Summary

The REMAP study rests on the observation of two long-term processes: increasingly dense obligations under Human Rights law that are recognized as relevant to migration, and the emergence of the EU as a powerful player in migration policy. Their encounter has resulted in a growing number of instances in which European migration policies conflict with Human Rights. The REMAP study identifies these instances, outlines the applicable legal standards, and provides recommendations to ease the tension. It is based on an understanding of Human Rights as legal norms of international law that are rich in content but that must be construed by means of interpretation that are methodologically sound – a 'positivist Human Rights maximalism', as it were.

The study looks into acts or omissions that actually violate Human Rights and their corresponding provisions of EU fundamental rights, or instances in which current policies and practices run the risk of doing so. In our view, the EU is primarily accountable for European migration policy being in conformity with Human Rights. Accordingly, the legal analysis encompasses EU Member States acting in situations principally covered by EU legislation. The EU is also required to answer for its failure to enact a comprehensive legal framework that is sufficiently specific or broad to address cases in which Human Rights violations by Member States frequently occur (we call such situations 'underinclusive legislation').

The REMAP study is organized according to the interests of migrants protected by Human Rights guarantees. Each chapter identifies the main challenges to these protected interests: major trends in European migration policy that pose increasing and/or structural conflicts with Human Rights. These trends and patterns are analyzed as to their conformity with relevant provisions of Human Rights law. Based on the ensuing findings, we offer specific recommendations to stop ongoing Human Rights violations and prevent them from occurring. We also make suggestions where our findings indicate that legislative action on the part of the EU is required, naturally involving a higher degree of political discretion. This is in line with our understanding of Human Rights both as 'guardrails', setting strict and justiciable limits to policy choices, and 'directive principles' that legally guide policy-making. Calling for the EU legislature to act may sound politically naïve, given that the current political climate

tends to lower Human Rights standards for migrants. And yet, we imagine ourselves being the trusted legal advisors of a 'bona fide' policy-maker who would like to know what a European migration policy based on Human Rights must and should entail.

1. Ensuring Access to Asylum

Chapter 1 addresses access to asylum, arguably the most pressing challenge to European migration policy. The EU and its Member States have developed a range of policies that prevent potential asylum seekers from gaining access to status determination procedures and, hence, from seeking and enjoying asylum in the EU as promised in Art. 18 EU-CFR. The EU not only fails to effectively offer legal and safe passages to asylum but has also actively implemented policies that aim at circumventing international obligations toward refugees by way of non-exercise of asylum jurisdiction. According to our analysis, these policies take three forms: tacitly avoiding, normatively contesting, and transferring jurisdiction.

First, we observe increased efforts among the EU and its Member States to avoid asylum jurisdiction through the externalization of mobility control – that is, via cooperation with third countries. Policies of cooperative externalization aim at preventing migrants from leaving their country of origin or a transit country in the first place ('non-departure policies'). The EU–Turkey Statement of 2016 serves as a model for this approach. In addition, the EU and its Member States implement 'non-arrival policies' aiming at 'pulling back' migrants before arrival on EU territory. The latter approach is exemplified by the ongoing cooperation of Italy and Malta with the so-called Libyan Coast Guard. The EU is actively involved in this particular cooperation by providing technical and financial assistance and conducting aerial surveillance coordinated by Frontex. Moreover, Frontex has concluded a growing number of status agreements and working arrangements with third countries on matters of border control, contributing to the EU's non-departure as well as non-arrival policies.

Second, policies of contesting asylum jurisdiction strategically challenge, and possibly reverse, the scope of Human Rights protection through calculated acts of non-compliance with legal obligations. We observe a growing trend among EU Member States of disregarding their Human Rights obligations (and corresponding obligations under EU law) to migrants who demand access to asylum. Such practices include push-back measures at or near the external border ('hot returns') and the closure

of ports to the disembarkation of migrants rescued at sea. We read this trend as an expression of principled resistance; that is, as a political attempt at reversing Human Rights jurisprudence post-*Hirsi*, rather than singular infringements of rights.

Finally, the Common European Asylum System provides for, and embraces, policies of transferring asylum jurisdiction by referring migrants to other States. Such measures delegating international responsibilities are mandated both within the Union (in the context of the Dublin system) and beyond, to non-European countries through the use of the 'safe third country' concept. We observe increased efforts to implement such schemes that refer migrants to presumed protection in countries other than their actual residence, even when effective 'protection elsewhere' is based on counterfactual assumptions. Recent legislative initiatives at EU level even aim at lowering the standards for a third country to be considered 'safe'.

Regarding the standards used to legally evaluate these trends, a Human Right to asylum has yet to emerge as an undisputed part of international law. The most important rule of international law that, to some extent, ensures access to asylum is the principle of non-refoulement. It prohibits States from expelling or returning anyone to a place where his or her fundamental Human Rights are threatened. The prohibition of refoulement amounts to an unconditional right to be admitted and protected whenever the possible alternative to provisionally granting access to the territory would entail the risk of Human Rights violations. The principle is enshrined in various sources of international law, including the prohibition of torture and inhuman or degrading treatment as laid down in Art. 3 ECHR. In its case-law on this Article, the European Court of Human Rights (ECtHR) has consistently held that 'push-backs' are illegal, both at the land borders and on the High Seas. Note that this jurisprudence was not reversed in the controversial Grand Chamber judgment *N.D. and N.T. v. Spain*, which invented a limited exception to the prohibition of collective expulsion enshrined in Art. 4 Protocol No. 4 ECHR.

