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# Beyond the deportation regime: differential state interests and capacities in dealing with (non-) deportability in Europe

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## ABSTRACT

There is considerable variation in how countries deal with the presence of migrants lacking a legal right to stay. We present an analysis of the post-arrival migration enforcement regimes of European countries using a two-phased mixed-methods approach. The article (1) provides the currently best possible statistical overview of forced and assisted return in 12 European countries among rejected asylum seekers from six source countries, and (2) explores policy practices in six Western European and Scandinavian countries regarding deportability and effective non-deportability. While most rejected asylum seekers examined do not demonstrably return, we see highly divergent return patterns between host countries, and significant policy differences. The article thus shows the importance of better examining variation in post-arrival enforcement policies and their underlying interests and capacities. There is not one unified 'deportation regime'; there are at least four ideal-typical 'post-arrival enforcement regimes': thin, thick, targeted, and hampered.

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## Introduction

Scholarship on deportation studies has increased exponentially in the past decade following the so-called 'deportation turn' (Gibney 2008). Traditionally considered a secondary instrument of immigration control, liberal states increasingly take efforts to make 'unwanted' migrants leave their territories through forced return and Assisted Voluntary Return (henceforth AVR or assisted return) programmes. The deportation turn is part of a broader tendency among states to make it harder to immigrate without a residence permit (De Haas, Natter, and Vezzoli 2016).

In spite of the clear tendency toward heightened post-arrival migration enforcement, there is considerable international variation in how countries deal with the presence of migrants lacking a legal right to stay. Even in the European Union, with its attempts to prioritise and harmonise Member States' return policies for irregular migrants under the 2008 Return Directive, there seems to be considerable variation in the efforts that states put in deportation and deportation-like departure, and how they deal with issues of *non-deportability*, i.e. when irregular migrants do not leave the territory and are difficult to deport.

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In this article, we present the first results of a multi-year project that is aimed at mapping and understanding international variation in post-arrival migration enforcement regimes. We ask: How do the post-arrival migration enforcement policies of different European countries compare to each other, what are their outcomes in terms of deportation and deportation-like departure, and what can be said about the different logics underlying the ways in which deportability *and* non-deportability are dealt with? Is there any evidence that *different* post-arrival enforcement regimes exist?

We considerably improve previous estimates of the forced and assisted return rates of different (European) countries (Weber 2014; Wong 2015). Additionally, we update previous comparative attempts to map European countries' policies on irregular migrants and deportation (Düvell 2005; Clandestino 2009), adding more information on non-deportability measures in particular. The analysis is based on Eurostat data for 11 EU countries and Norway for the 2013–2017 period for asylum seekers of six nationalities (Afghanistan, Eritrea, Iran, Iraq, Somalia and Syria), and a qualitative exploration of six countries in Western Europe and Scandinavia (Belgium, Denmark, Germany, Netherlands, Norway, and Sweden).

Our academic contributions are threefold. First, our study shows the need to examine variation in post-arrival migration enforcement policies, and how they are used, in order to better understand the deportation turn. We find evidence for a 'glocalised' deportation turn that, much like other elements of globalisation (cf. Hannerz 1992), takes different forms, and has different consequences, depending on how it interacts with national and local contexts. That interpretation takes issue with De Genova and Peutz (2010) notion of a unified 'deportation regime', a term that is widely used in deportation studies: there are actually multiple logics at work that cause and sustain *considerable variation* in policies and practices with regards to (non-)deportability, producing variation toward not one, but at least *four* ideal-typical regimes, to be described in the final section.

Second, the analysis contributes to the discussion on the role of the state in migration and deportation studies. Migration scholars often stress the limited effects of immigration control, pointing at various 'gaps' between policy discourse and migration outcomes (Czaika and De Haas 2013). Some migration scholars even argue that immigration control is counterproductive (Massey, Durand, and Pren 2016). In deportation studies, by contrast, there is an opposite tendency to see states as extremely powerful and oppressive actors that are embedded in broader structures of governmentality (Bloch and Schuster 2005; De Genova and Peutz 2010). We offer a more nuanced view based on the observation that immigration control results from a complex mix of policy interests and differential capacities. States have considerable power, but how they want, and are able, to deal with (non-)deportability is variable.

Third, the analysis contributes to the discussion in political science and law on the harmonisation of asylum policies in Europe (Hatton 2015; Den Heijer, Rijpma, and Spijkerboer 2016; Thielemann 2018). In addition to there being large differences in recognition rates of asylum seekers across the EU despite a shared international legal framework for refugee protection (Neumayer 2005; Leerkes 2015), we show evidence for even larger international differences with regards to post-arrival enforcement.

## Post-arrival migration enforcement regimes and their underlying rationales

There are two main components of immigration policy: (1) admission policy, which defines and enforces the conditions under which foreigners may legally immigrate and (2) integration policy, which defines and enforces the rights and obligations of admitted foreigners, and regulates how they may obtain permanent legal residence or become national citizens. Admission policy – ‘immigration control’ – consists of (1) policies *defining* the grounds on which a migrant is entitled to stay in the territory, and (2) policies *enforcing* admission policies.

Our project is aimed at identifying different *post-arrival immigration enforcement regimes*: more or less coherent clusters of post-arrival immigration enforcement policies that are aimed at achieving the departure of foreigners who have no legal stay in the territory, and accommodate the presence of irregular migrants who are difficult to deport. These regimes are part of admission policy, but the approaches to non-deportability overlap with integration policy.

A post-arrival enforcement regime is produced by *interests of (non-)enforcement*, which may or may not be formally written down in laws and policy documents, and *capacities of (non-)enforcement*, and both are discussed in what follows. We link our exploration to Boswell’s (2007) overview of the core functions of the liberal state: (1) providing security, (2) promoting economic accumulation, (3) promoting fairness by redistributing wealth in the welfare state, and (4) performing compliance to the rule of law in order to promote institutional legitimacy. Part of these functions are inherent in the institution of citizenship: social rights require redistribution, and civil and political rights are unthinkable without a state’s commitment to the rule of law. While Boswell positions herself against (new) institutionalism, we propose to connect this approach to the institutional logics perspective (cf. Thornton, Ocasio, and Lounsbury 2012): states follow different institutional logics that sometimes complement, sometimes contradict each other, and also align, or compete with, the logics of non-state institutions.

