

Chapter 13. 'Experts': The Mantra of Irregular Migration and the Reproduction of Hierarchies – Jeff Handmaker and Claudia Mora*

1. Introduction

The movement of people around the globe is connected to a larger set of economic, transnational and geopolitical trends. Migrant flows are part of the global exchange of people, capital, goods and intangibles.¹ Inequalities among different global regions are one of the factors that have fostered the displacement of large numbers of people. Hence, the direction and characteristics of some migration flows suggest the workings of overlapping patterns of stratification and inequality.² These are reinforced by legal distinctions between those subject to special protection (such as refugees) and other migrants, who have limited or no access to state social welfare and economic systems. The latter category is in fact the majority of migrants in the world. This has led to a structural dependence by wealthier, migrant-receiving countries, on (im)migrant labour.³ In this broad context, migration experts have emerged.

Migration experts from non-governmental organisations (NGOs), research institutes, corporations and international organisations have long been involved in the formulation and implementation of migration policies. International organisations, platforms and networks involved in developing migration policy, including the United Nations High Commissioner for Refugees (UNHCR), the Hague Process on the Future of Asylum and Migration, and most especially the International Organisation for Migration (IOM), the main international organisation devoted to migrant issues, have emphasised the importance of expertise from non-state actors. The IOM in particular has emphasised

* Handmaker was a participatory observer in the migration policy discussions, which were organised by IOM/UNHCR and the Hague Process.

¹ S. Sassen, *Globalization and Its Discontents: Essays on the New Mobility of People and Money* (New York: The New Press, 1999).

² Migration flows are comprehensively documented by organisations such as the Migration Policy Institute in Washington D.C. See www.migrationinformation.org/.

³ S. Castles, 'Why Migration Policies Fail', *Ethnic and Racial Studies*, 27 (2004), 205–27, at 210.

that these partnerships help it to provide 'substantive, expert and organizational assistance to governments and other institutions.'⁴ According to the IOM, partnerships with NGOs, research institutes, corporations and international organisations 'provide an important platform for advancing cooperation on migration'.⁵ IOM spokesperson Irena Vojackova-Sollorano has highlighted the importance of expertise from different sources, and stressed the need for 'cooperative approaches that bring together governments, the shipping industry, NGOs and international organizations (to) ensure the safety and protection of all people rescued at sea'.⁶ In practice, as this chapter will reveal, migration experts have not only been involved in framing the content of policy discussions; but also in assisting states in the implementation of migration policies. However, the close, albeit always secondary involvement of experts in state-led policy discussions and implementation programmes cannot be said to be free of challenges.

The content and practical implementation of migration policies is oriented around 'irregular migration', a very problematic concept. Uncritical use of this concept results in the reproduction of what we will argue is a false dichotomy between regular and irregular migrants. In this chapter, we will first explain how the concept of irregular migration has become a policy mantra, rooted in notions of state security and reinforced by the use of strict enforcement measures to stem the flow of migrants, and why this is problematic.⁷ We will substantiate this by explaining that the enforcement of border controls, which often involves a number of migration experts, is an extension of a state-centred, extra-territorial and often privatised interdiction and/or deterrent measures, including detention and carrier sanctions. Alternatively, a migrant-centred perspective reveals both the social

⁴ www.iom.int/jahia/Jahia/partnerships/ngos/lang/en.

⁵ IOM's cooperation with NGOs and research institutes is very close, occurs 'in various contexts and reflects the diverse relationships between the two actors. ... IOM and NGOs may act as equal partners, or complement each other's activities'. See IOM, 'Civil Society and NGOs', www.iom.int/jahia/Jahia/partnerships/ngos/lang/en.

⁶ IOM, 'Expert Meeting on Refugees and Asylum Seekers in Distress at Sea Opens in Djibouti', www.iom.int/jahia/Jahia/media/press-briefing-notes/pbnAF/cache/offonce/lang/en?entryId=30937.

⁷ B. Ghosh, *Huddled Masses and Uncertain Shores: Insights into Irregular Migration* (The Hague: Kluwer International, 1998).

exclusion and the liminal legality⁸ to which all migrants are relegated as a result of measures aimed at 'combating' irregular migration.

Secondly, this chapter will substantiate that, with some exceptions, migration experts have become involved in reproducing binary explanations of contemporary migration by using the regular versus irregular distinction in relation to trans-national migrants.⁹ We will provide one example where experts from non-governmental organisations challenged the concept of irregular migration, and another example where experts from NGOs and corporate backgrounds who advise states and international organisations reproduced the irregular migration mantra rather than critically engaged with the concept. This binary notion of transnational migration reinforces patterns of social exclusion, based on the possession of social, economic and human capital (knowledge migrants and refugees), and deepens the marginalization of those lacking this capital (most other migrants). In other words, by emphasising a distinction between certain privileged categories of migrants and others, experts reproduce state-created hierarchies or categories of 'worthiness' within the discourse on migration. This distinction may add to existing public and political pressures to take an uncompromising stance on undocumented migrants that has a significant external impact on migration policy discourses, and reinforces the normative vulnerability of the vast majority of migrants.

The reality of contemporary migration and border control enforcement measures has overwhelmingly been focussed on what Helton has referred to as containment measures designed to combat irregular migration.¹⁰ Consequently, as we will substantiate later in this chapter, migration experts have become a core component in giving legitimacy to the enforcement of migration policies and border controls, as a direct extension of state-centred efforts to contain and control migrants. We will also show that

⁸ Liminal legality refers to a form of 'in-between' legal status which falls short of the legal status held by others and fails to allow migrants to protect their rights. The concept has been developed and applied by various authors, notably C. Menjivar, 'Liminal Legality: Salvadoran and Guatemalan Immigrants' Lives in the United States', *American Journal of Sociology* 111 (2006), 999–1037 and E. Glenn, 'Constructing Citizenship: Exclusion, Subordination and Resistance', *American Sociological Review*, 76 (2011), 1–24.

⁹ The term 'transnational migrants' refers to migrants who travel between different nation-states.

¹⁰ A. Helton, *The Price of Indifference: Refugees and Humanitarian Action in the New Century* (Oxford University Press, 2001).

migration experts from NGOs, academia and elsewhere engaged in migration policy discussions and enforcement measures are fulfilling central roles as policy advisors and even implementers, and that their unquestioning acceptance of the concept of irregular migration is problematic. We conclude that the consequences of this are not only worrying from a human rights perspective; containment measures by states to address migration flows will continue to fail so long as policymakers continue to focus on a state-centred approach and lack a deeper and more contextualised understanding of both the dynamics of migration and the relationship between private/civic actors and the government.