When the EU or Member States cooperate with third countries, they often do not exercise direct and exclusive control over the migrants concerned but, rather, facilitate the commission of Human Rights violations by others. We find that this does not necessarily absolve them from being responsible according to the rules of international law. Art. 16 of the relevant Articles on State Responsibility (ASR) establishes international responsibility through complicity – that is, by 'aiding or assisting' internationally wrongful acts commissioned by others. Insofar as Art. 16 ASR requires 'knowledge' of the circumstances of the violation on the part

of the complicit State, we argue that a due diligence standard must be applied. Applying this standard of 'reasonably foreseeable threats', it would be hard to deny the fulfillment of the knowledge criterion in the context of lasting cooperation with third countries, such as Libya, that have a well-documented record of Human Rights violations. Moreover, we argue that the jurisdiction clause of Art. 1 ECHR has to be read in light of Art. 16 ASR, with the result that effective control may extend to cases of complicity.

Regarding rescue at sea and disembarkation, an additional layer of protection is achieved through the International Law of the Sea. The duty to render assistance to persons in distress at sea, expressed in various provisions of the Law of the Sea, requires that rescued persons be delivered to a 'place of safety'. This obligation must be construed in light of Human Rights law. Disembarkation policies must therefore respect the principle of non-refoulement and any positive obligations arising from other Human Rights. These may well leave the requested coastal state with no other option but to allow for disembarkation on its own soil.

In a similar manner, shifting responsibility through transferring jurisdiction must respect Human Rights. While international refugee law, as it stands, does not categorically rule out schemes based on the concept of 'protection elsewhere', they must be implemented in compliance with Human Rights obligations. These include not only the non-refoulement principle but also other guarantees such as Art. 8 ECHR or the Convention on the Rights of the Child (CRC). Accordingly, any 'safe third country' policies must ensure the safety of the person based on a good faith empirical assessment, in which the burden of proof lies with the country where asylum application was filed. Human Rights (and the corresponding EU fundamental rights) also demand transfers under the Dublin system to guarantee access to a fair asylum procedure. Finally, we argue that Human Rights entail a broadly framed, but nonetheless existing, positive obligation to facilitate legal pathways of accessing the asylum system (that is, to provide for 'genuine and effective access to means of legal entry', in the language of the ECtHR).

Building on this legal evaluation, we recommend that the EU and its Member States strictly condition any cooperation with third countries in the area of migration management on Human Rights compliance. Accordingly, cooperation with States known for systematic violations of Human Rights must be suspended. Any 'migration partnership' should be established or maintained only if the third country is able and willing to effectively protect Human Rights and is sufficiently stable at the time

of concluding the agreement. To guarantee a certain level of protection over time, Human Rights compliance in third countries should be objectively and independently evaluated through a monitoring mechanism. We recommend that such a mechanism consist of a politically responsible management body as well as an independent body for risk assessment of Human Rights violations, composed of experts from the EU Fundamental Rights Agency (FRA), UNHCR and NGOs.

Furthermore, we recommend that the Human Rights obligations at external borders as well as at EU ports be spelled out and detailed in EU legislation in order to foster compliance by Member State authorities. The legislative agenda includes, inter alia, the Schengen Borders Code that should specify the conditions that apply to any border control measures carried out by Member States.

As regards 'safe third country' policies and transfers within the Dublin system, any reform must respect Human Rights obligations, including the right to access a functioning asylum procedure and reception system, and respect for the applicant's family and social ties. Specifically, the notion of partial territorial protection should not allow for qualification as a 'safe third country'. A new Dublin Regulation must not reverse the achievements in terms of Human Rights and EU fundamental rights brought about through case-law, most notably the protection against transfers to Member States where there is a threat of Human Rights violations, and the guarantee of effective legal remedies. In order to ensure sufficient flexibility of Member States to comply with Human Rights obligations, the system must continue to provide for an open-ended discretionary clause allowing Member States to assume responsibility for a particular asylum claim.

Finally, in order to comply with its positive obligations to protect and promote Human Rights, the EU must become proactive in providing safe and legal pathways to refuge within the EU. While there are a number of different avenues to reach this goal, we are of the view that the most accessible, fair, and reliable mechanism would be the creation of a European Humanitarian Visa. We recommend that the EU follow the 2018 initiative report by the European Parliament to adopt a Regulation to this effect.

2. Ensuring Liberty and Freedom of Movement

Chapter 2 focuses on immigration detention and other restrictions on the freedom of movement. Detention is understood as 'deprivation of liberty or confinement to a particular place' and can take place in a variety of

locations such as specialized administrative facilities, prisons, or transit zones at the external borders. The EU has developed a broad regulatory framework on this type of administrative detention (as opposed to detention in the context of criminal proceedings), spanning the Reception Conditions Directive, the Dublin Regulation, and the Return Directive. Although these regulations are rather fragmentary, particularly in terms of detention conditions, together they cover all relevant situations of detaining migrants who are present on Union territory. The EU has therefore assumed for itself primary responsibility for Human Rights compliance in this field of European migration policy.

However, we observe an overall trend toward a tightening of the regime, moving toward a more restrictive and repressive approach – at the level of Member State practice as well as in legislative initiatives at EU level. First, we note an increased use of immigration detention for a wider range of reasons. This is particularly acute in the context of so-called border procedures, where some Member States systematically resort to detaining asylum seekers. This trend is, secondly, accompanied by a proliferation of other measures limiting migrants' freedom of movement that technically do not amount to detention (such as house arrest with reporting obligations or the restriction of movement to a small island). These less severe restrictions are sometimes misleadingly referred to as 'alternatives to detention' (ATD, which can be implemented when there is otherwise a ground for detention). Both in fact and in law, area-based restrictions are an independent policy tool that is available in addition to detention, widening the net of restrictive measures against migrants. They may also function as a pathway to detention, in cases where the failure of a migrant to respect the restriction provides a legal ground for detention. And, finally, we observe a persistent pattern of problematic conditions in detention facilities. Member States frequently disregard the fact that migrants are detained merely for administrative purposes rather than because they committed a crime.

