Chapter 5 – Preserving Social and Family Ties

There is an obvious tension between, on the one hand, the interest of migrants to maintain and develop family and other social ties in the place of their residence and, on the other hand, the selective logic of States' migration governance. States may refuse to admit certain members of the migrant's family, thus hampering or rendering impossible a normal family life. States may also sever the family and other social ties developed in the host State by adopting measures to terminate a person's stay. The tensions are more pronounced the closer the ties, and the more vulnerable the migrants (e.g., children or refugees). The conflict seems almost irreconcilable when an irregular migrant claims a right to maintain their social ties in the host country, since this could only be achieved by way of regularizing his or her status.

The EU legislature has addressed these tensions in the two legislative projects that mark the very beginning of the EU's legislative activity in the field of immigration: Directive 2003/86/EC on the right to family reunification (the FR Directive) and Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents (the LTR Directive). The 2003 Directives responded to the ECtHR's jurisprudence on Art. 8 ECHR, developed in the 1990s (see section 5.2.1, below), and the related political deliberations in the political bodies of the Council of Europe. These fora helped developing common ground for the 12 Member States originally participating in the EU's newly proclaimed Area of Freedom, Security and Justice.[522] Human Rights discourse in the Council of Europe thus formed the natural point of reference for the EU legislature.

In the FR Directive, the EU vested certain third-country nationals with an enforceable individual right to reunite in the host state with the members of their core family, subject to certain conditions that the sponsor and the family members must meet. In addition, refugee sponsors (in the narrow sense defined in the Geneva Refugee Convention) benefit from a privileged regime that waives some of these requirements. However, members of the wider family – such as the parents of adult sponsors, or

522 See Groenendijk, 'Long-term Immigrants and the Council of Europe', in E. Guild and P. Minderhoud (eds), *Security of Residence and Expulsion* (2001) 7.

siblings – are subject to discretionary decision-making by the Member States.

The LTR Directive also provides certain third-country nationals with an enforceable right to achieve an immigration status defined by the EU legislature. LTR status includes a wide range of rights, similar to those enjoyed by EU citizens. It can thus be classified as a denizenship – that is, a status that resembles the membership usually associated with the nationality of the host state.[523] In respect of security of residence, holders of LTR status benefit from reinforced protection against expulsion. This status element makes it less likely that the person will be subject to measures disrupting social ties developed in the host country, although the Directive falls short of laying down an absolute ban on expulsions.

Regarding irregular migrants, the EU legislature has thus far failed to recognize a legitimate interest in maintaining and developing such ties. On the contrary, not only are they excluded from the scope of the 2003 Directives, but irregular migrants are also subject to 'Directive 2008/115/EC on common standards and procedures for returning illegally staying third-country nationals' (the Return Directive). The Return Directive obliges Member States, as a rule, to conduct and expeditiously complete a procedure terminating the irregular residence of the migrant concerned.[524]

The political compromises laid down in the 2003 Directives still form the legal framework within which EU Member State practice unfolds. The only major development after that initial period was the decision, in 2011, to include all persons entitled to international protection into the scope of the LTR Directive.[525] In all other respects, the Commission made the choice *not* to propose a 'recast' of the FR Directive and the LTR Directive, despite ample indications that the discretion left to the Member States does give rise to Human Rights conflicts in light of Art. 8 ECHR. Moreover, to date the Commission has not returned to the earmarked legislative item to define a privileged regime for family reunification of persons enti-

523 Acosta Arcarazo, 'Civic Citizenship Reintroduced: The Long-Term Residence Directive as a Post-National Form of Membership', 21 *European Law Journal* (2015) 21; Bast, 'Denizenship als rechtliche Form der Inklusion in eine Einwanderungsgesellschaft', *Zeitschrift für Ausländerrecht (ZAR)* (2013) 353; for a narrower concept, see Thym, 'Vom "Fremdenrecht" über die "Denizenship" zur "Bürgerschaft"', 57 *Der Staat* (2018) 77.

524 CJEU, Case C-38/14, *Zaizoune* (EU:C:2015:260), at para. 31–32, 34.

525 Previously, only refugees as defined in the Geneva Refugee Convention but not persons entitled to subsidiary protection as defined in the Qualification Directive were eligible.

tled to subsidiary protection (see above, Chapter 4). The Commission does not intend to address Human Rights-based claims of irregular migrants, either, as evidenced by its 2018 proposal for a recast Return Directive.[526]

Despite this reluctance to complete and adapt the legislative framework protecting the family and social ties of migrants, the EU has occupied these subfields of migration policy to such an extent that it is henceforth accountable for any deviation from the relevant Human Rights standards. As we will demonstrate in the following sections, some of the gaps in the present framework can be closed by construing the relevant instrument in conformity with EU fundamental rights, which mirror Human Rights; others require further legislative activity by the EU.

