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## Illegalised and undeportable Migrants as translocal legal Subjectivities

Giulia Fabini\*

### Abstract

The mechanisms of border control display a transnational dimension, in which a variety of legal and normative orders affect the norm-making processes. The presence of unauthorised migrants in receiving societies reveals the emergence of new forms of normativity, produced by the interactions of local, national, supra-national, regional legal and normative processes. Mechanisms of border control can be better understood if we look at illegalised and undeportable migrants as *translocal legal subjectivities*, who are able to change the functioning of normative systems through their very existence as mobile subjects. Drawing from a case study of the interaction between the police and illegalised and undeportable migrants in Bologna (Italy), this article empirically assesses *translocal legalities* in the field of border control, and demonstrates how these encounters challenge an idea of law as based in the logic of sovereign authority, while opening new spaces of possible governance.

Keywords: migration law; illegalised migrants; translocal legal subjectivities; translocal legalities

### 1. Introduction

While walking on sidewalks covered by porticoes through Bologna's city centre, plenty of people running to work or university classes on a sunny spring early afternoon, I saw two young men surrounded by four police officers engaging in a conversation. The police left after a few minutes, leaving the two men alone. They were cousins, both from Tunisia and had been stopped for an ID check. One had been living in Italy for 6 years by then, he spoke perfect Italian and had a residence permit. The other had just arrived in the city after reaching Italian shores by sea; he could not speak a word in Italian and was undocumented. Later, over a coffee in a bar nearby, my interlocutors explained to me that they had been stopped while going to a square close by, Piazza Verdi<sup>1</sup>. While trying to reach the square to meet up with some friends, they had been stopped by the police who asked for their resident permits, which only one of them had. One of the young men explained to me that those police officers had decided to turn a blind eye to his cousin's illegal status without even taking him to the police station. With much perseverance, the 'legal' migrant had found a convincing argument: his cousin had just arrived and neither spoke the language nor knew the city very well. If they had taken him to the police

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All websites accessed 27 September 2021 if not otherwise indicated.

<sup>1</sup> The square, a well-known meeting place in the city for students, migrants, and marginal groups to socialise and engage in political activism, has always attracted police attention.

station to run identification procedures and to notify the expulsion order, then it would have been difficult for him to find his way home once released. The two sides negotiated, and while the police prevented the two men from reaching the square that day, they ultimately let them go. The point of this *vignette* is that my interviewee's preoccupation while talking with the police was not about the possibility for his cousin to be actually deported, but the fact that, if taken to the police station, identified and charged for breaking some (penal and administrative) norms of immigration law, he would then be released in the city, with an order to leave in seven days without any clue where to go.

According to Italian law, when migrants are found to be illegally present in the territory, they are identified, fingerprinted, and receive a removal order<sup>2</sup> or a term for voluntary return.<sup>3</sup> In reality, the great majority of the *illegalised* migrants who are ordered to leave, remain.<sup>4</sup> As is well known in Italian literature on migration control, actually deporting individuals is very challenging – a fact of which migrants are often very aware.<sup>5</sup> In 2020, according to estimates, there were about 517,000 illegalised migrants in Italy,<sup>6</sup> 26,885 of which were found to be illegally present in the territory<sup>7</sup> and ordered to leave.<sup>8</sup> Only 6,470 migrants were eventually repatriated.<sup>9</sup> This can be explained by somewhat contradicting facts. On the one hand, the removal order will most commonly be executed not by means of immediate repatriation to the country of origin<sup>10</sup>, but by an order to leave the national territory in seven days<sup>11</sup> – which means that migrants are asked to find a way to leave the country, at their expense and with a minimum notice to arrange things. On the other hand, only a small percentage of the illegalised migrants who receive a removal order are then actually deported.<sup>12</sup> The

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<sup>2</sup> Article 13 paragraph 1 of Legislative Decree n. 286 of 25 July 1998, converted into law n. 40/1998, Unified Code of Immigration Law

<sup>3</sup> Article 13 paragraph 5 of Legislative Decree n. 286 of 25 July 1998, converted into law n. 40/1998, Unified Code of Immigration Law. At the same time, migrants are charged with the crime of illegal entry and stay (article 10-bis of Unified Code of Immigration Law) or with disobeying a previous removal order (article 14 para. 5 ter/quarter of Unified Code of Immigration Law), or regarding the violation of re-entry ban (article 13 para. 13 of Unified Code of Immigration Law).

<sup>4</sup> The category of 'illegal migrants' is a legal category, and it is connected to state-law. At the core of my inquiry lies not the illegal migrant, but rather the 'illegalised migrant', a socio-legal category through which, following's De Genova's suggestions, I aim to stress the processes of illegalisation instead of the 'illegality' per se. Nicholas De Genova, 'Migrant "Illegality" and Deportability in Everyday Life' (2002) 31 *Annual Review of Anthropology*, 419.

<sup>5</sup> See for example Maurizio Ambrosini, 'From "illegality" to tolerance and beyond: Irregular immigration as a selective and dynamic process' (2016) 54(2) *International Migration* 144; Giuseppe Campesi, 'Hindering the deportation machine: An ethnography of power and resistance in immigration detention' (2015) 17(4) *Punishment and Society*, 427.

<sup>6</sup> For the estimates of undocumented migrants present in Italy in 2020, see ISMU, *XXVI Rapporto sulle migrazioni 2020* (2021 Franco Angeli), online: [www.ismu.org/presentazione-xxvi-rapporto-sulle-migrazioni-2020/](http://www.ismu.org/presentazione-xxvi-rapporto-sulle-migrazioni-2020/)

<sup>7</sup> EUROSTAT data. Third country nationals found to be illegally present - annual data (rounded) [https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr\\_eipre&lang=en](https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_eipre&lang=en).

<sup>8</sup> EUROSTAT data. Third country nationals ordered to leave - annual data (rounded) [https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr\\_eiord&lang=en](https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_eiord&lang=en)

<sup>9</sup> EUROSTAT data. Third country nationals returned following an order to leave - annual data (rounded) [https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr\\_eirtn&lang=en](https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_eirtn&lang=en)

<sup>10</sup> Article 13 paragraph 4 of Legislative Decree n. 286 of 25 July 1998, converted into law n. 40/1998, Unified Code of Immigration Law

<sup>11</sup> Article 14 paragraph 5-bis of Legislative Decree n. 286 of 25 July 1998, converted into law n. 40/1998, Unified Code of Immigration Law

<sup>12</sup> Even if the fact that migrants are not deported does not mean that they also avoid the violence involved in the mechanisms of border control. Migrants continuously undergo police checks even if deportation is not the most common outcome; and police checks might be violent – physically, verbally, or symbolically. In other words, mechanisms of border control include both enforcement *and* under-enforcement of law. Border control is the resulting of formal and informal practices of control, and of practices to deport migrants, but also to deal with the non-deported migrants.

small percentage of migrants actually deported yearly from Italy means that, even though illegalised migrants are constantly checked, deportation is not the most common outcome of their encounters with the police.<sup>13</sup> Leekers and van Holte<sup>14</sup> classified Italy, together with Spain, as a country with ‘Thin enforcement regime’: the low enforcement is due not only to lack of capacity to enforce migration, but also to lack of interest in doing so - mainly because of the widespread black labour market and the need of irregular workers - and result in non-deportation.

As the introductory vignette shows, studying the operation of borders from a purely legal perspective is not an easy task. Much of border control takes place in the shadows of the law, through the discretionary power of the agencies of control<sup>15</sup>, or in all the acts put in place by individuals to cross borders, avoid or resist deportation. As I have argued elsewhere, because of this, the internal bordering practices in Italy appears as a matter of ‘managing illegality’ rather than of a strict enforcement of Italian immigration law through administrative detention and deportation.<sup>16</sup>

Illegalised migrants seem to be invisible to the law. They only appear in the legal norms as individuals to be deported. At the same time, the lack of enforcement demonstrates that the law in action tolerates *de facto* their presence, which is governed through informal norms. Such norms regulate: what they are allowed to do while in the city and what they are not, how they should behave, what places in the city they can hang around and which ones they should avoid, how and where they can spend their free time, etc. The presence of unauthorised migrants in receiving societies *per se* reveals the emergence of new forms of normativity, through which the subjectivities of the illegalised and deportable migrant is produced, acknowledged and regulated.

The informal norms regulating the physical presence of illegalised and undeportable migrants in cities are negotiated at the local level, in the course of continuous encounters between the police and migrants. By the category of illegalised and undeportable migrant I refer to a person made “illegal” by means of law but not-deported, and most likely not-deportable.<sup>17</sup> As I will show in the course of the article, over the course of various grounded encounters between border crossers and border agents, the presence of illegalised and undeportable migrants in urban spaces has been continuously negotiated, contested, and possibly reaffirmed.

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Deportation and non-deportation are both part of the mechanisms of border control. See Giulia Fabini, ‘Managing illegality at the internal border: Governing through “differential inclusion” in Italy’ (2017) 14(1) *European Journal of Criminology*, 46; Arjen Leerkes, Marieke Van Houte, ‘Beyond the deportation regime: differential state interests and capacities in dealing with (non-) deportability in Europe’ (2020) 24(3) *Citizenship Studies*, 319.

<sup>13</sup> According to EUROSTAT data, in 2008-2020, 448,015 third-country nationals were found to be illegally present in Italy (n 7), of which 74.390 return to their country of origin (n 9). This means that actual deportation occurs in only 16,6 per cent of cases when migrants receive an order to leave.

<sup>14</sup> Leerkes and van Holte oppose the idea of the existence of a unique deportation regime. On the contrary, they elaborate four different categories to describe the different deportation regimes in Europe: ‘Thick enforcement regime’; ‘Hampered enforcement regime’; ‘Selective enforcement regime’; ‘Thin enforcement regime’. These enforcement regimes are based on the combined capacity and interest for each country to enforce deportation. Leerkes and Van Houte (n 12).

<sup>15</sup> See also Leanne Weber, Sigmund Book Mohn, Francesco Vecchio, Andriani Fili, ‘Beyond deportation: researching the control of outward mobility using a space of flows logic’ (2020) 20 *Global Network*, 65.

<sup>16</sup> Fabini (n 12).

<sup>17</sup> Giulia Fabini, ‘Internal bordering in the context of undeportability: Border performances in Italy’ (2020) 23(2) *Theoretical Criminology*, 175.

