptance of the terms of the agreements by all parties involved. This acceptance fosters cooperation and smooth implementation, reducing potential resistance and ensuring that the agreements are honoured consistently over time.

### Legitimacy and the policy cycle

Return and alternatives to return policies are proposed, made and modified in the policy cycle. The *policy cycle* is a chronological framework of the policy process that includes various stages starting from agenda setting, policy negotiation, formulation, implementation and evaluation or monitoring. It has been criticized for its oversimplification and unrealistic depiction of the policy process and for failing to provide a cohesive theoretical framework (Sabatier 1999). We agree with Jann and Wegrich (2007) that although these criticisms hold true, the policy cycle still serves as a useful heuristic device for breaking down the process into stages and understanding the complexities of policy-making. Additionally, the policy cycle is valuable for assessing the democratic quality of the policy process, particularly by identifying the actors that are dominant in different stages. In this way, we can assess whether the relevant stakeholders, including marginalized or minority voices, had meaningful opportunities to participate and influenced decision-making.

The *policy cycle* provides a framework for understanding the different stages of the return-and-its-alternatives-making process. By breaking down the policy process into distinct stages, we can identify the actors and institutions involved and the legitimacy deficits and dilemmas they encounter. Enforced return and alternatives to return policies do not exist in a vacuum, they are born out of a complex policy process that includes the negotiation with relevant actors and stakeholders, the formulation of their terms, their implementation, and the subsequent monitoring. The cyclical model highlights the role of feedback loops, where inputs from actors (e.g. media, public opinion and societal debate)

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<sup>10</sup> As will become clearer later, even those agreements that have incentives, need legitimacy. Having agreements that provide incentives does not ensure compliance, because it may be those incentives are not perceived as adequate by the constituencies in third countries. Ellermann (2008) argues that resistance will be especially high when agreements do not take the position and concerns of third countries seriously.

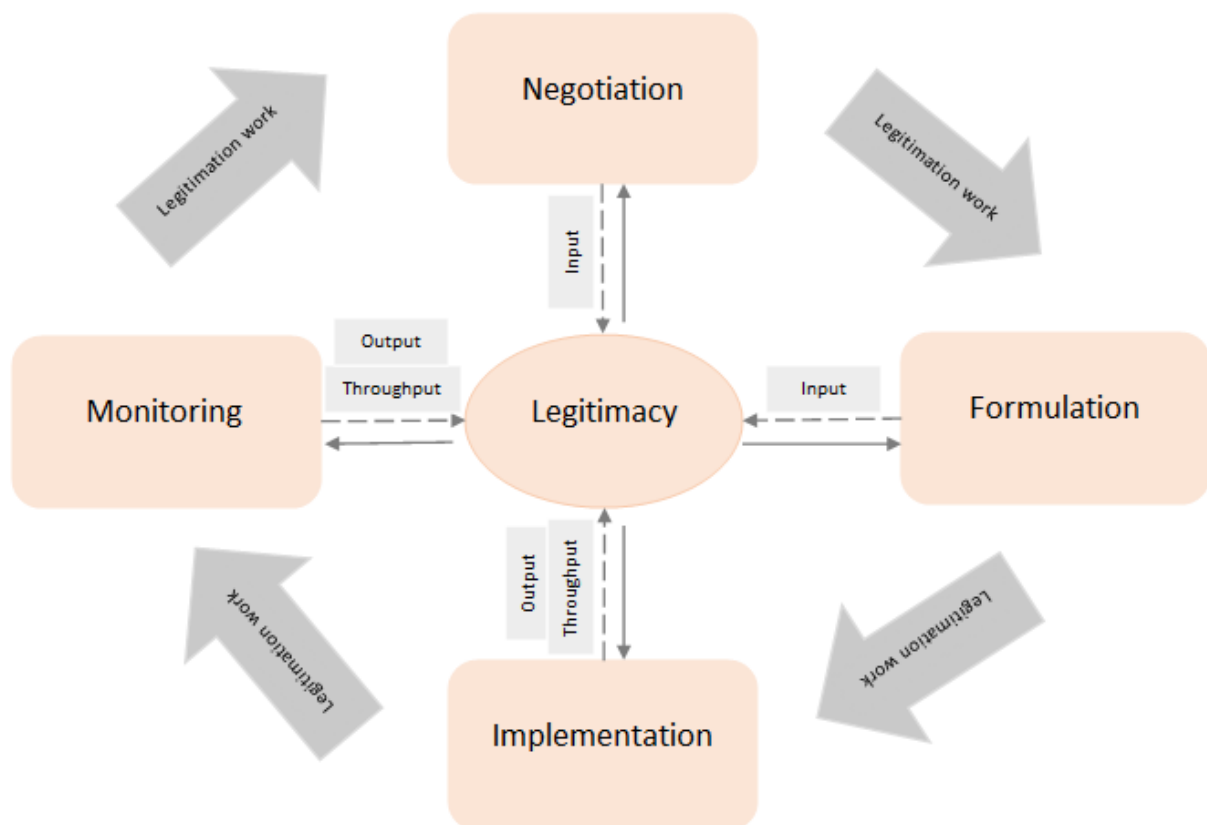




influence the outcomes, which in turn can lead to the initiation of new policies (Jann and Weigrich 2007).