5.1 Structural challenges and current trends

Trend 1: Requirements of socio-cultural integration are used to deny family reunification

We observe that several Member States have established, and are consistently applying, requirements of socio-cultural integration that are aimed at family members seeking to join the sponsor. Such requirements also take the form of pre-entry conditions – that is, legal requirements for admission that are examined before entering the country. The respective policies may have the effect that family reunification takes place only after a long waiting period, or is frustrated entirely.

Restrictive policies toward family migration are currently particularly salient with respect to reunification claims made by people seeking or enjoying international protection in the EU. We discuss these policies elsewhere in the study – in particular, from the angle of non-discrimination (see Chapter 4). However, there seems to be a consistent pattern of restrictive policies toward 'ordinary' migrants as well. Integration requirements play a vital role in this regard.[527]

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526 European Commission, Proposal for a recast Return Directive, COM(2018) 634, 12 September 2018.

527 Goodman, 'Controlling Immigration Through Language and Country Knowledge Requirements', 34 *West European Politics* (2011) 235; see, e.g., K. de Vries, *Integration at the Border: The Dutch Act on Integration Abroad and International Immigration Law* (2013), chapter 2, on Dutch integration policy.

Within the framework of the FR Directive, imposing certain integration measures is explicitly permitted. Member States may adopt them pursuant to Art. 7(2) of the Directive.[528] They constitute optional requirements for exercising the right to family reunification, which complement the mandatory requirements of socio-economic integration laid down in other provisions in respect of the sponsor or the family member. Several Member States have used that discretion and require some kind of (pre- or post-departure) integration measures.[529] Language tests are a typical tool. Other measures include testing the migrant's knowledge about the State's legal and political system, or a pledge to respect the social habits of the host country as part of an 'integration contract' signed by the newly arriving migrant.[530]

Most of the requirements laid down in national law had not been in place when the FR Directive was adopted in 2003.[531] This reflects a general policy trend in EU Member States (and beyond) to defend established 'cultural compromises' of the host societies in view of increased ethnic and religious diversity.[532] The rise of socio-cultural integration requirements is seen as expressing legitimate expectations directed at migrants to adjust themselves to the dominant culture of the host society. In other words,

528 For an early account, see K. Groenendijk, R. Fernhout, D. van Dam, R. van Oers and T. Strik, *The Family Reunification Directive in the EU Member States: The First Year of Implementation* (2007) 27–28.

529 As of 2019: AT, BE, CZ, DE, EE, FR, LV, NL, SE, as well as DK and UK (which were by then already not bound by the Directive). See European Commission, Report on the implementation of Directive 2003/86/EC, COM(2019) 162, 29 March 2019, at 7–9. The Report was based on a study by the European Migration Network, see EMN, *Synthesis Report: Family Reunification of Third-Country Nationals in the EU plus Norway: National Practices* (2017), Migrapol EMN Doc 382.

530 For details, see S. Carrera, *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU* (2009) 291–349; Groenendijk, 'Pre-departure Integration Strategies in the European Union: Integration or Immigration Policies?', 13 *European Journal of Migration and Law (EJML)* (2011) 1.

531 Strumia, 'European Citizenship and EU Immigration', 22 *European Law Journal* (2016) 417, at 431, providing references to France, Italy, Austria, Luxembourg, and the Netherlands.

532 On the role of 'cultural compromises' in immigration contexts, see Zolberg and Long, 'Why Islam Is Like Spanish: Cultural Incorporation in Europe and the United States', 27 *Politics & Society* (1999) 5; J. Bast, *Aufenthaltsrecht und Migrationssteuerung* (2011) 100–101.

they serve as a means of implementing assimilationist policies.[533]Though such policies are usually formulated in non-discriminatory terms, in practice they produce inequitable results due to the heterogeneity in the migrant population in terms of linguistic and cultural backgrounds.[534]Moreover, testing a defined level of 'knowledge' is inherently biased against migrants with limited access to education, particularly when the test must be performed before entering the country. Studies have shown that 'civic integration' testing has a chilling effect irrespective of the contents of the tests, which may conform with liberal or republican values.[535] In some cases, the very purpose of the measures is apparently to prevent 'unwanted' immigrants from entering the country in the first place. In fact, restrictionist measures taken by the Member States today are often legally shaped and politically justified in the language of 'integration'.[536] Arguably, this is also an indirect effect of the entry into force of the FR Directive, which narrows the scope for other, more overtly restrictionist policies in the field of family migration.

In sum, while the FR Directive aims to protect the family ties of migrants, its optional requirements for socio-cultural integration enable policies that effectively thwart family reunifications. Hence, the task of this chapter is to identify the Human Rights limits to such restrictionist policies.