### Interests

We consider all European states in our analysis to be liberal states, as they are based on the principles of representative democracy, constitutionalism, nationhood and capitalist accumulation (cf. Hampshire 2013). As such, the liberal state is strongly driven by the interest to obtain legitimacy in the eyes of its citizens, and Boswell (2007) argues that its legitimacy is based on four structural core functions. A discussion of these shows the tensions within and between different interests regarding immigration enforcement, and also helps us understand why states develop policies for groups that are difficult to deport. Interest is here defined in a broad sense as something that brings advantages or is important to the state, including certain social norms and ideas. Table 1 summarises the relationships between functions and interests.

A first institutional logic underlying immigration enforcement pertains to the function of the state to provide security and stability to its citizens. This relates to both physical and symbolic security, leading to a variety of interests for immigration enforcement: all European states have developed at least some infrastructure to deport foreigners convicted of crimes *and* states need to deal with social disruption and security issues that emerge from non-deportability, such as petty crime by marginalised migrants who

**Table 1.** Core functions of the liberal state and interests underlying post-arrival enforcement.

	Dealing with deportability	Dealing with non-deportability
Security	Prioritise ‘criminals’, appear to be ‘in control’	Control petty crime and homelessness
Economic welfare	Prioritise non-employable irregular migrants	Grant residence permits based on merit and/or turn a blind eye to employed irregular migrants
Fairness/social redistribution	Limit irregular stay <i>including</i> irregular employment	Provide pathways to equal rights
<i>Rechtsstaat</i> /Rule of law	Limit irregular stay and prioritise assisted over forced return	Ensure basic human rights and selectively grant residence permits to ‘morally deserving’ migrants

cannot be deported. States also want to *show* concerned citizens that they are still in control, despite their loss of influence due to globalisation, which explains highly ritualised acts of enforcement (Wacquant 1999; Leerkes and Broeders 2010). The degree to which immigration is seen as a threat varies between countries (Hiers, Soehl, and Wimmer 2017).

A second logic is related to the function of the liberal state in promoting welfare and economic growth. States want to deal with migrants in ways benefiting the economy, being more welcoming to migrants, including asylum migrants (Neumayer 2005), in times of labour shortages, while possibly being less inclined to enforce admission requirements then, in order to not obstruct the inclusion of irregular migrants on secondary labour markets (cf. Ambrosini 2017). When other interests are held constant, a state’s interest to enforce irregular migrants’ departure will therefore be inversely related to the size of its informal economy, and, relatedly, the domestic demand for flexible, unskilled labour. The informal economy is a variable: in Southern-Europe it is larger, for example, than in Northern-Europe. The logic of accumulation may also promote an interest in countries with a strong demand for labour migrants workers to selectively deal with non-deportability by giving (temporary) residence permits to employable migrants.

Third, the liberal state in general, and states with extensive welfare arrangements in particular, will want to promote some measure of domestic fairness by guaranteeing their citizens certain social rights, such as by setting a minimum wage, and/or by providing social benefits. The more elaborate a country’s welfare state, the stronger its interest in limiting irregular stay, *including* irregular employment: irregular labour may put pressure on the minimum wage and/or risks creating unemployment among citizens, who then apply for costly unemployment benefits, while irregular migrants may also apply for costly societal services themselves that need to be paid from taxes. Social citizenship, in Marshall’s sense, thus contributes to an interest in excluding non-citizens and enforcing restrictive admission policies (cf. Ruhs 2013).

Fourth, the liberal state wants to be perceived as protecting human rights and be in accordance with the rule of law, as described in the constitution and international treaties. This means making sure that those lacking legal stay are removed, and that coercive enforcement measures, such as detention and the use of force during deportations, are constrained by constitutional and international regulations protecting human rights. This tension partially explains why liberal states try to prevent unwanted migrants from reaching their territories to begin with, and why they prefer AVR, using forced

removal as a last resort. While this fourth logic will be influential in all liberal states, it may be especially strong in countries with a strong democratic tradition.

The liberal state's commitment to the rule of law and redistribution also explains certain approaches to *non-deportability*, especially why it grants special humanitarian permits, and sometimes carries out amnesties. It is hard for the liberal state to permanently deny equal rights to individuals who have the right moral resources (cf. Lockwood 1996) and are seen as 'deserving' members of the society. The willingness to eventually offer such pathways to citizenship through the backdoor may be stronger in countries where citizenship is understood in a relatively 'civic' (i.e. Sweden or Belgium) instead of a more 'ethnic' manner (i.e. Denmark, Norway, Italy) (Koopmans et al. 2005) – or, relatedly, where territorial ties are a necessary and sufficient condition for citizenship (Vink and Bauböck 2013).

### Capacities

Different post-arrival enforcement regimes are not only the outcome of states negotiating competing interests in context-specific ways. They are also related to what they are able to do; their enforcement capacities. Capacities can be defined as the range of available policy instruments to obtain return and accommodate non-return, *and* the available opportunity structures to use these instruments. Both direct and more indirect post-arrival enforcement policies exist (cf. Leerkes, Bachmeier, and Leach 2013): 'territorial exclusion policies' aim to achieve departure in a direct way. These include international and bilateral readmission agreements with origin countries to create the legal and practical conditions for return; incentives to encourage (assisted) return, starting with fair and humane treatment to enhance legitimacy during admission procedures and, further down the line, an AVR infrastructure; and measures to increase forced return, such as identification obligations, apprehension targets, and detention facilities.