2. Contextualising the role of experts: the mantra of irregular migration

The context in which migration experts have contributed to migration policy discussions and measures for the implementation of these policies has overwhelmingly been framed by the notion of irregular migration. It is not clear when the term irregular migration first came into use, although IOM provided the following definition at a workshop in its World Migration Report of 2008, referring in particular to states' practices:

The term 'irregular' may refer variously to conditions of entry, stay and employment, including possession of appropriate documentation. Most commonly, irregularity is determined by reference to the norms of the country of destination or transit, although recent research has shown that irregularity is a multifaceted concept that is often not reflected in policy responses.¹¹

Despite this lack of clarity, the term has been propagated extensively by both states and the IOM and has been perceived as a desirable alternative to other terms that were either less clear (e.g. undocumented migrants) or denigratory (e.g. illegal migrants). Elspeth Guild has noted that irregular migration 'occupies a central place on the European

¹¹ IOM, *World Migration Report 2008* (IOM, 2008).

Union's area of freedom security and justice'.¹² Guild acknowledged the ambiguity of IOM and states' definitions, arguing that irregular essentially means 'illegal' and that states are notoriously reluctant to define what it means exactly to be either irregular or illegal.

So, what do other experts understand to be irregular migration? Bimal Ghosh, a long-time advisor to the IOM, argued in 1998 that 'there is still no clear or universally accepted definition of irregular migration'.¹³

According to Ghosh's broad formulation, irregular migration is: 'any inter-country movement that takes place outside the regulatory framework of the sending country, or the receiving country, or both'.¹⁴ Referring to an expert roundtable in Lisbon in 2002, Koser argued that the term irregular migration should relate exclusively to the 'secondary movement' of asylum seekers and refugees that decide to travel onwards to a country other than the one in which they originally applied for, or had been granted refugee status.¹⁵ Similar to Guild, Koser explained that there is a lack of conceptual clarity in the use of the term. Similar to many other migration experts, Koser is exclusively focussed on a particular category of irregular migrants (asylum seekers and refugees) whose legal status is explicitly protected in international law. This exclusive focus has had a (perhaps unintended) consequence. As we discuss later on in this chapter, states have directed their efforts at combatting irregular migration through introducing ever-stringent restrictions on applying for refugee status, making it increasingly difficult for irregular migrants to obtain this status.

Pécoud and Guchteneire, for their part, argue that irregular migration is a central feature of migration policy that suggests that borders are porous and thus need greater

¹² E. Guild, 'Who is An Irregular Migrant?' in B. Bogusz, R. Cholewinski, A. Cygan & E. Szyszczak (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Martinus Nijhoff, 2004), 3–28, at 3.

¹³ Ghosh, *Huddled Masses and Uncertain Shores*, at 1.

¹⁴ *Ibid.*, at 34.

¹⁵ Koser went on to explain that there are multiple reasons for secondary movement, including a 'lack of access to legal migration opportunities'. K. Koser, 'Irregular Migration, State Security and Human Security: A Paper Prepared for the Policy Analysis and Research Programme', (Geneva: Global Commission on International Migration, 2005), at 5-7.

surveillance.¹⁶ However, the authors condemned the impact that restrictive policies, aimed generally at irregular migrants, have had on both asylum seekers and economic migrants:

The measures meant to stop irregular migration have direct consequences on the asylum principle, according to which all human beings are entitled to seek protection from persecution. The lack of legal migration channels incites some economic migrants to present themselves as asylum-seekers, which, in a self-nurturing process, then casts doubts on all refugees and leads to even more restrictive measures.¹⁷

The use of the term irregular migration has been reflected in three particular, state-led trends in which migration experts have fulfilled an important, albeit secondary role. First, conceptually, the term has been invoked in unilateral and collective state efforts to combat irregular migration. The mantra of irregular migration has underpinned the efforts of states to interdict migrants, both in-country (through strict border controls)¹⁸ and extra-territorially (for example interdictions at sea).¹⁹ Second, governments have invoked the term in their efforts to prioritise knowledge migrants, recognise refugees and exclude all other categories of migrants. Third, the mantra has been invoked to justify the detention of migrants as well as to justify sanctions against private carriers,²⁰ both in an effort to contain irregular migration.²¹ We will discuss each of these trends in turn.

2.1. Combatting irregular migration and the transnationalisation of border controls

Efforts to combat irregular migration have taken similar forms in jurisdictions around the world and have also taken on a transnational dimension. In Europe, the principal institution established to interdict migrants and enforce border control at a collective level is the European Agency for the Management of Operational Cooperation at the External

¹⁶ A. Pécoud and P. Guchteneire, 'International Migration, Border Controls and Human Rights: Assessing the Relevance of a Right to Mobility', *Journal of Borderlands Studies*, 21 (2006), 69–86, at 70.

¹⁷ *Ibid.*, at 73.

¹⁸ *Ibid.*; Ghosh, *Huddled Masses and Uncertain Shores*

¹⁹ A. Fischer-Lescano, T. Löhr & T. Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law', *International Journal of Refugee Law*, 21 (2009), 256–96.

²⁰ The latter is explained in depth in by Scholten and Terlouw, chapter 14, this volume.

²¹ A fourth and relatively more recent trend in the development of the irregular migration mantra is the containment of migrants through social and economic measures, designed to compel irregular migrants who have failed to obtain – or lost – their legal residential status to return home.

Borders of the Member States of the European Union (Frontex). A significant feature of Frontex are the Rapid Border Intervention Teams or 'Rabit'.²² The Regulation setting up the Rabit system in 2007 aimed at:

Effective management of the external borders through checks and surveillance ... to combat illegal immigration and trafficking in human beings and to prevent any threat to the internal security, public policy, public health and international relations of the Member States.²³

After vaguely asserting that the Regulation respects 'fundamental rights', the Rabit Regulation refers explicitly to the rights of 'refugees and persons requesting international protection, in particular as regards non-refoulement'.²⁴ Such an exclusive focus on refugees, we argue, is problematic as it disregards the vast majority of migrants.

Frontex is not the only agency coordinating border enforcement. As Saskia Sassen has noted, there has been a proliferation of transnational regimes aimed at regulating temporary labour migration, much of which has been privatised. This proliferation of these transnational regimes, she argued, has seriously undermined state sovereignty. She described this phenomenon as:

part of the larger institutional reshuffling of some of the components of sovereign power over entry and can be seen as an extension of the general set of processes whereby state sovereignty is partly being decentred onto other non- or quasi-governmental entities for the governance of the global economy.²⁵

The privatisation of border control has been especially problematic.²⁶ Interdictions of irregular migrants, especially outside a state's physical borders, have fuelled an economically significant and technology-driven industry. Insurance companies sell 'risk management' policies to companies with expertise in interdicting, detaining and deporting irregular migrants. Israel, the United States, South Africa, Denmark, the United

²² EU, 'Regulation (EC) No 863/2007 of the European Parliament and of the Council establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers', *Official Journal L* 199 (2007), 31/07/2007, 30–9.