Trend 2: Settled migrants are subject to security-driven policies of expulsions

In recent years there has been a new wave of expulsions specifically targeting elements of the migrant population perceived as an inherent threat to public security, mainly in the context of counter-terrorist measures or in response to public demands to be 'tough' on criminal foreigners.

533 On normative justifications of the 'culture defense' of collective/national identity, see L. Orgad, *The Cultural Defense of Nations: A Liberal Theory of Majority Rights* (2015).

534 E. Pochon-Berger and P. Lenz, *Language Requirements and Language Testing for Immigration and Integration Purposes: A Synthesis of Academic Literature* (2014) 20–21.

535 R. van Oers, *Deserving Citizenship: Citizenship Tests in Germany, the Netherlands and the United Kingdom* (2014) 275–277.

536 L. Block, *Policy Frames on Spousal Migration in Germany: Regulating Membership, Regulating the Family* (2016) 309–318.

Particularly alarming in this context is the fact that policies of expulsion are applied to settled migrants – that is, persons who immigrated long ago or were born in the country and may not even identify themselves as 'migrants'.[537]

And yet, as long as a settled migrant has not obtained the nationality of the host state, he or she is potentially subject to an order to leave the territory according to the traditional rules of Public International Law. Policing and, if necessary, expelling 'dangerous aliens' have always been features of States' policies toward migrants, even in periods in which they adopted fairly liberal admission policies.[538] From a long-term perspective, the combined effects of national constitutional law, Human Rights law, and EU legislation have substantially curtailed States' powers to expel unwanted foreigners, establishing both procedural and substantive limits to that power (on the procedural guarantees, see Chapter 3).[539]

More recently, however, the securitization of migration discourse[540] has triggered a backlash against a rights-based approach to expulsion, including in the Union. Expulsion has re-emerged as a policy tool in its own right, rather than being an instrument addressing the situation of individual migrants. The loss by members of targeted groups of a regular immigration status, and the ensuing enforcement of the duty to leave the country, are defined as policy goals in themselves.[541] Securitized policies of expulsion take different shapes and forms. As far as settled migrants are concerned, they mainly unfold on the level of the Member States and primarily affect, it appears, migrants who do not benefit from enhanced protection provided by EU law. Unfortunately, reliable data on actual expulsions by Member State authorities are difficult to obtain, particularly since a change in practice is not necessarily accompanied by a change in laws. Using case-law as evidence, there is a trend toward intensification of

537 Cf. the attribute 'post-migrant' used in academic literature; see Foroutan, 'Was will eine postmigrantische Gesellschaftsanalyse?', in N. Foroutan, J. Karakayali and R. Spielhaus (eds), *Postmigrantische Perspektiven* (2018) 269.

538 J. Bast, *Aufenthaltsrecht und Migrationssteuerung* (2011) 80.

539 D. Thym, *Migrationsverwaltungsrecht* (2010) 197–211.

540 J. Huysmans, *The Politics of Insecurity* (2006) 45–62; Karamanidou, 'The Securitisation of European Migration Policies: Perceptions of Threat and Management of Risk', in G. Lazaridis and K. Wadia (eds), *The Securitisation of Migration in the EU: Debates Since 9/11* (2015) 37.

541 Gibney, 'Asylum and the Expansion of Deportation in the United Kingdom', 43 *Government and Opposition* (2008) 146.

expulsions 'on the ground' that has not faced resistance from the courts.[542] Our impression is that the authorities have learned to speak the language of 'balancing', while the result is pre-determined by schemes that normalize expulsions. To this effect, States have established catalogs of serious offenses or other deviant behavior that entail, as a rule, an expulsion order being issued.[543]

Such security-driven policies target specific groups of the migrant population that have been identified in public discourse as inherently 'dangerous'. Two partly overlapping groups stand out in this regard.

First, expulsion policies in the Union specifically target members of Muslim communities. While these policies must be placed in the wider context of rising Islamophobia, they specifically emerged as part of the fight against militant jihadism, including in its most violent, terrorist forms.[544] However, the use of expulsion measures for the purposes of counter-terrorism fails to recognize the fact that such threats are, to a large extent, 'home-grown' – that is, the relevant processes of radicalization took place in the midst of our society. Such measures at times focus on prominent individuals susceptible of spreading jihadist ideologies ('hate preachers').[545] In other instances, migrants are labeled as 'dangerous persons' (*Gefährder*, in the language of German legal discourse) without compelling evidence of an actual threat to public security, connecting to lawful behavior such as worshiping in certain mosques or being member of a non-violent group of Islamists.[546] Note that expelling 'dangerous'

542 E.g., German courts have confirmed that expulsion may be ordered on general preventive grounds – that is, with a view to deterring other migrants – even under the new law introduced in 2016 that was meant to bring Germany in line with the ECtHR's jurisprudence. See K. Bode, *Das neue Ausweisungsrecht* (2020) 189 et seq.; J.-R. Albert, *Gefahrenprognose im Ausweisungsrecht nach strafrechtlicher Verurteilung* (2020).