The figure shown below demonstrates how legitimacy is both the cause and effect of collaboration and rule compliance in migration governance. When a policy is seen as legitimate, people are more likely to follow it, which in turn reinforces its legitimacy (Beetham 1991). In our conceptualization, the presence of legitimacy in each phase of the policy cycle is a key factor in the success of that phase. This framework emphasizes that effective *legitimation work* is crucial for the success of each stage.

Figure 2. The policy cycle of enforced return and alternatives to return



### Process and Substantive Legitimacy

Scharpf (1970) initially conceptualized legitimacy based on two levels: input and output. Input legitimacy is derived from the participation in the decision-making process, while output legitimacy relates to the results of the policy. Schmidt (2013) later added the throughput level, emphasizing the importance of the quality of governance processes themselves, including transparency, accountability, and inclusiveness. Other scholars, however, have framed legitimacy in terms of process and substantive dimensions (Tyler 2003, Beetham 1991, Esty 2006).



We will use all these forms of legitimacy to assess the authority of return and alternatives to return policies, as they are interrelated. Process legitimacy, which refers to the fairness and quality of the policy-making process, includes both input and throughput legitimacy as conceived by Scharpf and Schmidt. Input legitimacy focuses on how decisions are made, including who participates and which stakeholders are included. Throughput legitimacy addresses how the process is conducted, stressing the importance of participation, consultation, and consensus-seeking (Schmidt 2013). Substantive legitimacy, also known as output legitimacy, pertains to the alignment of policy outcomes with social values and principles, as well as the effectiveness of the policy in achieving desirable results (Tyler 2003, Schmidt 2013).

## Input Legitimacy

In the context of return and readmission frameworks and alternatives to return policies, input-based legitimacy focuses on the participation of stakeholders in the negotiation and formulation process. This includes management of boundary issues such as agenda setting and defining who gets a seat at the table and who counts as stakeholders. The inclusion of diverse actors in the policy-making process enhances legitimacy by ensuring that a broader range of perspectives and interests are represented (Kjaer 2004).

For input legitimacy, it is crucial not only that stakeholders are represented and given a chance to participate, but also that the conditions under which they participate are fair (i.e., feelings of being taken seriously, addressing power imbalances between stakeholders, etc.). This approach will increase the broader acceptance of return and readmission agreements and of the alternative to return policies.

Input legitimacy for alternatives to return policies can be particularly useful given the common fear that these alternatives are not accepted by EU citizenries, as they are perceived as encouraging irregular status and as disadvantaging regular migrants' regularity by rewarding irregular stay (Bansak 2016). The input of EU citizens becomes particularly essential to clarify these uncertainties and provide valuable insights. Their input can not only shed light on the provision of alternatives but also on their scope, conditions, and implementation. This involvement ensures that the policies are aligned with the values and preferences of the broader public. Input from non-EU+ stakeholders in alternatives to return policy can similarly contribute to input legitimacy. Non EU+ stakeholders are likely to also have certain perspectives on these alternatives, which influences non-collaboration (e.g. for certain alternatives, such as regularization, it is often required that migrants obtain certain identity documents from the authorities of their country of nationality).

Input legitimacy in the return policies can be seen in the way return and readmission agreements are negotiated. One common legitimacy deficit of return and readmission agreements is that they hardly involve third states during the negotiation of the terms of the agreement. Agreements made between the EU and third states are often presented as a complete package, without allowing third states to have any input or say in the terms of the agreement (Billet 2010, Cassarino 2012, Reslow 2013, El Qadim 2014, Zanker 2023, Ellermann 2008). The negotiations focus mainly on the implementation of the agreement and not on its formulation, therefore the agreement risk being one-sided, reflecting the EU's interests only. It does not secure a commitment to the values and outcomes implied by the legal text. Besides third states, other commonly excluded stakeholders include migrant organizations, community organizations, employers, and local governments in cities where irregular migrants are concentrated.