'Social exclusion policies', on the other hand, aim to promote departure more indirectly by constraining irregular migrants' livelihood chances: they are excluded from the right of employment, housing, social benefits, medical care, and other services. Various Western and Northern European countries have developed systematic control mechanisms, which include an extensive ICT infrastructure, to verify the immigration status of employees and clients of state and semi-state services. Such policies are meant to protect the welfare state, but are also used to disincentivise irregular stay.

A side-effect of social exclusion policies is the heightened marginalisation of irregular migrants who are undeterred by them, leading to homelessness and petty crime among individuals who cannot sustain themselves through paid work. As this compromises several functions of the state mentioned above, states also develop instruments to deal with those who cannot be deported, or tolerate poor relief measures at the municipal level. The most common instruments of national states to deal with non-deportability are (1) regularisation, (2) tolerated stay, and (3) encampment/detention. The use of encampment/detention still leans toward enforcement; tolerated stay and regularisation become part of a state's integration policies.

Next, the question is to which extent states have the capacity to implement these measures within the existing institutional structures. For example, enforcement capacities require an effective bureaucracy and interpersonal relations that enable the collaboration

between the different state and non-state organisations – operating at the international, national, local level – involved in return. This involves both the effective collaboration between different institutions within the enforcement regime, as well as the de facto compliance of origin states with readmission agreements. Furthermore, the capacity to socially exclude irregular migrants will be greater in countries with well-developed welfare arrangements, where the state penetrates relatively deeply in economic and civil life in the fields of labour, education, health care, and social benefits. A strong welfare state not only contributes to an *interest* to exclude irregular migrants, it also facilitates the *implementation* of that interest: in such countries, it will be relatively affordable, and accepted, to add social exclusion policies to existing regulations through institutional layering (cf. Van der Heijden 2011). Such opportunities are considerably more limited in countries with a liberal and/or large informal economy, which include the Southern-European countries (Ambrosini 2017). The power of the rule of law and the judiciary system may similarly affect interests and capacities. Countries with a strong commitment to the rule of law will not only have a strong interest to regulate migration within national and international legal frameworks, they also have the strongest capacity to do so using less forced forms of return: arguably, migrants and other relevant actors, such as immigration lawyers and the authorities of countries of citizenship, are more likely to comply with immigration law if they perceive it as transparent and fair (Ryo 2015; Leerkes, Van Os, and Boersema 2017).

There also is a historical component in these capacities. Countries in Western-Europe have had positive net immigration rates for decades, and have had more opportunity to develop capacities to deal with (non-)deportability than the Southern-European countries, which had a *negative* net immigration rate until the 1990s. An immigration tradition and a large number of established immigrants may also limit enforcement capacities, however: more established immigrants also means more possibilities for irregular migrants to find support within ethnic communities, which diminishes their social exclusion and reduces apprehension and deportation risks (Leerkes, Varsanyi, and Engbersen 2012).

### Methodology

A two-phased mixed methods approach was used to explore the research questions. In Phase 1, we aimed to provide the best possible overview of return rates and return modes (forced or assisted return) in 12 European countries (11 EU Member States and Norway) for six nationalities, using Eurostat data. In Phase 2, we explored policy practices to deal with (non-)deportability of rejected asylum seekers in six selected host countries in Western Europe and Scandinavia. The case studies were based on document analysis and interviews and correspondence with experts – academics, government and NGO-representatives – from the respective countries and the EU level. The countries were selected on the basis of having a somewhat comparable GDP per capita to enable a comparison of enforcement interests and capacities that cannot be explained by differential financial resources alone.

In Phase 1, we approximated return rates as follows. First, we selected groups for which we could reasonably estimate the size of the population at risk of being required to leave the territory. We therefore selected nationalities that mainly consist of asylum seekers: these are registered by states whereas there are no accurate estimations of irregular populations not seeking international protection. We selected the ten



nationalities with the highest number of asylum seekers in EU+ countries in 2016 and 2017, excluding four nationalities (Pakistan, Albania, Nigeria, Russia) because a significant number of returnees to these countries are not rejected asylum seekers but other irregular migrants, including visa overstayers. This left us with six nationalities: Afghanistan, Eritrea, Iran, Iraq, Somalia and Syria.

For the host country selection, we selected all EU plus Schengen Associated Countries (hereafter: EU+ countries) with at least 10,000 negative first instance decisions in 2016 and 2017, excluding countries with land borders with non-EU+ countries that are regularly crossed by persons (from the six nationalities selected) applying for asylum.<sup>1</sup>

The *numerator* of the return rate for nationality X from country Y is the sum of enforced returns ‘to a third country’ in the 2013–2017 period involving individuals of country X from country Y. For eight of the 12 EU+ countries, Eurostat specifies the number of forced and AVR (assisted) returns separately, which we used to also calculate rates of these different return modes. We added indicative information for the Netherlands from a national source (see Van Houte and Leerkes 2019).

Different operationalisations are possible of the *denominator*, i.e. the population at risk of post-arrival migration enforcement. In our view, two existing international overviews of enforcement rates operationalized the denominator too broadly as the country’s total population or its total number of immigrants or foreign-born (Weber 2014; Wong 2015), thus also including immigrants who hardly are at risk of enforcement, including people with family reunification permits or EU-citizens – or had to rely on imprecise and rather incomparable national estimates of the total irregular population (Weber 2014). Eurostat, on the other hand, uses a, in our view, too narrow operationalisation by counting the total number of return decisions.<sup>2</sup> Some countries seem to be strategic in issuing return decisions, for example by giving return decisions only when returns can take place. These operationalisations also do not control the effects of the country of origin on a host country’s return rate.