Four interrelated layers of legal standards are particularly relevant to ensuring liberty and freedom of movement. The first layer of universal and regional Human Rights protects against arbitrary detention per se. Substantively speaking, the most comprehensive standard of protection is provided for in the International Covenant on Civil and Political Rights (ICCPR) and the jurisprudence of the relevant quasi-judicial body, the Human Rights Committee. According to this jurisprudence, detention is unlawful unless there are circumstances specific to the individual – such as a risk of absconding or a risk of acts against national security – that make it

necessary and proportionate to resort to this ultimate measure. Restrictions of liberty that are based on abstractly formulated criteria, establishing irrebuttable presumptions to the detriment of migrants, are considered arbitrary. The UN standard supersedes the level of protection provided for in Art. 5(1)(f) ECHR according to the contested *Saadi* case-law of the ECtHR, which fails to require a full proportionality test in cases of immigration detention. Considering that Art. 52(3) EU-CFR recognizes that EU law may provide more extensive protection than the ECHR, the higher standard developed at universal level is applicable in the EU.

A second layer of Human Rights law protects against other forms of arbitrary limitation of movement. This is laid down in both Art. 12(1) ICCPR and Art. 2 of Protocol No. 4 ECHR. In line with these provisions, third-country nationals have a conditional right to freedom of movement within each EU Member State. The EU must also respect these guarantees when exercising its legislative powers to provide for the freedom of movement of third-country nationals within Union territory. In both instruments, however, the right to intra-territorial mobility is limited to persons staying 'lawfully'. According to our legal evaluation, this includes registered asylum seekers, documented migrants who are qualified as non-deportable (such as persons with toleration status in Germany), and those with a pending request to have their immigration status regularized. Restrictions on movement of other irregular migrants must be tested against Art. 8 ECHR, which equally requires a proportionality assessment. This layer of protection tends to be overlooked, as it is not explicitly mirrored in one of the provisions of the EU-CFR. Applying the presumption of substantive homogeneity between EU fundamental rights and Human Rights, these sources nonetheless are incorporated into EU law as general principles in the sense of Art. 6(3) TEU.

The third layer of Human Rights protection pertains to detention conditions. Art. 3 ECHR constitutes an absolute guarantee of detention conditions that preserve the detainee's human dignity. In addition, the ECtHR has frequently found immigration detention to be in violation of Art. 5(1)(f) ECHR due to the concrete detention conditions, notably when more vulnerable migrants such as minors were involved. The right to respect for family and private life enshrined in Art. 8 ECHR provides a fourth layer of protection, relating also to area-based restrictions of any kind. Since personal liberty is an indispensable condition for the development of the person – that is, his or her private life – any infringement of this right must be duly justified in accordance with the principle of proportionality. Given that these standards to measure the conditions of detention or other

forms of liberty-restricting measures are developed by judicial and quasi-judicial bodies based on broadly framed provisions in international treaties, more detailed international soft law is of key importance to specifying the contents of Human Rights. Here, the existing rules adopted in the UN and the Council of Europe for the management of prison facilities and the treatment of prisoners are a relevant source of inspiration, although one must acknowledge that the criminal detention standards are neither directly applicable to, nor necessarily adequate for, immigration detainees.

Using the above Human Rights yardstick to evaluate European migration policy, we identify several shortcomings. On a positive note, any immigration detention governed by EU law can only be imposed by Member State authorities when the decision meets the principle of proportionality. According to the EU Court of Justice (CJEU), this is a constitutional requirement even in the absence of a statutory provision to this effect. This doctrine is in line with the UN standard and partly compensates for the insufficient protection under Art. 5(1)(f) ECHR. However, our detailed analysis of the relevant provisions in EU legislation reveals that the EU has defined the possible grounds for immigration detention too broadly, and in overly ambiguous terms, for it to be consonant with Human Rights. A consistent interpretation would render several clauses inapplicable or substantially limit the remaining scope of application. For pre-removal detention, the Return Directive provides for two broadly framed grounds for detention; arguably the list is not even exhaustive. Recent reform proposals intend to add new grounds and make the list explicitly non-exhaustive. For asylum seekers, the Reception Conditions Directive lays down a list of grounds for detention which exceeds the permissible grounds pursuant to Human Rights law. The Directive also contains a cross-reference to the Dublin Regulation that is entirely self-referential, adding to the indetermination of the current regime.

As regards area-based restrictions, Art. 7 of the Reception Conditions Directive authorizes Member States to impose restrictions on the movement of asylum seekers 'for reasons of public interest', a broad notion which would encompass measures taken for mere bureaucratic convenience. This is not in conformity with Human Rights law, which permits such limitations only for reasons of the narrower notions of 'public order' (*ordre public*) and 'national security' (see Art. 12(3) ICCPR and Art. 2(3) Protocol No. 4 ECHR). This layer of protection has further gained in significance since the European Commission proposed, in its legislative package of 2020, to expand the use of area-based restrictions in the context of border procedures. The new Asylum Procedures Regulation would make imposing

such restrictions mandatory for certain types of asylum claims, without an assessment on a case-by-case basis. We consider quasi-automatic imposition of mobility restrictions on asylum seekers, based on statutory assumptions set by the EU, to be manifestly unlawful in light of Human Rights and EU fundamental rights, regardless of whether such measures would amount to de facto or de jure detention.

In order to counteract the expansive use of immigration detention and to prevent actual violations of Human Rights, we recommend that the EU enact a horizontal provision on detention grounds across all relevant legal instruments, which exhaustively defines and carefully circumscribes the permissible grounds for detention. We suggest that detention should be allowed only when strictly necessary in order to prevent 'absconding' or 'acts against national security'. We also recommend that the EU abstain from enacting or encouraging legal presumptions regarding grounds for detention, such as those for asylum seekers who are subject to border procedures. Specifically, we recommend deleting Art. 8(3) Reception Conditions Directive, which presumably provides a general legal basis for detention during border procedures. The same approach should guide the reform of Art. 7 Reception Conditions Directive regarding area-based restrictions. For reasons explained above, the EU must refrain from requiring Member States to impose area-based restrictions on migrants based on abstractly defined criteria.

