Chapter 6 – Guaranteeing Socio-Economic Rights

Not all migrants are in situations that render them particularly vulnerable. Many migrants, however, can face social and economic exclusion, compete in jobs in the low-skilled sector and have limited access to the host society's support systems. This puts them at a heightened risk of destitution and exploitation. This risk is partly caused by law, because it is conditioned by the migrants' legal status.[649]

Immigration statuses define the scope of migrants' rights, particularly in relation to the conditions of entry, residence and employment.[650] Immigration law classifies migrants into a stratified system, ranging from denizens to those with a much more precarious legal status.[651] These include asylum-seekers, non-removable returnees (such as those with toleration status in Germany or Austria, *Duldung*) as well as irregular migrants without documents (*sans papiers*).[652] We summarily refer to this marginal group as 'margizens'.[653]

Margizens are particularly vulnerable to violations of basic guarantees, in particular their socio-economic Human Rights. With a view to deterring

649 European Commission: Directorate-General for Employment, Social Affairs and Inclusion, *Study on Mobility, Migration and Destitution in the European Union: Final Report* (2014), chapter 5; Jesuit Refugee Service Europe, *Living in Limbo: Forced Migrant Destitution in Europe* (2010), at 139, available at https://jrseurope.org/wp-content/uploads/sites/19/2020/07/Living-in-Limbo.pdf.

650 J. Bast, *Aufenthaltsrecht und Migrationssteuerung* (2011), at 25–28.

651 On the concept of civic stratification, see Morris, 'Managing Contradiction: Civic Stratification and Migrants' Rights', 37(1) *The International Migration Review* (2003) 74, at 79 et seq.; L. Morris, *Managing Migration: Civic Stratification and Migrants' Rights* (2002), at 19 et seq. and 103 et seq.

652 S. Castles and A. Davidson, *Citizenship and Migration: Globalization and the Politics of Belonging* (2000), at 95–96; see also C. Janda, *Migranten im Sozialstaat* (2012), at 380; Mohr, 'Stratifizierte Rechte und soziale Exklusion von Migranten im Wohlfahrtsstaat', 34 *Zeitschrift für Soziologie* (2005) 383, at 388.

653 The term was coined by Marco Martiniello in *Leadership et pouvoir dans les communautés d'origine immigrée: l'exemple d'une communauté ethnique en Belgique* (1993), at 290–291; further developed in Martiniello, 'Citizenship of the European Union: A Critical View', in R. Bauböck (ed.), *From Aliens to Citizens: Redefining the Status of Immigrants in Europe* (1994) 29, at 42–44; in the context of current immigration law, see Nachtigall, 'Die Ausdifferenzierung der Duldung', *Zeitschrift für Ausländerrecht (ZAR)* (2020) 271, at 278.

present and future 'unwanted' migrants, States limit their freedom of movement, deny a right to family reunification, and restrict their access to the labor market and social benefits. This chapter focuses on the latter aspect.[654] Low levels of social support are used to deter potential candidates from entering, and to prompt (voluntary) returns.[655] We refer to situations where social and economic exclusion is used as a policy tool to control migration as 'planned destitution'.[656] These are contexts where EU and Member State migration policy choices lead to, build on, or condone destitution.

Planned destitution as a deterrent against (unwanted) migration, including forced migration,[657] generates acute tensions between migration policy and Human Rights protection.[658] The EU has only partly addressed these tensions in its legislation, with basic socio-economic rights of asylum seekers laid down in Directive 2013/33/EU (the Reception Conditions Directive). Regarding rejected asylum seekers or other migrants without a legal right to stay, the EU legislature has regulated around destitution and exploitation by focusing on preventing entry and increasing return rates. In view of the consistently low rates of actual returns, this policy approach is insufficient. Moreover, by definition this approach is not applicable to irregular migrants who are non-removable due to factors beyond their control. Provisions establishing minimum standards for the protection of individual rights of irregular migrants are largely absent at the EU level. Legal instruments whose regulatory scope touches on irregular migrants are Directive 2008/115/EC (the Return Directive), for those subject to a return decision, and Directive 2009/52/EC (the Employers Sanctions Directive) for clandestine or other migrants working irregularly.

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654 On freedom of movement, see Chapter 2; on family reunification, see Chapter 5.

655 Da Lomba, 'Fundamental Social Rights for Irregular Migrants: The Right to Health Care in France and England', in B. Bogusz et al. (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (2004) 363, at 363.

656 Term coined by Eve Lester in *Making Migration Law* (2018), at 235. Catherine Woollard uses the term 'strategic destitution' in her 'Editorial: Strategic Destitution and the Politics of Migration', *ECRE Weekly Bulletin*, 8 March 2019, available at https://www.ecre.org/editorial-strategic-destitution-and-the-politics-of-migration/.

657 L. Slingenberg, *The Reception of Asylum Seekers under International Law: Between Sovereignty and Equality* (2014), at 2.

658 See also ECRE, *Withdrawal of Reception Conditions of Asylum Seekers: An Appropriate, Effective or Legal Sanction?*, July 2018, available at https://asylumineurope.org/wp-content/uploads/2020/11/aida_brief_withdrawalconditions.pdf.

Neither of these instruments comprehensively provide for socio-economic rights aimed at preventing destitution. However, as per Art. 2 TEU, the EU is committed to respect human dignity and Human Rights as foundational values of the Union. By virtue of Art. 78(2) TFEU for asylum, and Art. 79(2) TFEU for immigration policy, the EU has sufficient powers to address the legal position of margizens and protect the Human Rights of these migrants in most vulnerable situations. We argue that, as a necessary corollary of these tasks and powers, the EU is accountable for guaranteeing a minimum standard of socio-economic rights for all migrants in the EU, irrespective of their status, in order to live up to its constitutional commitments.

6.1 Structural challenges and current trends

In EU migration policy, three areas in particular give rise to concerns with regards to the protection of margizens' socio-economic rights. The first relates to policies sanctioning secondary movements of asylum-seekers. The second arises from policies that aim at incentivizing returns of non-removable migrants. The third relates to exploitation in labor relations involving clandestine or other irregular migrants.

Trend 1: Policies to prevent movements of asylum-seekers within the EU build on planned destitution

We observe that Member States resort to planned destitution to prevent so-called secondary movements of asylum seekers within the EU. The deprivation of socio-economic rights is explicitly used as a sanction for migrants who find themselves in a Member State different from the one in which they ought to be.

A core element of the Common European Asylum System is the allocation of responsibility for hearing claims of asylum seekers. The Dublin III Regulation (Regulation 604/2013) defines the Member State responsible according to a list of criteria in order to avoid asylum seekers applying for asylum in more than one Dublin State or choosing one according to their preferences ('asylum shopping'). Accordingly, asylum seekers do not enjoy freedom of movement in Europe but must remain in the State to which they have been allocated. Among the reasons given by policy-makers for largely disregarding asylum seekers' preferences is the assumption

that higher standards of reception conditions or social security constitute 'pull factors' and, thus, would trigger onward movements – although the 'welfare-magnet' hypothesis is widely considered an overly simplistic explanation in migration research.[659]

If asylum seekers decide to move to countries within the EU other than the one responsible for their asylum request, such onward movement is referred to as 'secondary movement'. Preventing secondary movements has evolved into an (almost) generally agreed goal guiding the reform of the European asylum system. In its 2016 reform package, the Commission identified the tackling of secondary movements as a stand-alone policy priority to be pursued so as not to disrupt the 'first country of irregular entry' logic of the Dublin system and to prevent 'asylum shopping'.[660]

Against this backdrop, there is a trend among Member States to resort to cutting social benefits in order to sanction secondary movements of asylum seekers. This does not necessarily conform with the legal framework of EU law. The Reception Conditions Directive lays out material reception conditions in Art. 17–20 (just as Art. 13–16 of the previous Directive 2003/9/EC), including the circumstances under which these conditions may be cut. Sanctions for onward movement are not foreseen.

Regardless, some Member States have implemented legislation to that end. For example, France excluded allowances for asylum seekers in the Dublin procedure,[661] and Ireland limited access to the labor market, provided for in the Reception Conditions Directive, for those subject to a pending Dublin transfer.[662] While these policies have been found to be unlawful by the CJEU,[663] in 2019 Germany also introduced sanctions curtailing material reception conditions for asylum seekers subject to a Dublin transfer.[664] According to this legislation, protection-seeking migrants for whom it is been established that another Member State is responsible are

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659 For a critical account of neo-classical assumptions about migration causation, see Massey et al., 'Theories of International Migration: A Review and Appraisal', 19(3) *Population and Development Review (PDR)* (1993) 431, at 432–454.

660 European Commission, Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe, COM(2016) 197, 6 April 2016.

661 CJEU, Case C-179/11, *Cimade and GISTI* (EU:C:2012:594).

662 CJEU, Cases C-322/19 and C-385/19, *K.S.* (EU:C:2021:11).

663 CJEU, Case C-179/11, *Cimade and GISTI* (EU:C:2012:594); Cases C-322/19 and C-385/19, *K.S.* (EU:C:2021:11).

664 See Sec. 1a(7) of the Asylum Seekers Benefits Act (*Asylbewerberleistungsgesetz*), introduced by the Second Act on Better Enforcement of the Obligation to Leave the Country ('Orderly Return Act') which entered into force on 21 August 2019.

not entitled to regular benefits anymore. Until their departure or deportation, they are only granted benefits to cover their needs for food and accommodation, as well as physical and health care.[665]

In sum, while the Reception Conditions Directive aims to protect the basic socio-economic rights of asylum seekers, the conflicting policy aim of preventing secondary movements risks undercutting that protection.

Trend 2: Measures to enforce returns rely on creating 'hostile environments'

We also observe a pattern of policies using planned destitution as a means to enforce returns for a destination outside the EU. The trend is particularly marked vis-à-vis non-cooperative returnees.