Another issue related to the lack of participation from relevant actors in non-EU countries is the potential legitimacy deficit that arises due to the fast-tracked decision-making process of the executive



branch, this is particularly the case of informal agreements, which are kept outside of the supervision of the legislative (Slominski and Trauner 2021). The rapid growth of the executive branch allows it to make decisions without seeking input or consulting with other interested parties within the country. This is problematic especially if the executive commits the state to obligations that are unpopular giving the impression the only reason that the agreement was reached because participatory safeguards were sidestepped (Buchanan and Keohane 2006). Research on discretion suggests that bureaucrats that implement policies to some extent make their own decisions on individual cases, orienting themselves to norms in the organization and in the wider society (e.g. Lipsky 1980).

Third states and their constituencies should feel that they can meaningfully participate in the negotiation process and that the resulting agreement is the product of thorough and thoughtful discussions. To achieve this, it is essential that the negotiations are transparent not only to the representatives of third states but also to their societies. As Steffek (2003) highlights in the context of legitimacy in international governance, agreements must reflect the shared norms and values of all participants. While achieving full participation and complete alignment is challenging, it is crucial that the goals, means, and procedures of the agreement can be justified and accepted by all parties involved. This inclusiveness is especially important for agreements that require ongoing consensus and cooperation among various parties, such as return and readmission frameworks.

Transparency is also necessary for EU states. We should not assume that constituencies in EU states uniformly support return agreements. Some citizens favour immigration, including diaspora groups, others oppose the deportation of certain groups, such as children, highly integrated individuals, and vulnerable people (Rosenberger and Winkler 2014, Hasselberg 2015). These groups can feel excluded and alienated by executive fast-tracked agreements.

Since a considerable number of the EU return and readmission frameworks are signed with autocratic (i.e. Azerbaijan, Russia, Belarus) and hybrid governments (i.e. Georgia, Armenia, Pakistan, Turkey, Bangladesh, Ethiopia, The Gambia, Guinea, Ivory Coast), it is important to highlight the relevance of input legitimacy for this type of regime. The study by Natter (2018) in Tunisia and Morocco between 2016 and 2017, points out that autocratic governments similarly need legitimacy to ensure their survival. To this purpose, they engage in negotiations and arrangements with economic and political actors within and outside the country. Furthermore, Bolkvadze's (2016) research conducted in Georgia indicates that hybrid regimes (including so-called elected autocracies) are motivated to embrace EU reforms that enhance their popularity among their people, as long as these reforms do not jeopardize their perpetuation in power. This is relevant for some (but not all) countries of origin under the scope of this research.

### Throughput Legitimacy

While input legitimacy is about who participates in the policy process, throughput legitimacy is more about the actual decision-making and implementation processes. Throughput legitimacy is concerned with the quality of the governance processes, with a focus on accountability, transparency, openness, and inclusiveness. Throughput legitimacy is about the quality of the participation and interaction between the different stakeholders. It involves evaluating whether the decision-making process has been transparent and open to public scrutiny (Schmidt 2013).

It is not sufficient to include all relevant stakeholders if they are not given the power and ability to participate meaningfully, if they are not empowered to make decisions, or if necessary information is not available. Without these elements, participation can become merely formal or tokenistic (Arnstein 2019). Participants must have a meaningful participation in the policy process.



In the context of alternatives to return policies, throughput legitimacy can be assessed by examining several factors. These include the genuine inclusion of stakeholders in discussions and decision-making processes, the availability and accessibility of information necessary for informed participation, the transparency of procedures, and the openness of the process to public scrutiny. Baldwin-Edwards and Kraler (2009) note that many stakeholders, such as states, employers, and NGOs, often have conflicting interests in alternatives to return policies. Assessing whether these inputs have been considered and have had a real impact can provide insight into the level of throughput legitimacy achieved. Additionally, it can be important that EU citizens are well informed about why certain alternatives, or complements, to return are opportune.

In the context of return and readmission frameworks, throughput legitimacy can be assessed by ensuring the existence of accountability mechanisms to evaluate the responsiveness of agreements to expected outputs. Interestingly, in a study conducted by Mouthaan (2019), state officials from Senegal mentioned their willingness to readmit migrants if the possibility of their regularization was considered first. The agreement they signed with France allowed them to negotiate the regularization of migrants under predetermined circumstances. This example underscores the importance of throughput legitimacy by demonstrating the need for mechanisms that ensure the input from third states during the negotiation and formulation of agreements is considered during the implementation phase.

With a view to the legitimation audiences composed by individuals (e.g. migrants and returnees), it is relevant to state that in social psychology, there is a concept related to throughput legitimacy called the 'quality of decision-making' (Tyler 2006). According to Tyler, the quality of decision-making is influenced by factors such as the perceived transparency and accountability of the decision-making process. When individuals perceive that decisions are made in a transparent manner, where processes are clear and accountable, they are more likely to view the decisions as legitimate. This perception of legitimacy is crucial for fostering trust and compliance among the individuals affected by for instance, return decisions.