²³ *Ibid.*, at 30.

²⁴ *Ibid.*, at 31–32.

²⁵ S. Sassen, 'Regulating Immigration in a Global Age: A New Policy Landscape', *The ANNALS of the American Academy of Political and Social Science*, 570 (2000), 65–77, at 71.

²⁶ See also Scholten and Terlouw, chapter 14, this volume.

Kingdom and other countries with large security industries offer a range of products and advisory services to countries interested in strengthening their physical borders against irregular migrants.²⁷ The euphemistically named 'immigration liaison officers' (ILOs), are hired by states as security experts with very little, if any knowledge or training in migrant protection or human rights. ILOs appear in airports around the world, screening passengers from the manifest list, to the final point of physical embarkation of the aircraft.²⁸ ILOs have been contracted by the governments of European countries, the United States, Australia and others in an effort to interdict irregular migrants before they physically travel to these countries. With a drop in the cost of air travel, these countries have become a popular destination for largely middle-class, irregular migrants seeking to better their economic situation or protection from persecution.²⁹

Interdiction at land and sea borders targets the remaining 'irregular' migrants. States have constructed formidable physical barriers to keep them out. Some of the most notorious have been technology-enhanced barriers erected by the United States along its border with Mexico, with substantial assistance from private corporations and advisors.³⁰ The significant increase in US border controls, has led to a substantial increase in migrant deaths.³¹ In Europe, Frontex coordinates the interception of irregular migrants on land, particularly in Eastern European countries, and also at sea, in cooperation with EU member states. Fischer-Lescano and colleagues explored the extent to which countries in the EU claimed jurisdiction not only in their own territory, but also extra-territorially, both in the high seas and in the territorial waters of third countries. Their principal concern was whether states' obligations to refugees extended to these extra-territorial

²⁷ Elbit systems, an Israeli company, provides various surveillance, detection and other equipment to manage border control, including at the UK/Mexico border – see www.elbitsystems.com. P&I (Personal and Indemnity) Associates is an Australian/South African company that specialises in migrant deportations – see www.pandi.co.za. G4S is a UK/Danish company involved in various forms of migrant interdiction and detention. In 2002 it bought the US firm Wackenhut, which had long been involved in migrant detention – see www.g4s.com.

²⁸ Interview on 9 March 2011 by Handmaker with an official (details on record) of the International Organization for Migration (IOM) who was responsible for liaising with ILOs.

²⁹ *Ibid.*

³⁰ A. Aradas, 'US-Mexico border: Efforts to Build a Virtual Wall', *BBC Mundo*, 29 August 2012, www.bbc.co.uk/news/technology-19409682.

³¹ W. A. Cornelius, 'Death at the Border: Efficacy and Unintended Consequences of US Immigration Control Policy', *Population and Development Review*, 27 (2001), 661–85.

interdictions, and they concluded that this was the case.³² It was notable that the authors did not express a view as to the (il)legality of extra-territorial interdictions regarding irregular migrants more generally. Their focus was on refugees, the implication being that their status as (potential) refugees invoked these protective obligations.

2.2. Prioritising knowledge migrants, recognising refugees and condemning others

In individual states, such as the Netherlands, the irregular migration mantra has led to a highly confusing situation. Dutch immigration policy is, officially, based on protection of human rights, while simultaneously it is intolerant towards immigrants. Between October 2010 and the end of April 2012 the then government of the Netherlands ('Rutte 1') had the basis for its migration policies enshrined in a so-called *gedoogakkoord* ('Tolerance Agreement')³³ which stated that:

[a]sylum and migration policy is strict but fair. ... The Netherlands will continue to protect and absorb refugees in terms of the Refugee Convention ... This cannot apply to asylum seekers who appear to be economic migrants. Therefore, it will be determined as soon as possible in which category the applicant belongs and whether they can stay here or must leave the Netherlands.³⁴

Accordingly, the then Dutch Minister for Immigration, Leers, enforced this policy with little exception, including in the well-publicised case of an 18-year old Angolan simply known as 'Mauro'³⁵. While Mauro originally arrived as an under-aged asylum seeker, by reaching the age of majority, with little prospects to continue his education (which would have placed him in desirable category of knowledge migrant), he was subsequently regarded as an economic migrant (a migrant in search of labour or a labour migrant) and

³² Fischer-Lescano et al., 'Border Controls at Sea'.

³³ This agreement was the outcome of government coalition negotiations between the anti-immigration Freedom Party (PVV), the socially conservative Christian Democrats (CDA) and the liberal VVD party.

³⁴ Tolerance Agreement, *Gedoogakkoord VVD-PVV-CDA*, signed on 30 July 2010, www.kabinetformatie2010.nl, at 4.

³⁵ See e.g. www.rtl.nl/components/actueel/editie/nieuws/2011/w43/Mauro-moest-al-eerder-het-land-uit.xml; nos.nl/op3/artikel/307808-stemming-mauro-na-cdacongres-online-acties-voor-de-angolees.html.

should, according to Minister Leers' interpretation of the government's 'Tolerance Agreement', be removed 'as quickly as possible'.³⁶

Furthermore, the Dutch government's favouring of 'knowledge migrants'³⁷ who migrate in an orderly manner has been accompanied by a shift away from labour migrants. The promotion of knowledge migrants has become a cornerstone of European governments' migration policies. Faist put it as follows:

[i]n immigration countries, notions of economic globalisation have led to an increased effort by companies and states to attract post-secondary international students and future scientists. OECD countries have thus changed their legislation, moving from a 'red card' to a 'red carpet' strategy. The hunt for knowledge workers is nonetheless reminiscent of 'body shopping' and the poaching of workers ... The difference is, however, that nowadays it is not the countries catching up that engage in poaching, but those who are furthest ahead.³⁸

According to this 'red carpet' treatment, Leers also made it clear that the government ought to be able to 'choose' who arrives and works in the Netherlands. The criteria for choosing are tied to the paternalistic assumption that it is only those with a real chance of success that ought to be formally admitted to the Netherlands.³⁹

2.3. Detention and carrier sanctions

³⁶ On 30 March 2013 it was reported that Mauro received a permanent residence permit for the Netherlands, as part of the 'children's pardon' applied by the Dutch government. See Defence for Children International, 'Finally certainty for Mauro' (translation), <http://www.defenceforchildren.nl/p/21/2675/mo89-mc21>.