Our main operationalisation of the denominator of the rate of nationality X leaving from country Y is the number of negative ‘first instance decisions’ plus the number of ‘asylum requests withdrawn’ in the 2013–2017 period, involving individuals with nationality X in country Y. As a robustness check, we also present figures using a broader and narrower operationalisation. The broader operationalisation pertains to the total number of first asylum requests between 2013–2017 (giving an estimate of the *de facto* protection against return). The narrower operationalisation deducts the number of positive decisions leading to subsidiary protection on national grounds from the negative decisions and the asylum request withdrawn (Eurostat gives data on national subsidiary protection for 9 of the 12 EU+ countries). Arguably, persons obtaining national subsidiary protection are not at risk of enforcement, but it could also be argued that such protection, which is often quite precarious (e.g., needs to be renewed each year), is not independent of enforcement interests and capacities – possibly, such protection is given because the state cannot enforce return, or does not want to enforce it.

While our figures give a good indication of countries’ enforcement rates involving rejected asylum seekers, there are considerable methodological limitations (for a more thorough discussion see Van Houte and Leerkes 2019). First, the data will overestimate rates of return to the *country of origin* as Eurostat only gives data on ‘returns to a third country’, which also include returns to non-EU countries, such as Turkey under the 2016



EU-Turkey return agreement. Second, the figures are not cohort data. This means that the persons returning in year  $t$  are not necessarily the same people as receiving a negative asylum decision in that year. We reduced biases this may cause by examining a relatively long period (five years) and by comparing six countries of origin. Third, rejected asylum seekers successfully appealing a negative first decision are not required to leave. Fourth, Eurostat does not include persons returning to their country of origin without any assistance or force from European governments. However, the literature suggests that this number will be limited, especially for nationals from relatively unsafe countries (Leerkes, Galloway, and Kromhout 2011). Fifth, the Eurostat counts on asylum decisions include double counts as they also pertain to decisions regarding repeated asylum applications. Sixth, while Eurostat is dedicated to providing standardised data, several experts have indicated that there could still be differences in how countries construct and report data. For example, there may be differences in the operationalisation of forced and assisted return – if only because the distinction between the two is not clear-cut in reality. It has also been mentioned that Southern European countries do not register asylum procedures as systematically as the more Northern countries; they may have an interest, for example, to not register asylum applications so as to reduce Dublin claims involving asylum seekers who have travelled to the North (but they do not appear to have such an interest to not register returns).

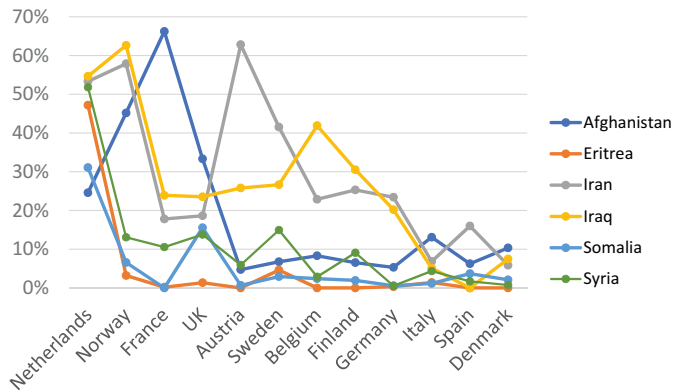
All in all, the figures should be treated like *proxies*: the Eurostat data do not give precise information on return rates, but can only be used to give a rough estimate of them, so as to create a basis for international comparison.

For phase 2, we proceeded as follows: Based on Phase 1, we identified similarities and differences in the return patterns per country, leading us to formulate a number of guiding questions in addition to the general research questions. We then looked for documentation (academic and ‘grey’ literature) on the focal countries and comparatively across the EU. Next, we approached 25 focal country or comparative experts, asking them to interpret and discuss our findings based on their expertise. Eventually, we interviewed, or corresponded with, ten experts at the EU+ level, and country specialists on Norway, Sweden, the Netherlands, Germany, and Belgium.

The explorative nature of the study so far, did not allow us to reach full saturation: the policies of the Netherlands, Sweden, Belgium and Germany are well-documented in reports of the European Migration Network, but those of Norway and Denmark are not. Information is also easier to find on Norway than on Denmark. Moreover, the experts were hesitant to comparatively interpret the findings, which highlights a more fundamental knowledge gap: little is known about why and how different post-arrival migration enforcement regimes have emerged in comparative perspective. Throughout this article, we indicate which elements need further investigation.

### **Returns to a third country from 12 EU+ countries**

Figure 1 shows the estimated percentage of asylum seekers not obtaining international protection in the 12 EU+ countries in 2013–2017 who were ‘returned to a third country’ in this period, specified for the six nationalities. Asylum seekers’ return rates vary considerably by nationality of origin (also see Leerkes, Van Os, and Boersema 2017), but that is not the main focus here.<sup>3</sup> Table 2 then shows estimates of the *average*



**Figure 1.** Proxied return rates 'to a third country' from 12 EU+ countries for 6 nationalities (2013–2017).

**Table 2.** Estimated average return rates 'to a third country' for 12 EU+ countries for 6 origin countries (2013–2017) under three operationalisations of the population at risk.

	Per person not receiving international protection <sup>b</sup>	Per person seeking asylum <sup>a</sup>	Per person not receiving international or national protection <sup>c</sup>
1. Netherlands	43.8%	17.6%	51.6%
2. Norway	31.4%	14.2%	37.5%
3. France	19.8%	4.0%	<sup>d</sup>
4. UK	17.8%	9.0%	19.7%
5. Austria	16.7%	4.1%	18.9%
6. Sweden	16.2%	6.9%	17.3%
7. Belgium	13.1%	7.3%	<sup>d</sup>
8. Finland	12.2%	6.1%	13.2%
9. Germany	8.4%	3.0%	9.6%
10. Italy	5.3%	0.9%	7.2%
11. Spain	4.6%	1.6%	<sup>d</sup>
12. Denmark	4.4%	3.7%	4.4%

<sup>a</sup>Returns divided by sum of 'first instance rejections' and 'applications withdrawn'.

<sup>b</sup>Returns divided by 'first asylum applications'.