### **Output-based Legitimacy**

Not only processes are important, but the contents of the agreements and the results that the agreement produces. Substantive or output-based legitimacy refers to the values reflected in the policies and the goals they achieve (Tyler 2003, Schmidt 2013). Another way of expressing this concept is by making reference to the common interest of the parties involved. Substantive legitimacy is achieved when a policy serves the common interest of the parties (Bodansky 2013). An agreement that is legitimate in its form and processes, may not enjoy compliance support if the results that it seeks to achieve are perceived as unfair or unjust.

This means that for alternatives to return policies to be substantively legitimate, they must not only be created through inclusive and transparent processes but also achieve outcomes that are perceived as fair and just by all involved parties. Policies must reflect the values and serve the interests of the stakeholders, ensuring that they address the real needs and concerns of migrants and communities in the countries of residence and return alike. Only then can these policies gain the necessary support and compliance to be effective.

Achieving substantive legitimacy in return policies can prove difficult. Return frameworks involve parties with diverging interests. In the EU, it has been acknowledged that return and readmission frameworks predominantly benefit countries of residence and transit countries, and incentives like development aid and visa facilitation agreements have been proposed to encourage third states to commit to returns (European Council 2002, 2005). There are efforts to create shared (if not common)



interest by conditioning return collaboration to development aid, capacity building or visa facilitation. However, there is no evidence that this incentive-based approach has been successful (Leerkes et al. 2022b). This could indicate that the rewards offered are either insufficient or not viewed as suitable compensation for cooperation with returns.

To ensure legitimacy, it is essential that return and readmission frameworks are seen as appropriate by third countries and their societies. Although return and readmission frameworks are popularly justified by EU actors as necessary for safe and orderly migration, it has not been investigated whether third countries also share this justification. There is evidence to suggest that third countries would like some acknowledgment of the positive impact that migrants have on European societies and some tangible manifestation of the understanding that migration is a human phenomenon as well as the creation of the more legal pathways for migration (Bolkvadze 2016, Mouthaan 2019, Cham and Adam 2021, Zanker and Altrogge 2022).

According to the Beetham (1991) an exception to the principle of common interest arises when there is a principle of differentiation in play which justifies focuses on only some special interest. There is no consensus on the principle of differentiation in migration governance, in the same way as we find it in other areas, such as in international trade with the idea that least developed nations merit a special treatment. In the context of return and readmission agreements, it may be argued that a principle of differentiation entitles states to govern human mobility within their borders, treat their own citizens differently from non-citizens, and expel those who do not meet the legal requirements (Opi 2021). However, this is not enough because the application of this principle in practice will only benefit some states and not others.

Some authors emphasize either the procedural or substantive aspects of legitimacy. For instance, Tyler and Huo (2002) emphasize the importance of process-based over outcome-based legitimacy. However, a comprehensive theory would acknowledge that processes without fair outcomes would not ensure legitimacy in the long run. As states would feel that they are asked to comply with unfair or unjust commitments.

### Legal Legitimacy

Legitimacy can also be seen from a legal angle. Legal legitimacy has to do with the quality of the rules and requirements enshrined in the return and alternatives to return policies and their conformity with human rights principles. Integrating the legal perspective with the political and social dimensions provides a comprehensive understanding of legitimacy which can enhance the social acceptance of return and alternatives to return policies.

From the literature, at least two conditions should be met for legal legitimacy. First, with regards to the return and readmission frameworks, they have to be in accordance with secondary rules on treaty creation. This includes, among others, the principles enshrined in the Vienna Convention on the Law of Treaties (e.g. state consent and capacity) and the principles of state sovereignty and equality of states of the UN Charter. This requirement of conformity with existing norms is connected to the concept of 'adherence' used by Franck (1990). According to Franck, adherence is essential for the legitimacy of the international system. When nations follow the rules and norms of the system, they contribute to a sense of shared values and expectations, which in turn promotes cooperation and stability. In contrast, when nations violate these rules and norms, they undermine the legitimacy of the system and create a sense of distrust and conflict. Franck explains this as a mutual reinforcement of legitimacy and adherence which might also be called a virtuous cycle between these two qualities.