With a view to detention conditions, we find that legislation at EU level is underinclusive with regard to existing standards in Human Rights law to prevent inhuman or degrading treatment in detention. EU law as it stands hardly provides for any specific regulation in respect of conditions of immigration detention, e.g., on how a detention center is to be designed and what facilities it must provide. The EU therefore fails to live up to its primary responsibility for Human Rights compliance in this field. In the absence of such comprehensive legislation, we recommend that the EU expand the provisions on reception conditions of asylum seekers to provisionally serve as a general standard for all persons in immigration detention and reception centers. An independent monitoring mechanism in these places should be established, including inspections without notice. With regard to further developing international soft law on detention conditions, we recommend that the EU take an active role within the Council of Europe to implement a Human Rights-based approach to defining the adequate conditions for administrative detention.

Finally, although there is no undisputed prohibition in Human Rights law of detaining children and other persons in situations of particular vul-

nerability, the requirements of necessity and proportionality will almost always render their administrative detention unlawful. We therefore recommend that the EU legislature, by way of legislative balancing, explicitly prohibit immigration detention of these groups of people.

3. Guaranteeing Procedural Standards

Chapter 3 focusses on the procedural rights of migrants. Procedural guarantees complement the substantive rights discussed in other chapters, recognizing migrants' agency as legal subjects in immigration or asylum proceedings, and thus their human dignity. In a community based on Human Rights, individuals must be heard before adverse decisions are taken, public authorities must give reasons for such decisions, and effective legal remedies must be at hand to challenge them.

In the EU, these standards are in principle accepted to be inherent in the rule of law, one of the foundational values stipulated in Art. 2 TEU, and considered to constitute general principles of the Union's law. The Charter of Fundamental Rights has given them the status of procedural fundamental rights, enshrined in the right to good administration (Art. 41 EU-CFR) and the right to an effective remedy and a fair trial (Art. 47 EU-CFR). The EU has, therefore, assumed legal responsibility, and is politically accountable, for ensuring that these standards are observed in all administrative and judicial proceedings that fall within the substantive scope of EU migration law.

However, the EU and its Member States are not immune to the legacy of 'immigration exceptionalism' – that is, the notion that non-citizens are subject to the discretionary power of state authorities, justifying a diminished set of procedural rights in comparison to citizens. This mindset is particularly marked in the admission of migrants (decisions on visa applications and admission at the borders) and regarding the termination of residence (decisions taken in the context of return procedures).

Concerning the first type of decisions, we observe a persistent pattern of denying procedural guarantees in such proceedings. Notoriously little attention is given to standards in visa application procedures conducted at Member States' consular or diplomatic missions. The relevant EU legislation is shallow and fragmentary, particularly in respect of so-called national visas for long-term stays (although the ground of admission may be governed by EU law). The trend of avoiding asylum jurisdiction, described in Chapter 1, frequently amounts to decisions of collective non-admission

at the land or sea borders. The fact that such decisions do not necessarily qualify as 'decisions' according to the terms of procedural codes is precisely the point of concern.

We also observe, secondly, a persistent pattern of disregarding procedural standards in deportation procedures (or 'removals', as the EU calls them). The Return Directive fails to comprehensively regulate sufficient procedural guarantees, including the right to be heard and independent forced-return monitoring. Provisions that do exist are repeatedly ignored by Member State authorities, which leads to unlawful deportations.

Moreover, migrants' enjoyment of procedural rights has become even more difficult as the EU agencies Frontex, EASO and eu-LISA gain in importance in European migration policy. Increasing causes of concern are (1) the diffusion of responsibility in mixed administrative proceedings and joint operations that involve both EU agencies and Member State authorities, (2) the agencies' complex and opaque structures, and (3) the limited possibilities to challenge acts of EU agencies directly. Hence, the trend toward 'agencification' of European migration policy tends to blur accountability and menace the effective protection of procedural rights.

The relevant constitutional guarantees of EU law build on and enhance procedural guarantees derived from international law, involving a higher level of protection in the EU. Still, we argue that recalling the fact that a basic layer of procedural guarantees owed to migrants is part of Human Rights law may be instrumental in overcoming the legacy of 'immigration exceptionalism'. The ECHR contains a number of important provisions in this context, including the right to a fair trial (Art. 6(1) ECHR) and to an effective remedy (Art. 13 ECHR) as well as even stronger procedural guarantees derived from the principle of non-refoulement (Art. 3 ECHR). In our legal evaluation, we pay particular attention to the prohibition of collective expulsion of aliens laid down in Art. 4 of Protocol No. 4 to the ECHR, which – unlike Art. 1(1) Protocol No. 7 ECHR – does not require the migrant to be 'lawfully resident' in a Convention State. According to the ECtHR's case-law, Art. 4 Protocol No. 4 ECHR requires a reasonable and objective examination of the particular case of each individual who is subject to a non-admission or removal procedure. In this sense, the prohibition of collective expulsion constitutes a general due process clause in European migration law. The rights enumerated in Art. 1(1) Protocol No. 7 ECHR can serve as a point of reference for determining the minimum standard for all migrants seeking admission, notwithstanding the carve-out established in 2020 in the case *N.D. and N.T. v. Spain*. As far as visa decisions are concerned, we argue that the EU, and EU Member

States when implementing EU law, must meet the standards defined in the ECHR in terms of substance, regardless of whether the applicant is 'within their jurisdiction' as defined in Art. 1 ECHR. Decisions taken by Member States' missions abroad are acts 'implementing Union law' for the purposes of Art. 51(1) EU-CFR if they are the pre-entry stage of granting a residence right defined in an EU instrument.

Against this background, EU migration law falls short of what is required by Human Rights in several instances. In our view, it does not suffice that the gaps concerning procedural rights in the relevant pieces of legislation could be closed, on a case-by-case basis, by way of judicial construction relying on fundamental rights or unwritten general principles of EU law.