<sup>c</sup>Returns divided by sum of 'first instance rejections' and 'applications withdrawn', minus 'decisions: humanitarian status'.

<sup>d</sup>Not available on Eurostat.

enforcement rates, which is the (unweighted) average of a host country's rate for the six nationalities. It also presents these averages using the broader and narrower operationalisation of the denominator.

We see highly variegated patterns of return. When we use the, in our view, best operationalisation of the population at risk, we find average rates from 4.4% (Denmark) to 43.8% (Netherlands). Generally, countries in Southern Europe have considerably lower return rates than in Western and Northern Europe, a pattern that is in line with the existing qualitative literature (Düvell 2005; Gibney 2008; King and DeBono 2013; Collyer, Düvell, and De Haas 2012). However, we also find considerable differences among the six focal countries: return rates are highest in the Netherlands and Norway, followed by Sweden and Belgium, followed by Germany and Denmark.

The broader operationalisation leads to a correlated, lower range, from 0.9% (Italy) to 17.6% (Netherlands). When considering the degree of harmonisation in European asylum policies, it is clearly not enough to only look at ‘recognition rates’: there are large international differences in the level of de facto protection against return, i.e. regardless of residence status acquisition. An asylum seeker not knowing his/her admission decision who is primarily interested in not being returned, is better advised to go to Italy or Spain, or Germany or Denmark, than to Norway or the Netherlands. The narrower operationalisation leads to a range of between 4.6% (Denmark) to 53.5% (Netherlands), showing that the large differences in return cannot be explained by differences in subsidiary protection on national grounds.

Figure 2 shows separate estimated rates of forced and AVR (assisted) returns for nine EU+ countries. We see, for example, that Sweden combines a relatively high assisted rate (13.5%) with a relatively low forced return rate (2.8%). Denmark, by contrast, combines a comparable forced return rate (3.7%) with a nearly non-existing assisted return rate (0.7%). Norway and the Netherlands both have a relatively high forced and assisted return rate. Interestingly, no EU+ country combines a high forced return rate with a low assisted return rate.

As the distinction between forced and assisted return is blurred in reality, there is a possibility that these figures also reflect efforts by states to classify returns in accordance with their official policies: some states may try to be perceived as minimizing state violence, whereas other states may try to downplay their dependence on migrants’ compliance. Without further evidence, however, we take these figures as indicating significant differences in the *mode* of returns on top of the *rates* of return.

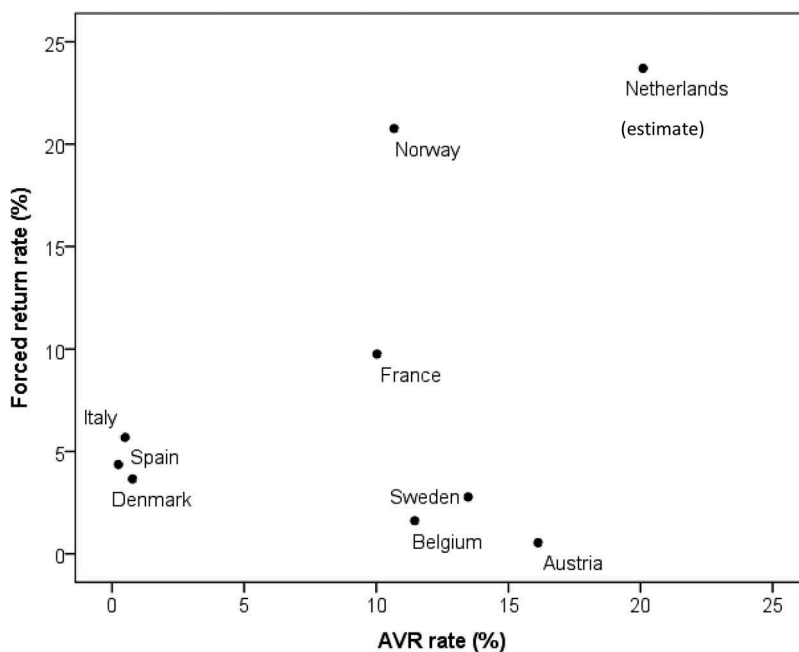


Figure 2. Estimated rates of AVR and forced return to a third country for nine EU+ countries.

Next to all the differences, we observe one important regularity: even in host countries with the highest return rates, the majority of the migrants not obtaining international protection do *not* demonstrably leave the territory, a finding that confirms existing research (Koser and Kuschminder 2015; Leerkes, Van Os, and Boersema 2017). We interpret these patterns in the next section, focusing on the six focal countries.

### Dealing with (non-)deportability: toward a typology

In Phase 2, we mapped the focal countries' infrastructure regarding territorial exclusion (return agreements, apprehension and detention infrastructure, AVR policies), social exclusion (exclusion from services and regular life chances) and 'non-return' policies (amnesties, humanitarian permits on special grounds, accommodation and encampment policies), summarised in Table 3, and further discussed below (for a more detailed discussion see Van Houte and Leerkes 2019).

On paper, we see strongly *converging* policy approaches: all focal countries have an infrastructure for both forced return and assisted return, use social exclusion measures, and have policies to accommodate non-return. The apparent convergence indicates that liberal states do follow comparable logics to some extent.

A closer look nonetheless reveals notable differences. We find the enforcement infrastructure to be somewhat more developed in the Netherlands and Norway, followed by Sweden and Germany, followed by Belgium and Denmark. Additionally, we find indications for variation in how countries *use* their capacities, which we interpret as reflecting differences in enforcement interest: relatively strong in the Netherlands, Norway, Denmark and Belgium, and somewhat weaker in Sweden and Germany. The *combination* of capacities and interests also shows in the differential return rates of these countries reported in the above.

All in all, our analysis suggest that it is useful to analytically distinguish four ideal-typical regimes, based on different positions with regard to enforcement capacity *and* enforcement interest (see Figure 3): thick, targeted, hampered and thin. Below we discuss these ideal-typical regimes in more detail, illustrating each type with two countries, while fully acknowledging that none of the countries are perfect examples of the pure types.