³⁷ According to the Dutch Government, a knowledge migrant is one who has graduated with a Master's degree or PhD from a university ranked in one of the recognised World University Rankings, who obtained this higher degree not more than three years ago (or graduated from a Dutch University). Additionally, the knowledge migrant should earn at least Euros 51,239 (or Euros 37,575 if younger than 30 years). This income criterion does not apply to a person who is admitted for doctoral studies at a Dutch university, or if the person is fulfilling a medical residency as a specialist. This information is difficult to find and changes frequently. The above-mentioned criteria were obtained from the Dutch government's website www.rijksoverheid.nl/onderwerpen/buitenlandse-werknemers/vraag-en-antwoord/wat-zijn-kennismigranten.html, and in a document (in English) provided to prospective knowledge migrants: Immigration and Naturalisation Service, *A Highly Educated Migrant Seeking Employment*, Ministry of the Interior and Kingdom Relations, 30 August 2012, <http://www.ind.nl/en/Customer-Information/Documents/1211.pdf>.

³⁸ T. Faist, 'Migrants as Transnational Development Agents: An Inquiry into the Newest Round of the Migration-Development Nexus', *Population, Space and Place*, 14 (2008), 21-42, at 33.

³⁹ A. Smit, 'De kansrijke migrant bestaat niet', *De Volkskrant*, 25 October 2011; M.E. van Bochove, K.M. Rusinovic & G B.M. Engbersen, 'Over de rode loper: Kennismigranten in Rotterdam en Den Haag', Research Report, Faculty of Social Sciences, Erasmus University Rotterdam (2010).

The rapid growth in the border control industry, fuelled by global efforts to combat irregular migration, has included detention facilities, both within a state's territorial boundaries and abroad. For example, Morocco has hosted Spanish-run detention centres in Ceuta and Melilla in an attempt to interdict and deter would-be migrants.⁴⁰ This has been further reinforced by a Spanish-funded 'early warning radar system' to control Spanish maritime borders.⁴¹

At home, states have spent relatively large portions of their budget on the detention of irregular migrants. The Dutch government spends well over Euro 250 million per year on the detention of migrants and asylum seekers.⁴² Recorded as overseas development assistance, this amount substantially exceeds the Dutch government's annual non-earmarked contribution of Euros 2.9 million to the budget of UNHCR by a figure of ten.⁴³

Following general global trends of detaining irregular migrants, an increasing number of migrant detention facilities has been privatised. Describing the treatment of irregular migrants in secure detention in the United States, which are often run by large corporations, Dow described the well-documented 'beat and greet reception' by correctional officers in the US, which has included:

kicking, punching, and ... plucking detainees' body hairs with pliers, forcing detainees to place their heads in toilet bowls, encouraging and ordering detainees to perform sexual acts upon one another, forcing detainees to assume unusual and degrading positions while naked and cursing at and verbally insulting the detainees.⁴⁴

In South Africa, the 'inadmissibility facility' at Johannesburg airport and 'Lindela Accommodation Centre', both run by private corporations, are responsible for the detention of irregular migrants. Lindela⁴⁵ is run by Bosasa and is located in a former

⁴⁰ M. Carr, 'Policing the Frontier: Ceuta and Melilla', *Race and Class*, 39 (1997), 61–6.

⁴¹ H. de Haas, 'The Myth of Invasion: The Inconvenient Realities of African Migration to Europe', *Third World Quarterly*, 29 (2008), 1305–22, at 1309.

⁴² Netherlands Parliament, *HGIS-Jaarverslag 2010, Homogene Groep Internationale Samenwerking*, presented to Parliament on 18 May 2011, at 19.

⁴³ *Ibid.*, at 34.

⁴⁴ M. Dow, *American Gulag: Inside US Immigration Prisons* (University of California Press, 2008) at 143–44.

⁴⁵ 'Lindela' means 'wait here' in several South African indigenous languages.

mine, outside Johannesburg. The Lindela facility's management persistently distinguishes itself from its contractor, the South African Department of Home Affairs, making clear that the management 'has no authority over the apprehension, detention or release of any person at Lindela'. And yet, it offers services in: '[c]apturing of finger prints, induction programme to inform detainees of their legal rights [and] visiting procedures'.⁴⁶ The South African Human Rights Commission has issued at least two reports describing the deplorable conditions in the facility⁴⁷ and lawyers acting on behalf of detainees have taken legal action against the facility, albeit mainly in relation to the detention of asylum seekers and refugees.⁴⁸

Finally, emphasising states' transnational approach to combatting irregular migration, in addition to internal controls, extra-territorial interdictions and detention, states have introduced carrier sanctions. The idea is to push responsibility for border control away from states towards private actors. For example, airlines that transport migrants lacking legal travel documentation are fined large sums of money per migrant.⁴⁹

3. Migration experts and their reproduction of the term irregular migration

As mentioned at the outset, the movement of people around the globe is connected to a larger set of economic, transnational and geopolitical trends. The realities of migration are in tension with the containment-oriented migration policies that states use in their efforts to combat irregular migration.

This section will show that the realities of migration have not been a central feature of most migration policy debates involving the contributions of migration experts. In particular, the sparse efforts of migration experts to seriously critique the concept of irregular migration has led to a reproduction and normalisation of the concept. The

⁴⁶ PMG, 'Bosasa briefing to the Parliamentary Committee on Home Affairs on 11 August 2005' (Cape Town: Parliamentary Monitoring Group, 2005).

⁴⁷ SAHRC, *Lindela at the Crossroads for Detention and Repatriation: An Assessment of the Conditions of Detention* (Johannesburg: South African Human Rights Commission, 2000), www.queensu.ca/samp/migrationresources/xenophobia/reports/sahrc1.pdf.

⁴⁸ Human Rights Watch, *Living on the Margins: Inadequate Protection for Refugees and Asylum Seekers in Johannesburg* (Human Rights Watch, 2005), www.hrw.org/reports/2005/11/16/living-margins, at 48. .

⁴⁹ See Scholten and Terlouw, chapter 14, this volume.

importance of examining migration from a migrant-oriented, rather than a state-oriented perspective has not been a mainstream view.⁵⁰ In this section, the involvement of migration experts in reproducing the irregular migration mantra is analysed in three forms, namely: through promoting the link between asylum and (orderly) migration, through giving a 'human face' to state-led efforts to interdict migrants and, more broadly, through failing to speak out and address the efforts of governments to 'combat' irregular migration.

3.1. Migration experts and the asylum-migration nexus

In the context of refugee and asylum, experts have responded to IOM-led and UNHCR-supported initiatives to promote a nexus between the provision of asylum for political refugees, and the promotion of orderly migration more generally.