Yet, the local level is not the unique site that one should observe in order to understand the processes through which specific forms of migrants' 'illegality' and undeportability are produced. Neither can these forms of normativity be understood by limiting our perspective to the state level. In fact, sovereign power encounters limits in its attempt to regulate this field of border control. On the one hand, control efforts by states are continuously exceeded by the mobility of people crossing borders and their search for freedom and satisfaction; on the other hand, asylum systems, immigration policies and readmission agreements depend on the relations among sovereign states. Migrants' nationality is a key element to track the mechanisms of (il)legalisation and (un)deportation. The normative forms producing, acknowledging and regulating the physical presence of illegalised and undeportable migrants in urban spaces are the product of transnational legal and normative processes intersecting at the local level.

The specific forms of normativity that regulate and produce the illegalised and undeportable migrants as a political and legal subjectivity emerging in grounded contexts challenge 'a logic of law based on the principle of state sovereignty that aspires to universality'.<sup>18</sup> These forms of normativity raise some critical questions about the law when it comes to border control: On what scales does the law operate and produce effects? On what scales does the law possibly transform and evolve and who are the actors involved in such transformations? I will come back to these questions in my conclusions.

The aim of this article is to demonstrate that a translocal lens and a bottom-up approach focused on acts of resistance within the borders are essential for understanding the processes, actors, and scales of border control mechanisms in contemporary globalised contexts. To achieve this aim, I apply the theoretical concept of 'translocal legalities' to data from my previous research on illegalised and undeportable migrants and their encounters with the police in Bologna (Italy).<sup>19</sup> 'Translocal legalities' is a new theoretical concept elaborated by the Translocal Law Research Group,<sup>20</sup> defined in this Special Issue as 'emergent forms of normativity that are constituted through grounded encounters with local and transnational legal practices, discourses, subjectivities, and forms of resistance'.<sup>21</sup> This concept provides a theoretical and methodological lens from which to observe possible transformations of law *a*) occurring far from the traditional sites of legal production and *b*) developed from below, that is *c*) emerging from the interactions between local/translocal resistance and transnational legal processes.

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<sup>18</sup> Matthew Canfield, Julia Dehm and Marisa Fassi, 'Translocal legalities: Local Encounters with Transnational Law' (2021). *Transnational Legal Theory*.

<sup>19</sup> Fabini (n 17)

<sup>20</sup> The Translocal Law Research Group was initiated at the 2015 Transnational Law Summer Institute, King's College-London. Comprised of a group of early-career scholars, this collaborative research project seeks to interrogate the emergent socio-legal field of Transnational Law through the lens of social struggles in local contexts. It draws on a team of international researchers from different continents with interdisciplinary backgrounds in law, sociology, political science and anthropology.

<sup>21</sup> Canfield, Dehm and Fassi (n 18)

As explained by Canfield, Dehm and Fassi ‘understanding translocal legalities requires an engagement with legal pluralism, an empirical sensitivity and a critical commitment’.<sup>22</sup> The next three sections analyse each of these dimensions with the last section drawing some conclusions about the space for possible transformation.

## 2. Legal Pluralism and the transnational dimension of Border Control

As said, understanding of translocal legalities requires an engagement with legal pluralism—defined by Griffiths as the ‘the presence in a social field of more than one legal order’.<sup>23</sup> I here refer to legal pluralism in border control mechanisms as the presence of more than one legal and *normative* order in the same social field *traditionally delimited by nation-state borders*. Scholars in different disciplines have long considered the state as a yardstick to investigate borders. This article instead takes a different view, namely that in the functioning of border regime, an obvious element is legal pluralism.

A variety of legal and normative orders affects norm-making processes in the mechanisms of border control, producing different outcomes at the state and even local level. By engaging with the concept of legal pluralism as a starting point, I argue that 1) law regulating immigration is not just state law; 2) the national level is not the right place to analyse immigration control; and 3) transnational lens best suits the urgency to grasp the scalar dimension of increasingly expanding mechanisms of border control.

As Saskia Sassen argues, sociology has traditionally considered the state as the measure of empirical research and resisted the category of globalisation.<sup>24</sup> Similarly, much empirical research on borders focuses on state borders, paying attention to the construction of fences, checkpoints and militarised zones.<sup>25</sup> State stands at the centre of these analyses. Also valuable researches investigating the symbolic use of immigration laws often put the state at the centre of the analysis, by addressing how nation-states use immigration laws to reassert their sovereignty over their territory, at the time when that very sovereign power is challenged by other global forces.<sup>26</sup> These lines of research are of crucial importance to reveal the instrumental use that nation-states – and especially their governments - make of immigration laws and also of penal law to control borders and define membership.<sup>27</sup> I surely agree that at the nation-state level one can observe the material and symbolic use of immigration laws by governments in times of globalisation. However, the focus on nation-state does not tell the whole story about mechanisms of border control. Based on that, an emerging and growing literature

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<sup>22</sup> *Ibid*

<sup>23</sup> John Griffiths, ‘What is Legal Pluralism?’ (1986) 18(24) *The Journal of Legal Pluralism and Unofficial Law*, 1, 1

<sup>24</sup> Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press 2008).

<sup>25</sup> Cecilia Menjivar, ‘Immigration Law Beyond Borders: Externalizing and Internalizing Border Controls in an Era of Securitization’ (2014) 10 *The Annual review of law and social sciences*, 353.

<sup>26</sup> See for example Catherine Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press 2008).

<sup>27</sup> See for Juliet Stumpf JP, ‘The crimmigration crisis: Immigrants, crime, and sovereign power, (2006) 56 *American University Law Review* 367.

is looking at the transnational dimension of border control.<sup>28</sup> This article contributes to this debate from a socio-legal perspective. It investigates the operations of more than one legal and normative order in the mechanisms of border control. These legal and normative orders operate at different scales and produce specific effects in situated contexts.

As Eve Darian-Smith explains, the problem of scale becomes crucial for understanding the operation of laws.<sup>29</sup> Though, it is not an easy task to develop empirical methodologies for doing researches on the scalar dimensions of the plurality of legal and normative processes present in one social field. As Sassen argues, globalisation might be empirically investigated if one posits ‘that the global—whether an institution, a process, a discursive practice, an imaginary—both transcends the exclusive framing of national states and also partly emerges and operates within that framing’.<sup>30</sup> In line with Sassen, in the mechanisms of border control at the local level it is possible to observe the compresence and intersection of global, national, supra-national, regional, and local legal and normative processes.

According to Zumbansen, law and regulation have a transnational nature ‘always pushing against the various claims to legal unity and hierarchy made over time’.<sup>31</sup> The greatest utility of the term transnational is, indeed, to provide ‘a methodological space in which to make sense of the conditions that shape references to law or non-law in functionally highly differentiated contexts.’<sup>32</sup> Zumbansen defines transnational law as a ‘thought experiment in legal methodology and legal theory’, where ‘the line of thought is driven, partly, by the myriad of forms of regulatory innovation and interaction that illustrate the transformation of political sovereignty and rule-making in the larger process of globalization’.<sup>33</sup> In a sense, the methodology of transnational law must be understood as an attempt of legal thinking and legal inquiry to reposition law in the globalised and evolving structures of state and society. This kind of inquiry into law sheds light on the complex relationship between the law itself and the state in the era of globalisation, where the state is not the unique actor in producing legal effects in society.<sup>34</sup> Of particular note in Zumbansen’s theoretical and methodological proposal is that the centre of legal inquiry could be society rather than the state. The emerging idea of transnational law looks at the law as focused on actors, norms and processes, being produced and moving

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<sup>28</sup> Bridgette Anderson, ‘New directions in migration studies: towards methodological de-nationalism’, (2019) 36(7) *Comparative Migration Studies*; Vanessa Barker, ‘The criminalization of migration: A Regional Transnational Legal Order or the Rise of a Meta-TLO?’, in Gregory Shaffer and Ely Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge University Press, 2020) 154-175; Richard Staring and René van Swaaningen, ‘Borders, Mobilities, and Governance in Transnational Perspective’, *Oxford Research Encyclopedia of Criminology* (1 Nov. 2021), online <https://oxfordre.com/criminology/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-657>; Weber, Sigmund Book, Vecchio and Fili (n 15).

<sup>29</sup> Eve Darian Smith, *Laws and Societies in Global Contexts Contemporary Approaches* (Cambridge University Press, 2013).

<sup>30</sup> Saskia Sassen, ‘The global inside the national. A research agenda for sociology’ (2010) 1 *Sociopedia.isa*, 2.

<sup>31</sup> Peer Zumbansen, ‘Transnational Legal Pluralism’ (2010) *Comparative Research in Law & Political Economy. Research Paper No. 1/2010*, 9, online: <http://digitalcommons.osgoode.yorku.ca/clpe/70>.

<sup>32</sup> Zumbansen (n 31), 9.

<sup>33</sup> Peer Zumbansen, ‘Transnational law, evolving’, in Jan Smits (ed.) *Encyclopedia of Comparative Law (2nd ed.)* (Edward Elgar, 2012), 899-925, 899

<sup>34</sup> *Ibid*



beyond the borders of nation-state<sup>35</sup>. This article contributes by focusing on the role of and effects on actors of transnational legal pluralist mechanisms of border control. It does so using the concept of translocal legalities.

Deportation is an aspect of mechanisms of border control where the legal and normative processes display their transnational dimension with enough clarity.

Leerkes and van Houte talk of a “glocalised” deportation turn’, meaning that, ‘while there is a global trend toward more post-arrival enforcement’, the deportation turn ‘takes different forms, and has different consequences, depending on how it interacts with national and local contexts.’<sup>36</sup> One such possible example is the so-called Return Directive, aimed at harmonising all laws regulating removal procedures in each EU member state.<sup>37</sup> The Directive is a regional answer to the global trend toward deportation, it has been negotiated at the European level but implemented at the state level, leading to different results in different state contexts.<sup>38</sup> Leerkes and van Houte bear that, in spite of Return Directive’s attempt of harmonising the enforcement of deportation in each member country, there is considerable variation in the Deportation regimes operating in each state context, due to ‘context-specific domestic factors’.<sup>39</sup>

Nowadays, transit or origin countries participate in migration control, so that border control can occur beyond the state’s geographical border – something that has been referred to as externalisation of borders, or outsourcing of border control.<sup>40</sup> This is the case, for example, for visa procedures, or negotiations between receiving and transit countries – such as the agreement in 2017 between Italy and Libya, or that between EU and Turkey in 2016.<sup>41</sup> Scholars studying borders from different disciplines have observed for a number of years how border practices have operated not just at the physical and territorial borders, but beyond them.<sup>42</sup>

Bilateral readmission agreements between countries of arrival and countries of origin affect the actual implementation of deportation at the state level. In fact, the level of deportation risk for third-country nationals

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<sup>35</sup> *Ibid*

<sup>36</sup> Leerkes and Van Houte (n 12), 320.