The socio-economic rights of irregular migrants who cannot be returned and who continue to stay in the EU in a limbo situation remain largely outside the focus of policy debate (see also above, Chapter 5). Barriers to removal may be humanitarian, legal, or practical in nature, ranging from delays in obtaining the necessary papers from third countries to the non-refoulement principle and non-cooperation of individuals.[666]

In response, 'hostile environment' policies are mounting. Member States make access to basic needs conditional upon cooperation with return[667] and forcibly evict irregular migrants from makeshift homes.[668] The intention is to convince returnees that they will not be able to establish themselves within the EU. One key criterion used by Member States in this field relates to the existence of 'justified reasons for non-return' as opposed

665 For legal evaluation in light of EU law, see Hruschka, 'Die europäische Dimension von Leistungseinschränkungen im Sozialrecht für Asylsuchende', 34 *Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht* (2020) 113.

666 European Migration Network, *EMN Synthesis Report for the EMN Focussed Study 2016: The Return of Rejected Asylum Seekers: Challenges and Good Practices* (2016), Migrapol EMN Doc 000.

667 Rosenberger and Koppes, 'Claiming Control: Cooperation with Return as a Condition for Social Benefits in Austria and the Netherlands', 6 *Comparative Migration Studies* (2018) 1; Ataç, 'Deserving Shelter: Conditional Access to Accommodation for Rejected Asylum Seekers in Austria, the Netherlands, and Sweden', 17 *Journal of Immigrant & Refugee Studies* (2019) 44.

668 P. Mudu and S. Chattopadhyay (eds), *Migration, Squatting and Radical Autonomy* (2017); Slingenberg and Bonneau, '(In)formal Migrant Settlements and Right to Respect for a Home', 19 *European Journal of Migration and Law (EJML)* (2017) 335.

to 'non-justified reasons for non-return', with the latter encompassing all variations of non-cooperation, such as lack of cooperation in obtaining travel documents; lack of cooperation in disclosing one's identity; destroying documents; absconding; or otherwise hampering removal efforts.[669]

The term 'hostile environment' was coined in the United Kingdom, where the policies aimed explicitly at cutting undocumented migrants' access to any public services, including healthcare services. In addition, the British government pushed to make employment and rental accommodation impossible for migrants without adequate paperwork.[670] While the United Kingdom is no longer a Member State of the EU, similar policies have even longer traditions in Denmark and the Netherlands, for example. In Denmark, 'motivation enhancement measures' were introduced in 1997, intended to encourage asylum seekers and migrants to leave Denmark or cooperate in their own removal from the country.[671] In the Netherlands, the 1998 Linkage Act (*Koppelingswet*) coupled access to all public services with lawful migration status.[672] Non-removable migrants can only receive regular social benefits, such as social assistance and health insurance, if they obtain a residence permit based on a no-fault status (*buitenschuldvergunning*). This status provides access to social welfare but is granted on a remarkably limited scale.[673] Conditions for the no-fault status require the migrant to take concrete steps to arrange their own

669 Lutz, 'Non-removable Returnees under Union Law: Status Quo and Possible Developments', 20 *European Journal of Migration and Law (EJML)* (2018) 28, at 41.

670 See UK Immigration Act 2014 (c. 22), expanded by Immigration Act 2016 (c. 19). For an assessment of some of the measures, see Independent Chief Inspector of Borders and Immigration (D. Bolt), *An Inspection of the 'Hostile Environment' Measures Relating to Driving Licenses and Bank Accounts* (2016), available at https://www.gov.uk/government/publications/inspection-report-of-hostile-environment-measures-october-2016.

671 These measures are found in the Danish Aliens Act, among others in Sec. 34, 36, 40, 41, and 42a; J. Suarez-Krabbe, J. Arce and A. Lindberg, *Stop Killing Us Slowly: A Research Report on the Motivation Enhancement Measures and Criminalization of Rejected Asylum Seekers in Denmark* (2018), at 8 et seq., available at http://refugees.dk/media/1757/stop-killing-us_uk.pdf.

672 K. Zwaan et al., *Nederlands Migratierecht* (2018), at sec. 8.8.1. See the Dutch Aliens Circular (*Vreemdelingencirculaire*) 2000, at para. B8/4. As per Art. 10(1) Aliens Act (*Vreemdelingenwet*) 2000, social services are tied to regular migration status; the narrow exceptions are access to emergency medical care, children's education, and legal support, as per Art. 10(2) of the *Vreemdelingenwet*.

673 Cf. Ministry of Security and Justice, Parliamentary Questions 609 (2016), available at https://zoek.officielebekendmakingen.nl/ah-tk-20162017-609.

departure.[674] The goal of the Act is to ensure that undocumented migrants are discouraged from staying in the Netherlands.[675]

More recent changes to that effect occurred in Austria and in Germany. In Austria, the 2017 reform of the Aliens Act (*Fremdenrechtsgesetz*) laid down an obligation to cooperate in the return proceedings. Only if rejected asylum seekers are considered cooperative can they potentially receive a formal toleration status (*Duldungskarte*). In any case, reasons for postponement of deportation must not lie within the person's own responsibility.[676] In Germany, while non-cooperation with return does not prevent the issuance of toleration status (*Duldung*) entirely, legislative changes in 2019 have created the so-called *Duldung light* – a non-official term referring to the fact that the least favorable conditions are provided to this subgroup of documented irregular migrants – that is, those who are considered non-cooperative.[677] This is the case either if they make false statements regarding their identity or nationality, or if they fail to take reasonable steps to comply with the obligation to obtain a passport.[678] They are sanctioned with residence orders, a blanket ban on employment, and benefit cuts, to the extent that the latter only cover their needs for food and accommodation, including heating, as well as physical and health care.[679]

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674 In addition, there are some shelters that are open for irregular migrants: *gezinslocaties* (for families with minor children), the VBL and the LVV. Currently, only the VBL is conditional upon cooperation in return procedures. The Dutch government recently announced, in accordance with the coalition agreement, to also make the LVV shelters conditional upon cooperation again. Both the VBL and the *gezinslocaties* have (quite) severe restrictions on freedom of movement and a daily reporting obligation. See https://www.rijksoverheid.nl/documenten/rapporten/2020/07/01/tk-bijlage-eindrapport-plan-en-procesevaluatie-lvv-regioplan.

675 Cf. Ombudsman Metropool Amsterdam, *Onzichtbaar: Onderzoek naar de leefwereld van ongedocumenteerden in Amsterdam en Nederland* (2021), available at https://www.ombudsmanmetropool.nl/uploaded_files/article/Rapport_Onzichtbaar.pdf.

676 As per Sec. 46a(1)(3) and 46a(3)(3) Aliens Police Act (*Fremdenpolizeigesetz*); see Rosenberger and Koppes, 'Claiming Control: Cooperation with Return as a Condition for Social Benefits in Austria and the Netherlands', 6 *Comparative Migration Studies* (2018) 1.

677 As per Sec 60b(5) Residence Act and Sec. 1a Asylum Seekers Benefits Act; see Nachtigall, 'Die Ausdifferenzierung der Duldung', *Zeitschrift für Ausländerrecht (ZAR)* (2020) 271, at 273 et seq.

678 As per Sec. 60b(2)(1) and 60b(3)(1) Residence Act.

679 As per Sec. 1a(1) Asylum Seekers Benefits Act.

As we shall develop below, the EU legislature has failed to enact legislation that successfully precludes such policies of planned destitution.

Trend 3: Persistent pattern of exploitation of irregular migrants in informal labor relations

Furthermore, we observe that European migration policy in general condones the exploitation of irregular migrants, especially clandestine migrants, in informal labor relations. They are subjected to severe exploitation and other kinds of abuse in firms, factories, and farms across the Union,[680] regularly facing underpayment or withholding of pay, unsafe working conditions and very long working hours, and substandard living conditions.[681]

Destitution resulting from the lack of a lawful residence status, of the right to work, and of access to any government support is a primary factor driving irregular migrants into exploitative work.[682] Be it intentional or otherwise, policies that increase destitution thereby secure an exploitable workforce that serves important labor market needs.[683] This 'adverse incor-

680 FRA, Protecting Migrant Workers from Exploitation in the EU: Workers' Perspectives (2019); see also the statement of the Global Migration Group, adopted on 30 September 2010, on the Human Rights of Migrants in an Irregular Situation, available at https://www.iom.int/news/statement-global-migration-group-human-rights-migrants-irregular-situation.

681 FRA, Protecting Migrant Workers from Exploitation in the EU: Workers' Perspectives (2019).

682 Anna Triandafyllidou and Laura Bartolini describe the connection between irregular migration and irregular work as a 'chicken and egg dilemma'; see Triandafyllidou and Bartolini, 'Irregular Migration and Irregular Work: A Chicken and Egg Dilemma', in S. Spencer and A. Triandafyllidou (eds), *Migrants with Irregular Status in Europe: Evolving Conceptual and Policy Challenges* (2020) 139.

683 Cheliotis, 'Punitive inclusion: The Political Economy of Irregular Migration in the Margins of Europe', 14 *European Journal of Criminology* (2017) 78.

poration'[684] into the labor market thus functions as a form of 'punitive inclusion'[685] in the EU migration management system.[686]

In addition to those margizens who are known to the authorities and subject to policies of planned destitution, undocumented migrants are particularly vulnerable to slavery-like work situations.[687] These *sans papiers* may have used the services of a facilitator (or 'human smuggler') to enter the Union territory and end up in bonded labor without ever having been registered with the authorities anywhere. Their immigration status – or, rather, the absence thereof – compounds situations of precarious employment and creates a situation of hyper-precarity.[688] Deportability creates exploitability. A set of generalized fears created by insecure status and non-existent rights to residence, welfare, and work can operate both directly – in the case of employers making threats to denounce workers to immigration authorities – but also indirectly to discipline workers by limiting their ability or willingness to exit or seek help.