Correspondingly, the casual use of the term 'irregular migration' by many migration experts has reinforced states' efforts to combat irregular migration in a way similar to how states combat crime. In his 1998 book, Ghosh already forewarned policy-makers of the potential dangers involved in what others (including Helton) have later referred to as containment measures.⁵¹ Ghosh argued there was a 'real danger' on the part of states' policy-makers that:

in their anxiety to curb irregular migration as quickly as possible, the receiving industrial countries might attach a disproportionate importance to a set of narrow and *ad hoc* measures, focusing on short-term cures through border control and punitive action.⁵²

The concept of irregular migration and resulting policies of containment long pre-date the rigorous, state-centred responses to the events of 11 September 2001. Immigration control was, in fact, already a big issue from the 1980s.⁵³ The so-called war on terror brought with it additional pressures to protect industrialised states from terrorist attacks in

⁵⁰ See T.-D. Truong, D. Gasper, J. Handmaker & S. I. Bergh (eds.), *Migration, Gender and Social Justice: Perspectives on Human Security* (Frankfurt: Springer, 2013).

⁵¹ Helton, *The Price of Indifference*

⁵² Ghosh, *Huddled Masses and Uncertain Shores*, at 46–7.

⁵³ B. Chiswick, 'Illegal Immigration and Immigration Control', *The Journal of Economic Perspectives*, 2 (1988), 101–15, at 101.

future, through further curtailing the already restricted possibilities for migration. In short, the war on terror has justified new and ever-more draconian measures against migrants, including the use of biometrics.⁵⁴

As confirmed by Koser and others, a trend in the use of the term 'irregular migration' has been to deliberately link it to the need for legal protection and institutional arrangements for asylum seekers and refugees. This was, in fact, the central topic of policy discussions in 2001, when the IOM sponsored an initiative designed to address the so-called asylum-migration nexus as part of the UNHCR's 2001 Global Consultations on International Refugee Protection.⁵⁵

A document was produced by IOM and was formally, albeit reluctantly, endorsed by UNHCR,⁵⁶ clearly implying that asylum reception systems were to be the primary target of states' individual and collective efforts to deal with irregular migrants. The document placed substantial attention on state security and control. It furthermore confused notions of who should qualify as an irregular migrant by conflating irregular migrants with the even more vague characterisation of a 'broader mixed flow' of migrants:

Refugees are not migrants in the lay sense of the word. They move through compulsion, not on the basis of meaningful choice, and their immediate objective is to seek protection, not a migration outcome. This being said, refugees may also move – in fact increasingly do so – within a broader mixed flow which includes both forced and voluntary movements. They may even resort to migrant smugglers as one way to leave their country. At the same time, in the absence of viable, legal migration options to pursue, persons who are not refugees are nevertheless seeking to enter countries of their choice through the asylum channel, it being often the only entrance possibility effectively open to them. So the line between migrant and asylum-seeker progressively blurs in the public mind, just as does the distinction between migration control and refugee protection in the policies of some States.⁵⁷

⁵⁴ L. Amoore, 'Biometric Borders: Governing Mobilities in the War on Terror', *Political Geography*, 25 (2006), 336–51.

⁵⁵ Leading up to the fiftieth anniversary and second meeting of States party to the 1951 United Nations Convention Relating to the Status of Refugees, the UNHCR held a series of meetings as part of the 'Global Consultations on International Protection'. For more information, see www.unhcr.org/pages/4a16b14b6.html.

⁵⁶ United Nations, 'Refugee Protection and Migration Control: Perspectives from UNHCR and IOM', *Refugee Survey Quarterly*, 22 (2003), 111-25. At a June 2001 meeting to discuss this document (attended by Handmaker), the then Director of International Protection, Erika Feller, made clear that she was not in favour of UNHCR's endorsement of the IOM document, but that it had been made clear to her that the UNHCR had 'no choice' but to be involved.

⁵⁷ *Ibid.*, at 1.

The document further stressed elaborate interdiction or 'interception' measures as 'one of the most effective measures to enforce their domestic migration laws and policies'.⁵⁸ By contrast, the document dedicated only minimal attention to migrant or refugee protection by way of a variety of unelaborated 'safeguards'.⁵⁹ Although the document acknowledged the complex realities of migration, it still focused on measures to discourage 'root causes' of migration, in order to 'maintain the integrity of the institution of asylum'.⁶⁰

Migration experts responded to the document in a variety of ways.⁶¹ Firstly, the document's cursory treatment of the root causes of movement was criticised, based on the argument that more complex reasons as to why people were moving were being avoided. As an alternative to the restrictive line proposed by the IOM-UNHCR document, NGO experts, led primarily by Human Rights Watch, collectively promoted a rights-based normative discourse, emphasising that 'all human beings have inalienable rights', but that refugees have 'additional rights'.⁶² Some critique of the concept of irregular migration noted that there were 'grey areas' involved in avoiding the 'orderly' migration channels. For example, they argued that some irregular or undocumented migrants may have a valid asylum claim and very good reasons for not presenting themselves to the authorities.⁶³ The experts further critiqued the perception by IOM that migrants were merely abusing the system, which tended to ignore the very stringent measures involved in migrating in an 'orderly' manner.⁶⁴ Finally, the experts criticised the interception of irregular migrants as a key policy strategy, which often took place in unmonitored zones.⁶⁵

⁵⁸ *Ibid.*, at 5.

⁵⁹ *Ibid.*, at 8–9.

⁶⁰ *Ibid.*, at 10.

⁶¹ Human Rights Watch and Others, 'NGO Background Paper on the Refugee and Migration Interface (28–29 June 2001)', *Refugee Survey Quarterly*, 22 (2003), 373–89. The original version of this NGO Paper, which lists the full set of organisation that contributed, is available on the website of Human Rights Watch, www.hrw.org/en/node/77559.

⁶² *Ibid.*, at 375.

⁶³ *Ibid.*, at 376–77.

⁶⁴ *Ibid.*, at 378.

⁶⁵ *Ibid.*, at 380–81.

In other words, NGO-affiliated migration experts in this policy discussion critiqued the enforcement of border controls, as well as certain questionable assumptions underpinning the concept of irregular migration. While asylum seekers and refugees were noted as particularly vulnerable in these circumstances, the NGO-affiliated migration experts on this occasion did not reinforce the hierarchical division between 'orderly' and other migrants. By contrast, as will be explained in the next section, a rather different approach was taken where migration experts strove to present a 'positive' face to orderly migration.

3.2. Giving migration a 'positive' face?

Another example of the involvement of migration experts in global migration policy processes is one in which the concept of irregular migration was uncritically reproduced and hierarchies of migrants were reinforced, despite the emphasis placed by these experts on giving migration a 'positive' face. In 2000, under the auspices of the Netherlands Society for International Development, an initiative was launched that eventually became known as 'The Hague Process', supported by a panel of experts known as the 'Club of The Hague'.⁶⁶ A series of meetings were held that led to a Declaration of The Hague, eventually adopted by the United Nations General Assembly on 23 December 2002.⁶⁷ Arguing that migration should be viewed as 'a normal phenomenon which can contribute positively to economic and social development, cultural richness and diversity', the preamble to the Declaration further argued that 'no state can any longer act alone', effectively shifting the responsibility for migration policies towards collective efforts.