<sup>37</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008L0115>

<sup>38</sup> Karin Zwaan, *The Returns Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Legal Publishers, 2011).

<sup>39</sup> Leerkes and Van Houte (n 12), 319.

<sup>40</sup> Cecilia Menjivar, ‘Immigration Law Beyond Borders: Externalizing and Internalizing Border Controls in an Era of Securitization’ (2014) 10 *The Annual review of law and social sciences*, 353.

<sup>41</sup> Jenny Poon, ‘A legal pluralist approach to migration control: Norm compliance in a globalized world’ (2020) 34 *Emory National Law Review*, 2037.

<sup>42</sup> See, among others, Didier Bigo and Elspeth Guild, ‘Policing at a distance: Schengen visa policies’ in Didier Bigo and Elspeth Guild (eds) *Controlling Frontiers: Free Movement Into and Within Europe* (Ashgate, 2005), 233; Katja Franko, ‘The Ordered and the Bordered Society: Migration Control, Citizenship, and the Northern Penal State’, in Katja Franko and Mary Bosworth (eds) *The borders of punishment: Migration, Citizenship and social exclusion* (Oxford University Press, 2013) 21-36; Alice Riccardi and Tommaso Natoli, ‘Borders and International Law: Setting the Stage’. In Tommaso Natoli and Alice Riccardi (eds) *Borders, Legal Spaces and Territories in Contemporary International Law* (Springer, 2019) 1-20; Eva Magdalena Stambøl, ‘Borders as penal transplants: Control of territory, mobility and illegality in West Africa’ (2021) 25(3) *Theoretical Criminology*, 474; Leanne Weber and Sharon Pickering, *Globalization and Borders: Death at the Global Frontier* (Palgrave, 2011).

in each EU member state depends on what readmission agreement has been agreed upon between the countries of origin and arrival.<sup>43</sup> As observed by Broeders, a ‘deportation gap’ may occur when deportee cannot return to their countries of origin due to lack of agreements.<sup>44</sup> In turn, readmission agreement depend on international relations among states, challenging the principle of the sovereign state. In fact, deportation cannot be operated unilaterally.<sup>45</sup> The dependence of domestic control upon other state actors has been highlighted with regards to pre-removal detention,<sup>46</sup> but also with regards to, more broadly, the processes of criminalisation of migration. In fact, As noticed by Katja Franko, ‘situating contemporary crime control within a broader context of international relations’ is important because it reveals how ‘global inequalities are inscribed into (domestic) crime control and criminalization patterns’ and ‘they in turn reinforce and reify these inequalities’.<sup>47</sup> Franko sees immigration control as a vantage point for relocating punishment—traditionally located at the national level—in the global sphere, and invites ‘a reflection on questions of scale when it comes to issues of criminalization and crime control’,<sup>48</sup> given that analysing penalty through only national perspectives may prevent deeper understanding of global phenomena taking place at national level.

Alongside formal agreements, a whole system of ‘administrative arrangements, bilateral deals and exchanges of letters and memoranda of understanding as an alternative to formal readmission agreements’ is in place.<sup>49</sup> Pijnenburg, Gammeltoft-Hansen and Rijken point at a change in these kinds of agreements between states. The role of the countries of Global North seems to have softened and to be limited for example to training, giving instruments of control, or funding, for example detention facilities. These resources provide some problems on a legal level and put in question the legality of these pacts as for example with regard to the push backs and the necessary respect of the *non-refoulement* principle: it is not clear who is responsible for specific violation of rights.<sup>50</sup> In the context of this article, what I would like to underline is the effect that these agreements have on the undocumented migrants in receiving countries: their level of undeportability will be

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<sup>43</sup> The selectivity of the ‘deportation machine’ regarding migrants’ nationality has been convincingly demonstrated by Jose Angel Brandariz and Cristina Fernandez-Bessa for the case of Spain, which embraced a managerial attitude towards deportation following the economic crisis. José Angel Brandariz-Garcia and Cristina Fernandez-Bessa, ‘The Managerial Turn: The Transformation of Spanish Migration Control Policies since the Onset of the Economic Crisis’ (2018) 56(2) *The Howard Journal of Crime and Justice*, 198.

<sup>44</sup> Dennis Broeders, ‘Return to sender? Administrative detention of irregular migrants in Germany and the Netherlands’ (2010) 12(2) *Punishment and Society* 169.

<sup>45</sup> Antje Ellermann, ‘The limits of unilateral migration control: deportation and inter-state cooperation’ (2008) 43(2) *Government and Opposition* 168

<sup>46</sup> Bosworth writes that in pre-removal detention ‘the coercive nature of state power’ is ‘imbricated in and subverted by its dependence on other state actors and NGOs’. See May Bosworth, ‘Can Immigration Detention Centres be Legitimate? Understanding Confinement in a Global World’, in Katja Franko and Mary Bosworth (eds) *The Borders of Punishment Migration, Citizenship, and Social Exclusion* (Oxford University Press, 2013), 149–165, 159

<sup>47</sup> *Ibid.*, 22.

<sup>48</sup> *ibid*

<sup>49</sup> See Jean-Pierre Cassarino, ‘Informalising Readmission Agreements in the EU Neighbourhood 42(2) *The International Spectator*, 179, 180; See also Patrick Muller and Peter Słominski ‘Breaking the legal link but not the law? The externalization of EU migration control through orchestration in the Central Mediterranean’, (2021) 28 *Journal of European Public Policy*, 801.

<sup>50</sup> Annick Pijnenburg, Thomas Gammeltoft-Hansen and Conny Rijken, ‘Controlling migration through International cooperation’ (2018) 20 *European Journal of Migration and Law*, 365, 369.

affected by these agreements via their nationalities. Therefore, such cooperation agreements enter into our understanding of the transnational lenses to be used to understand mechanisms of border control.

Surveillance technologies also play a role in the transnational dimension of border control. At the regional level, large scale databases such as EURODAC and SIS affect the enforcement of immigration laws at the state level: they represent the Europeanisation of border control.<sup>51</sup> And this is also true for the European Agencies operating at the EU borders to control them, namely Frontex (European Border and Coast Guard Agency),<sup>52</sup> but also to help managing asylum procedures, namely Easo (European Asylum System Agency).<sup>53</sup>

The ‘exchanges of information, and the development of common manuals in the European Union’<sup>54</sup> might be also included among the tools of border control operating beyond the state borders.

The transnational lens invites us to pay attention also to the space through which ideas circulate. Just as people, goods and money move across borders, so too do ideas, theories, and laws – or, better, legal approaches – and the legal cultures behind them. Edward Said first introduced the metaphor of ‘traveling theory’,<sup>55</sup> pointing at how theories move across different contexts, while being embedded in cultural practices, long historical processes, and power struggles in those contexts.<sup>56</sup> The ‘criminal question’<sup>57</sup> travels as well and in the process of travelling is translated to local circumstances.<sup>58</sup> In fact, as stated by Melossi, Sozzo and Sparks, punishment ‘cannot be conceived separately from the historical evolution and development of the larger setting of social action within which they have emerged - a setting constituted also through given cultural traditions’.<sup>59</sup> Therefore, if it is true that a punitive turn has occurred in various countries of the Global North and South to be ‘tough on crime’,<sup>60</sup> one should also consider the possibility that such an approach changes its meaning and implications in the course of its journey and translation into the local context. Similarly, a punitive

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<sup>51</sup> See Dennis Broeders, ‘A European “Border” Surveillance System under Construction’ in Huub Dijstelbloem and Albert Meijer (eds) *Migration and the New Technological Borders of Europe* (Palgrave Macmillan, 2011); Valeria Ferraris, ‘Border control: a new frontier for automated decision making and profiling?’ in Niklas Creemers, Daniel Guagnin and Bert-Jaap Koops (eds) *Profiling Technologies in Practice Applications and Impact on Fundamental Rights and Values* (Wolf Legal Publishers, 2015), 89; Evelien Brouwer, ‘Large-Scale Databases and Interoperability in Migration and Border Policies: The Non-Discriminatory Approach of Data Protection’ (2020) 26(2) *European Public Law*, 71.

<sup>52</sup> <https://frontex.europa.eu/>

<sup>53</sup> <https://www.easo.europa.eu/>

<sup>54</sup> Cecilia Menjivar, ‘Immigration Law Beyond Borders: Externalizing and Internalizing Border Controls in an Era of Securitization’ (2014) 10 *The Annual Review of Law and Social Sciences*, 353, 358.

<sup>55</sup> Edward Said, ‘Traveling Theory’ in Edward Said, *The World, the Text, and the Critic* (Harvard University Press, 1983), 226.

<sup>56</sup> Claudia De Lima Costa, ‘Introduction to debates about translation/lost (and found?) in translation/feminisms in hemispheric dialogue’ in Sonia Alvares et al. (eds) *Translocalities/Translocalidades. Feminist Politics of Translation in the Latin/a Americas* (Duke University Press, 2014).

<sup>57</sup> Criminologists use the concept of ‘criminal question’ in order to consider crime ‘not independently from the procedures by which it is defined, the instruments deployed in its administration and control and the politics and debates around criminal justice and public order’. Tamar Pitch, *Limited Responsibilities* (Routledge, 1995), 52.

<sup>58</sup> Dario Melossi, Maximo Sozzo and Richard Sparks, *Travels of the Criminal Question: Cultural Embeddedness and Diffusion* (Hart Publishing, 2011).

<sup>59</sup> *Ibid.*, 4.

<sup>60</sup> See for example Loic Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Duke University Press, 2009).

turn also occurred in the field of border control and immigration laws.<sup>61</sup> Dowling and Xavier Inda talked about ‘governing immigration through crime’,<sup>62</sup> to address the move towards the use of criminal or semi-criminal tools to manage migration.<sup>63</sup> However, similarly to the ‘travelling’ of the ‘criminal question’, scholars in border criminology have shown that ‘cimmigration law’<sup>64</sup> has been translated differently in each European state.<sup>65</sup> In the case of Italy, as stated by Ambrosini, the criminalisation of migrants ‘matters more in declared than in actual policies; more in legislation than in everyday governance; more for certain categories of migrants, and in some circumstances, less for others and in different circumstances’.<sup>66</sup>

Nevertheless, the diffusion of ideas and legal approaches is not a one-way process. Also people move between localities and contribute to circulation of ideas. Alvarez et al address the way in which people move between localities through the concept of translocalities/translocalidades.<sup>67</sup> As explained by Porst and Sakdapolrak, ‘[t]he concept of translocality seeks to provide a frame to understand mobility, peoples’ embeddedness while being mobile, and how mobile and immobile actors (re-)produce connectedness and thereby reshape places’.<sup>68</sup> These practices ‘are not only considered multi-sited but also multi-scalar’.<sup>69</sup> Alvarez’s use of the concept involves ‘multidirectional crossing and movements’ even across borders, many of which ‘emotionally, materially, and physically costly, often dangerous, and increasingly perilous’, and with the effect of ‘always reposition[ing] and transform[ing] subjectivities and worldviews’.<sup>70</sup>

In this section I have discussed the multifaceted transnational dimension of the legal and normative processes involved in deportation practices. In the next section, I will focus on the site-specific effects of grounded encounters of illegalised and undeportable migrants with these transnational legal and normative processes.