Second, return and readmission frameworks should be perceived in accordance with human rights principles as contained in relevant international treaties and in the EU acquis (e.g. the principle of non-refoulement, the right to an effective remedy, the prohibition of collective expulsion, the need to take into account the best interest of the child, etc.).<sup>11</sup> In recent years, Frontex – a European Agency who gains an increasingly important role in return and readmission over the past decade – has been involved in a number of pushback operations, where migrants or refugees attempting to cross the EU’s borders are forcibly returned to the country they came from, or a third country, without being given the opportunity to apply for asylum and putting them at risk of refoulement. While pushbacks may not be directly linked to the return and readmission policies, the concerns about their legitimacy may impact the legitimacy of the return system. If actors in non-EU countries perceive that the right to seek refuge is being violated through illegitimate means, this could reduce their willingness to cooperate with return policies. After all, if migration by legal means is restricted, why should non-EU states uphold their obligation to readmit returnees? The legitimacy of migration policies is just as important as that of return policies as both are two sides of the same coin. This requirement of consistency with human rights is related to the requirement for ‘coherence’ used by Franck (1990). According to Franck, coherence is necessary for legitimacy as this will ensure that the rules are applied consistently.

The legal legitimacy of alternatives to return policies is mainly measured by their compliance with human rights principles. These principles set limits on the admission requirements to these programs and guide their implementation, ensuring they adhere to the principles of equality, non-discrimination, transparency, and accountability. The perception of human rights, however, varies from place to place. Sanctuary cities, for instance, often have a more inclusive and protective conception of human rights compared to other localities, emphasizing the protection and integration of migrants (Oomen and Baumgärtel 2018, Bauder 2016). This difference can significantly influence the perceived legal legitimacy of these policies.

Among all alternative to return policies, regularization has the highest legal legitimacy. It directly addresses the legal status of individuals and provides a clear pathway to legality. Yet, in its implementation, there can be problems with arbitrariness and selectiveness. Some groups may be facilitated more in their regularization on different grounds because they are seen as worthy and deserving, while others can be more easily left in the irregularity. The legal legitimacy of other forms of alternatives, such as institutional abandonment are legally problematic. These approaches often lack clear legal frameworks and fail to provide adequate protection for migrants’ rights, leading to questions about their compliance with legal norms and principles.

For repeated administrative detention where no return will occur in the short-run, legal legitimacy would be low because such detention is only allowed when there is a view to deportation.<sup>12</sup> Both the legal and sociological legitimacy of administrative detention for migrants is low since it is conceived that detention should be reserved for criminals (Leerkes and Kox 2017), and being imprisoned for overstaying a visa and after seeking asylum has been considered disproportionate (Gerlach 2017).

## Section 4: Ethical dilemmas in enforced return

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<sup>11</sup> If states are bound to adhere to the body of laws encompassing human rights, it is crucial to consider human rights when interpreting their obligations. This approach ensures a consistent implementation of the existing norms.

<sup>12</sup> It has been recently proposed to add threats to public interest or public security to the grounds for pre-removal detention in the proposal for a recast of the Return Directive (Wessels 2023).



## The (non-)deportability of long-term residents: a normative and substantive legitimacy perspective

In this section we discuss some ethical dilemmas in enforced return. The literature on these dilemmas is primarily informed by normative theory in the field of political philosophy, and therefore touches upon philosophical notions of legitimacy (see Fallon 2005). By enforcing the law and expelling those who have entered the country without authorization, the state reaffirms its power to control borders and asserts its authority over immigration policies. It also signals that unauthorized entry should not become a pathway to permanent residence (Kobach 2007).<sup>13</sup>

The power of the state to enforce the law should be subject to certain limits to protect other fundamental principles and rights that are important for society. The essence of a liberal state revolves around balancing the need for order and security with the protection of individual rights and freedoms (Cleton 2022). This balance is crucial in maintaining the legitimacy and ethical foundation of the state. For instance, in the realm of deportation, the use of force or compulsion must be carefully weighed against the potential violation of core liberal principles, such as human dignity, individual freedom and proportionality.

It is not uncommon in modern liberal states to protect *de facto* situations that, despite originating from initial illegality, such as occupying property that belongs to someone else, necessitate protection under certain circumstances. The passage of a certain amount of time is usually taken into consideration in various legal systems worldwide to grant protection to the illegal occupier of a good (Akkermans 2017). The reason for such protection is that the state needs to protect stability and fairness, ensuring that long-term occupation is recognized to prevent constant upheaval and insecurity.

Likewise, when a person has lived long-term in a country, there are compelling reasons to avoid strictly applying the law to expel them. These reasons are grounded in various principles, such as the right to family life, social integration, the avoidance of creating marginalized groups, among others. Here we have a conflict between the state's general power to control its borders and specific situations that need protection. The dilemmas that the state faces are not easy but require a balanced application of the law to ensure solutions that consider principles beyond mere legality. An adequate balance of those principles against the power of the state to compel irregular migrants to leave will enhance the legitimacy of the policy.