At EU level, this issue is currently addressed in Directive 2009/52/EC (the Employers Sanctions Directive). However, as we shall discuss in more detail below (see section 6.2.5), the one-sided, repressive approach taken in this Act fails to effectively protect clandestine and other irregular migrants from labor exploitation.

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684 Lewis and Waite, 'Asylum, Immigration Restrictions and Exploitation: Hyper-precarity as a Lens for Understanding and Tackling Forced Labour', 5 *Anti-Trafficking Review* (2015) 49, at 64; drawing on Phillips, 'Unfree Labour and Adverse Incorporation in the Global Economy: Comparative Perspectives on Brazil and India', 42 *Economy and Society* (2013) 171.

685 Cheliotis, 'Punitive Inclusion: The Political Economy of Irregular Migration in the Margins of Europe', 14 *European Journal of Criminology* (2017) 78.

686 Cf. Coddington, Conlon and Martin, 'Destitution Economies: Circuits of Value in Asylum, Refuge, and Migration Control', 110 *Annals of the Association of American Geographers* (2020) 1425; the authors argue that precisely the 'permanently temporary' status of irregular migrants is a useful part of capitalist 'destitution economies'; see also, in the US context, H. Motomura, *Immigration outside the Law* (2014), at 31–55.

687 FRA, Protecting Migrant Workers from Exploitation in the EU: Workers' Perspectives (2019); Amnesty International, *Exploited Labour: Migrant Workers in Italy's Agricultural Sector* (2012), available at https://www.amnesty.org/en/documents/EUR30/020/2012/en/.

688 Lewis and Waite, 'Asylum, Immigration Restrictions and Exploitation: Hyper-Precarity as a Lens for Understanding and Tackling Forced Labour', 5 *Anti-Trafficking Review* (2015) 49.

6.2 Legal evaluation

This section focuses on the Human Rights constraints on policies of planned destitution (trends 1 and 2) and the related positive obligation to address the situation of clandestine migrant workers (trend 3). We will then proceed to discuss whether the present EU legal framework sufficiently addresses these situations.

6.2.1 General legal framework regarding human dignity of margizens

At the universal level, the International Covenant on Economic, Social and Cultural Rights (ICESCR) protects the rights of 'everyone'. Thus, States are obliged to respect, protect, and fulfill the rights laid down in the Covenant of all individuals within their jurisdiction. The Committee on Economic, Social and Cultural Rights (CESCR), charged with overseeing the implementation of ICESCR, has clarified that the Covenant rights apply to everyone, including non-nationals, regardless of legal status and documentation.[689]

According to Art. 2 ICESCR, rights laid down in this Covenant are contingent upon availability of resources. In the situations analyzed here, however, States use arguments related to migration control, rather than a lack of resources, to justify restrictive measures. The relevant provision is Art. 4 ICESCR, which stipulates that States may subject the Covenant rights only to such limitations as are determined by law and only insofar as this may be compatible with the nature of these rights, and solely for the purpose of promoting the general welfare in a democratic society.[690] Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective.[691] This includes an assessment as to whether the aim and effects of the measures or omissions are legitimate. The Limburg Principles on the Implementation of ICESCR, drafted by a group of experts in international law, suggest that 'promoting the general welfare' should be construed to mean 'furthering

689 CESCR, General Comment No. 20: Non-discrimination in economic, social and cultural rights, E/C.12/GC/20, at para. 13.

690 Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights', 9 *Human Rights Law Review* (2009) 557.

691 CESCR, General Comment No. 20: Non-discrimination in economic, social and cultural rights, E/C.12/GC/20, at para. 30.

the well-being of the people as a whole'.[692] Generally speaking, aims of migration policy such as preventing 'secondary movements' and fostering 'effective returns' might qualify for such justification.[693]

However, the measures or omissions must not entirely frustrate the rights granted in the Covenant – that is to say, there are minimum guarantees of socio-economic rights that must not fall prey to the goal of migration control.[694] On this point, the CESCR opined that 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant.'[695] Even when resources are severely constrained, vulnerable members of society must be protected.[696] As regards asylum seekers and irregular migrants specifically, the CESCR found that States must refrain from 'denying or limiting equal access for all persons, including … asylum seekers and illegal immigrants, to preventive, curative and palliative health services'.[697] Other treaty-monitoring bodies have also consistently described such migrants as a vulnerable group entitled to particular protection when States implement their treaty obligations.[698] The CESCR considers these core obligations as non-derogable and 'indivisibly linked' to the dignity of the human person. These obligations include access to basic shelter and minimum essential food for everyone, regardless of immigration status.[699]

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692 The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, annexed to UN doc. E/CN.4/1987/17, 8 January 1987, at para. 52.

693 Although the limitation is to be construed narrowly, see Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights', 9 *Human Rights Law Review* (2009) 557, at 570–575.

694 Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights', 9 *Human Rights Law Review* (2009) 557, at 579–583.

695 CESCR, General Comment No. 3: The Nature of States Parties' Obligations, E/1991/23, at para. 10.

696 Ibid., at para. 12.

697 CESCR, General Comment No. 14: The right to the highest attainable standard of health (Art. 12), E/C.12/2000/4, at para. 34.

698 See, e.g., CMW, General Comment No. 1 on migrant domestic workers, CMW/C/GC/1, at para. 7 and 21.

699 CESCR, General Comment No. 12: The right to adequate food, E/C.12/1999/5, at para. 4 and 15; General Comment No. 4: The right to adequate housing,

Therefore, in order to preserve the human dignity of 'everyone', States must ensure a minimum core of the Covenant rights for irregular migrants who are actually present. For as long as a person falls within the jurisdiction of a State Party, this State must comply with its Human Rights obligations toward that individual, rather than referring the person to protection elsewhere.

At the regional level, Art. 3 ECHR provides for a source of minimum social guarantees. While the ECHR mainly sets forth civil and political rights, the ECtHR has recognized that many of them have implications of a social or economic nature.[700] Thus, although the ECHR does not explicitly lay down a right to human dignity, it is generally accepted that Art. 3 ECHR is derived from that principle. In its case-law, the Strasbourg Court has developed that a State's responsibility is engaged under Art. 3 ECHR when applicants who are wholly dependent on State support find themselves faced with official indifference in a situation of serious deprivation or want incompatible with human dignity.[701] In *M.S.S. v. Belgium and Greece*, the Court applied this principle to the situation of an asylum seeker from Afghanistan who had been transferred from Belgium to Greece, where he faced destitution without any support from Greece; the Court considered this to entail a violation of Art. 3 ECHR.[702] In its subsequent case-law relating to migrant destitution, the ECtHR has further clarified that violations of Art. 3 ECHR arise in situations where the persons concerned are highly vulnerable because of their dependency related to the inability to leave a difficult situation. Accordingly, the Court found no violation where the applicants were not found to be dependent on their relationship with the State – either because they did not have such a relationship in the first place,[703] or because they did not convince the

E/1992/23, at para. 6–7; General Comment No. 14: The right to the highest attainable standard of health (Art. 12); E/C.12/2000/4, at para. 43 and 47.

700 See ECtHR, *Airey v. Ireland*, Appl. no. 6289/73, Judgment of 9 October 1979, at para. 26.

701 ECtHR, *Budina v. Russia*, Appl. no. 45603/05, Admissibility Decision of 18 June 2009.

702 ECtHR, *M.S.S. v. Belgium and Greece*, Appl. no. 30696/09, Grand Chamber Judgment of 21 January 2011, at para. 252.

703 For example, because they did not formally apply for asylum, benefits or entry – see ECtHR, *Halimi v. Austria and Italy*, Appl. no. 53852/11, Admissibility Decision of 18 June 2013, at para. 70–72; *Miruts Hagos v. the Netherlands and Italy*, Appl. no. 9053/10, Admissibility Decision of 27 August 2013, at para. 38 and 44; *Ndikumana v. the Netherlands*, Appl. no. 4714/06, Admissibility Decision of 6 May 2014, at para. 45.

Court that the costs of leaving it were prohibitively high.[704] If the migrants in question can influence their destitute situation, such as by lodging an application for benefits or starting legal proceedings against a refusal – but also, for those subject to a return decision, by leaving the host country voluntarily or cooperating in a return procedure – there is no violation of Art. 3 ECHR.[705]

Beyond the ECHR, the European Social Charter of 1961 (ESC, extended by an Additional Protocol of 1988) and the Revised European Social Charter of 1996 which entered into force in 1999 (Revised ESC) contain comprehensive lists of social and economic rights. These rights are, as a rule, binding on the vast majority of European States. Yet, according to its Appendix, the Revised ESC in general exempts irregular migrants from the scope of its protection.[706] In its jurisprudence, however, the European Committee on Social Rights (ECSR) – the treaty body that monitors the implementation of the ESC and the Revised ESC and hears collective complaints in a quasi-judicial procedure since the 1995 Additional Protocol came into force in 1998 – has bridged this gap by setting out a minimum floor of social protection that should apply to all persons, including irregular migrants.[707] Relying on the preservation of human dignity as 'the fundamental value and indeed the core of positive European human rights

704 For example, because they left accommodation by choice – see ECtHR, *Abubeker v. Austria and Italy*, Appl. no. 73874/11, Admissibility Decision of 18 June 2013, at para. 61; *Hussein Diirshi and others v. the Netherlands and Italy*, Appl. no. 2314/10 et al., Admissibility Decision of 10 September 2013, at para. 140; or because they could leave for another country – see ECtHR, *A v. the Netherlands*, Appl. no. 60538/13, Admissibility Decision of 12 November 2013, at para. 50–53; *Hunde v. the Netherlands*, Appl. no. 17931/16, Admissibility Decision of 5 July 2016, at para. 53–59.

705 Slingenberg, 'The Right Not to be Dominated: The Case Law of the European Court of Human Rights on Migrants' Destitution', 19 *Human Rights Law Review* (2019) 291, at 312.