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<sup>61</sup> David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2002)

<sup>62</sup> Jonathan Simon coined the famous concept of ‘governing through crime’ to stress the contemporary governmental trend to deal with social issue as they were criminal issues. Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford University Press 2009)

<sup>63</sup> Julie A. Dowling and Jonathan Xavier Inda, *Governing Immigration Through Crime. A Reader* (Stanford University Press, 2013)

<sup>64</sup> The merging of immigration law and criminal law was first theorized by Juliet Stumpf. See Stumpf (n 27).

<sup>65</sup> Robert Koulis and Maartje van der Woude (eds) *Crimmigrant nations. Resurgent nationalism and the closing of borders* (Fordham University Press, 2020); Vanessa Barker, Johanne van der Leun and Maartje van der Woude, ‘Cimmigration in Europe’ (2017) 14(1) *Special Issue of the European journal of Criminology*.

<sup>66</sup> Maurizio Ambrosini, ‘From “illegality” to tolerance and beyond: Irregular immigration as a selective and dynamic process’ (2016) 54(2) *International Migration* 144, 154.

<sup>67</sup> Sonia Alvarez et al. (eds) *Translocalities/Translocalidades. Feminist Politics of Translation in the Latin/a Americas* (Duke University Press 2014)

<sup>68</sup> Luise Porst and Patrick Sakdapolrak, ‘How scale matters in translocality: uses and potentials of scale in translocal research’ (2017) 71(2) *Erdkunde* 111, 112

<sup>69</sup> *Ibid*

<sup>70</sup> Sonia E Alvarez E, (2014) ‘Introduction to the project and the volume/enacting a translocal feminist politics of translation’ in Sonia Alvarez et al. (eds) *Translocalities/Translocalidades. Feminist Politics of Translation in the Latin/a Americas* (Duke University Press 2014), 1-18, 2.

### 3. Empirically assessing grounded translocal Encounters between Migrants and the Police in Bologna

Investigating the legal pluralism of bordering practices that take place at the translocal level requires a strong engagement with empirical sensitivity. If it is true that immigration law is state law, then it is also true that the processes through which illegalised and undeportable migrants are produced as legal subjectivities in one given local context do not just take place at the state level. As this section demonstrates, illegalised and undeportable migrants are the product of legal and normative processes occurring at the intersection of the local, state, regional and supra-national level.

The national context of the present research is Italy and the local context is one of its Northern cities, Bologna. Out of a population of about 60 million inhabitants, 5,039,637 foreign residents resided in Italy in 2020, with 3,615,826 of those residents hailing from non-EU states, predominantly from Morocco, Albania, China, Ukraine, Philippines, India, Bangladesh, Egypt, Pakistan.<sup>71</sup> In 2015, the arrival of about 1 million people seeking asylum mainly through Italy, Greece, and Hungary, led to the tightening of controls at the outer European borders and at the intra-national borders within Europe. Migration continued as migrants found new strategies to evade barriers to entry – sometimes literally walls and fences - erected by nation-states to stop them. For example, they change routes, or organise self-managed camps with the help of local activists and humanitarian organisations,<sup>72</sup> or find a way to remain in the places of arrival, avoiding deportation. The more difficult it becomes for migrants to immigrate, the more they will resist once they have arrived, in order to avoid seeing their migratory project fail. As H, a Syrian migrant, whom I interviewed in 2015, explained, in time of crisis ‘arriving here is already a life goal’. Therefore, migrants try to remain even when living conditions become unpleasant. Bologna is a city of less than 400,000 inhabitants in Northern Italy, and foreign citizens amount to around 15 percent of the population.<sup>73</sup> Far from Italy’s borders, that is to say from Europe’s external borders, Bologna is a way station for migrants arriving in Italy and willing to reach other countries in Northern Europe; but it is also a place where migrants come to live and find a job even in the black labour market. One of the detention centres for unauthorised migrants in Italy operated in Bologna between 2002 and 2013.

Between November 2013 and May 2015 I interviewed 36, mainly male, migrants who had been living in Bologna for at least two years, most of whom had arrived from Senegal and Morocco.<sup>74</sup> In addition, in order to understand the state’s role in addressing migration, I conducted part of my research at the Office of the

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<sup>71</sup> [www.istat.it/it/archivio/249445](http://www.istat.it/it/archivio/249445)

<sup>72</sup> For example, famous self-organized camps were the “Jungle” in Calais, France, or “La Bolla” in Ventimiglia, Italy, where migrants wait for an occasion to cross the border and reach the countries in Northern Europe, where it is easier that asylum is granted, or where their relatives live. See Luca Queirolo Palmas, ‘Tra le macerie della Jungle di Calais. Reperti da una battaglia’ (2017) 10(3) *Emografia e ricerca qualitativa*, 453.

<sup>73</sup> See ‘Cittadini stranieri Bologna 2021’, online: [www.tuttitalia.it/emilia-romagna/32-bologna/statistiche/cittadini-stranieri-2021/](http://www.tuttitalia.it/emilia-romagna/32-bologna/statistiche/cittadini-stranieri-2021/); ‘I numeri di Bologna metropolitana’ <http://inumeridibolognametropolitana.it/cittadini-stranieri-bologna>

<sup>74</sup> The migrants who I interviewed were unauthorised at the time of the interview or had been unauthorised before. Most of them were from Senegal and Morocco, but I also interviewed Tunisians, Pakistanis, Indians, Chinese, Cubans, Egyptians and Syrians. Unfortunately, only two women are part of the sample. All interviewees were between 20 and 40 years old. The Data was collected in cycles dating from January to February 2011; from November 2013 to June 2014; and from January to May 2015.

Justice of the Peace (JoP). The JoP oversees police decisions in controlling migration by acquitting or convicting migrants for immigration crimes, and validating immigration detention and deportation orders. I spent seven months observing trials of immigration crimes, interviewing four JoPs and analysed files on validation hearings, immigration crimes and validation decisions over detention in Bologna.<sup>75</sup> These various sources have been used to triangulate information collected through interviews.

By using the lens of *translocal legalities*, I examine encounters of migrants and the police in Bologna in order to shed a different light onto the different levels (local, national, supra-national, regional) at which legal and normative orders participate in internal bordering mechanisms. According to this perspective, interactions between migrants and police become ‘grounded encounters with transnational legal claims, norms, and technologies of governance’ occurring in ‘situated contexts in which different forms of legality encounter one another and circulate into new contexts’.<sup>76</sup> Through an empirical assessment of translocal legalities in the field of border control, I show how these encounters challenge ‘a notion of law based on the logic of sovereign authority that aspires to universality’,<sup>77</sup> while opening up new spaces of possible governance. In other words, the illegalised and undeportable migrants acting as translocal legal subjectivities are able to change the functioning of normative systems through their very existence as mobile subjects.

Using the legal pluralist lens *and* empirical sensitivity the next three sub-sections provide some examples grounded in situated contexts of three components of the transnational mechanisms of border control: *Processes of illegalisation, Undeportability, Visibility/invisibility*. I show not only how the specific subjectivities of the illegalised and undeportable migrants in Bologna are produced at the intersection of different legal and normative processes, but also identify potential transformations of the normative systems regulating the presence of these migrants in the local context.

### **3.1. Processes of Illegalisation**

In Italy, it is difficult to escape migration status and to obtain Italian citizenship, to such an extent that the majority of non-European migrants are long term residents (1,496,772 in 2020).<sup>78</sup> However, maintaining legal authorisation to remain in Italy is not an easy task, and ‘legal migrants’ time and again risk undergoing various processes of illegalisation. For example, the humanitarian protection (which was the protection most commonly granted to asylum seekers in Italy) was abolished in 2018 in Italy by the former rightist Minister of

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<sup>75</sup> I analysed 130 files on validation hearings (in 2013 and in 2015), 50 files on immigration crimes (2013), and about 1200 files of validation decisions over immigration detention in Bologna (2011-2013). The analysis of files was part of a broader research project on the jurisprudence of the Justices of the Peace (JoP) in migration matters in Italy comparing five different urban contexts (Milan, Turin, Bari, Florence, Bologna). See Fabrizio Mastromartino, Enrica Rigo and Maurizio Veglio, ‘Lexilium. Osservatorio sulla giurisprudenza in materia di immigrazione del Giudice di Pace: sintesi rapporti 2015’ (2017) 2 *Diritto immigrazione e cittadinanza*, <https://www.dirittoimmigrazionecittadinanza.it/allegati/lexilium/84-sintesi-ricerca/file>.

<sup>76</sup> Canfield, Dehm and Fassi (n 18)

<sup>77</sup> Ibid

<sup>78</sup> According to ISTAT (Italian National Institute of Statistics), the total number of non-European residents in 2020 was 2,433,854. See Table 21.1.5 online, <https://www.istat.it/it/archivio/262806>

the Interior, Matteo Salvini.<sup>79</sup> Such change in the national legal framework resulted in higher percentages of asylum seekers being denied protection.<sup>80</sup> Additionally, refugees who had been granted a humanitarian visa for a limited period of time (between 6 months and 2 years), did not have the possibility to renew it when expired, and not all of them were able to turn it in a permit for working reasons (which was permitted by the law, but very difficult to obtain). In 2018, according to the estimates, the number of unauthorised migrants in Italy stood at 533,000, 8.6 per cent more than the previous year.<sup>81</sup>

The processes of illegalisation do not depend only on national legislation. The legal categories into which migrants are channelled upon entry, such as “economic migrants”, “asylum seekers”, “tourists”, “family members”, “illegal migrants”, and so on, are the effects of immigration policies and how they are implemented. Complex political relations among nation-states play a role in such categorisation. Several authors have shown that migrants’ nationality intersecting with class, race and gender, determines the chances of being channelled into the different categories.<sup>82</sup> As a matter of fact, international relations influence domestic control via not only deportation but also immigration policies.