⁶⁶ This initiative involved a network of hundreds of representatives from NGOs, policy institutes, governments and international organisations in the 'Club of the Hague'. Participating organisations included the European Council on Refugees and Exiles, Brookings Institute, Danish Institute for Human Rights and many others. More information about the history of the process leading up to the document and follow-up can be found at www.thehagueprocess.org.

⁶⁷ United Nations, *Declaration of The Hague on the Future of Refugee and Migration Policy*, United Nations General Assembly, A/57/693 (2002), <http://thehagueprocess.org/wordpress/wp-content/uploads/2012/12/Declaration-English.pdf>. Although technically this document was the outcome of a state process, in fact the Declaration was adopted with little to no debate by the General Assembly.

The preamble further stated that 'refugees and migrants matter enormously to the international community' and that it was 'time for a major change of focus'.⁶⁸

The migration experts involved in drafting the Declaration of The Hague adopted a rights-based approach, insisting that 'powerful instruments of human rights, international humanitarian law and refugee law already exist to protect refugees, and to a lesser extent migrants'.⁶⁹ The Declaration reflected a similar bias as the IOM-UNHCR document towards refugees and the promotion of 'orderly' migration.⁷⁰

By promoting 'orderly legal migration' and discouraging 'disorderly migration', the migration experts who drafted the document explicitly endorsed the efforts of states and international organisations to combat irregular migration. Neither in the document, nor during the processes leading up to the drafting of the document, was the concept of irregular migration questioned or addressed.⁷¹ Accordingly, by adopting a consensual, non-confrontational approach, and notwithstanding the 'positive' and rights-based approach adopted by the experts, specific problems relating to migration enforcement were left unaddressed.

3.3. Mixed efforts to address the problems of migration enforcement

A third example of the role of migration experts in the development of migration policy is their failure to critique a range of problems in states' and private companies' efforts at border control.⁷² An example of this was revealed in South Africa, where Dutch and South African experts, associated with NGOs, paralegal advice offices and church groups became engaged in a well-intentioned, but highly problematic project to assist the South

⁶⁸ *Ibid.*, Preamble.

⁶⁹ *Ibid.*, Principle 12.

⁷⁰ *Ibid.*, The Commentary, point 7.

⁷¹ Handmaker attended nearly all meetings of the Hague Process from 2000 to 2002, as well as meetings of the strategy and drafting group that produced the Declaration.

⁷² 'Orderliness' here refers to the promotion of orderly, state-regulated migration, while efficiency points to the preoccupation of states to deport irregular migrants as quickly as possible.

African government in the return or regularisation of several hundred thousand former Mozambican refugees residing in South Africa without residence papers.⁷³

By failing to confront the government with their primary responsibilities to administer these programmes and to a large extent taking on the responsibilities themselves, a chaotic situation emerged. The roles of government and the mainly South African NGOs assisting the government became blurred. This situation was further complicated by a non-transparent political lobby by a Dutch NGO that was driven more by the demands of financial donors than by sound management, let alone the protection concerns of the migrants themselves.⁷⁴ With unclear responsibilities, the former Mozambican refugees became squeezed in the middle, with several thousand being denied any form of residential status and only very limited possibilities for legal appeal.⁷⁵

The failure of NGO migration experts to adequately address the problems of migration policy enforcement does have some notable exceptions. For example, Menjivar has gone to exceptional lengths to challenge arguably the most insidious form of migrant interdiction and control, that is the social control of migrants, by denying them access to basic services such as health care or labour rights.⁷⁶ Migrants' liminal status is furthermore well-understood by two migration experts and lawyers, Pim Fischer and Jelle Klaas, who have been litigating the Dutch government's policies aimed at the containment of migrants by way of targeted, restrictive social policies. They have challenged the exclusion of their clients as a result of what they refer to as the 'breakdown of the welfare state'.⁷⁷ They base their arguments on Dutch legal and constitutional obligations and international human rights instruments. These Dutch lawyers challenge what they see as 'degradation'. As quoted by Westerink and De Waard:

⁷³ J. Handmaker, *Advocating for Accountability: Civic-State Interactions to Protect Refugees in South Africa* (Intersentia, 2009), at 123–52.

⁷⁴ *Ibid.*, at 145–46.

⁷⁵ *Ibid.*

⁷⁶ C. Menjivar, 'Liminal Legality: Salvadoran and Guatemalan Immigrants' Lives in the United States', *American Journal of Sociology* 111 (2006), 999–1037.

⁷⁷ H. Westerink and E. de Waard, 'Leftist Lawyers in Action against Exclusion' (translation), *De Fabel van de Illegaal*, 89/90 (2008), www.doorbraak.eu/gebladerte/11375f89.htm.

an ideology has advanced according to which you have to be able to take care of yourself and it is your own fault if you live in poverty. Migrants and refugees without papers and without a right to facilities are being told: you have made the choice to come here, and now that your application for a residence title failed, you must also sort things out yourself.⁷⁸

Fischer and Klaas have broken with the mainstream and conservative tradition of legal practice in the Netherlands by persistently litigating their cases, which few practising lawyers, including those with expertise in migration matters, have tended to emulate. Oomen has observed that Fischer and Klaas' break with tradition also extends to their extensive use of international law in cases that are brought before the Dutch court, which few Dutch lawyers do.⁷⁹

Apart from their unconventional legal practice, Fischer and Klaas are unique in other ways as well. As experts in what can be broadly termed migration law,⁸⁰ Fischer and Klaas depart from most other migration experts. They do not focus their attention on 'orderly migrants' and asylum seekers, but on the largely forgotten category of irregular migrants that have lost, or never had in the first place, their legal residential status in the Netherlands and who face often profound social exclusion. As exceptions to the general rule that migration experts tend to privilege refugees and knowledge migrants, Fischer and Klaas, as well as Menjivar⁸¹ highlight a number of issues and concerns faced by the majority of so-called irregular migrants that most migration experts overlook.

3.4. Issues and concerns overlooked by most migration experts

In each of the aforementioned examples of policy formulation or (privatised) implementation measures aimed at combatting irregular migration, particular issues and concerns arise that tend to be overlooked by migration experts. Firstly, migration experts have tended to focus their attention on state responsibility, overlooking the increasingly private and for-profit nature of migration policy enforcement. State-defined security needs have increasingly shifted to companies, who deploy their state-given mandate with

⁷⁸ *Ibid.*

⁷⁹ B. Oomen, *Small Places: The Homecoming of Human Rights in the Netherlands*, inaugural lecture, Utrecht University, delivered in Middelburg, 2 December 2011, at 38. Oomen went on to explain that this attitude reflects the 'primacy of parliament in political and legal decision-making'.