706 As laid down in the first paragraph of the Appendix, which is, according to Art. N of the Revised ESC, an integral part of this Charter.

707 ECSR, *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 14/2003, Decision of 8 September 2004 (on access to the health care system); *Defence for Children International (DCI) v. the Netherlands*, Complaint No. 47/2008, Decision of 20 October 2009 (on access to social housing); *DCI v. Belgium*, Complaint No. 69/2011, Decision of 23 November 2012 (on social assistance). See O'Cinnéide, 'Migrant Rights under the European Social Charter', in C. Costello and M. Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (2014) 282, at 289–292.

law',[708] the ECSR has argued that the limited personal scope of the Revised ESC should not affect disadvantaged groups. In light of other international treaties ratified by all Parties, in particular the ECHR, the rights of the Revised ESC should be extended to non-nationals without distinction.[709] Therefore, it held, the denial of rights connected to life and dignity to foreign nationals within the territory of a State Party, 'even if they are there illegally', is contrary to the Revised Social Charter.[710] The Committee has since upheld and expanded this jurisprudence.[711] In subsequent reporting cycles, the ECSR has also begun to clarify the circumstances in which non-nationals, including those irregularly present on the territory of a Contracting State, are entitled to the protection of the Revised ESC.[712] As a result, the restriction on the scope of rights imposed by the Appendix does not apply when it comes to the enjoyment of the 'minimum core' of the rights set out in this Charter that are essential to maintain human dignity.[713] This minimum-floor logic converges with the obligation to meet 'minimum essential levels', as developed by the CESCR.

Although the ECSR makes reference to ECtHR jurisprudence, the Committee also explicitly observes that 'the scope of the Charter is broader [than that of the ECHR, as developed among others in *M.S.S. v. Belgium and Greece*] and requires that necessary emergency social assistance be granted also to those who do not, or no longer, fulfill the criteria of entitlement to assistance specified in the above instruments, that is, also to migrants staying in the territory of the States Parties in an irregular

708 ECSR, *FIDH v. France*, Complaint No. 14/2003, Decision of 8 September 2004, at para. 27–31.

709 ECSR, Conclusions XVII-1, Vol. 1 (2004), General Introduction, at para. 5.

710 ECSR, *FIDH v. France*, Complaint No. 14/2003, Decision of 8 September 2004, at para. 32.

711 ECSR, *DCI v. the Netherlands*, Complaint No. 47/2008, Decision of 20 October 2009, at para. 37; *Centre on Housing Rights and Evictions (COHRE) v. Italy*, Complaint No. 58/2009, Decision of 25 June 2010 at 33; *DCI v. Belgium*, Complaint No. 69/2011, Decision of 23 October 2012; *Conference of European Churches (CEC) v. the Netherlands*, Complaint No. 90/2013, Decision of 1 July 2014, at para. 144; *European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands*, Complaint No. 86/2012, Decision of 2 July 2014, at para. 58–61.

712 See also O'Cinnéide, 'Migrant Rights under the European Social Charter', in C. Costello and M. Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (2014) 282, at 291.

713 ECSR, Conclusions XVII-1, Vol. 1 (2004), General Introduction, at para. 5.

manner, for instance pursuant to their expulsion.'[714] Specifically, the Committee held that emergency social assistance must be granted without any conditions and, in particular, cannot be made conditional upon the willingness of the persons concerned to cooperate in the organization of their own expulsion.[715]

(2) At EU level, both the ECHR and the Revised ESC are reflected in the EU-CFR. Art. 1 EU-CFR gives the right to human dignity a central place in the EU Charter. The prohibition of torture and inhuman or degrading treatment contained in Art. 3 ECHR is literally mirrored in Art. 4 EU-CFR. In addition, the EU Charter also transfers some provisions of the Revised ESC into the EU legal order, relating to labor, social security, social assistance, and healthcare; in some cases, the text is taken directly from the Revised ESC. Specifically, Art. 34 EU-CFR lays down the right to social security and social assistance and thus mirrors and specifies Art. 12 and 13 Revised ESC. Notably, pursuant to Art. 34(3) EU-CFR, the EU (and thus the Member States when they are implementing EU law) 'recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources'. The Explanations to the EU Charter note that Art. 34(3) EU-CFR inter alia draws on Art. 30 and 31 of the Revised Social Charter.[716] The CJEU has repeatedly referred to this social right to interpret the term 'core benefits' used in the Long-term Residents Directive (Directive 2003/109).[717]

This consonance speaks in favor of adopting the doctrines developed by the CESCR and the ECSR as part of the applicable EU law. However, their jurisprudence has a less certain legal status within EU law, as compared to the case-law of the ECtHR. While all EU Member States are Parties to the ICECSR and the ESC, five of them have signed but not yet ratified the Revised ESC.[718] The collective complaint procedure has been accepted

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714 ECSR, *CEC v. the Netherlands*, Complaint No. 90/2013, Decision of 1 July 2014, at para. 117.

715 Ibid.

716 Explanations relating to the Charter of Fundamental Rights, 2007/C 303/02, on Art. 34 EU-CFR. The explanations only mention Art. 153 TFEU as a legal basis to implement this provision. This interpretation is too narrow; there is nothing in the text of Art. 34 EU-CFR that restricts its application to a particular legal basis.

717 CJEU, Case C-571/10, *Kamberaj* (EU:C:2012:233), at para. 80 and 92; Case C-94/20, *KV* (EU:C:2021:477), at para. 39 and 42.

718 Since Germany and Spain ratified the Revised ESC in 2021, Croatia, Czech Republic, Denmark, Luxembourg, and Poland are the remaining five EU Member States that have yet to ratify the Revised ESC (situation at 1 July 2021).

by 12 EU Member States,[719] while all EU Members are subject to the reporting system of the Social Charter. The EU Charter of Fundamental Rights does not establish an explicit link with the quasi-judicial practice of the CESCR or the ECSR (cf. Art. 52(3) EU-CFR). Moreover, the Revised ESC – like the ESC – has an 'à la carte' system, allowing acceding States, within certain limits, to choose which provisions they agree to be bound by – which leads to variable commitments across the States Parties.[720]

Against this backdrop, the CJEU unsurprisingly does not consider the ESC or the Revised ESC, in its entirety, as having 'de facto' binding force on the EU, unlike the ECHR – although the CJEU has repeatedly referred to the ESC and the Revised ESC in its case-law as a source of inspiration for interpreting EU law, including the Charter of Fundamental Rights.[721] The CJEU has also reminded the Member States that when they are implementing EU legislation – on family reunification, in the instant case – they must conform with their international obligations, including those derived from the ESC.[722] Consequently, where rights stipulated in the ESC or the Revised ESC have been incorporated into the EU Charter they shall be taken into account as a guide for the interpretation of the EU Charter. This naturally extends to the jurisprudence developed by the ECSR.[723] While there is no automatic relationship between these bodies of law, the presumption of substantive homogeneity between EU fundamental rights and Human Rights (see above, introduction to this volume) also applies in the realm of social and economic rights.

719 As of 1 July 2021, six EU Member States have signed but not yet ratified the relevant Additional Protocol of 1995 (CETS No. 158), see https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/158.

720 See Art. A Revised ESC and Art. 20 ESC.

721 See, e.g., CJEU, Cases C-119/19 P and C-126/19 P, *Commission and Council v. Carreras Sequeros et al.* (EU:C:2020:676), at para. 113–123; Case C-116/06, *Sari Kiiski*, (EU:C:2007:536), at para. 48–49; Case C-268/06, *Impact* (EU:C:2008:223), at para. 113–114.

722 CJEU, Case C-540/03, *Parliament v. Council* (EU:C:2006:429), at para. 107.

723 O. de Schutter, *The European Pillar of Social Rights and the Role of the European Social Charter in the EU Legal Order* (2017), at 47–48.

6.2.2 General legal framework regarding labor rights of irregular migrant workers

Human Rights law also protects the labor rights of irregular migrants.[724] At the universal level, Art. 7(a)(i) ICESCR protects the right of 'everyone' to just and favorable conditions of work without distinctions of any kind.[725] The CESCR specifically emphasizes that nationality and legal status should not bar access to the protection of rights under the ICESCR.[726] This has been reiterated in the CESCR's concluding observations on State Party reports.[727] In addition, Art. 5(e)(i) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) states that the protection of the right to work applies to all persons.[728] According to CERD, the relevant Committee, 'undocumented non-citizens' also fall within the scope of protection of ICERD.[729]

Building on these essentially uncontested general obligations, Part III of the UN Migrant Workers Convention (ICRMW) reiterates and specifies the Human Rights of all migrant workers and members of their families irrespective of their immigration status. The Committee on Migrant Workers (CMW) elaborates on the rights of migrant workers, particularly those in irregular migration situations, specifying that Art. 11 of this Convention requires States parties to take effective measures against all forms of forced or compulsory labor by migrant workers.[730]

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724 See, e.g., E. Dewhurst, 'The Right of Irregular Immigrants to Back Pay: The Spectrum of Protection in International, Regional, and National Legal Systems', in C. Costello and M. Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (2014) 216.

725 Art. 7(a)(i) ICESCR.

726 CESCR, General Comment No. 20: Non-discrimination in economic, social and cultural rights, E/C.12/GC/20, at para. 30; see also CERD, General Recommendation No. 30: Discrimination against non-citizens, CERD/C/64/Misc.11/rev.3.

727 See references in E. Dewhurst, 'The Right of Irregular Immigrants to Back Pay: The Spectrum of Protection in International, Regional, and National Legal Systems', in C. Costello and M. Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (2014) 216, at 223, note 21.