By looking at the grounded encounters at the local level between translocal resistance and these transnational legal processes of illegalisation, it emerges the malleability of legal categories *and* of the meanings, constraints and possibilities associated with such legal categories in situated contexts. For example, how Italy managed the arrival of ‘asylum seekers’ at the beginning of the ‘refugees’ crisis’ in 2014/2015 is a paramount example of such malleability.

Up until the economic crisis of 2008, the most common way to migrate to Italy had been as a migrant worker. Immigration laws were used to link the resident permit to a working contract, so that the loss of the latter caused the loss of the former. “Illegality” was a circular status, not a permanent condition, and illegalised

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<sup>79</sup> A similar form of protection, now called Special protection, has been re-introduced at the end of 2020. The permit for Special Protection was introduced with changes to art. 19 of the Consolidation Act on Immigration no. 286/1998 introduced by the Decree-Law n. 130/2020, converted with amendments into the Law n. 173/2020. See Nazzarena Zorzella, ‘La nuova protezione speciale introdotta dal d.l. 130/2020. Tra principio di flessibilità, resistenze amministrative e problematiche applicative’ (2021) 2, *Diritto, immigrazione e cittadinanza*, online: <https://www.dirittoimmigrazione cittadinanza.it/archivio-saggi-commenti/saggi/fascicolo-n-2-2021-1/763-la-nuova-protezione-speciale-introdotta-dal-d-l-130-2020-tra-principio-di-flessibilita-resistenze-amministrative-e-problematiche-applicative>.

<sup>80</sup> In fact, international protection was denied in the first instance in 60% of cases in 2016, 57% in 2017, 67% in 2018, 81% in 2019. Data from Italian Minister of the Interior – Dipartimento per le Libertà Civili e l’immigrazione. Data from ‘*Quaderno statistico dal 1990 al 2020*’, online: [http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/quaderno\\_statistico\\_per\\_gli\\_anni\\_19\\_90\\_2020.pdf](http://www.libertaciviliimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/quaderno_statistico_per_gli_anni_19_90_2020.pdf)

<sup>81</sup> The estimates about numbers of undocumented migrants present in Italy yearly are taken from the annual reports by Fondazione ISMU (n 6)

<sup>82</sup> Jose Angéł Brandariz and Cristina Fernández-Bessa, ‘A Changing and Multi-scalar EU Borderscape: The Expansion of Asylum and the Normalisation of the Deportation of EU and EFTA Citizens’ 2020 9(3) *International Journal for Crime, Justice and Social Democracy* 21; Valeria Ferraris, *Immigrazione e criminalità. Teorie, norme e rappresentazioni* (Carocci Editore, 2021), ch.1; Ioana Vrăbiescu, ‘Devised to punish: Policing, detaining and deporting Romanians from France’ (2021) 18(4) *European Journal of Criminology*, 585; Nancy Wonders, ‘Global flows, semi-permeable borders and new channels of inequality’, in Sharon Pickering and Leanne Weber (eds) *Borders, mobility and technologies of control* (Springer, 2006), 63–86.

migrants were overstayers or former workers.<sup>83</sup> However, between 2014-2018, crossing borders as an ‘asylum seeker’ became an increasingly popular way to immigrate to Italy.<sup>84</sup> Many of the people seeking asylum were eventually categorised as ‘economic migrants’, granted no protection, and, thus, turned into ‘illegalised migrants’ to be supposedly deported. The first categorisation as either ‘economic migrant’ (to be removed) or ‘asylum seekers’ (to be welcomed in the Italian reception system) took place in the *Hotspots*.<sup>85</sup> These are centres for the first reception of people seeking asylum arriving by sea, established in Greece and Italy in May 2015, via the *European Agenda on Migration*.<sup>86</sup> Two other administrative documents – *Italy’s Roadmap* in September 2015<sup>87</sup> and the *Standard Operation Procedures* in March 2016<sup>88</sup> – defined the operational procedures to be carried out in the facilities.<sup>89</sup> In the Hotspots, incoming migrants undergo medical screening, pre-identification, EURODAC registration and photo fingerprinting. The Hotspot teams are composed by Italian and European agencies, namely Italian police, Frontex, EASO,<sup>90</sup> EUROPOL<sup>91</sup>. The procedures behind the categorisation either as ‘economic migrant’ or ‘asylum seeker’ are not crystal clear,<sup>92</sup> but some researchers have identified the migrants’ nationality to be the – informal – principal vector of the decision.<sup>93</sup> In this way, the domestic policies of migration control not only depend on European and Italian legislation and policy, but they display a transnational dimension: they are also (and again) linked to the international relations among states, they are decided at the local level (in the hotspots), with the participation of national (Italian police and, later, Italian courts) and regional (Frontex, EASO, EUROPOL) actors, they answer to pressures coming from the European Union, and to migrants’ mobility across borders.<sup>94</sup> Thus, legal status when applied to migrant

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<sup>83</sup> Kitty Calavita, *Immigrant at the margins. Law, race and exclusion in Southern Europe* (Cambridge University Press, 2005)

<sup>84</sup> Luca Ciabbari, *L’imbroglio mediterraneo. Le migrazioni via mare e le politiche della frontiera* (Raffaello Cortina editore, 2020)

<sup>85</sup> Giulia Fabini, Omid Firouzi Tabar and Francesca Vianello, *Lungo i confini dell’accoglienza. Migranti e territori tra resistenze e dispositivi di controllo* (Manifestolibri, 2019)

<sup>86</sup> The European Agenda on Migration can be consulted online: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1485255362454&uri=CELEX:52015DC0240>.

<sup>87</sup> <https://www.statewatch.org/media/documents/news/2015/dec/no-279-Italian-Road-Map-2015.pdf>.

<sup>88</sup> [http://www.libertacivilimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/hotspots\\_sops\\_-\\_english\\_version.pdf](http://www.libertacivilimmigrazione.dlci.interno.gov.it/sites/default/files/allegati/hotspots_sops_-_english_version.pdf).

<sup>89</sup> There are four Hotspot facilities in Italy, all of them are in the Southern Italy: Trapani, Pozzallo, Taranto, Lampedusa.

<sup>90</sup> European Asylum Support Agency, online: <https://www.easo.europa.eu/>

<sup>91</sup> European Union’s law enforcement agency, online: <https://www.europol.europa.eu/>

<sup>92</sup> The *Foglio Notizie* is key element in the first categorization of incoming migrants. The *Foglio Notizie* is a pre-printed form with a migrant’s personal information and a list of pre-established reasons for migrating: work, family reunification, escape poverty, other, asylum. Migrants will be categorized as asylum seeker only if they chose ‘asylum’ as the reason to migrate. Yet, they are not given clear information about the procedures and the consequence of their choice, and in a language that they do not necessarily understand; sometimes the choice has even to be made in the traumatic moments just after disembarkation, when still at the ports. See the reports by Amnesty International, ‘Hotspot Italy. How EU’s flagship approach leads to violations of refugee and migrant rights’ (2016), online: <https://www.amnesty.org/en/documents/eur30/5004/2016/en/>.

<sup>93</sup> Francesco Ferri, ‘Cosa può un hotspot’ in Giulia Fabini, Omid Firouzi Tabar and Francesca Vianello (eds) *Lungo i confini dell’accoglienza. Migranti e territori tra resistenze e dispositivi di controllo* (Manifestolibri 2019), 63; Carlo Caprioglio, Francesco Ferri and Lucia Gennari, ‘Detention and Selection: An Overview of the Italian Hotspot System’ (2018) *Border Criminologies Blog* (University of Oxford), online: <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/04/detention-and>.

<sup>94</sup> For the European Union’s influence on the creation of Hotspot approach in Italy, see Giuseppe Campesi, ‘The Reinvention of Immigration Detention in Italy in the Aftermath of the “Refugee Crisis”: A Study of Parliamentary Records (2013–2018)’ (2020) 39(3) *Refugee Survey Quarterly*, 381.



has a malleable character with different categorisations resulting from mechanisms operating at different scales and intersecting at the local level.

However, also the meanings, constraints and possibilities that a legal category acquires in practice often depends on the grounded translocal encounters between migrants and the police in a situated context.

During the refugee crisis, the arrival of newcomers in Bologna had a paradoxical effect. The migrants I was able to interview shared the perception that, given the high number of refugees and asylum seekers crossing the city to reach the Northern countries in summer 2015, the police preferred to ignore them rather than enforce immigration laws.<sup>95</sup> The migrants who I interviewed in June-September 2015 perceived police controls as less frequent than before:

Now that so many migrants arrived, they find it more difficult to check on everybody and [to] have the whole situation under control.<sup>96</sup>

As a matter of fact, for a few months, the Italian government chose to adopt *laissez-passer* politics and embraced tactics of just letting the ‘transient’ migrants move across Italy in order to reach other countries in Northern Europe where they could ask for international protection.<sup>97</sup> If Italian police stopped the transient migrants on their way to Northern countries, those migrants would immediately turn into ‘asylum seekers’ and, as a result, would be trapped in Italy, where they would be forced to seek protection according to the Dublin system.<sup>98</sup> In this sense, one of the justices of the peace, interviewed in the summer of 2014 (immigration flows through Italy had already enormously increased), said:

Now, no more illegal migrants [*clandestini*] are arriving, refugees are. Once refugees arrive, police do not control anymore, because, otherwise, all the refugees would turn into illegal migrants [*clandestini*] again.<sup>99</sup>

This quote demonstrates the malleability of legal categories not just by those subject to them but also by those tasked with controlling migrants. Just as the police make an instrumental use of the law to respond to urgent and practical issues they may face during patrolling activity,<sup>100</sup> so too the legal categorisations concerning migration might be instrumentalised by the police at the local level to manage a specific situation.<sup>101</sup>

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<sup>95</sup> This is confirmed by other empirical researches. See Weber, Sigmund Book, Vecchio and Fili (n 15)

<sup>96</sup> Interview with A, illegalised migrant from Senegal living in Bologna. Interview on file with author.

<sup>97</sup> Barbara Pinelli, ‘Control and abandonment: The power of surveillance on refugees in Italy, during and after the Mare Nostrum operation’ (2017) 50(3) *Antipode*, 725; Weber, Sigmund Book, Vecchio and Fili (n 15)

<sup>98</sup> See for more detail Alessandra Sciarba, ‘Categorizing migrants by undermining the right to asylum. The implementation of the “hotspot approach” in Sicily’ (2017) 1 *Etnografia e ricerca qualitativa*, 97.