First, we recommend that the EU legislature provide for comprehensive procedural safeguards for visa applications according to the standards of Art. 41 and 47 EU-CFR. Any processing of applications that are substantively governed by EU law must respect the right to be heard and the duty to submit reasons for a decision adversely affecting the applicant, and would have to provide for the possibility of review and representation before the competent judicial authority. The existing sectoral provisions should be supplemented by a horizontal regulation applicable to all applications for granting a right to reside that falls within the scope of EU law, irrespective of where the acting authority or the applicant are located.

Second, the Schengen Borders Code should be amended in order to provide for automatic suspensive effect of legal remedies whenever there is an arguable claim of the risk of refoulement, and for a right to seek an interim injunction before a court in all other cases.

Third, we recommend amending the Return Directive to explicitly provide for a right to be heard before a return decision is taken. Moreover, the Directive should provide for a clearly drafted provision on automatic suspensive effect of appeals against decisions related to return in the case of a potential violation of the principle of non-refoulement.

Fourth, the EU should set up a binding and detailed list of minimum requirements that a forced-return monitoring mechanism must fulfill in order to be effective, including its institutional separation from the authority in charge of returns.

Finally, in view of the trend toward agencification of EU migration policy, we call for the mechanisms ensuring accountability and legal responsibility of the agencies to be strengthened. The EU should adopt a horizontal regulation pertaining to all EU agencies, providing for a general minimum standard for safeguarding procedural rights. Such horizontal

regulation would increase transparency as a precondition to effective and adequate access to justice. This regulation should be complemented by reinforced procedural safeguards in the specific context of each agency, providing, inter alia, for an appeals procedure in the case of complaints filed with the Frontex fundamental rights officer in order to render its decisions reviewable by the CJEU.

4. Preventing Discrimination

The next chapter addresses the challenge to prevent discrimination in EU migration policy. Establishing differences in treatment between citizens and non-citizens, and among groups of non-citizens, is at the very heart of modern migration law. Nevertheless, Human Rights law poses limits to inequality of status in the realm of migration. Distinctions in immigration and asylum law that lack an objective and reasonable justification amount to discrimination and, therefore, constitute a violation of Human Rights.

The activity of the EU legislature has contributed to a plurality of immigration statuses and the ensuing stratification of migrants' rights. While a certain trend toward a pan-European harmonization of statuses is inherent in the Europeanization of migration policy, the dominant trend is one of increasing sectoral divergence within the Europeanized fields of migration. This results from incomplete harmonization, incremental decision-making, and the absence of a clear *Leitbild* (a model or overall concept) on the part of the EU legislature. All too often, the EU's unprincipled approach has produced inconsistencies and contradictory policy choices with questionable legal justification. We demonstrate this finding using the example of the right to equal treatment, or the lack thereof, in respect of social assistance enshrined in the various EU Directives. Another, partly overlapping case in point is the difference in treatment among beneficiaries of international protection as defined in the Qualification Directive – that is, legal distinctions between Convention refugees and persons protected on subsidiary grounds.

In determining which distinctions embedded in the laws of migration governance amount to unlawful discrimination, three objectionable grounds of distinction stand out: 'race', nationality, and immigration status.

The most important Human Rights instrument that stipulates a comprehensive prohibition of racial discrimination is the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

ICERD does apply in the field of immigration law, and it also protects against indirect forms of racial discrimination, although the details of the related jurisprudence developed by the relevant Committee, the CERD, are subject to debate. Adopting a cautious reading of Human Rights law as it stands, we consider the bulk of EU migration law to be in line with ICERD. However, a centralized system for the exchange of criminal record information, the so-called ECRIS-TCN established by Regulation 2019/816, entails indirect racial discrimination as it in effect distinguishes between groups of migrants according to their ethnic origin.

The main source preventing discrimination on grounds of nationality is Art. 14 ECHR. According to the case-law of the ECtHR, distinctions based exclusively on the nationality of a migrant must be justified by 'very weighty reasons' – provided that the matter substantively falls within the ambit of the ECHR, e.g., in cases relating to family migration or social benefits. The Court has long held that distinctions between Union citizens and third-country nationals are in principle justified due to the special (read: federal) nature of EU law. Arguably, the privileged treatment of certain third-country nationalities resulting from EU association agreements is also supported by sufficiently weighty reasons, since these privileged immigration statuses mirror the privileged partnership between the respective subjects of international law. A critical case in point is the visa regime under the EU Visa List Regulation, which imposes a visa requirement based exclusively on the nationality of the travelers (and hence, of the potential migrants). A particular cause of concern here is the fact that placement of a large majority of countries on the visa 'black list' has never been properly justified on a case-by-case basis.

Yet, the main focus of Chapter 4 is the quest for objective and reasonable justification for any difference in treatment based on immigration status per se. Again, the most developed jurisprudence is provided in the case-law on Art. 14 ECHR, in particular since a series of ECtHR judgments in 2011 and 2012, the impact of which has yet to be digested in scholarship. This jurisprudence, analyzed here in some detail, has established that the legal position defined in immigration law constitutes a 'status' for the purposes of Art. 14 ECHR. However, the ECtHR held that the required justification supporting distinctions among groups of migrants need not involve 'very weighty reasons'. Rather, the Court will usually enquire only whether the difference in treatment is 'manifestly without reasonable justification'.

Regarding the inconsistent EU legislation in respect of social assistance, we doubt that the relevant Directives address all situations in which equal

treatment would be required under Art. 14 ECHR. We suggest that the EU legislature remedy the situation by enacting, as a minimum guarantee, a right to equal treatment in respect of social assistance for all migrants present in the Union for more than 90 days. Regarding the difference in treatment between Convention refugees and persons protected on subsidiary grounds, most strikingly in respect of the right to family reunification, we conclude that these distinctions plainly lack a reasonable justification (let alone being supported by very weighty reasons – that is, the standard of review that we consider applicable in cases involving persons in need of international protection). Accordingly, we hold that EU Member States are legally bound to immediately accord non-discriminatory treatment to persons protected on subsidiary grounds in respect of social assistance and family reunification. In terms of EU legislation, these obligations should be explicitly stated in the Qualification Directive and the Family Reunification Directive respectively. We hold that it would be unlawful to maintain a situation of incomplete ('underinclusive') legislation in respect of the asylum status that invites the Member States to apply arbitrary distinctions based on immigration status.