728 Art. 5(e)(i) ICERD.

729 CERD, General Recommendation No. 30: Discrimination against non-citizens, CERD/C/64/Misc.11/rev.3, recital 3.

730 CMW, General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families, CMW/C/GC/2, at para. 60–61.

In addition, universal labor rights, as developed under the auspices of the International Labour Organization (ILO), also apply to irregular migrants. Indeed, the text of the ICRMW and the interpretations by the CMW derive the labor rights of irregular migrants from ILO standards, including Forced Labour Convention No. 29 (1930).[731] The ILO considers this Treaty one of the eight fundamental ILO Conventions that codify 'the fundamental principles and rights at work' – that is, the Human Rights core of international labor law, which all ILO Member States have committed to observe.[732] The Forced Labour Convention aims to suppress all forms of work or service that are exacted from a person under menace of a penalty and for which that person has not offered themselves voluntarily. More recently, the 2014 Protocol to ILO Convention No. 29 has further specified State obligations regarding the prevention of forced labor. It enshrines the general duty to 'prevent and eliminate' forced labor (Art. 1(1) Protocol of 2014), and the duty to create a national policy and plan of action to that end (Art. 1(2)). Specific efforts must be undertaken to ensure the coverage and enforcement of labor laws 'as appropriate' to 'all workers and all sectors of the economy' (Art. 2(c)(i)) and to strengthen labor inspection services (Art. 2(c)(ii)). Also required is specific protection, particularly for migrant workers, 'from possible abusive and fraudulent practices during the recruitment and placement process' (Art. 2(d)).

At the regional level, the two significant instruments that protect irregular migrants against exploitation are the ECHR and the Revised ESC. The Revised ESC provides an extensive list of labor rights in Art. 1–8; these are, however, subject to lawful residence status as per the Appendix. Regarding these Articles, the ESCR has not (yet) developed a minimum core exception for irregular migrants, although it could well be argued that the same reasoning applies to these rights. The remainder of this section therefore focuses on the ECHR.

While the ECHR does not generally protect labor rights due to its focus on civil and political rights, it does prohibit forced or compulsory labor (Art. 4 ECHR). The substance of this provision is part of EU law (see Art. 5(1) and (2) EU-CFR). Art. 4(1) ECHR requires that 'no one shall be

731 As well as ILO Convention No. 189 (2011) concerning Decent Work for Domestic Workers; and ILO Convention No. 111 (1958) concerning Discrimination (Employment and Occupation).

732 ILO Declaration on Fundamental Principles and Rights at Work (1998); see also ILO, *The Rules of the Game: An introduction to the standards-related work of the International Labour Organization* (4th ed. 2019), at 19.

held in slavery or servitude'. Note that, unlike most of the substantive clauses of the Convention, Art. 4(1) ECHR makes no provision for exceptions, and no derogation is permissible under Art. 15(2) ECHR even in the event of a public emergency threatening the life of the nation.[733] Given its absolute nature, this provision also extends to irregular migrants.[734] In view of Art. 52(3) EU-CFR, the same holds true in EU law; the general limitation clause of Art. 52(1) EU-CFR is not applicable.

By reference to international instruments specifically concerned with the issue, including the ILO Forced Labour Convention, the ECtHR has held that limiting compliance with Art. 4 ECHR only to direct action by State authorities would be inconsistent with these international instruments and would amount to rendering it ineffective.[735] It has, therefore, held that States have positive obligations under Art. 4 ECHR. The positive obligations are both substantive and procedural, including the obligation to investigate.[736]

In order to comply with their substantive obligations, Member States are required to put in place a legislative and administrative framework to prohibit and punish such acts.[737] Art. 4 ECHR may, in certain circumstances, also require a State to take operational measures to protect victims, or potential victims, of treatment in breach of that Article.[738] In order for a positive obligation to take operational measures to arise in a particular case, it must be demonstrated that the State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspi-

733 ECtHR, *C.N. v. UK*, Appl. no. 4239/08, Grand Chamber Judgment of 13 November 2012, at para. 65; ECtHR, *Stummer v. Austria*, Appl. no. 37452/02, Grand Chamber Judgment of 7 July 2011, at para. 116.

734 Cf. also ECtHR, *Siliadin v. France*, Appl. no. 73316/01, Judgment of 26 July 2005; the applicant was unlawfully present in France. See for discussion Mantouvalou, 'Servitude and Forced Labour in the 21st Century: The Human Rights of Domestic Workers', 35 *Industrial Law Journal* (2006) 395. See also ECtHR, *Rantsev v. Cyprus and Russia*, Appl. no. 25965/04, Judgment of 7 January 2010.

735 ECtHR, *Siliadin v. France*, Appl. no. 73316/01, Judgment of 26 July 2005, at para. 89.

736 ECtHR, *S.M. v. Croatia*, Appl. no. 60561/14, Grand Chamber Judgment of 25 June 2020, at para. 306.

737 ECtHR, *C.N. v. UK*, Appl. no. 4239/08, Grand Chamber Judgment of 13 November 2012, at para. 66; *Siliadin v. France*, Appl. no. 73316/01, Judgment of 26 July 2005, at para. 112; *C.N. and V. v. France*, Appl. no. 67724/09, Judgment of 11 October 2012, at para. 105.

738 ECtHR, *Rantsev v. Cyprus and Russia*, Appl. no. 25965/04, Judgment of 7 January 2010, at para. 286; *C.N. v. UK*, Appl. no. 4239/08, Grand Chamber Judgment of 13 November 2012, at para. 67.

cion that an identified individual had been, or was, at real and immediate risk of being subjected to treatment in breach of Art. 4 ECHR. In the case of an answer in the affirmative, there will be a violation of that Article where the authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk.[739] The preventive measures include measures to strengthen coordination at national level between the various anti-trafficking bodies and to discourage the demand for all forms of exploitation of persons. Protection measures include facilitating the identification of victims by qualified persons and assisting victims in their physical, psychological, and social recovery.[740]

The procedural requirements under Art. 4 ECHR are similar irrespective of whether the treatment has been inflicted through the involvement of State agents or private individuals. The requirement to investigate does not depend on a complaint from the victim or next-of-kin; rather, the authorities must act of their own motion once the matter has come to their attention.[741]

The Court has developed the positive obligations arising under Art. 4 ECHR mainly in its jurisprudence relating to human trafficking.[742] However, the ECtHR has specifically clarified that the notion of 'forced or compulsory labour' under Art. 4 ECHR aims to protect against instances of serious exploitation, irrespective of whether they are connected to a human trafficking context.[743] Thus, Art. 4 ECHR requires that member States penalize and prosecute effectively any act aimed at maintaining a person in a situation of slavery, servitude, or forced or compulsory labor.[744] In

739 ECtHR, *Rantsev v. Cyprus and Russia*, Appl. no. 25965/04, Judgment of 7 January 2010, at para. 286; *C.N. v. UK*, Appl. no. 4239/08, Grand Chamber Judgment of 13 November 2012, at para. 67; *V.C.L. and A.N. v. UK*, Appl. no. 77587/12 and 74603/12, Judgment of 16 February 2021, at para. 152.

740 ECtHR, *Chowdury and others v. Greece*, Appl. no. 21884/15, Judgment of 30 March 2017, at para. 110.

741 ECtHR, *S.M. v. Croatia*, Appl. no. 60561/14, Grand Chamber Judgment of 25 June 2020, at para. 312–320; *Rantsev v. Cyprus and Russia*, Appl. no. 25965/04, Judgment of 7 January 2010, at para. 288.

742 Cf. V. Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (2017).

743 ECtHR, *S.M. v. Croatia*, Appl. no. 60561/14, Grand Chamber Judgment of 25 June 2020, at para. 300 and 303.

744 ECtHR, *C.N. v. UK*, Appl. no. 4239/08, Grand Chamber Judgment of 13 November 2012, at para. 66; *Siliadin v. France*, Appl. no. 73316/01, Judgment of 26 July 2005, at para. 112; *C.N. and V. v. France*, Appl. no. 67724/09, Judgment of 11 October 2012, at para. 105.

Chowdury and others v. Greece the ECtHR held that, irrespective of the legal qualification of the circumstances as human trafficking or forced labor, the positive obligations generated by Art. 4 ECHR also apply to the severe exploitation of workers in employment relationships.[745] The Court found that the applicants' situation – irregular migrants working in difficult physical conditions and without wages, under the supervision of armed guards, in the strawberry-picking industry in a particular region of Greece – constituted human trafficking and forced labor.[746]

In sum, there is a comprehensive set of positive obligations imposed on both the EU and its Member States by virtue of Art. 4 ECHR/Art. 5 EU-CFR, to protect the rights of irregular migrant workers – in particular, from the risk of being subjected to severe exploitation. On a more fundamental level, this also raises the question of whether the positive obligations on States to avoid exposing individuals to forced labor encompass an obligation to rethink some features of how immigration is commonly regulated.[747]

6.2.3 Specific issue: Human Rights limits to sanctioning 'secondary movements'

It emerges from the above legal analysis that States must provide a socio-economic subsistence level to all migrants in order to safeguard their human dignity. This minimum core cannot be undercut by migration policy considerations. Measures sanctioning 'secondary movements' of asylum seekers within the Union by withdrawing material reception conditions regularly conflict with this obligation.

The relevant legislative instrument providing for the reception conditions of asylum seekers in the EU is the Reception Conditions Directive. Art. 17–19 of this Directive lay out the general rules and modalities for material reception conditions and health care. In addition, Art. 15 provides for the right to access employment. As per Art. 20, material reception conditions may be reduced or withdrawn in the event an applicant is

745 ECtHR, *Chowdury and others v. Greece*, Appl. no. 21884/15, Judgment of 30 March 2017.

746 Ibid., at para. 127.

747 See Costello, 'Migrants and Forced Labour: A Labour Law Response', in A. Bogg, C. Costello, A. Davies and J. Prassl (eds), *The Autonomy of Labour Law* (2014) 189.

considered to have abandoned the place of residence, not conformed with reporting duties, or lodged a subsequent application. Moreover, Member States may reduce reception conditions when an applicant has not lodged their application for international protection as soon as reasonably practicable, when an applicant has concealed financial resources, or when an applicant has seriously breached the rules of the accommodation center or demonstrated seriously violent behavior.