<sup>99</sup> Justice of the Peace in Bologna, interview is on file with author.

<sup>100</sup> Egon Bittner, *The Functions of the Police in Modern Society. a review of background factors, current practices, and possible role models* (National Institute of Mental Health, Center for studies of crime and delinquency, 1970).

<sup>101</sup> See for example Paul Mutsaers, ‘An ethnographic study of the policing of internal borders in the Netherlands. Synergies Between Criminology and Anthropology’ (2014) 54 *British Journal of Criminology*, 831; Leanne Weber, *Policing Non-Citizens* (Routledge, 2013); Ana Aliverti, *Policing the borders within* (Oxford University Press, 2021)

The point here is that the discretionary decisions made by the police at the local level, which have an impact on the border regime, depend on the fact that they are called to respond to phenomena originating at a higher scale: On the one hand the phenomena originate from the choices of migrants to move from their countries of origin, and on the other hand from the transnational legal processes of illegalisation that I described above: not only European and state laws and policies are involved in the processes of illegalisation; ‘illegality’ is also linked to migrants’ nationality. The quote also shows that in the attempt to avoid newcomers from seeking asylum in Italy police softened control on the entire population of migrants living in Bologna. For a short period, the arrival of huge number of newcomers and transient subjects provided all illegalised migrants in the city with an enhanced possibility to negotiate with the police the informal rules of their staying, due to the reduced likelihood of being stopped and denounced. This migration event showed not only the malleability of legal categories and the transnational dimension of the legal and normative processes involved in the state’s attempt to control borders, but also the role of border-crossers to resist and cope with the system. As the under-enforcement of border control during the ‘Refugees’ crisis” shows, migrants themselves have an impact on the actual implementation of EU and domestic laws and policies.

In describing the processes of illegalisation, In this sub-section I demonstrated how elements operating at the national, supranational and local levels, from the bottom-up and from the top-down, coexist and may intersect in peculiar ways at the local level, in grounded encounters between border crossers and border agents, producing specific ‘illegalities’ in specific contexts.

### ***3.2. Undeportability***

Despite the pervasive processes of illegalisation, the number of annual deportations remain low in Italy. Of the migrants who returned to their country of origin following an order to leave from Europe in 2018, 5,615 were from Italy, compared to 29,055 from Germany, 15,445 from France, 11,800 from Spain, 8,830 from Netherlands.<sup>102</sup> In essence, migrants were not deported even after becoming illegal. Therefore, what happens in a local context when migrants remain illegally and are not deported? How do they cope with the system? What forms of governance emerge from the interactions between them and the agencies of control that need to find alternatives to deportation in order to manage the illegalised migration?

The translocal encounters between illegalised migrants and the police in Bologna are possible because of the context of undeportability.<sup>103</sup> Undeportability is a structural and contingent situation, which has to do with a variety of material and structural limitations of the deportation regime, occurring at the local, state, supra-national, and regional level. Alongside the general context of illegalisation procedures, these limitations include: the limited number of available places in Italian detention centres,<sup>104</sup> which leaves the police with no

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<sup>102</sup> Eurostat (n 9)

<sup>103</sup> Fabini (n 17)

<sup>104</sup> The number of places in immigration detention in Italy is very limited: 471 in 2014, 413 in 2015, 359 in 2016, 486 in 2017, 704 in 2019. Source are data from the Minister of Interior. These data are published on a yearly basis in the annual report of the National guarantee for the Rights of people deprived of liberty, online: [www.garantenazionaleprivatiliberta.it/gnpl/it/pub\\_rel\\_par.page](http://www.garantenazionaleprivatiliberta.it/gnpl/it/pub_rel_par.page).

choice but to select among illegalised migrants those to stop, possibly prosecute and rarely detain; the political orientation of the government bodies, both at the local and national level; the lack of funds for the efficient implementation of deportation,<sup>105</sup> and the fact that the general police – at least when far from external borders – regard immigration control as lying outside of their duties – as it was ‘rubbish work’.<sup>106</sup> The impossibility to deport is also the effect of the limited efficacy of the few readmission agreements between Italy and the countries of origin<sup>107</sup>. In fact, as one of the justices of the peace explained, some migrants were detained for several months in Bologna’s detention centre but were ultimately not removed because of their nationality:

There were collaborative and non-collaborative states. There has been a time when Tunisia and Morocco, but especially Tunisia, collaborated when the Italian government were covering the costs of repatriation, they [Tunisian Consul] used to arrive [in the detention centre], and take them all [Tunisians citizens] home. The consul used to arrive and board full flights... Nigerians never collaborated.<sup>108</sup>

The nationality of migrants is an important variable for successful deportation. According to the data I collected in Bologna’s detention centre related to the years 2011-2013, Tunisian and Moroccan migrants would spend shorter periods in detention centres before deportation, especially Tunisians.<sup>109</sup> On the contrary, Nigerians would spend longer periods in detention prior to possible deportation: as the Justices of the peace in the excerpt above, Nigeria has never been a ‘collaborative state’<sup>110</sup>, meaning that Nigeria is very slow to document its Nationals. This does not happen only in the Italian case. In the case of UK, other states show sluggishness of documenting their Nationals, like China and India, or are in no position to identify their citizens, such as Somalia or the Democratic Republic of Congo, resulting in long-term detentions.<sup>111</sup> In this sense, the degree of deportability varies with nationality. The international relations between states affects the likelihood of

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<sup>105</sup> Leerkes and van Houte have categorized Italy as a state with a thin deportation machine. Leerkes and van Houte (n 12)

<sup>106</sup> David Sausdal, ‘Everyday policing: toward a greater analytical appreciation of the ordinary in police research’ (2021) 31 *An International Journal of Research and Policy*, 784.

<sup>107</sup> The great majority of deportations are executed to Tunisia. The other countries where Italy deport migrants are Morocco, Nigeria, Egypt, Albania, and also Romania and Georgia. Tunisians counted for the 84% of total deportations from Italy in 2020. In 2019, Tunisians counted for the 46,6% of total deportations, while Albanians, Egyptians, Moroccans and Nigerians for the 37,6%. In 2018, the 62,5% of total deportations were to Tunisia and the 25,8% to the other four countries. In 2017, respectively, the 58,3% and the 31,6%; in 2016, the 43,7% and the 44% of the total. Source are data from the Minister of Interior. These data are published on a yearly basis in the annual report of the National guarantee for the Rights of people deprived of liberty (n 104). For an analysis of the readmission agreements and the other agreements (Memorandum of understandings and agreements between national police forces of receiving countries and countries of origin) see, for example, Jean-Pierre Cassarino, ‘Il sistema ibrido della riammissione: Genealogia di un allineamento tra sovranazionalismo e bilateralismo’, *ADiM Blog*, Editoriale, febbraio 2020, online <https://hal.archives-ouvertes.fr/hal-02861576/document>.

<sup>108</sup> Justice of the Peace in Bologna. Interview is on file with author.

<sup>109</sup> These data refer to Tunisian migrants detained in Bologna’s detention center, and refer to the files analysis carried out by author during her PhD research: Giulia Fabini, *Bordering subjects. The unspoken incorporation of undocumented migrants in Italy*. PhD Dissertation, international PhD programme “R. Treves” in Law and Society, a.a. 2014/2015, University of Milan. Data is on file with author.

<sup>111</sup> Bosworth (n 46), 159

deportation of illegalised migrants remaining in receiving countries depending on whether readmission agreements have been negotiated or not, or if the existing ones are actually implemented.

The migrants interviewed neither exclude the possibility of being controlled by the police, nor the possibility of receiving a removal decree and an order to leave in seven days. Yet, receiving a removal order does not appear to be a big deal.

When they [the police] stop me, I remain calm: “Do you have your documents?” I don’t, so they take me to fingerprinting and photo, sometimes they make me sleep over [at the police station], and sometimes they also take a pizza for me, sometimes (He laughs).<sup>112</sup>

As seen in the opening vignette, if the police find a migrant illegally present and take them to the police station, it is likely that the removal order will be executed through an order to leave the national territory in seven days (and not through forced removal). After being ordered to leave, the migrant will be released in the territory, and will likely keep on living in the city. The migrants interviewed usually dismiss the possibility of being moved to a detention centre and then deported:

If they stop you, they don’t give you the deportation order, they give you the order to leave. Before it was different. Before, if they stopped you, two or three years ago, they would give you a deportation order. Now they don’t anymore, they just do so in serious cases, when some mess happened. They do not enforce the law. The law is the same.<sup>113</sup>

Interviewees explain that police control over illegalised migrants in the city softened after the detention centre in Bologna shut down, because the police had no place to hold migrants waiting for removal, not because the law had changed. This is an example of how the context affects the actual implementation of legislation and points at the importance of taking into consideration the impact of local elements for understanding the mechanisms of border control. In fact, the migrants interviewed underlines that the mechanisms of control have changed in practice, because the immigration centre shut down, even if the law regulating migration at the state level remained the same.

Even when, in a very limited number of cases, the police decide to keep migrants in a detention centre, there is always the possibility to ‘hinder the deportation machine’,<sup>114</sup> for example by physically and collectively opposing deportation through rioting within the centre, or by not providing the police with real identity, as was the case for the Chinese people in the quote below:

There is no place anymore for keeping people in [a detention centre]. The police are not interested in the undocumented Chinese anymore... Once upon a time, leaving was compelling. They

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<sup>112</sup> Interview with Z, Moroccan citizen and undocumented migrant in Bologna. Interview is on file with author.

<sup>113</sup> Interview with L, Moroccan citizen and undocumented migrant in Bologna. Interview is on file with author.

<sup>114</sup> Giuseppe Campesi, ‘Hindering the deportation machine: An ethnography of power and resistance in immigration detention’ (2015) 17(4) *Punishment and Society*, 427.

escorted you to the plane, it happened many times, and China had to pay for repatriation. Then, no more expulsions. And you know why? Because Chinese people do not show their ID anymore, so police cannot be sure of their country of origin, and therefore, after a period in [a detention centre], which costs money, they let them go.<sup>115</sup>

When interacting with migrants, the police do follow some rules, which both the police and migrants know well. The illegalised migrants that I interviewed were aware of being a target of police control, but they were prepared regarding the manner in which the police used their discretionary power and knew what to expect in response to their behaviours. However, the informal rules are not the same in each and every local context. As one of the justices of the peace explained in one of our conversations, police practices in managing illegal migration change from city to city:

[Bologna's police] used to send us predominantly people with penal records, who had already disobeyed the second or third order to leave, therefore: people who are not willing to leave the national territory'. And then you could also receive a few migrants with no criminal history, clean record, who instead used to be sent predominantly from other cities' police... There were other police headquarters using other strategies.<sup>116</sup>

According to the interviewee's experience during hearings to validate migrants' detention, Bologna's police propose detention just for illegalised migrants with a mild criminal record, while the police in other cities also send illegalised migrants with no criminal record. Undeportability is therefore the result of intersecting legal and normative orders, producing a specific effect at the local level, where new forms of governance emerge, as we shall see in the next section.