Next to amending the specific pieces of legislation referred to above, we recommend that the EU systematically review its asylum and immigration *acquis* to ensure that any distinctions between immigration statuses defined in EU law are based on objective and reasonable justification. This pertains, inter alia, to difference in treatment in respect of family reunification, social welfare, health care, access to the labor market, and mobility within the Union. Moreover, the Commission should conduct a systematic review of Member States' laws and policies that use optional clauses or derogations provided for in the relevant legal instruments that seemingly allow for less favorable treatment of third-country nationals. The Commission should institute, where appropriate, infringement proceedings and/or propose amendments to EU legislation.

Future EU legislation in migration law should be guided by a *Leitbild* of status equality that serves as a template for the status of all third-country nationals residing in the EU. Union citizenship and the status defined in the Long-Term Residents Directive could serve as a dual point of reference for such a 'general status'. Any deviation from that template should relate to the specific nature of the class of migrants concerned and the specific right at hand. On a procedural level, the EU legislature should include explicit 'equality reasoning' in the preamble to every new act.

5. Preserving Social and Family Ties

Chapter 5 discusses the Human Rights of migrants and their family members to preserve their social ties, established among themselves and in relation to the host society. These rights often involve claims to a continued stay in, or being admitted to, the country of their choice and, hence, tend to conflict with the selective logic of immigration law. The EU legislature has convincingly addressed certain aspects of the conflict, in particular in two Directives adopted in 2003, the Family Reunification Directive (FR Directive) and the Long-Term Residence Directive (LTR Directive). In other respects, however, the EU has failed to sufficiently counteract problematic trends and persistent patterns on the part of its Member States that entail Human Rights violations.

First, restrictive policies in the area of family reunification are oftentimes legally shaped and politically justified in the language of socio-cultural 'integration'. Establishing integration requirements, including pre-departure language tests, is basically permitted according to the FR Directive. The CJEU's approach to limit this discretion left to Member States via a proportionality assessment is not sufficient to counter covert non-admission policies. Second, we observe a new wave of security-driven policies of expulsions against 'dangerous' migrants in many Member States, which also concerns settled migrants. Such policies tend to specifically target members of Muslim communities labeled as potential 'terrorists', and criminal offenders, often of a young age. Notwithstanding their strong social ties within the country of residence (which frequently is their native country, too), many of the settled migrants addressed by such policies do not benefit from the secure immigration status provided by the LTR Directive. Third, neither of the two Directives applies to irregular migrants. The relevant Return Directive only vaguely mentions Human Rights of persons who are subject to a return procedure. It therefore fails to protect the social and family ties de facto developed in the host country by irregular migrants, even in cases in which the legal or practical obstacles to removal are likely to be persistent.

Universal Human Rights law has yet to develop a meaningful jurisprudence that specifically protects the unity of migrant families and recognizes a right to abode in the country of residence. The ECtHR's case-law on Art. 8 ECHR is pioneering in this regard. According to its jurisprudence, the entirety of social ties developed in the host country constitutes a protected interest for the purposes of Art. 8 ECHR, including, but not limited to, the ties developed among family members. The ensuing

protection is not unconditional in nature: the Court recognizes goals of migration policies, such as 'ensuring effective integration' or sanctioning criminal offenses, as legitimate public interests that may justify an interference with this right. However, when exercising their discretion under Art. 8 ECHR, States are under the two-fold obligation to assess each individual case and arrive at a substantially 'fair' (balanced) decision that gives sufficient weight to the private interests of the migrants. These obligations equally apply in expulsion and family reunification cases.

While the essentials of this case-law, developed and consolidated during the 1990s, are well-established legal knowledge, legal doctrine and practice tend to overlook that the obligation to respect the social and family ties of migrants may also amount to a well-founded claim to achieve a lawful and secure immigration status. An important authority is the Grand Chamber judgment in the *Kurić* case of 2012. The ECtHR held that the positive obligation inherent in effective 'respect' for private or family life, or both, may lead to the conclusion that 'the regularization of the residence status of [the applicants] was a necessary step which the State should have taken to ensure that [the adverse consequences of the applicable laws] would not disproportionately affect the Article 8 rights'. Accordingly, the protection provided by Art. 8 ECHR is not limited to a pre-defined category of lawfully staying migrants but may amount, in exceptional circumstances, to a right of irregular migrants to have their status regularized.

In light of that jurisprudence, current EU legislation is not sufficiently specific and inclusive to prevent Human Rights violations from occurring in individual cases, even though Member States would be obliged, as a matter of EU constitutional law, to implement the relevant Directives in conformity with their international obligations. We therefore recommend that the EU consistently follow an approach of 'overinclusive legislative balancing' to meet its own positive obligations to protect the rights derived from Art. 8 ECHR. The EU legislature should address the typical situations in which Human Rights violations may occur, and grant enforceable individual rights to family reunification and to a secure legal status respectively to all persons in these situations. Such legislation would prevent the Member States from exercising their discretion under Art. 8 ECHR with potentially unlawful results.

To this effect, the EU legislature should amend the provisions in the FR Directive relating to 'integration measures'. In its present form, the legal framework fails to address the structural biases and hidden restrictionist agendas of integration narratives and practices. We recommend, inter alia, that the EU prohibit pre-departure integration requirements or, at the

least, define a maximum waiting period for the family members staying abroad.

The LTR Directive seems to provide a well-functioning safety net against securitized policies of expulsion. In practice, however, few people that are clustered in a limited number of Member States have actually acquired the status under the LTR Directive. We recommend that the EU facilitate access to that status. Hidden restrictive practices should be remedied and potential beneficiaries actively be encouraged. In addition, the legal requirements laid down in the Directive should be liberalized. Among other things, a maximum level of language skills which States may require should be stipulated, and the qualifying period be lowered from five years to three.