**Table 3.** Overview of return and non-return policies.

	Territorial exclusion		Social exclusion	Non-return	Non-return policies
	Forced returns	Assisted Returns			
NL	++	++	++	+	Amnesties; special humanitarian permits; basic shelter and food provisions.
NO	++	++	++	+-	Indefinite access to reception centres
SE	+	++	++	++	Amnesties; special humanitarian permits; non-enforcement policies, track switching
DE	+	+	++	++	Special humanitarian permits, non-enforcement policies, track switching
BE	+-	+	+-	+	Amnesties; special humanitarian permits, bed-bad-bread centres for families
DK	++	+-	++	+-	Indefinite compulsory stay in 'departure centres'.

		Enforcement interest	
		-	+
+ Enforcement capacity	-	Thin enforcement regime <i>(Spain)</i> <i>(Italy)</i>	Hampered enforcement regime <i>Belgium</i> <i>Denmark</i>
	+	Targeted enforcement regime <i>Germany</i> <i>Sweden</i>	Thick enforcement regime <i>Netherlands</i> <i>Norway</i>

**Figure 3.** A typology of post-arrival immigration enforcement regimes.

### **Thick enforcement regimes**

The Netherlands and Norway tend toward the ‘thick enforcement regime’, which combines strong enforcement interests with extensive enforcement capacities. The thick regime has an interest to return as many irregular migrants as possible and has a relatively strong infrastructure to do so. Both Norway and the Netherlands combine instruments to obtain forced return – detention facilities, identification measures and personnel, but also comprehensive diplomatic and interpersonal relations with origin and transit countries – with generous regulations for AVR, communicated through motivational counselling. Both countries also have comprehensive regulations, which include extensive ICT infrastructures, to socially exclude unauthorised migrants from formal labour markets, social benefits, education and health care. The combination of ‘hard’ policy (force, social exclusion) with ‘softer’ interventions (seeking to obtain migrants’ trust, diplomacy) seems to result in relatively high levels of assisted and forced return.

Several experts emphasise that effective return policies are not only about influencing migrants’ decision-making processes; they also stand or fall with bilateral agreements with the country of origin, embedded in good international relations. Especially the high forced return rates of Norway are argued to be related to its investment in comprehensive diplomatic and interpersonal relations, where, next to a formal agreement, immigration police officers are stationed in origin countries to make arrangements for individual cases. Also, both countries are said to have an effective, centralised bureaucracy, with a clear central coordination of return. For example, the Netherlands saw its return rates increase with the arrival of a designated Return and Repatriation Service (DT&V) in 2007, which coordinates the return process and chairs local return consultations with relevant stakeholders (cf. Leerkes, Van Os, and Boersema 2017). Although AVR programmes alone do not convince people to return, money does seem to matter: Increases in financial assistance in the Netherlands seemed to have increased AVR rates, although they may also lead to some degree of substitution from unassisted to assisted return, and attract irregular migration from relatively nearby countries (Leerkes, Van Os, and Boersema 2017).

Within these ‘thick’ enforcement regimes, the specifics of the different measures seem to be less relevant. While the Netherlands makes full use of the maximum 18-month detention period set by the Return Directive, Norway makes rather limited use of detention in spite of an equally long legal maximum. Norway nonetheless allows surprise raids and assigns arrest quota to the police force, which is known for its stoicism in aiming for these targets. In the Netherlands, too, various centre-right cabinets tried to set similar quota, but these were always met resistance by police – which traditionally fall under the responsibility of local mayors – especially when police were being required to apprehend migrants who do not cause public order concerns (Leerkes, Varsanyi, and Engbersen 2012).

Such a comprehensive package of return measures is expensive – especially the costs of identification, travel documents, diplomatic relations, detention, police, and charter flights. Thick enforcement regimes do not only have the resources to spend these budgets, but are also willing to spend them, being relatively unselective as to the range of irregular migrants that the national government tries to target.

Our experts indicate that high enforcement interests partially stem from welfare state logics. It is claimed that the Nordic countries until recently were relatively culturally homogenous societies built on solidarity and a large welfare state, which supposedly led to forms of ‘welfare nationalism’ (Brochmann and Hagelund 2012), granting more priority to excluding ‘those who are not members of these close-knit democracies’ (Weber 2014; Barker 2013; Ugelvik and Ugelvik 2013). The Netherlands has earlier experience with immigration-related diversity and began investing in return policies since the late 1980s, claiming it was necessary to protect the welfare state. Later, centre-right governments increasingly began using security-related and law-and-order arguments, arguing that enforcement of negative admission decisions would deter future irregular migration and, in more progressive readings, help to maintain popular support for legal migration.

The tendency of thick regimes to exclude irregular migrants from livelihood opportunities unintendedly produces conditions that compromise public security, such as petty crime and homelessness, and raise humanitarian concern among part of the population. For this reason, the thick enforcement regime paradoxically contributes to a need to provide basic relief and accommodation in order to mitigate issues of public security and unrest. Indeed, in both Norway and the Netherlands we find poorhouse-like institutions for irregular migrants who are difficult to deport with basic accommodation, food and living allowance provided below the level for citizens, without access to employment, benefits or education (Leerkes 2016; Suárez-Krabbe, Arce, and Lindberg 2018). In addition to keeping people off the streets, it is also hoped that the basic provisions will encourage migrants’ willingness and readiness to leave, and/or to make sure that people can easily be traced whenever forced return becomes possible.

There is little support for collective regularisation programmes in Norway in particular (UDI 2011; Brick 2011). The Netherlands has had a few regularisation programmes – preceded by years of political discussion – targeting specific migrant categories for a limited amount of time. Regularisations based on individual cases at the discretion of a minister or state secretary do not happen in Norway, and in May 2019, the Netherlands decided to remove the discretionary power from the state secretary.<sup>4</sup> The Netherlands does have other individual-level regularisation mechanisms, in which

legalisation is partially earned (e.g. for minors who have been in the country for more than five years and are believed to have cooperated sufficiently with return).