⁸⁰ P. Boeles and M. den Heijer, *European Migration Law* (Antwerp: Intersentia, 2009).

⁸¹ C. Menjivar, 'Liminal Legality'.

patently economic goals. This has a potentially perverse effect on the implementation of containment policies, for example where restricting food rations offered to detained migrants in privately-run detention facilities results in a raise for prison employees and the escape of a detainee harms the stock price of the private detention facility.⁸²

Second, if one regards – as we do – the proliferation of privatised enforcement measures as an inevitable harshening of the measures of containment, then migration experts would also be expected to question, equally harshly, the broader effects of for-profit containment of labour migrants in the labour market more generally. It has been discussed how the lack of attention to an already vulnerable labour force furthers their exploitation in labour markets profiting from migrants' inability to claim rights, but further attention could be paid to the structural dimensions of this issue.⁸³

Third, and perhaps more importantly, migration experts often fail to appreciate how these developments reveal the normative persistence of the notion of the Westphalian state, which is being simultaneously challenged by the extension, velocity and depth of the movements of people, capital and intangibles. For example, contemporary patterns of migration challenge traditional notions of citizenship, understood as the bond between individuals, their rights and responsibilities, and a nation-state. In a highly mobile world, immigrants do not always become, or want to become, national citizens, or even to become visible.⁸⁴ Hence, states are unable to deny these rights to non-citizens.⁸⁵ Rights claimed by immigrants could be derived from the legal status accorded them by a nation-state or by supranational norms entitling individuals to new avenues of citizenship participation, from accessing basic services such as health and education, to labour protection. In other words, nationality (and citizenship) is no longer the only possible link to a political community, which an influential community of experts and policies seem to ignore in their reification of a self-contained nation-state.

⁸² Dow, at 97.

⁸³ C. Cranford, 'Networks of Exploitation: Immigrant Labor and the Restructuring of the Los Angeles Janitorial Industry', *Social Problems*, 52 (2005), 379–97.

⁸⁵ I. Bloemraad, *Becoming a Citizen Incorporating Immigrants and Refugees in the United States and Canada* (University of California Press, 2006).

As highlighted above, the reproduction by migration experts of the migration-asylum nexus, coupled with their failure to give migration a positive face, while simultaneously failing to address the problems of migration regulation and enforcement thereof, leads to a situation where migration experts overlook a range of highly relevant issues and concerns. Accordingly, larger questions can be asked, including about the social legitimacy that these experts have to participate in migration policy discussions, to assist in the implementation of migration policies, or to consider alternative approaches for evaluating the scope and dynamics of migration.

4. Experts and output legitimacy

As discussed in the previous sections, the involvement of migration experts has the potential to reproduce bland policy mantras and to promote – intentionally or not – hierarchical categories of migrants. In this section we evaluate the roles that these experts have, either in formulating policy or assisting states with the implementation of that policy according to Abels' notion of input and output legitimacy'.

According to Abels:

[i]nput legitimacy pertains to participation, i.e. the social dimension insofar as it considers who has actually access to the policy process and who can influence policy-making ... Output legitimacy, in contrast, builds on a concept of policy-making as problem-solving in the interest of the general public. The criterion here is functional, i.e. utilitarian effectiveness ... Input and output legitimacy are not disconnected, but closely interlinked. Output legitimacy actually builds on some form of political inclusion and representation, whereas input models argue that inclusion allows achieving a better quality of the output such as enhanced acceptance and compliance.⁸⁶

By preoccupying themselves with refugees and migrants' knowledge and skill contributions, and by neglecting the pernicious nature of migration policies and enforcement measures, many migration experts involved in the migration and asylum debate neglect the vast majority of migrants.

However, some migration experts, including Menjivar, take a more nuanced approach. Referring to the circumstances of labour migrants and their social exclusion in

⁸⁶ G. Abels, 'Citizen Involvement in Public Policy-Making: Does it Improve Democratic Legitimacy and Accountability? The Case of PTA', *Interdisciplinary Information Sciences*, 13 (2007), 103–16, at 106–7.

Canada, Menjivar explained that the 'in between' or liminal legal status 'shapes who [migrants] are, how they relate to others, their participation in local communities, and their continued relationship with [their countries of origin]'.⁸⁷ Although the uncertain legal status they possess can be 'long-term',⁸⁸ the 'grey areas' of possessing a liminal status have not been widely explored,⁸⁹ let alone incorporated into migration policies.

Similarly, Glenn explained that the notion of a liminal legal status transcends fixed categories of legal and illegal.⁹⁰ She referred to the hidden nature of segregation, both legal and social,⁹¹ which was further manifested in the existence of internal organisations and activities 'allowing for emancipation' and 'external institutions of the political order, where non-whites were disenfranchised'.⁹² The in-between status that irregular migrants claim, she argued, 'disturbs the coherence of the legal-illegal dichotomy'.⁹³

Similar to Menjivar, Glenn's explanation represents a departure from the conventional binary understandings of migrants. By avoiding a characterisation of migrants as being either 'orderly' (i.e. documented) or in search of protection in terms of international and national refugee and humanitarian laws or, on the other hand, irregular and falling outside either of these two categories, Glenn and Menjivar contributed to the output legitimacy of migration experts by resisting a binary categorisation of migrants.

Experts engaged in migration policy discussions and even in the course of enforcement – also a component of the policy-making process – are clearly involved in what Abels referred to as a form of 'problem-solving in the interest of the general public'.⁹⁴ There are three categories that form a useful basis for testing the output legitimacy of these experts, namely whether the roles of migration experts are (1) irrelevant, (2) position them as policy advisors and/or (3) render them (administrative)

⁸⁷ Menjivar, 'Liminal Legality', at 1000.

⁸⁸ *Ibid.*, at 1001.

⁸⁹ *Ibid.*, at 1004.

⁹⁰ Glenn, 'Constructing Citizenship' at 3. See also C. Mora and E. A. Undurraga, 'Racialisation of Immigrants at Work: Labour Mobility and Segmentation of Peruvian Migrants in Chile', *Bulletin of Latin American Research*, 3 (2013), 1–17.

⁹¹ *Ibid.* Glenn, at 4-7.

⁹² *Ibid.*, at 8.

⁹⁴ Abels, 'Citizen Involvement in Public Policy-Making', at 105.

decision-makers. In each of these categories, the public role of the state as policy-maker and implementer will have been brought into question.