### **3.3. Visibility / Invisibility**

The illegalised migrants interviewed share a common idea of their 'undeportability', and reported feeling safe around the city as long as they did not break any of the informal rules regulating their presence in the public space. Both Migrants and the police are aware of the 'rules of the game' which, by complying with, informally allows migrants to remain.<sup>117</sup> The informal rules operating in Bologna at the time of the interviews included: to 'be clean', not commit any crime, respect police's authority, speak good enough Italian, always pay for bus and train tickets, not convene in a group of co-nationals and remain outside of the so called 'risk zones'.<sup>118</sup> For the police, risk zones are sites mainly dedicated to dealing drugs. Yet, for migrants, risk zones are also places for social interaction:

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<sup>115</sup> Interview with L, Chinese citizen and migrant in Bologna. Interview is on files with author.

<sup>116</sup> Interview with a Justice of the Peace in Bologna. Interview is on files with author.

<sup>117</sup> Forrest Stuart, 'Becoming "Copwise": Policing, Culture, and the Collateral Consequences of Street-Level Criminalization' (2016) 50 *Law & Society Review*, 279.

<sup>118</sup> Giulia Fabini, "'Buongiorno, documenti". Meccanismi di controllo ed effetto di disciplinamento: storie di migranti e polizia locale' (2016) 11(1) *Studi sulla questione criminale*, 73.

We say: “No, we are not here to sell drugs, we are here to have drinks, because we don’t have other places where to... that is, where do we go? We cannot enter the campus; we cannot enter... go where people are. You have isolated us here, that’s it, we are people, we want to stay... together...”<sup>119</sup>

During grounded encounters with the police, many of the illegalised migrants I interviewed told me that they usually act in a calm and self-confident manner, knowing that if they try to hide, they may give reasons to the police for suspecting them. In a sense, they chose to resist by interacting strategically.<sup>120</sup> This is the case of one of the interviewees, who chose to go out - even at night, when the risk for migrants to be stopped for ID check is higher - but not to drink and to always dress up properly:

I have been here for two years, the police never stopped me, I never messed up; I sometimes went dancing until 5 in the morning, because I don’t drink, I’m never drunk, I don’t smoke, never fought, always dressed up, always done the things right.<sup>121</sup>

From the present case study, it becomes clear that there is a normative system regulating the acceptable and tolerated behaviour for illegalised migrants, allowing them to remain in Bologna even without official authorisation to do so. The construction of such a normative order is not a one-way process. Migrants try to change those informal rules that allow them to remain in the territory by, for example, continuing to enter the risk zones regardless of the risks that they run in doing so. Such a normative system intersects with the legal norms and is needed not just by the migrants to be able to remain and live a ‘quiet’ life even without a residence permit, but also, by the police in order to govern a difficult situation: managing the presence of illegalised migrants in the city, when the law they are expected to implement, immigration law, is a law impossible to enforce. On top of that, the illegalised migrants living inside national territories exceed the resources at the disposal of the police anyway.

The migrants I interviewed knew the rules of the game. At the same time, they enacted some strategies to change those rules bit by bit, pushing their *space of freedom* a little bit further. According to these unwritten and well-established rules, illegalised migrants are expected to be invisible in the public space. Many times, when police stop migrants and find out that they are ‘illegal’, they invite them to ‘get lost’ or ‘go home’. This is a recurring pattern in the stories told by the interviewees. Migrants usually do not oppose what they consider to be a normal and acceptable response from a ‘good’ police officer, who consents to under-enforce the law despite their illegality, and asks from them in return only their invisibility. Yet, some interviews resisted the requirement of ‘invisibility’. For instance, when told to go home S pretends to obey, but he does not:

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<sup>119</sup> Interview with MA, Senegalese citizen and undocumented migrant in Bologna. Interview is on file with author.

<sup>120</sup> Pietro Saitta, *Resistenze. Pratiche e Margini del conflitto nel Quotidiano* (Ombre Corte, 2015).

<sup>121</sup> Interview with B, Senegalese citizen and undocumented migrant in Bologna. Interview is on file with author.

They always tell me: “go home”. (He laughs). Still I ask, “Can’t I stay on the street?”, “No, no, go home”. I leave, but I do not go home (laughing out loud).<sup>122</sup>

While still laughing over the memories of all the occasions when police told him to go home and he did not, S asked me why he should go home instead of remaining on the city’s streets. This is a core question: Why do the police demand invisibility from illegalised migrants? And what does it mean when migrants oppose that request of being invisible?

The fact that the illegalised migrant is invisible to the law is nothing but a *legal fiction*. On the contrary, migrants and especially illegalised migrants are extremely visible to the police. I propose that the police’s request ordering migrants to go home should be interpreted as evidence that police accept and acknowledge the presence of illegalised migrants in the city, at least as long as they do not create trouble and are not perceived as dangerous.<sup>123</sup> However, police also know that the presence of illegalised and undeportable migrants is a demonstration of both the ‘fiction of the law’ and inefficacy of the police. As scholars in the sociology of police have argued, law-enforcement represents only a minimal part of police activity.<sup>124</sup> Rather than enforcing the law, police act by waiting, listening, reassuring,<sup>125</sup> to such extent that, for some, law-enforcement is a myth, a fiction useful for the police who face an impossible mandate. The police, rather than enforce the law, create the appearances of enforcing the law, and this is important for them to maintain legitimacy in the public eye.<sup>126</sup> From here stems the request of invisibility.

Yet, migrants resist just by being there and for going to places where they are not supposed to be. Given the context of undeportability, not only do migrants give the police no choice other than to manage their illegality,<sup>127</sup> but some of them even view the request of invisibility as unacceptable and claim their right to visibility. They do so with their very physical presence, which counter-acts the fiction of the law:

I’m not hiding; you want me to hide. Yet, I am so visible!<sup>128</sup>

One way to oppose the border regime and its unspoken request of *invisibility* is to claim *visibility*. I argue that by moving from place to place, looking for strategies to remain in the countries of arrival even without official authorisation, and negotiating with the police, illegalised and undeportable migrants oppose the border regime by acting as translocal legal subjectivities. Through their practices during grounded encounters with the police

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<sup>122</sup> Interview with S, Egyptian citizen and undocumented migrant in Bologna. Interview is on file with author.

<sup>123</sup> Giuseppe Campesi and Giulia Fabini, ‘Immigration detention as social defence: Policing “dangerous mobility” in Italy’ (2020) 24(1) *Theoretical Criminology*, 50.

<sup>124</sup> John van Maanen, ‘Watching the watchers’, in Peter K Panning and Jhon van Maanen (eds) *Policing* (Goodyer, 1978); Robert Reiner, *The politics of the police*, 4<sup>th</sup> Edition (Oxford University Press, 2010).

<sup>125</sup> David H Bayley, *Police for the Future* (Oxford University Press, 1994).

<sup>126</sup> Peter Manning, *Police work: the social organization of policing* (M.I.T. Press, 1977); Robert Reiner, ‘Police and Media’, in Benjamin Bowling, Robert Reiner, James Sheptycki, *The politics of the police*, 5<sup>th</sup> Edition (Oxford University Press, 2019), 207; Mark Neocleous, *The fabrication of social order: A critical theory of police power* (Pluto Press, 2000).

<sup>127</sup> Fabini (n 12).

<sup>128</sup> Interview with M, Moroccan citizen and undocumented migrant in Bologna. Interview is on file with author.

taking place in the shadows of the law, the illegalised and undeportable migrants struggling for their visibility in the public space contribute to the production of a specific border regime, based on legal and normative processes operating at different scales (local, national, supra-national, regional) and intersecting to each other. These migrants are part of a non-legal category, the category of the illegalised and undeportable migrants. While struggling to obtain their documents, and legal status, they also struggle for the informal 'right' to live in the city and to be visible even without any official authorisation to do so.

Laws regulating the entry of unauthorised migrants in receiving countries are 'embedded' in the local context. This means that, even if laws travel from one place to another, they obtain different meanings in the course of the journey. These meanings depend on the grounded encounters between transnational legal and normative processes and actors enacting various strategies of resistance at the local level. The existence of illegalised and undeportable migrants is the result of complex processes occurring not only at the state level, but also at the transnational level: while undeportability is a result of local, regional, and state factors as well as of international cooperation. Illegalised migrants' very presence and visibility is affirmed, negotiated, contested, and opposed at the local level. The border regime observed from the pluralist lens appears more multi-faceted than only state law. Furthermore, the empirical sensitivity employed in examining the grounded encounters between migrants and the police in Bologna shows that the legal and normative orders combining at the local level - where they sometimes produce paradoxical effects, such as illegalised and undeportable people - have a transnational dimension interacting with translocal resistance. This empirical sensitivity means focusing on the strategies of resistance to recognise both the transnational dimension of phenomena one might observe at the local level, and to identify possible space for transformation across scales.

#### **4. Critical commitment**

Understanding translocal legalities requires an engagement with legal pluralism, empirical sensitivity and a critical commitment. Having a critical commitment in looking at the operation of law means, first and foremost, to recognise that 'law' is not neutral, but rather a complex product of discourses, knowledge, practices, and material conditions,<sup>129</sup> and it is produced by and reproduces asymmetries of power. Looking at how law works from a critical perspective means understanding that law does not merely describe reality, but that it also has the power to produce a reality. Furthermore, if one views law from a critical perspective enriched by a transnational lens and empirical sensitivity, the asymmetries of power in international relations, and how they impact the national and local contexts are revealed. The transnational dimension is important in examining the processes of illegalisation of migrants from a critical perspective. At the basis, there is 'a conception of law as

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<sup>129</sup> Illegality is not a natural condition, nor an inner quality of undocumented migrants. In his seminal article, Nicholas De Genova explained that migrants' illegality is the effect of legal, cultural and economic processes of illegalization. Nicholas De Genova, 'Spectacles of migrant "illegality": The scene of exclusion, the obscene of inclusion' (2013) 36(7) *Ethnic and Racial Studies*, 1180.



grounded, geographically and geopolitically contextual, rather than universal, abstract, and immutable'.<sup>130</sup> In this research I have taken the lenses of translocal legalities and I have shed light on the translocal dimension of legalities, discourses, but especially subjectivities.