Legislation that reduces or withdraws reception conditions for other reasons than those foreseen in Art. 20 are contrary to the Directive. Specifically, sanctions for onward movement are not foreseen. This was confirmed in 2012 by the CJEU in its *Cimade and GISTI* judgment. The CJEU held that, under the current legislation, a Member State is obliged to provide material reception conditions even to an asylum seeker in respect of whom it decides to call upon another Member State to take charge of or take back that applicant under the Dublin Regulation. The obligation ceases only when the applicant is actually transferred.[748] Although access to the labor market is not, strictly speaking, a material reception condition, the CJEU later extended this reasoning to Art. 15 of the Reception Conditions Directive.[749] In both cases, the CJEU did not rely solely on the wording of the Directive but also buttressed its argument by reference to the preservation of human dignity.[750]

This reasoning links the construction of the Directive to Art. 1 EU-CFR, as well as to the broader legal discourse in Human Rights law discussed above. In its case-law on a dignified standard of living of asylum seekers, the CJEU initially turned to the ECHR and the case-law of the Strasbourg Court, transferring to Art. 4 EU-CFR the standard that the ECtHR first developed for Art. 3 ECHR *in M.S.S. v. Belgium and Greece*.[751] Yet, as discussed above, extreme material poverty in breach of Art. 3 ECHR is a narrower concept of human dignity than the one developed by the CESCR and the ECSR. This is beginning to be reflected in case-law, as the CJEU appears to be developing a notion of human dignity under Art. 1 EU-CFR that is more independent of the prohibition of torture and inhuman or de-

748 CJEU, Case C-179/11, *Cimade and GISTI* (EU:C:2012:594).
749 CJEU, Cases C-322/19 and C-385/19, *K.S.* (EU:C:2021:11), at para. 67–68.
750 CJEU, Case C-179/11, *Cimade and GISTI* (EU:C:2012:594), at para. 56; Cases C-322/19 and C-385/19, *K.S.* (EU:C:2021:11), at para. 69.
751 CJEU, Cases C-297/17, C-318/17, C-319/17 and C-438/17, *Ibrahim* (EU:C:2019:219), at para. 90 et seq.; Case C-163/17, *Jawo* (EU:C:2019:218), at para. 92 et seq.

grading treatment.[752] This would imply a higher standard of protection. In the case of *Haqbin*, interpreting the provision on reduction and withdrawal of reception conditions, the CJEU concluded, with reference to Art. 1 EU-CFR, that a sanction that consists in the full withdrawal of material reception conditions relating to housing, food, or clothing, even if only for a limited period of time, is irreconcilable with the requirement to ensure a dignified standard of living for the applicant.[753] Although the Court did not make explicit reference to the ECSR in that regard – which arguably reflects the uncertain legal status of the Revised ESC in EU law – it appears that the CJEU's notion of human dignity is closer to that developed by the ESCR. Hence, we argue that, in respect of a dignified standard of living, the CJEU has embraced the view that the relevant EU fundamental right in substance is consonant with the jurisprudence of the ECSR, rather than merely reflecting the Art. 3 case-law of the ECtHR.

Accordingly, EU law as it stands obliges Member States to provide for a socio-economic subsistence level that meets their obligations under international law. Policies to sanction secondary movements which resort to socio-economic deprivation are therefore unlawful if they fall below the core minimum as defined in international jurisprudence. According to our legal analysis, this is not only a matter of accurate interpretation of the Reception Conditions Directive but also enshrined in the EU Charter, read in light of the pertinent Human Rights law.

The reform proposal for a recast Reception Conditions Directive, tabled by the European Commission in 2016,[754] is, therefore, highly questionable. Rather than explicitly preventing such policies of planned destitution, the Commission proposed creating a legal basis for them. Unsurprisingly, in the ensuing political process the legislative bodies are struggling to develop a provision that both enables the possibility of withdrawing material reception conditions and, at the same time, is in line with the requirement for a socio-economic subsistence level to safeguard human dignity. According to a compromise text, prepared in 2018 by the Bulgarian Presidency of the EU Council that seems to reflect an agreement between the governments,[755] the general standard that Member States must provide for

752 CJEU, Case C-233/18, *Zubair Haqbin* (EU:C:2019:956), at para. 45–47.
753 Ibid., at para. 47.
754 Proposal for a recast Reception Conditions Directive, COM(2016) 465, 13 July 2016.
755 Council of the EU: Note from the Presidency to the Permanent Representatives Committee, Directive 2013/33/EU (recast): Conditional confirmation of the final compromise text with a view to agreement, 10009/18 ADD 1, 18 June

asylum seekers under Art. 17–19 of the Directive is formulated as follows: 'an *adequate* standard of living for applicants, which guarantees their subsistence, protects their physical and mental health and respects their rights under the Charter of Fundamental Rights of the European Union' (emphasis added). In addition to the existing reasons for reductions and withdrawals, as currently laid down in Art. 20 (which, in an amended form, corresponds to Art. 19 of the compromise text), the Presidency suggested a new provision according to which material reception conditions will be withdrawn from the moment an applicant has been notified of a transfer decision under the Dublin Regulation (Art. 17a of the compromise text).

Assuming that this text will eventually be signed into law, the ambiguous wording leaves considerable leeway for conflicting interpretations. Unlike the current Directive, the draft avoids the term 'dignified standard' as a limit on reductions and withdrawals.[756] When called upon to interpret the 'dignified standard of living' as laid down in Art. 20(5) of the Reception Conditions Directive, the Court has held that the most basic needs cover, inter alia, food, personal hygiene and a place to live.[757] In contrast, for sanctions for non-cooperation within the Dublin State (as per Art. 19 in the compromise text), as well as for sanctions for unauthorized secondary movements (as per its Art. 17a), the new reduced fallback standard in the proposal is 'a standard of living in accordance with Union law, including the Charter of Fundamental Rights of the European Union, and international obligations'. This wording would certainly still be open to a construction that ensures the socio-economic subsistence level as it emerges from both ICESCR and Revised ESC. However, in light of the political context, we have serious concerns that the 'core minimum' would be undercut, especially because the distinction between the normal standard ('adequate') and the reduced standard (only 'standard') invites Member States to test the bottom line – and frequently cross it in practice.

Taken together, by introducing the legal possibility of sanctioning secondary movements with the withdrawal of material reception conditions,

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2018; leaked document available at https://www.statewatch.org/media/1429/eu-council-reception-conditions-conditional-confirmation-text-10009-18-add1.pdf. For discussion, see S. Carrera et al., *When Mobility is not a Choice: Problematising Asylum Seekers' Secondary Movements and Their Criminalisation in the EU* (2019), at 8–11, available at https://www.ceps.eu/wp-content/uploads/2019/12/LSE2019-11-RESOMA-Policing-secondary-movements-in-the-EU.pdf.

756 See recital 25 and Art. 20(5) Reception Conditions Directive.

757 CJEU, Case C-163/17, *Jawo* (EU:C:2019:218), at para. 92.

the current reform proposals risk creating a new category of asylum seekers vulnerable to destitution.

6.2.4 Specific issue: Human Rights limits to sanctioning non-cooperation in return proceedings

Our analysis revealed a trend toward the use of policies of socio-economic deprivation in order to incentivize returns of (non-cooperative) non-removable returnees. Such policies risk interfering with the right to a minimum socio-economic subsistence level as developed above.

Art. 9 of the Return Directive (Directive 2008/115/EC) acknowledges that the actual deportation of a person to whom a return decision has been addressed and has become final may nevertheless be postponed. This raises the question of the status of those persons whose stay is technically 'illegal' and at the same time 'tolerated' – in particular, in terms of their social and economic rights.

The Return Directive falls short of comprehensively regulating this status. Art. 14(1) merely establishes a list of 'principles' that 'are taken into account as far as possible' pending return:

> *Member States shall, with the exception of the situation covered in Articles 16 and 17 [i.e., in situations of detention], ensure that the following principles are taken into account as far as possible in relation to third-country nationals during the period for voluntary departure granted in accordance with Article 7 and during periods for which removal has been postponed in accordance with Article 9:*
> *(a) family unity with family members present in their territory is maintained;*
> *(b) emergency health care and essential treatment of illness are provided;*
> *(c) minors are granted access to the basic education system subject to the length of their stay;*
> *(d) special needs of vulnerable persons are taken into account.*

The protective scope of this provision is limited in both its personal and material dimension, as well as in terms of the nature of the obligations it creates.

Unlike the initial proposal from the Commission,[758] the Return Directive does not cross-reference the corresponding rights of asylum seekers laid down in the Reception Conditions Directive.[759] Member State governments had expressed concerns during the negotiations that references to the Reception Conditions Directive might be perceived as 'upgrading' the situation of irregular migrants and thus 'send a wrong message'.[760] In terms of substance, the list of safeguards is less comprehensive than the rights provided for asylum seekers. As far as social and economic rights are concerned, it merely mentions emergency healthcare (point b) and basic education for minors (point c). The most notable omission relates to access to employment and material reception conditions, which were not even included in the Commission proposal. The provision does not foresee the coverage of basic needs, such as food or housing.

The status and the rights of unremovable migrants should be primarily defined at national level, as the preamble suggests: Recital 12 specifically stipulates that the situation of people 'who are staying illegally but who cannot yet be removed should be addressed', and that their basic conditions of subsistence should be defined according to national legislation. As a result, EU law possibly creates a legal vacuum that needs to be filled by domestic law. This is flanked by non-binding recommendations from the Commission. In its 2014 Communication, the Commission stressed that 'protracted situations' should be avoided and non-deportable people

758 European Commission, Proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals, COM(2005) 391, 1 September 2005. This proposal was accompanied by an Impact Assessment (SEC(2005) 1057) and a Commission Staff Working Document (SEC(2005) 1175), containing detailed comments.