Whether based at NGOs, research institutions or in corporations, the relevance of these experts' roles in policy-making seems clear at first glance, although it may be overstated by themselves. However, influencing policy makers will be of little to no effect if experts fail to appreciate that certain structural boundaries exist in the relationship between civic actors and states. For example, it is primarily the role of governments to develop migration policies. In order to be of influence, NGOs could be recognised for their expertise, and as 'concerned stakeholders', while by no means regarding themselves as irrelevant or replacing the role of government.⁹⁵ Furthermore, experts concerned with refugee protection could enhance the relevance of their role by not only taking heed of migrants more generally, but also of states' interests and global trends, and by illustrating the direction that refugee policy could take by way of 'scenario analysis'. Explaining this approach, Helton wrote:

[t]he future of refugee policy is contingent upon a myriad of decisions within and outside of officialdom. Circumstances in the real world will impose constraints and create opportunities for policy development. ... leaders and thinkers must attempt to see forward: to expect the unexpected.⁹⁶

That migration experts qualify as policy advisors also seems clear, although the (democratic) legitimacy of this role may be questioned. Experts often do fulfil the role of policy advisors, either as invited participants to a policy process⁹⁷ or as policy advocates or practising lawyers campaigning for a particular position.⁹⁸ NGO experts in particular are increasingly expected by their donors to support government, through providing advice rather than resorting to confrontation. At the same time, the constituencies that NGOs often claim to represent expect experts to distance themselves from the

⁹⁵ Handmaker, *Advocating for Accountability*, at 202–3.

⁹⁶ Helton, *The Price of Indifference*, at 257.

⁹⁷ Handmaker, *Advocating for Accountability*, at 91–122.

⁹⁸ J. Handmaker, J. Klaaren & J. Dugard (eds.), *South African Journal on Human Rights: Special Issue on Public Interest Litigation*, 27 (2011).

governments they criticise, or at least not appear to be too influenced by the government. As explored elsewhere, the dual-roles fulfilled by NGO experts in particular involve an inevitable tension between, engaging constructively in a government-led policy process and maintaining their critical independence.⁹⁹

Nevertheless, identifying migration experts as administrative decision-makers is increasingly a reality. As sub-contracted immigration liaison officers, deportation escorts and other private-run interdiction and risk-management operations or even as NGOs assisting government in the implementation of a migrant return programme,¹⁰⁰ migration experts fulfil a growing number of roles traditionally fulfilled by politicians and bureaucrats administering the state. Furthermore, corporate migration experts are also carrying out central roles traditionally fulfilled by states.

However, key to note on all these cases is that in the diverse roles that they fulfil, as both advisers and implementers, experts are – perhaps inadvertently – privileging certain groups of migrants over others, and notably refugees and victims of humanitarian emergencies, as well as knowledge migrants who enter through orderly or regular channels.

5. Conclusions

This paper has argued that based on a state-centred approach the reproduction by some migration experts of the term 'irregular migration' has reinforced a false distinction between regular and irregular migrants. Other migration experts who take a more grounded and nuanced approach have avoided this problem. The former categorisation has become increasingly problematic in a globalised and conflict ridden world, where the movement of people is becoming the norm. A further classification reproduced by migration experts has emerged within the concept of 'irregulars': that of refugees and knowledge migrants, on the one hand, and labour migrants, on the other. This appears to be based on an assumption that the forces propelling migration and the human capital of

⁹⁹ Handmaker, *Advocating for Accountability*, at 5–8.

¹⁰⁰ *Ibid.*, at 123–54.

knowledge migrants constitute different subjects, with different rights attached. The efforts of experts are then directed to the protection of refugees, while the economic system serves to 'protect' highly qualified knowledge migrants. Irregular migrants are hence seen as a problem to be solved.

This idea of regarding irregular migrants as a problem was confirmed by sociologist Saskia Sassen who has argued that we are witnessing the emergence of two different circuits of migration – skilled migration and claims for refugee protection – that leave social stratification unchallenged.¹⁰¹ There has been greater mobility of highly skilled professionals on the one hand, which more closely resembles the relatively free movement of capital. On the other hand, the vast majority of informal migrants are, by comparison, largely ignored. Concerning the latter category, a further distinction is made between labour workers and refugees. Labour workers are subject to increasing constraints of movement. This leads to flows 'outside the regulatory framework' of the sending and/or receiving country.¹⁰² In short, the motivations for movement by refugees are valued by migration experts and policy makers as more worthy of protection than the economic deprivation of migrant labourers.

Experts engaged in migration policy discussions and enforcement measures fulfil central roles as policy advisors and even implementers. This is potentially problematic, not only because many of these experts do not address the negative effects of combatting irregular migration but also because they reinforce the protection of certain, privileged categories of migrants – namely refugees and knowledge migrants – to the neglect of the vast majority of migrants. Accordingly, migration experts without a more nuanced appreciation of migration miss an important opportunity to address the core issue at stake, namely the inherent contradiction between the nature of migration and the reductionism of the irregular migration concept.

Consequently, many if not most migration experts have failed to address the complicated liminal legal and social status or associated marginalisation that awaits them in their country of destination. A more grounded position is that the interests and

¹⁰¹ Sassen, 'Regulating Immigration in a Global Age'.,.,.

¹⁰² S. Sassen, 'Informalization in Advanced Market Economies', *Issues in Development Discussion Paper*, 20 (Geneva: ILO, 1990), at 2.

concerns of refugees and other legal categories of migrants should be seen as fundamentally intertwined in terms of their legal and social exclusion.

The consequences of experts' involvement in migration policy discussions and enforcement measures are not only worrying from a human rights and social justice perspective. A closer look at the consequences of migration policies and the roles of experts in the construction of these policies aimed primarily at combatting irregular migration reveals the failure of containment measures to address migration flows. As Stephen Castles has maintained:

[p]olicies that claim to exclude undocumented workers may often really be about allowing them in through side doors and back doors, so that they can be more readily exploited. This, in turn, could be seen as an attempt to create a transnational working class, stratified not only by skill and ethnicity, but also by legal status. The vast disparities of wealth and power in the emerging global order mean that not all citizens are equal and that some passports are better than others. Such hierarchies may be the basis of a new system of global economic stratification, in which migration – in all its guises – is a key element. In this context, migration control is really about regulating North-South relationships and maintaining inequality.¹⁰³

We pose that this will continue to be the case so long as states, and the experts that advise and assist them, lack a deeper and more contextualised understanding of the dynamics of migration and the tense relationship between private actors and the government.

The implications of this are that experts engaged in migration policy discussions and implementation programmes would be regarded as more relevant and legitimate if they were more conscious in: (1) recognising the primary responsibility of government, as well as the narrow, but significant possibilities to influence the direction of policy in state-led processes; (2) openly challenging one of the primary concepts underpinning state centred international migration policies and implementation programmes, namely the concept of irregular migration and (3) developing a more grounded and migrant-centred understanding of the realities of migration, and in particular the social stratification and liminal legality that many migrants face.

¹⁰³ S. Castles, 'Why Migration Policies Fail', *Ethnic and Racial Studies*, 27 (2004), 205–27, at 210, www.iom.int/jahia/Jahia/partnerships/ngos/lang/en.