Walzer (1983) contends that states have the authority to control immigration and deport non-citizens because this control is essential for maintaining the integrity of the political community. He believes that allowing unrestricted immigration or limiting the state's ability to deport non-citizens could undermine the social and cultural cohesion that binds the community together. However, Walzer also acknowledges that this right is not absolute and should be exercised in accordance with principles of justice and fairness. He emphasizes that states have moral obligations to non-citizens, especially those who have formed significant social ties within the community.

Most of the normative arguments against expelling irregular migrants focus on defending long-term irregular migrants, those who have resided in a country for an extended period. While some argue for a specific time threshold (e.g., 10 years), others emphasize indicators of integration (e.g., work, family ties) as grounds for protection from expulsion (Carens 2013, Hosein 2019).

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<sup>13</sup> Some authors may reject the authority of the state to control immigration and argue for an open borders policy (Carens 2013). However, this is a utopian position which will not be considered in this study, as our aim is to improve policy within the constraints of the interests of various stakeholders.



In what follows we will discuss the several—interrelated—normative political arguments that support the right of non-expulsion for long-term residents emphasizing their relevance to substantive legitimacy. Substantive legitimacy involves the ethical justifications and moral principles that underpin policies, ensuring they align with societal values such as avoiding cruelty, respecting social integration, preventing unjust enrichment, allowing people to plan their lives, honouring the social contract, and avoiding the marginalization of groups.

First, it is argued that based on humanitarian grounds, long-term irregular migrants should not be expelled. It is considered cruel to remove someone from the “people and place that they know and love” (Hosein 2019, 183). This argument is particularly applicable for those that have lived in the country for most of their lives. Removing them to an unfamiliar place is inhumane, but it may not necessarily apply to those that have networks and family in the country of return. Additionally, humanitarian grounds alone may not provide a strong firewall against removal, as it often appeals to benevolence and charity, which are discretionary rather than recognizing non-removal as an individual’s inherent entitlement (Hosein 2019).

Second, it is argued that long-term migrants should not be removed based on their integration into the community where they reside, regardless of legal status. Although they may not legally be part of society, they are *de facto* members (Bader and Probst 2018, Rosenberger and Winkler 2014). This perspective emphasizes the principle that individuals who have established strong social ties and have become embedded in the community deserve protection from expulsion (Carens 2013, Rubio-Marin 2020, Schachar 2009). An important limitation of this theory is that irregular migrants often struggle to integrate due to their precarious and vulnerable situations, which makes their right to stay conditional on integration and can backfire against them (Hosein 2019). Additionally, although this theory supports social membership and feeling part of society, it may not protect those who are socially reclusive, unemployed, do not speak the language, or are incarcerated (Schachar 2009). Proponents, like Carens (2013), argue that long-term residence should be measured objectively, such as by the number of years lived in the country.

Third, it is argued that long-term residents should not be expelled because of the contributions that they have made to the society where they reside, often performing jobs unwanted by legal residents but necessary for the community (Rubio-Marin 2000, Song 2016). Critics argue that this theory alone may not justify a right to remain, suggesting that repaying welfare contributions should be an alternative (Birnie 2019). Some propose combining this theory with other arguments, such as their level of integration to strengthen the argument against expulsion (Hosein 2019).

Fourth, it is argued that long-term irregular migrants have a moral right of residence. Long-term residents have developed life projects and emotional attachments in the country of residence, creating a need for stability to flourish (Birnie 2019, 2020). This need for stability is essential for their personal development and well-being. According to Birnie (2020), one should not be removed from one’s country of residence because of the importance of the preservation of existing life plans and projects and of the emotional attachments one develops with the place and people where one lives. Unlike the previous theories, this theory does not centre on the role of the individual in society but on their need for stability to realize their life plans.

Fifth, based on the idea of the social contract, it is argued that there is an implicit social contract between the state of residence and the long-term irregular migrant which protects them from expulsion (Motomura 2014). This implicit social contract arises from the lack of enforcement of external border control policies and internal policies of monitoring and regulation, which leads to the creation of expectations on the part of the migrants that they can build their lives in the country. This theory is weaker than the previous ones because it suggests that to avoid creating a right to stay, the





state should invest more in internal and external migration controls. Therefore, this theory does not establish a right to prevent deportation but incentivizes the state to become more stringent and reduce the possibility of irregular entry and stay.

Sixth, it is argued that not ensuring a right to stay for long-term irregular migrants creates a marginalized group in the society where they reside, a sort of underclass with fewer rights and protections (Fiss 1999). The idea is that fears of deportation lead migrants to avoid seeking help from authorities, making them more vulnerable to abuse, exploitation, and health issues. This perpetual insecurity undermines their ability to plan for the future, creating a disenfranchised segment of the population, which is under-protected. The problem with this theory is that, although it is better to avoid the creation of such an underclass, the state is not necessarily committing an injustice by not combating it (Hosein 2019). An additional limitation is that while it might be preferable for such a marginalized group not to exist, its presence is actually a result of individuals remaining in the country without state approval. Just as the state is authorized to exclude criminals from society based on their behaviour, it is also authorized to exclude those who stay in the country without permission, as noted by Hosein (2019).