759 Commission Proposal COM(2005) 391, Art. 13: 'Member States shall ensure that the conditions of stay of third-country nationals for whom the enforcement of a return decision has been postponed or who cannot be removed for the reasons referred to in Article 8 of this Directive are not less favourable than those set out in Articles 7 to 10, Article 15 and Articles 17 to 20 of Directive 2003/9/EC.' The referenced Articles essentially cover family unity, health care, schooling and education for minors as well as respect for special needs of vulnerable persons.

760 Lutz, 'Return Directive 2008/115/EC', in K. Hailbronner and D. Thym (eds), *EU Immigration and Asylum Law: Commentary* (2nd ed. 2016), commentary on Art. 14, at para. 2; F. Lutz, *The Negotiations on the Return Directive* (2010), at 64; see also Majcher and Strik, 'Legislating without Evidence: The Recast of the EU Return Directive', 23 *European Journal of Migration and Law (EJML)* (2021) 103, at 123.

should not be left indefinitely without basic rights.[761] The Commission's Return Handbook, which is equally non-binding, states that 'there is no general legal obligation under Union law to make provision for the basic needs of *all* third country nationals pending return', but notes that 'the Commission encourages Member States to do so under national law, in order to assure humane and dignified conditions of life for returnees'.[762]

Moreover, the fact that the safeguards are framed as 'principles' that are to be 'taken into account as far as possible', raises further questions as to the legal nature of the obligations they contain, if any. In *Abdida* the Court partly mitigated this gap by relying on the effectiveness principle to argue that emergency healthcare also includes the provision for the basic needs of the person concerned.[763] Referring to Art. 14(1)(b) Return Directive, the Court ruled that Member States have an additional obligation to provide for the basic needs of a third-country national suffering from a serious illness where such a person lacks the means to make such provision for themselves.[764]

Based on this reasoning by the CJEU, the obligation to cater for the basic needs of non-removable migrants could be derived from their effective enjoyment of the other rights enumerated in Art. 14(1) Return Directive.[765] Whereas a lower Belgian Court applied this principle with regard to family life,[766] the Netherlands' highest administrative court, the *Raad van State*, ruled that the *Abdida* rationale was not applicable to the situation of a third-country national who could not be returned to

761 European Commission, Communication on EU Return Policy, COM(2014) 199, 28 March 2014.

762 European Commission, Recommendation 2017/2338 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks, at para. 64 (emphasis in original).

763 CJEU, Case C-562/13, *Abdida* (EU:C:2014:2453), at para. 58–60; confirmed in Case C-402/19, *LM* (EU:C:2020:759), at para. 52–53. Note that in *Mahdi*, a detention case, the Court did not deal with Art. 14 Return Directive: CJEU, Case C-146/14 PPU, *Mahdi* (EU:C:2014:1320).

764 CJEU, Case C-562/13, *Abdida* (EU:C:2014:2453), at para. 60.

765 Opinion of Advocate General Bot in Case C-562/13, *Abdida* (EU:C:2014:2167), at para. 149; Lutz, 'Non-removable Returnees under Union Law: Status Quo and Possible Developments', 20 *European Journal of Migration and Law (EJML)* (2018) 28, at 36.

766 Tribunal du travail de Bruxelles, R.G.15/1/C, Judgment of 23 January 2015, cited in M. Moraru and G. Renaudiere, *European Synthesis Report on the Judicial Implementation of Chapter III of the Return Directive Procedural Safeguards* (2016), REDIAL Research Report 2016/03, at 38.

Côte d'Ivoire because his request for a laissez-passer was rejected by the embassy.[767]

While the expansive reading of Art. 14 Return Directive by the CJEU adds to the safeguards following from this provision, the nature of the obligation remains less clear. The Court's reasoning seems to imply that the 'principles' laid down therein give rise to binding obligations under EU law, since it held that Member States 'are required to provide' the safeguards of Art. 14.[768] On the other hand, this requirement is limited to 'in so far as possible',[769] and Member States 'determine the form' that such provision of basic needs takes.[770] As a result, the Court only partly addresses the legal and material situation of irregularly staying migrants whose removal is postponed.[771] In addition, the safeguards laid down in Art. 14 Return Directive only apply for the period granted for voluntary departure and cases where removal is temporarily postponed in accordance with Art. 9.

Still, provided that Art. 14 Return Directive is applicable, there is nothing in the wording of this Directive, nor in the reasoning of the CJEU, that authorizes sanctions for non-cooperation with return. On the contrary, the reference to technical reasons due to lack of identification in Art. 9(2)(b) appears to extend to situations where the returnee is unwilling to cooperate with his or her own deportation.[772]

In sum, the Return Directive creates a particularly vulnerable category of migrants – non-returnable people – who cannot be removed (yet) but

767 Raad van State, Uitspraak 201502872/1/V1 (NL:RVS:2015:4001), Judgment of 15 December 2015.

768 CJEU, Case C-562/13, *Abdida* (EU:C:2014:2453), at para. 58.

769 Ibid., at para. 59.

770 Ibid., at para. 61.

771 Farcy, 'Unremovability under the Return Directive: An Empty Protection?', in M. Moraru, G. Cornelisse and Ph. de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* (2020) 437, at 446.

772 While the distinction is not explicitly foreseen in the Return Directive, the Commission's 'Return Handbook' uses this distinction in the chapter on criminal sanctions: Recommendation 2017/2338, at para. 19. The 2013 'Ramboll study' on the implementation of the Return Directive suggested including the distinction between cooperating and non-cooperating returnees generally in legislation: M. Heegaard Bausager, J. Köpfli Møller and S. Ardittis, *Situation of Third-country Nationals Pending Postponed Return/Removal in the EU Member States and the Schengen Associated Countries* (2013), HOME/2010/RFXX/PR/1001, at 93 et seq.

who are not granted a comprehensive status under EU law.[773] EU legislation currently does not prevent – in any case, not with the necessary clarity – their minimum core of socio-economic rights required by Human Rights law being denied.

6.2.5 Specific issue: Human Rights obligations to combat exploitation of irregular migrants

As developed above, Member States have positive obligations to combat the exploitation of persons with irregular immigration status, including non-documented migrants. These obligations involve, inter alia, putting in place a legislative framework for prevention (see section 6.2.2).

In the context of the Union, the responsibility for meeting this obligation to legislate is shared between the EU and its Member States. The respective powers to combat social exclusion in the field of migration are categorized, in Art. 4(2) points (a), (b) and (j) TFEU, as shared competence between the Union and the Member States. According to the principle of subsidiarity, the Union shall act in such areas if the objectives of the proposed action cannot be sufficiently achieved by the Member States, but can rather be better achieved at Union level (Art. 5(3) TEU). Accordingly, in order to meet its constitutional obligations under Art. 5 EU-CFR (which mirrors the international obligation of Member States under Art. 4 ECHR), the EU is requested to use its legislative powers whenever the objective of preventing exploitation of irregular migrants cannot be sufficiently achieved by Member State action alone.

The EU legislature has addressed the issue of clandestine and other irregular migrant workers via the Employers Sanctions Directive (Directive 2009/52/EC). Pursuant to Art. 1, the Directive is designed as a measure to combat illegal immigration by setting Union-wide minimum standards for imposing sanctions against employers of third-country nationals who are staying irregularly. The Employers Sanctions Directive obliges EU Member States to prohibit the 'employment of illegally staying third-country nationals' and to criminalize certain forms of employment – for example,

773 B. Menezes Queiroz, *Illegally Staying in the EU: An Analysis of Illegality in EU Migration Law* (2018), at 84–85; Majcher and Strik, 'Legislating without Evidence: The Recast of the EU Return Directive', 23 *European Journal of Migration and Law (EJML)* (2021) 103, at 125.

when employers subject workers to particularly exploitative working conditions, as set out in Art. 9(1)(c).

This repressive approach is complemented by very limited protection of the labor rights of the irregular migrant workers concerned. The provisions laid down in the Directive primarily address the employers. The Preamble does refer to fundamental rights – but the considerations are concerned with the rights of the employers rather than those of the affected migrants.[774] The protective elements that are laid down in the Directive mainly emerge indirectly from the duties of the employers or Member States. For example, in accordance with Art. 6(1) Employers Sanctions Directive, employers are liable to make back-payments.

This reflects a lack of political interest in protection of Human Rights of irregular migrants. The legislative process of the Directive is illustrative of this finding. Member States opposed provisions on strict monitoring of employers, while the more rights-based approach of the European Parliament, supported by trade unions, has left only a light footprint in the final version of the Directive.[775] Further evidence is provided by the lack of or late implementation and de facto non-application of this Directive, and in particular its protective elements.[776] Especially as regards the core of the protective measures designed to redress injustices suffered by irregular migrants, and to access to justice and facilitate complaints (Art. 6(2) to (5) and Art. 13 Employers Sanctions Directive), Member States have implemented weak (if any) mechanisms to promote enforcement.[777]

The existence of an effective complaints mechanism, which enables exploited workers to access justice and receive compensation, is the cornerstone of protecting migrant workers from exploitation and abuse. Art. 14 of the Directive requires Member States to 'ensure that effective and adequate inspections are carried out' to control the employment of migrants of irregular status. However, there is a lack of safeguards to ensure that this data is not used for immigration enforcement. In 20 out of 25 Member States bound by the Employers Sanctions Directive, labor inspectorates report irregular migrants identified during inspections to the immigration law enforcement authorities. This discourages victims from reporting abus-

774 Employers Sanctions Directive, recital 37.

775 Schierle, 'Employers Sanctions Directive 2009/52/EC', in K. Hailbronner and D. Thym (eds), *EU Immigration and Asylum Law: Commentary* (2nd ed. 2016), commentary on Art. 1, at para. 17–18; on Art. 13, at para. 2–6.