### *Targeted enforcement regimes*

The ‘targeted regime’ has a relatively strong enforcement capacity, which is used in a more selective manner. Both Germany and Sweden tend in that direction. Their capacities to enforce returns are comparable to those of the Netherlands and Norway. Sweden’s capacity to realise assisted returns even stands out: while all countries adhere to the requirements of the Return Directive for a fair and transparent procedure for decisions on the return of irregular migrants, and a minimum set of rights pending their removal, Sweden has made this a priority. Sweden’s focus on human rights and legitimacy, along with generous AVR packages, seems to result in high assisted return rates (Figure 2) (DeBono, Ronnqvist, and Magnusson 2015; Weber et al. 2019). The low rate of forced return implies that it is not primarily the threat of forced return that pressures migrants into accepting assisted return in Sweden.

What is specific about the targeted enforcement regime is that certain categories of migrants are deliberately exempted from enforcement through track switching and formal toleration policies. In Sweden, rejected asylum seekers may under certain conditions be given a year to seek regular employment. If they find it, they will receive a non-asylum residence permit. Germany is known for its *Duldung* system, under which non-deportable rejected asylum seekers are officially tolerated and receive accommodation, basic health care and, depending strongly on local arrangements, may be entitled to living allowances, employment, and education. Furthermore, those with *Duldung* status may in specific cases apply for a residence permit after one year on grounds of being ‘well-integrated’. These regulations are permanent and therefore different from the more ad hoc *regularisation programmes* targeting specific migrant categories for a limited amount of time, although these have also occurred in both countries (Brick 2011).

In Sweden, the more targeted use of migration enforcement, and the stronger emphasis on perceived legitimacy, is associated with a tendency to give street-level bureaucrats a considerable measure of discretion when implementing enforcement. For example, Hansson (2017) argues that police officers responsible for the return of unaccompanied minors need discretionary space as a coping mechanism and have to combine efficiency and dignity (also see DeBono, Ronnqvist, and Magnusson 2015). This is clearly a different approach to immigration enforcement from that in Norway with its top-down apprehension targets. The Swedish case in particular also shows that welfare state logics, though important, do not fully explain enforcement regimes. Like Norway, Sweden is a universal welfare state, but it is far less ‘universal’ in its enforcement, and less inclined to use force.

While labour market needs and economic interests seem to drive the post-arrival enforcement regime in a more targeted direction, there seem to be additional logics at work in Sweden and Germany. Interestingly, both Sweden and Germany have a more limited (per capita) involvement in international military interventions compared to countries like Denmark, Norway, and the Netherlands, especially when they are expected to use violence.<sup>5</sup> Future research could examine if a cultural-historically formed reluctance to use state violence in liberal states like Sweden and Germany, which expresses itself in



policies of neutrality or non-intervention, also manifests itself in a reluctance to use force in immigration control, thus taking the enforcement regime in a targeted direction.

### *Hampered enforcement regimes*

Both Belgium and Denmark tend toward the ‘hampered regime’; here, a strong enforcement interest coincides with weaker enforcement capacities. In Belgium, the degree of state penetration in economic and civil life is lower than in the other focal countries, as indicated by a larger informal economy and larger private housing market (cf. Van Meeteren 2010) hampering the implementation of social exclusion policies. The bureaucratic apparatus also seems to be less effective: Belgian experts hypothesise that the complex and overall polemic governmental landscape in Belgium contributes to a reluctance among local law enforcers to comply with federal enforcement policies.

Denmark has a strong welfare state with ample opportunities to socially exclude irregular migrants and also takes a strict approach by requiring rejected asylum seekers to stay in ‘departure centres’ and by using long maximum detention periods. However, it lacks a well-developed AVR infrastructure, with stricter conditions for AVR than in the other countries and less financial compensation. We hypothesise that the Danish government’s anti-immigration and anti-Muslim rhetoric, which may partially be aimed at warding off the competition by populist anti-immigration parties, hampers the development of positive return incentives. Both the rhetoric and the lack of positive incentives, however, reduce the legitimacy of immigration law in the eyes of migrants and/or authorities in countries of origin and transit, which may contribute to a reluctance of both to comply with return. Levels of institutional trust are relatively low among migrants in Denmark, especially for the first generation (Dinesen and Hooghe 2010).

Hampered regimes seem to struggle with non-return and large numbers of irregular migrants residing in the country in legal limbo. In Denmark, non-deportable migrants are ‘tolerated’ in the remote ‘departure centres’, and there were plans to isolate unwanted migrants with criminal records on Lindholm island, until these plans were cancelled by the newly elected government in 2019. Belgium seems to resort mostly to delaying enforcement by issuing temporary humanitarian visas and seems to be grudgingly accepting informal absorption at relatively high levels (cf. Van Meeteren 2010). In the meantime, the issue of return is the subject of heated political debate and polarisation. Both countries did use regularisation programmes in the past (Brick 2011).

### *Thin enforcement regimes*

In the ‘thin enforcement regime’ there is limited interest *and* capacity to enforce admission requirements. Based on the quantitative findings and the available literature, Spain and Italy would traditionally fall into this category (cf. Düvell 2005), although we did not investigate these countries in-depth. Both Spain and Italy can be expected to have both a relatively weak enforcement interest and capacity, given the dependence on migrant labour in the informal sector, which makes it not only undesired but also more difficult to institutionally exclude irregular migrants through formal requirements to employers to check employees’ immigration status. Spain and Italy can also be expected to have more

limited enforcement capacities because of a lower GDP per capita. While the focal countries consider regularisations as incidental, the largest and most frequent regularisations have taken place in Italy and Spain (Brick 2011).