These arguments collectively emphasize the complexity and ethical considerations surrounding the expulsion of long-term irregular migrants. They also underscore the importance of other values and core ethical commitments beyond legality or enforcement. By incorporating these other values, deportation policies can be more just and humane enhancing therefore their legitimacy.

### **The (non-)deportability of criminals: a normative and process legitimacy perspective**

In addition to normative arguments addressing the state's right to expel long-term irregular migrants, there are arguments focused on the processes leading to deportation. These do not challenge the state's authority to deport criminals but emphasize the importance of adhering to principles such as non-discrimination, non-refoulement, proportionality, and protection against statelessness. Ensuring compliance with these principles guarantees that deportation decisions are not arbitrary but respect legal standards and procedural fairness.

Deportation was overwhelmingly supported by classical liberals, based on the idea of maintaining social order and upholding the rule of law. Kant (1790) for instance, justified the expulsion of those that committed a crime because of their violation to the social contract and Beccaria (1764) justified it based on the need for deterrence and to protect public order. Alternatively, some adhere to an organicist conception of the state, where if a member did not fulfil its role, society might expel them (Vattel [1758] 1844). Few classical liberals opposed deportation, not out of a desire to protect the individual, but because they questioned the right of the state to send individuals seemed undesirable to other countries. This perspective can be traced back to thinkers like Voltaire, who compared the expulsion of a criminal to "throwing into a neighbour's field the stones that incommode us in our own" (Voltaire 1843, 192).

Human rights principles and modern interpretations of justice have led progressive liberals to question the unrestricted authority to deport criminals. Most of these concerns focus on procedural aspects rather than challenging the fundamental right of states to expel criminals.

The first limitation is the issue of statelessness. Progressive liberalism questions the expulsion of individuals who would be rendered stateless, viewing it as cruel and inhumane. Having experienced statelessness herself, Hannah Arendt wrote about the risks of denationalization and the lack of protection and precariousness that stateless individuals have to endure:



“The calamity of the rightless is not that they are deprived of life, liberty, and the pursuit of happiness, or of equality before the law and freedom of opinion – formulas which were designed to solve problems within given communities – but that they no longer belong to any community whatsoever. Their plight is not that they are not equal before the law, but that no law exists for them (...)” (Arendt 1958, 296).

The second limitation is the principle of non-refoulement. The expulsion of criminals who would face deplorable treatment upon return is challenged under this principle. This principle, presents a significant ethical and legal barrier to expulsion of individuals under human rights law. Refugee law allows states to depart from this principle when the person represents a danger to the national security of the community in the state, or when it has been convicted for a serious crime (art. 35 Refugee Convention). However, this exception must be applied with caution, as it requires a careful balance between the protection of the individual’s rights and the security interests of the state of residence.

The third limitation is the principle of non-discrimination. Certain states make or used to make a distinction between dual citizens who naturalized and those who were born in the country, permitting deportation on the former. Those distinctions are usually criticized as they lead to the creation of a second-class citizen (Gibney 2013, Macklin 2018, Birnie 2019). Equal concerns are not raised when all dual citizens are subject to the same risk in case they commit a crime. Since dual nationality is considered a privilege and not an inherent characteristic, proponents argue that it is fair to hold dual citizens to different standards regarding deportation (Gibney 2013). However, what this argument ignores is that many dual citizens do not choose to keep dual nationality; rather, it is imposed by birth because of having a parent with that nationality, and it is often non-renounceable. This puts many individuals in the position of unavoidable dual nationality, falling short of a privilege but as an inherent characteristic.

The fourth limitation is the principle of proportionality, which restricts the state’s right to deport individuals to avoid causing disproportionate harm. This principle requires the state to balance the need to protect the public interest—considering the seriousness of the crime committed and its risk to society—against the rights and circumstances of the potential deportee (Gibney 2013). Factors to consider include the reasons for their irregular status, their integration and family ties in the country of residence, and their vulnerability upon return (such as health status and contacts in the country of return) (Birnie 2019). Making such a balance is essential to uphold principles of justice and social order.

Advocates for the non-deportability of long-term residents argue that, despite any crimes they may have committed, these individuals have acquired a moral right to stay, and any interference with this right would be disproportionate. However, they acknowledge that the principle of proportionality should apply more stringently to those residents who have not spent a considerable amount of time in the country (Birnie 2019, Carens 2013).