776 European Commission, Communication the application of Directive 2009/52/EC, COM(2014) 286, 22 May 2014, at 7–8.

777 Ibid.

es and violations of labor law.[778] Similarly, when labor inspectorates conduct inspections jointly with the police or immigration law enforcement authorities, this may discourage exploited workers from reporting their experiences; it may also cause them to hide to avoid apprehension and removal.[779] The issue also has been raised by the HR Committee, which called upon Belgium to ensure protection for the right to an effective remedy for irregular immigrants, which is 'jeopardised by the fact that police officers are obliged to report their presence' at court.[780] Absent such safeguards, migrants facing exploitation in their work place will not call labor inspectors.

In its repressive approach, the Employers Sanctions Directive contrasts with early (albeit abortive) legislative initiatives from the 1970s on the basis of Art. 100 EEC Treaty. This provision empowered the European Community to legislate with a view to the establishment or functioning of the Common Market, including on matters relating to the rights and interests of employed persons. Essentially the same power is today laid down in Art. 115 TFEU (cf. Art. 114(2) TFEU). On that legal basis, the European Commission proposed a 'Council directive on the harmonization of laws in the Member States to combat illegal migration and illegal employment'[781] in November 1976. As the Commission noted then, clandestine migrants facing the constant threat of discovery and deportation are particularly vulnerable to exploitation and intimidation.[782] The proposal contained strong references to Human Rights and justified the need to harmonize Member States' laws in terms of combating abusive

778 FRA, Protecting Migrants in an Irregular Situation from Labour Exploitation: Role of the Employers Sanctions Directive (2021), at 7 and in particular Annex II, Table A5. See also PICUM, *A Worker is a Worker: How to Ensure that Undocumented Migrant Workers Can Access Justice* (2020), available at https://picum.org/wp-content/uploads/2020/03/A-Worker-is-a-Worker-full-doc.pdf.

779 FRA, Protecting Migrants in an Irregular Situation from Labour Exploitation (2021), at 7.

780 HR Committee, Concluding observations on State reports: Belgium, A/59/40 vol. I (2004), at 72, para. 11; see also CESCR, Consideration of reports submitted by States parties: Russian Federation, E/2004/22 (2003), at para. 487–490.

781 Commission of the European Communities, Proposal for a Council Directive on the Harmonisation of Laws in the Member States to Combat Illegal Employment, COM(76) 331, 3 November 1976.

782 Commission of the European Communities, Action Programme in Favour of Migrant Workers and Their Families, COM(74) 2250, 18 December 1974, at 21; Proposal for a Council Directive on the Harmonisation of Laws in the Member States to Combat Illegal Employment, COM(76) 331, 3 November 1976, at 1 (Explanatory Memorandum).

employment relationships, protecting the rights of workers, and moving forward the general social aims of the then European Community.[783] The rationale for this approach was to deter the employment of irregular migrants by ensuring that, as a consequence of the fulfillment of employer obligations and safeguarding the rights of migrant workers, the cost of irregular labor would equate with or even exceed that of the lawful labor force.[784] The proposal was amended in April 1978[785] in response to criticism by the European Parliament and the Economic and Social Committee that it failed to devote sufficient attention to the protection of irregular migrants.[786] The proposal also foresaw the implementation of 'adequate control, especially of employers and persons and undertakings supplying manpower to third parties'.[787] However, the Commission's efforts were not pursued in the Council due to a lack of political consensus among the Member States.[788] When the file was reopened more than 30 years later with the Employers Sanctions Directive, it not only moved from internal market policy to the field of immigration policy, based on Art. 79(2)(c) TFEU, but also lost much of its protective rationale.

This could be remedied in reform efforts by picking up the rights-based approach of the Commission and Parliament from the 1970s. In order to meet its obligations to combat exploitation of migrants in particularly vulnerable situations, the EU should not only consider offering entitlements to regularization to victims of exploitation (see Chapter 5) but also use the

783 Kraler, 'Fixing, Adjusting, Regulating, Protecting Human Rights: The Shifting Uses of Regularisations in the European Union', 13 *European Journal of Migration and Law (EJML)* (2011) 297, at 303.

784 Commission of the European Communities, Amended Proposal for a Council Directive concerning the Approximation of the Legislation of the Member States, in order to Combat Illegal Migration and Illegal Employment, COM(78) 86, 3 April 1978, at para. 12 (Explanatory Memorandum).

785 Ibid., at para. 1 (Explanatory Memorandum).

786 Cholewinski, 'European Union Policy on Irregular Migration: Human Rights Lost?', in B. Bogusz, R. Cholewinski and A. Cygan (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (2004) 159, at 165.

787 Commission of the European Communities, Amended Proposal for a Council Directive concerning the Approximation of the Legislation of the Member States, in order to Combat Illegal Migration and Illegal Employment, COM(78) 86, 3 April 1978, Art. 3.

788 Cholewinski, 'European Union Policy on Irregular Migration: Human Rights Lost?', in B. Bogusz, R. Cholewinski and A. Cygan (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (2004) 159, at 166.

broad range of its powers to strengthen the rights of irregular migrants. To this effect, the EU could combine the legal bases to regulate the rights and interests of employed persons with a view to ensuring fair competition in the internal market (Art. 115 TFEU), to provide minimum harmonization in the field of social policy (Art. 153 TFEU), and to legislate in the area of illegal immigration and unauthorized residence (Art. 79(2)(c) TFEU). One important element to render the policy effective is the establishment of non-reporting obligations for the labor inspectors (so-called 'firewalls' between labor law and immigration law).[789]

6.3 Recommendations

The above legal evaluations revealed that enhanced efforts are required in response to Member States policies that potentially violate the Human Rights of margizens. Our recommendations build on the EU's positive obligation 'to protect' the relevant socio-economic rights. As a general approach, we recommend that the EU embrace the standards developed by the European Committee of Social Rights, irrespective of the disputed status of its jurisprudence in EU law. The EU legislative bodies should require States to ensure a decent existence for all migrants actually present, regardless of their legal status. Moreover, we recommend that the EU legislature adopt a level of protection that builds a safety margin against the absolute minimum, in order to avoid implementation deficits that violate Human Rights.

While there is no strict obligation under international law to choose such an approach, the EU would more effectively use its powers to prevent unlawful results in a field in which the EU is generally accountable, delivering on its commitment to human dignity as one of its foundational values.

789 Crépeau and Hastie, 'The Case for "Firewall" Protections for Irregular Migrants', 17 *European Journal of Migration and Law (EJML)* (2015) 157; see also Costello, 'Migrants and Forced Labour: A Labour Law Response', in A. Bogg et al. (eds), *The Autonomy of Labour Law* (2014) 189.

Recommendation 1: Stop using restrictions to socio-economic rights to sanction 'secondary movements' of asylum seekers

We urge the EU to prevent Member States from using restrictions to socio-economic rights as a means to disincentivize 'secondary movements' of asylum seekers. Counterfactual assumptions that the person ought not be present according to the terms of asylum laws cannot justify a real risk of violating the Human Rights of persons who do not respond to the incentive to leave.

Specifically, we recommend that the rights stipulated in the Reception Conditions Directive be available to all asylum seekers irrespective of the place of asylum jurisdiction according to the Dublin III Regulation or any follow-up Regulation. The text of the Directive should explicitly rule out any reduction or withdrawal of benefits as a tool to promote compliance with the Dublin rules. The Commission should amend its proposal for a recast Reception Conditions Directive accordingly, in particular in withdrawing the proposed Art. 17a.

Note that this approach does not amount to recognizing a general right to freedom of movement within the EU, as the States reserve their powers to perform Dublin transfers in accordance with EU law. Whenever they actually fail to enforce the obligation to leave, however, they must provide access to basic socio-economic rights without any discrimination based on (irregular) immigration status.

Recommendation 2: Provide equal treatment between asylum seekers and irregular migrants in respect of socio-economic rights

We recommend that the EU extend the rights and benefits granted to asylum seekers under the Reception Conditions Directive to all irregular migrants who are subject to the Return Directive, regardless of whether they are considered to cooperate in the return procedure. Art. 14 of this Directive should be amended accordingly.

Building on that minimum guarantee accorded to all irregular migrants, the EU should consider according more favorable treatment to irregular migrants whose removal has been postponed due to Human Rights concerns, including the principle of non-refoulement, or other legal or practical obstacles to removal likely to be persistent. The status of these 'non-removables' should be comprehensively regulated by EU law, next to stipulating a maximum period of successively postponing removals (see

Chapter 5). The status of being 'tolerated' in the EU should include, among others things, immediate access to the labor market of the respective Member State.

The power necessary to adopt these legislative acts follows from Art. 79(2)(c) TFEU, which enables to EU to comprehensively regulate the status of persons who are subject to return proceedings.

Recommendation 3: Adopt a rights-based approach toward undocumented irregular migrants to better protect them from exploitation and forced labor

We recommend that the EU move beyond a sanctions approach vis-à-vis employers in addressing labor relations involving irregular migrants. The EU should adopt an approach empowering irregular migrants to more effectively protect them from exploitation and forced labor. The Employers Sanctions Directive should be revised in the light of the positive obligations arising from Art. 5 EU-CFR/Art. 4 ECHR. In that regard, we recommend revisiting the proposals from the Commission in the 1970s.

In contrast to the revision of the Return Directive – recommended above, which addresses well-documented irregular migrants – the revision of the Employers Sanctions Directive should specifically target the situation of the most precarious (that is, undocumented or clandestine) irregular migrants. Next to legislating on their labor-related rights, the EU should foster their non-discriminatory access to other socio-economic rights, in particular health services and primary education provided according to national law. These regulations should also establish non-reporting obligations for the relevant authorities ('firewalls'). We consider the relevant powers of the EU to follow from Art. 79(1)(c), Art. 115 and Art. 153 AEUV.