In its present form, the Return Directive seemingly leaves to the discretion of Member States whether, and under what conditions, they regularize the status of a migrant who is subject to a return procedure. In light of Human Rights, however, we argue that in certain instances regularization is the only option to lawfully exercise that discretion. In order to prevent Human Rights violations, the Directive should explicitly stipulate that claims based on the private or family life of the migrants concerned shall be heard at all stages of the return procedure. Moreover, we recommend amending the Return Directive to establish a strict maximum period for repeatedly postponing removals. In the medium-term, the EU should work toward a comprehensive legislative framework on regularizations. The Commission should propose an EU Regularization Directive providing for minimum harmonization of the standards and procedures in Member States for regularizing illegally staying third-country nationals. This Directive should address the situation of all irregular migrants who cannot be removed on Human Rights grounds, whether due to the situation in the country of origin (Art. 3 ECHR) or the host country (Art. 8 ECHR).

6. Guaranteeing Socio-Economic Rights

Chapter 6 discusses the risks of destitution and exploitation and maps the ensuing challenges to guaranteeing socio-economic rights of migrants. Those risks are particularly acute for migrants with a precarious immigration status, notably asylum seekers and irregular migrants (be they documented or undocumented). We summarily refer to these migrants as 'margizens'.

The EU legislature has insufficiently regulated the socio-economic rights of margizens, and thus fails to prevent policies of planned destitution and practices of labor exploitation. Member States implement policies of planned destitution to combat 'secondary movements' of asylum seekers within the Dublin area. Similar policies are meant to deter irregular entry and enforce the obligation to leave the country and are directed in particular against 'non-cooperative' irregular migrants ('hostile environment' policies). These policies involve cutting or denying access to basic services as a sanction against unwanted migrant behavior. The resulting destitution is an additional factor driving irregular migrants into exploitative work. There is a persistent pattern of exploiting marginalized migrants in informal labor relations, notably regarding undocumented migrants – which EU migration policy fails to fight effectively, or even condones.

Human Rights provide for the protection of essential social and economic rights of all migrants irrespective of their status under immigration law. At the universal level, socio-economic rights are laid down in the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Committee on Economic, Social and Cultural Rights (CESCR) has developed a doctrine of 'minimum core obligations', according to which everyone is entitled to essential socio-economic rights that must not fall prey to goals of migration control. At the regional European level, the ECtHR has found that States' responsibility is engaged under Art. 3 ECHR when applicants who are wholly dependent on State support are faced with official indifference leading to destitution. An even wider scope of protection is afforded pursuant to the revised European Social Charter. According to the jurisprudence of the relevant Committee, the ECSR, the provision of a 'minimum core' of the rights set out in the revised European Social Charter that are essential to maintain human dignity cannot be made conditional upon the legal status of the persons concerned, nor upon their cooperation in the organization of their own expulsion. Recognizing the uncertain legal force of that jurisprudence in the EU legal order, we still argue that it informs the notion of human dignity pursuant to Art. 1 EU-CFR as well as the fundamental right to social and housing assistance laid down in Art. 34 EU-CFR. Accordingly, the presumption of substantive homogeneity between EU fundamental rights and Human Rights extends to the jurisprudence developed by the CESCR and the ECSR.

Regarding the positive obligations of States to address the exploitation of marginalized migrants, the Human Rights core of international labor law regarding the prevention of forced labor, and Art. 4 ECHR prohibiting

slavery and servitude, are the most relevant sources. The ECtHR's case-law on Art. 4 ECHR relating to human trafficking and forced labor has specified the relevant substantive and procedural obligations. These not only entail operational measures to protect victims of treatment in breach of Art. 4 ECHR, including the obligation to investigate *proprio motu*, but also the duty to establish a legislative framework to systematically fight such practices.

The present EU legislation fails to meet the above obligations to effectively ensure equal access to basic services and to fight exploitation of margizens. Current legislative trends at EU level even tend to weaken the level of protection in this regard. Concerning asylum seekers subject to a Dublin transfer, the existing legal framework would actually not allow for the withdrawal of material reception conditions as a sanction against unwanted 'secondary movements'. However, pending proposals for reform are problematic to the extent that they attempt to find vague formulations for a reduced 'standard of living' – which invites Member States to test the bottom line and frequently cross it in practice. In the context of enforcing returns via a 'hostile environment', the Return Directive merely lists vaguely framed 'principles' that Member States should take into account in the treatment of persons subject to a return procedure. Such fragmentary legislation falls short of implementing the 'minimum core' of socio-economic rights, let alone defining a comprehensive status of the persons concerned. The principal legal instrument relating to exploitation, the Employers Sanctions Directive, is also insufficient to provide protection for migrants who are in an irregular employment situation. The Directive adopts a punitive approach toward employers rather than a rights-based approach toward migrants. The protection it provides is undercut by the lack of 'firewalls' separating labor law from immigration law, disincentivizing irregular migrants from making complaints.

Accordingly, we recommend that the EU embrace the standards of socio-economic protection developed by the CESCR and the ECSR. The level of protection defined by the EU legislature should establish a safety margin against the absolute minimum, in order to avoid implementation deficits that violate Human Rights. In addition, the Reception Conditions Directive should explicitly rule out any reduction or withdrawal of benefits as a tool to promote compliance with the Dublin rules. Regarding irregular migrants, we recommend that the EU extend the rights and benefits granted to asylum seekers under the Reception Conditions Directive to all migrants who are subject to the Return Directive. Building on that minimum guarantee accorded to all irregular migrants, the EU should

consider according more favorable treatment to documented irregular migrants whose removal has been postponed due to Human Rights concerns or other obstacles to removal likely to be persistent. Such comprehensive regulation of the status of 'non-removable' migrants would be complementary to the EU Regularization Directive recommended in Chapter 5.