It is important to note that there is some form of social acceptance that may signal that the deportation of criminals are special cases ethically. A study conducted by Hasselberg (2015) in London in 2009, based on 18 interviews with foreign criminals facing deportation, revealed that even they believed the state was doing right in deporting criminals, signalling that serious crimes may constitute special cases in the ethics of deportation (although they except their own crimes from such treatment). Additionally, there seems to be some emergent practice of third states that indicates they generally do not view the return of those who have committed serious crimes as problematic. This can be seen in state practice in The Gambia (Cham and Adam 2021), Iraq and Ethiopia (Janmyr 2015).



The normative arguments presented in this section address both the substance of the state's right to expel long-term irregular migrants and the procedural limitations necessary when expelling criminals. While the arguments concerning long-term irregular migrants focus on the substantive legitimacy of their right to remain, the arguments related to the expulsion of criminals generally accept the state's right to deport, provided it adheres to specific limitations.

## Concluding remarks

This working paper has set the ground for the work that will be done in FAiR, by defining key terms: enforced return, alternatives to return, and legitimacy.

In FAiR, we use the term *enforced return* to describe situations where individuals are compelled to leave the country as a result of state actions and presence. This compulsion can involve the hard power of the state, such as the use of force, or its soft power, such as encouragement or persuasion. Soft power is often employed to legitimize return, promoting voluntary compliance. The concept of enforced return is pertinent to all work packages (WPs), with particular relevance to WP8, which focuses on measuring instances of enforced return.

We also use the term *alternatives to return* to refer to any measures or strategies implemented instead of enforced return. These alternatives can have both positive and negative connotations, including options like detention or institutional abandonment. They can also be more or less explicit depending on the specific context, implementation, and the policies of the country involved. The term *alternatives to return* is particularly relevant for WP6, but also intersects with other WPs where the implications of these alternatives affect enforced return.

We use the term *legitimacy* to indicate the perceived acceptance of the return and alternatives to return policies in Europe and in third countries. Legitimacy is a multidimensional concept with political, legal, and sociological connotations, that is assessed from the perspective of those against whom the authority is exercised. We have identified three key audiences relevant for FAiR: the intra-state audience, which includes both citizens in Europe and deportable immigrants; the inter-state audience, which encompasses third states and the narratives of their public officials; and the transboundary audiences, which consist of returnees, civil society organizations, NGOs, and other stakeholders in third countries. FAiR assesses the legitimacy of return and alternatives to return policies with regards to these three audiences. Legitimacy is a prevailing concept in all WPs. Legitimacy plays a crucial role to enhance cooperation and compliance with intergovernmental Return Frameworks, which is the focus of WP3. Strategies to improve the perceived legitimacy of these agreements can involve transparent negotiations, inclusive dialogues, and fairer terms that respect the interests of all the stakeholders.

The concept of sociological legitimacy is particularly significant for WP4 which focuses on Non-EU and Diasporic (Counter) Discourses. Within this WP, it will be examined how return policies are perceived by both the non-EU+ population and the diaspora groups in Europe. Addressing their concerns and incorporating their viewpoints can enhance the overall acceptance and legitimacy of return policies.

For WP5 (International Bureaucracy and Redocumentation), legitimacy is connected to implementation phase of return policies. The way bureaucrats involved in redocumentation processes adhere to fair practices, maintain transparency, and respect human rights plays a crucial role in legitimizing the return procedures. Effective legitimization work during implementation ensures smoother operations and higher compliance rates.



The relevance of legitimacy for WP6 (Alternatives to Return) is crucial as it would involve exploring and promoting alternative solutions to enforced returns. By presenting and implementing credible and humane alternatives, the EU can build legitimacy and trust among stakeholders and returnees.

For WP7, legitimacy is closely tied to the monitoring processes of enforced return and reintegration, which is the focus of this WP. Effective monitoring can ensure that returns are conducted humanely and that reintegration efforts are genuine and supportive. Such oversight not only prevents harm but also increases the willingness of both returnees and third countries to cooperate. Transparent and accountable monitoring processes bolster the legitimacy of return policies and practices.

In WP8 (Migration Outcomes), legitimacy is examined indirectly by comparing the effects of the different return frameworks. This involves assessing not just the content of these frameworks but also their perceived legitimacy across various dimensions. Understanding the impact of legitimacy on migration outcomes helps in refining policies to achieve sustainable cooperation with return.

This working paper has also addressed the ethical dilemmas surrounding return policies. Return policies should not only be effective but also humane and just, respecting the rights and dignity of individuals while balancing the needs and concerns of states. Understanding these dilemmas is crucial for developing policy recommendations that are both practical and ethically sound. By considering ethical dilemmas, policymakers can create strategies that are more likely to be accepted by stakeholders, ensuring long-term success and fostering a sense of justice and fairness.

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