Other authors have investigated the plurality of legal and normative systems regulating border control focusing on the actors involved. One such example is Moffette's research on the control of *manteros* in Barcelona (Spain).<sup>131</sup> *Manteros* are migrant street vendors with precarious immigration status. In his research, Moffete investigated the practices of control of *manteros* as 'borderwork'<sup>132</sup> and shows the multiplicity of actors, jurisdictions and scales involved. The Barcelona Urban police apply laws against unauthorised street vending whereas the Catalan regional police prosecute the sellers of counterfeit products by applying the criminal law. A third entity, the Spanish National police, apply the *Alien Act*<sup>133</sup> while the Port Police intervene when the selling happens on the territory under their competence. Through the juxtapositions of municipal, criminal or immigration laws, these various actors are all engaged in 'borderwork'. This is a clear example of a bottom-up perspective on migration control. Departing from *manteros* and their strategies to resist or cope with the system, Moffette suggests possible 'ways to account for the dynamic, asymmetric, and uneven legal intersections at play in immigration governance'.<sup>134</sup> In a similar vein, it is also worth mentioning research by Barbero on the *encierros* in Spain in 2001.<sup>135</sup> *Encierros* is the name for the three month protests led by illegalised migrants in Barcelona and other cities in Spain. They staged sit-ins at 10 churches for 47 days, organised massive demonstrations and went on hunger strike demanding lawful legal status and succeeding. Barbero argues these protests erupted and were carried on collectively, asking for a legal change which was eventually achieved through the interaction of a variety of legal and normative orders: human rights, transnational law, state immigration law, customary law, natural law and insurgent law.<sup>136</sup> Migrants exploited the interaction between a) state law, to which they demanded recognition as legal migrants, b) supranational institutions, such as Catholic Church or the European Parliament, to which they asked to act as external guarantees for the application of transnational Human Rights, and c) Representatives of local institutions, which intervened indirectly, complementing the agreements that were finally reached with the government. Barbero define the *encierros* 'as a space with multiple legalities', referring to the 'multiple normative sources coexisting in the terrain that were relevant in solving, transforming and enforcing the conflict', to 'the multiplicity or different scales among which the immigrants posed their resistance', and to 'the presence of multiple norms not necessarily recognized by state law, but that are on its margins.'<sup>137</sup> In the course of these

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<sup>130</sup> Katja Franko, 'The Ordered and the Bordered Society: Migration Control, Citizenship, and the Northern Penal State' in Katja Franko and Mary Bosworth (eds) *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford University Press 2013), 28.

<sup>131</sup> David Moffette, 'The jurisdictional games of immigration policing: Barcelona's fight against unauthorized street vending' (2020) 24(2) *Theoretical criminology*, 258.

<sup>132</sup> Chris Rumford, 'Introduction: Citizens and borderwork in Europe' 12(1) *Space and Polity*, 1.

<sup>133</sup> Law Organic 4/2000, Of 11 January, On Rights And Freedoms Of Foreigners In Spain And Their Social Integration

<sup>134</sup> Moffette (n. 131) 259

<sup>135</sup> Iker Barbero 'Migrant struggles and legal pluralism: claiming citizenship across multiple scales' (2013) 45(3) *The Journal of Legal Pluralism and Unofficial Law*, 357.

<sup>136</sup> *Ibid*, 357

<sup>137</sup> *Ibid*, 358

struggles, the illegalised migrants protesting emerged as a new legal subject, exploiting the interaction between different legal and normative orders to their own advantage. According to Barbero, the collective dimension of protests and the demand for legal change qualify those migrants as a social movement and their acts as ‘acts of citizenship’.<sup>138</sup> They succeeded in their struggle and brought about legal change at the local and state level by exploiting the multiple and multi-scalar normative and legal processes intersecting in the transnational dimension.

The concept of translocal legalities advances a different idea of what might be considered as resistance and *legal* change than those explored above. The concept of translocal legalities, in fact, might be used even when the struggle is not directly political nor has a collective dimension, but rather is an individual struggle in the sense of ‘everyday resistance’.<sup>139</sup> What the translocal legalities concept reveals is that these acts of resistance are translocally grounded encounters with normative and legal transnational processes and do not necessarily lead to the production of new laws, but to emergent forms of normativity.

The illegalised and undeportable migrants are the product of the border regime, and they are produced and reproduced from within, in the receiving societies, in a context of intersecting legal orders. By using the concept of translocal legalities we can shed light on emerging forms of normativity, which I propose to perceive as a space for change already in place, even if it is not (yet) law.

## 5. Conclusions

Through the lens of translocal legalities, I looked at the mechanisms of border control from the perspective of individual resistance enacted by illegalised and undeportable migrants at the local level, in order to identify different normative and legal systems participating in internal bordering practices. These legal and normative systems are produced at different scales (local, national, supra-national, regional), they interact with each other in the transnational dimension and produce specific effects at the local level. One such effect is the production of the illegalised and undeportable migrant. Both the processes of illegalisation and non-deportation depend not only on state-law, nor is only national the scale where these processes operate. Illegalisation and deportation (or undeportation) depend on international relations among states, which affect both the possibility of legal entry and those of actual removal. Moreover, at the local level, the subjects of my study - the illegalised and undeportable migrants in Bologna (Italy) - continuously negotiate their physical presence with the agencies of control, who instead expect invisibility from them. What I aim to demonstrate here is that the illegalised and undeportable migrants are by no means a failure from the agencies of control to enforce the law, but rather they are the situated products of specific transnational legal and normative processes encountering translocal resistance. In other words, it is not possible to fully detect the processes through which illegalised and undeportable migrants are produced at the local level without taking into account the transnational dimension

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<sup>138</sup> For a similar point in US context, see Nancy A Wonders, Lynn C Jones, ‘Doing and undoing borders: The multiplication of citizenship, citizenship performances, and migration as social movement’ (2019) 23(2) *Theoretical Criminology* 136

<sup>139</sup> James C Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (Yale University Press, 1985).

and plurality of the legal processes involved in such a production. The lens of translocal legalities reveal - even in the mechanisms of border control, which apparently are prerogative of the sovereign state, 'not a uniform field of law, but rather open-ended, contingent, and fragile legalities that enable new complex terrains of political struggle'.<sup>140</sup>

Translocal discourses, practices and subjectivities allowed me to consider how local, national supra-national and regional normative and legal orders participate in the production of subjectivity of the illegalised and undeportable migrant. The local level was chosen as a site of observation, because it is at this level that local, national, supra-national and regional dynamics intertwine, producing effects in their encounter with local forces.<sup>141</sup> It is also at this level that such dynamics become observable. At the local level, the police enforce what should be seen as global and transversal borders.<sup>142</sup> Such enforcement does not depend just on the law regulating immigration at the state level, but it results from overlapping legal and normative systems, and from the mobility of migrants and their strategies of resistance. As it emerged from the case that I have presented throughout this article, the operation of the law in border control cannot be understood by only examining state law. The normative orders converge at the local level, develop a transnational dimension and sometimes produce paradoxical effects, such as immobilising mobilities in a territory, or alternatively forcing people to move. However, migrants are not passive subjects in the immigration control regime. Instead, they enact strategies of resistance, challenge the police, force them towards negotiation, and contribute to the final results of interaction. In this sense, illegalised migrants become translocal legal subjectivities always struggling for their own existence, freedom of mobility, and a quiet life, moving across borders as agents of transformation, and having an active role in the final shape of the border regime.

Throughout the article, I described the processes of production of illegalised and undeportable migrants through translocal grounded encounters in local contexts, in order to shed light on the complexities of the regulations at play and their transnational dimension. Illegalised migrants are, in fact, the product of legal and normative processes, even if not in the form of state law. They are the product of normative and legal processes operating at different scales, both from the top-down and from the bottom-up. The illegalised subject might be found in any country; however, the characteristics that an illegalised migrant will exhibit will not always be the same. The illegalised migrant changes depending on the local context. In turn, the local context itself and the mechanisms of border control change as the result of migrants' struggles, their persistent presence, and continuous mobility.

The border regime embedded in the local context is the product of the movement, struggles, and negotiation with the police enacted by migrants themselves. Since borders are processual and relational, the border regime will be translated in the local contexts as a result of interactions at the internal borders between

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<sup>140</sup> Canfield, Dehm and Fassi (n 18)

<sup>141</sup> Darian (N 29)

<sup>142</sup> Leanne Weber, 'From state-centric to transversal borders: Resisting the "structurally embedded border" in Australia' (2019) 22(3) *Theoretical criminology*, 228.

the police and illegalised migrants. Migrants on the move enact a politics of location<sup>143</sup> through their struggles and strategies of collective and individual resistance. They act as translocal legal subjectivities, who use their bodies and their shared knowledge to challenge the transnational border regime. As the manifestation of an illegal(ised) collective mobility, people ‘on the move’ put in crisis a multiplicity of overlapping legal orders. The mobility of illegalised and undeportable migrants acting as translocal legal subjectivities resists the law without using the law. They modify the transnational legal pluralistic border regime by disobeying the law with their body in constant mobility across borders.

What I aim to shed light on with my case study is the importance of recognising the *existing* space for change, and to investigate how acts of resistance may affect norm-producing mechanisms even when they do not directly address the law. This is an invitation to recognise new forms of governance already in place. It is possible to identify spaces for possible transformations from below if we understand migrants as subjectivities forcing the system to change with their own presence. And, most of all, this is an invitation to recognise that such change is possible in a transnational dimension, or better, a translocal dimension, as I have argued in the course of this article. Paradoxically, the implementation of the law produces illegalised migrants who are then impossible to deport, but there is a compelling need to give citizens the appearances of a law just working fine and of a border adequately enforced. This paradox is a ‘dirty secret’<sup>144</sup> and an unspoken truth. Yet, when the illegalised and undeportable migrants claim visibility by negotiating with police the ‘rules of the game’ for living in the city, they open up spaces for new possible governance; not in the form of law, but in the form of emergent legalities. The lens of translocal legalities allows us to *see* such spaces and therefore to see possible transformations of borders from below while enacted. How these space of new possible governance, once emerged from invisibility, will become a good place to find rights or the place where control may strengthen is a political battleground.

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<sup>143</sup> Alvarez (n 70)

<sup>144</sup> De Genova (n 4)