Regarding labor relations involving irregular migrants, the revision of the Employers Sanctions Directive should specifically address the situation of the most precarious (that is, undocumented or clandestine) irregular migrants. Such regulations could draw inspiration from earlier proposals from the Commission in the 1970s, fostering non-discriminatory access to labor-related and other socio-economic rights, and should establish non-reporting obligations for the relevant authorities ('firewalls').

7. *Fostering Human Rights Infrastructure*

The last chapter addresses the actors and arrangements that are vital prerequisites for the legal guarantees, discussed in the other chapters, to be effective. We call such structures and procedures the 'Human Rights infrastructure'. We consider a plethora of supervisory bodies, judicial institutions, and civil society actors – each contributing by different means to the effective protection of migrants' rights – to form the Human Rights infrastructure in the field of European migration policy.

In the EU, the Human Rights infrastructure has increasingly come under pressure over the last years. Three developments stand out in this regard. First, we observe a trend in several Member States to criminalize civil society actors supporting migrants. These measures must be seen in the context of a 'shrinking space for civil society' – that is, a general trend toward restricting the activities of civil society actors, be they individuals or associations, in promoting and striving for the protection of Human Rights. Examples of pressure exerted on Human Rights defenders include the amendments to the Hungarian Criminal Code in 2018, penalizing a wide range of activities related to the support of migrants, as well as the comprehensive de-legitimization of Search and Rescue (SAR) operations conducted by NGOs in the Mediterranean Sea. Striking examples of the latter are the seizure of vessels and criminal charges brought against crew members in Italy under the Salvini government. Since 2020, the COVID-19 pandemic has been used as a pretext for closing ports and putting further constraints on the few remaining private SAR vessels.

Second, we also observe a trend in several Member States of growing public pressure on judges protecting the rights of migrants. Populist pressure on the independence of the judiciary – a cornerstone of the Human Rights infrastructure – takes various forms, reaching from rather diffuse exertion of political influence to the defamation of judges through smear campaigns and the formal limitation of judicial autonomy by way of institutional reform. In the last of these, the pressure on judges in charge of migration cases to take a more restrictive approach is intrinsically linked to the assaults on the independence of the judiciary as a whole – that is, the 'rule of law crisis' in parts of the EU. It is all the more remarkable that a considerable number of judges in countries most affected by assaults on their independence nevertheless resist the pressure, by, for example, making preliminary references to the CJEU.

Third, we observe a growing tendency in Europe to question the legitimacy of the ECtHR and its role as a guardian of migrants' Human Rights. Politically motivated challenges to the Strasbourg court are manifold. There appears to be an increased reluctance to fully implement ECtHR decisions, leading, inter alia, to repetitive cases and governments reckoning with the delay of remedies when resorting to questionable practices. The wider trend of 'principled resistance' to ECtHR judgments has also found expression in initiatives to change the architecture of the entire system, in particular by lowering the standard of scrutiny applied by the Court. In the draft Copenhagen Declaration of 2018, tabled by the Danish government, this goal was explicitly linked to the role of the ECtHR in asylum and immigration cases.

The duty to provide for functioning institutions to protect Human Rights is implied in the substantive guarantees of Human Rights treaties, entailing positive obligations of States to maintain and foster an adequate Human Rights infrastructure. These obligations are confirmed and specified in various sources of international soft law, such as the Global Compact for Migration which expresses the commitment of UN Member States to 'ensure' the 'effective respect for and protection and fulfilment of the human rights of all migrants' (GCM, para. 15). In terms of civil society actors and their essential role in effectively protecting Human Rights, a comprehensive set of rights was provided by the UN General Assembly in the 1998 Declaration on Human Rights Defenders. According to this declaration, '[e]veryone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels' (Art. 1 of the Declaration). These rights are complemented by vari-

ous measures that States are expected to take in order to strengthen the work of Human Rights defenders.

In light of these obligations, the aforementioned trends are highly problematic. Criminalizing SAR activities and other forms of altruistic assistance for irregular migrants is contrary to the UN Declaration on Human Rights Defenders, in addition to violating various provisions of the Law of the Sea regarding the duty of shipmasters (and States) to provide assistance to persons in distress at sea. Since Human Rights defenders are acting for altruistic reasons, their criminalization is also at odds with the 2000 UN Protocol against the Smuggling of Migrants, which penalizes 'smuggling of migrants' only if the illegal entry of a person was procured in order to obtain a 'material benefit'. Against this backdrop, the relevant EU legislation (the so-called Facilitation Directive) falls foul of the UN Smuggling Protocol which it intends to implement. The Directive seemingly leaves discretion to EU Member States to decide whether they want to criminalize humanitarian actors. We therefore recommend that the Facilitation Directive be amended to make the exemption of altruistic assistance mandatory under EU law.

As regards the threat to judicial independence in various Member States, it is the rule of law and thus a foundational value of the Union that is at stake. While systemic deficiencies, particularly in Poland, have been addressed more boldly in recent years by the Commission and the Court of Justice, this is less evident with regard to the anti-immigration policies often underlying assaults on the rule of law. The Commission has been rather reluctant to address attacks on the EU's asylum and immigration *acquis*. We recommend that the EU take a firm stance on violations of the EU asylum and immigration law in any Member State, and that it not tolerate political pressure on migration law judges. Next to thoroughly pursuing infringement proceedings and Art. 7 TEU procedures regarding judicial reform, the Commission should examine the possibility of taking legal action against policies of criminalizing humanitarian actors.

Finally, we recommend that the EU adopt a clear political stance on any attempts to challenge the legitimacy and relevance of the ECtHR. Respect for the ECHR and the decisions of the ECtHR are integral aspects of EU membership. The EU should also complete its own accession to the ECHR as foreseen in Art. 6(2) TEU. This would send an important message to the Member States and reinforce the ECtHR's role as a crucial component of the Human Rights infrastructure defending the rights of migrants.