## Discussion and conclusion

In this article, we compared 12 EU+ countries, of which six in more detail, and six main asylum seeker nationalities in order to identify the post-arrival migration enforcement and non-enforcement policies of different liberal states, and to explore the different logics underlying different approaches to (non-)deportability. The preliminary findings corroborate the main assumption underlying our project; there is not a unified deportation regime. Instead, countries tend towards different ideal-typical post-arrival migration enforcement regimes. Furthermore, we show that a state's approach to deportability should not be studied in isolation from its approach to non-deportability. To some extent, return and non-return policies have similar underlying logics and they are also likely to influence each other: for example, policies of social exclusion as an enforcement instrument paradoxically contribute to an interest to provide basic accommodation to irregular migrants who cannot support themselves. There is an additional reason for paying attention to non-return policies in deportation studies: a considerable number of irregular migrants are *not* demonstrably returned, even in countries with the highest return rates.

The analysis suggests that governmental approaches to (non-)deportability in Europe tend toward at least four ideal-typical regimes, which result from different positions on two underlying dimensions, namely enforcement interest and enforcement capacity: 'thick enforcement regimes' combine a strong enforcement interest with an extensive enforcement capacity; 'targeted enforcement regimes' have a relatively strong enforcement capacity, which is used in a more targeted manner; for 'hampered regimes', a strong enforcement interest coincides with limited enforcement capacities. A fourth regime type would be the 'thin enforcement regime' where there is limited interest and capacity to enforce.

There is suggestive evidence that the existing variation in post-arrival enforcement partially results from the various logics of the liberal state having different strengths in different contexts. All liberal states have some interests in common, which are related to the four core domains on which they obtain their legitimacy – security, economic welfare, domestic fairness (redistribution), and the rule of law. But to some extent, they also have specific interests and capacities. In our view, 'the' deportation regime as described by De Genova and Peutz (2010) actually qualifies as a targeted regime, as it mostly enforces deportation when migrants become unproductive or commit crimes.<sup>6</sup> In Europe, we clearly also see other varieties of post-arrival enforcement due to the stronger influence of the logic of fairness in relation to the welfare state and different concerns regarding institutional legitimacy. This variation, which is already observed for the six focal countries – and, more indirectly, for the 12 EU+ countries – suggests a 'glocalised' deportation turn: while there is a global trend toward more post-arrival enforcement, context-specific domestic factors produce and sustain a significant variation.

Differing national orientations to the institution and conceptualisation of citizenship may partly underlie the international similarities and differences in (non-)enforcement, but our analysis shows that they have only limited explanatory power. Certainly, states give nationals privileged access to social, civic and political rights, which contributes to certain

interests – and specific capacities – to exclude non-citizens by enforcing negative admission decisions, and liberal states in particular also have an interest to limit the use of force. Arguably, the tendency of liberal states to understand citizenship as something that can change – the right to change one's nationality is mentioned in the Universal Declaration of Human Rights – also puts pressure on these states to develop non-return policies by eventually offering pathways to citizenship to certain categories of 'deserving' irregular migrants, such as long-staying minors. It would be too easy, however, to solely attribute variation in (non-)enforcement to citizenship. The three social-democratic Nordic welfare states, with similar understandings of social citizenship, tend towards three different enforcement types, and Koopmans' et al. (2005) ideal-typical citizenship regimes also do not neatly coincide with (non-)enforcement policies. Denmark and Norway have a more ethnic orientation to citizenship (e.g. requiring 7 to 9 years of legal stay before naturalisation becomes possible) and are indeed relatively reluctant to provide pathways to citizenship to irregular migrants, mostly keeping non-deportable migrants in reception centres instead. But Germany, with a comparable orientation to citizenship, is considerably more willing to provide such pathways to (economically) integrated, non-deportable irregular migrants. Sweden is among the European countries with the most civic and inclusive understanding of citizenship and is indeed relatively willing to offer citizenship to certain segments of the irregular population. Belgium, by contrast, which has a more or less similar orientation to citizenship as Sweden (cf. Wright and Bloemraad 2012; Vink and Bauböck 2013), is not, or not as much.

Our comparative exploration still only scratches the surface of a highly complex issue. Future work could develop the preliminary typology offered here and delve deeper in the causes of international similarities and differences in states' interests and capacities regarding (non-)deportability. Truly and comparatively understanding the political conflicts, public support and controversy around immigration enforcement would also require more in-depth comparative-historical studies of state institutions and how they interact with non-state institutions in the 'interinstitutional system' (Thornton, Ocasio, and Lounsbury 2012), and of the activities of various political entrepreneurs that partially construct state interests, capacities and functions. With that view, more historical-comparative research is also needed on receiving states with different political systems and different migration histories, including in the Global South.

## Notes

1. We also decided to include Denmark (7,830 negative decisions).
2. See for example: [https://ec.europa.eu/eurostat/statistics-explained/index.php/Enforcement\\_of\\_immigration\\_legislation\\_statistics](https://ec.europa.eu/eurostat/statistics-explained/index.php/Enforcement_of_immigration_legislation_statistics). Visited December 2019.
3. The high return rate for Afghans in France may point at a peak in rejected asylum claims by Afghans before the selected period and/or the termination of residence permits previously issued to Afghans in France. It may also be related to the strong presence of the French army in Afghanistan in 2013–2017.
4. <https://ind.nl/nieuws/Paginas/Discretionaire-bevoegdheid-per-1-mei-afgeschaft.aspx>.
5. See for example: <https://www.theguardian.com/news/datablog/2009/sep/21/afghanistan-troop-numbers-nato-data#data>.
6. Traditionally, the 'neo-liberal' migration enforcement regime of the US was primarily driven by employer interests. Possibly, since the terrorist attacks on 11 September 2001,

there has been a stronger influence of security logics, which has led the federal government to try to show that it is able to ‘stop’ irregular migration.

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No potential conflict of interest was reported by the authors.

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