543 On Spanish expulsion law and practice until recently, see the summary in CJEU, Case C-636/16, *López Pastuzano* (EU:C:2017:949), at para. 5–10 and 15; see also the extensive list of crimes which constitute, pursuant to Art. 54(1) of the German Residence Act, an 'especially serious public interest in expelling the foreigner', which weighs heavily in the balancing process. The list was last expanded in 2019.

544 Volpp, 'The Citizen and the Terrorist', in C. A. Choudhury and K. A. Beydoun (eds), *Islamophobia and the Law* (2020) 19.

545 A. Kießling, *Die Abwehr terroristischer und extremistischer Gefahren durch Ausweisung* (2012) 32–47.

546 E.g., according to Sec. 58a(1) German Residence Act, a 'deportation order' (*Abschiebungsanordnung*) that is immediately enforceable may be issued to avert 'a special threat to the security of the Federal Republic of Germany or a terrorist

persons is usually not ordered by a criminal court following a conviction (which would imply a higher standard of proof and enhanced procedural guarantees) but, rather, relies on information gathered by administrative authorities, including intelligence agencies.[547]

Second, policies of intensified and more systematic use of expulsion are directed at criminal offenders, in particular juveniles or young adults. Such policies must be situated against the background of the demographics of many immigration societies in Europe, which are marked by large segments who were born and have grown up in the host country but who remain non-citizens, not least due to restrictive citizenships laws. These settled migrants typically have developed strong connection to their country of residence. Much like their siblings with a 'native' passport, a few of these non-citizens fall foul of the law and end up being convicted by the criminal courts, some of them repeatedly. Here is where expulsion policies come into play. Criminal offenders who are non-nationals are not only subject to criminal sanction but also to the threat of being expelled following a conviction. From the perspective of a settled migrant, the latter may even be the more severe sanction.

While legal instruments to remove 'criminal aliens' are part of immigration law's DNA, the relevant legislative frameworks and administrative practices vary significantly over time and space. More restrictive expulsion policies toward migrant offenders emerge in waves, as evidenced by the clusters of cases that have reached the European Courts. Suffice it to mention the French Government targeting of juvenile offenders of Maghreb

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threat'. The law merely requires the order to be 'based on the assessment of facts'. See Berlit, 'Umgang mit Gefährdern im Aufenthaltsrecht', *Zeitschrift für Ausländerrecht (ZAR)* (2018) 89.

547 The above policies are complemented by policies to deprive 'dangerous' citizens of their nationality. While in some Member States the deprivation of citizenship was on the rise for quite a while (see S. Mantu, *Contingent Citizenship: The Law and Practice of Citizenship Deprivation in International, European and National Perspectives* (2015) 173 et seq.), such measures have become more widespread after the fall of the Khalifate (the 'Islamic State') in Syria. Withdrawing the nationality of a person subjects him or her to expulsion measures or re-entry bans in the first place, measures which are not available vis-à-vis a country's own nationals. While policies of citizenship deprivation technically do not distinguish between migrants and non-migrants, they disproportionately concern naturalized citizens and persons holding more than one nationality, of whom many are actually (former) migrants; see Meijers Committee, *Policy Brief on 'Differential treatment of citizens with dual or multiple nationality and the prohibition of discrimination'* (CM2016), 6 December 2020, at 5–9.

origin in the late 1980s,[548] or the attempt of German *Länder* to get 'tough' on young Turkish migrants in the early 2000s that was eventually blocked by the CJEU.[549] Currently, Denmark seems to have taken the lead in more systematically resorting to such policies.[550] Overall, there are indications that a new wave of more restrictive policies is building across Europe. Policy-makers are more often, and more systematically, resorting to expulsion as a means to address criminal behavior, irrespective of its literally 'home-grown' nature.

As we discuss in more detail below, these patterns and trends in expulsion cause tensions with the ECtHR's jurisprudence, as the Strasbourg Court always requires that an individual decision be taken that balances all relevant factors, including the social ties developed in the country of residence. Hence, the re-emergence of a systematic policy of expelling settled migrants as a means to provide 'security' constitutes an important challenge to the EU's accountability for compliance with Human Rights in the field of migration.

Trend 3: Efforts to enforce irregular migrants' return disregard their social and family ties

Perhaps the most crucial challenge to Human Rights compliance in this field is migrants with an irregular immigration status ('illegally staying third-country nationals', in the language of the Return Directive). Both at the EU level and on the level of the Member States, we observe increased efforts to enforce the 'duty to leave' against irregular migrants, either by way of removing obstacles to deportation or by fostering voluntary returns. In this context, a persistent pattern of disregarding the social and family ties of irregular migrants seems to exist.

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548 See the facts of the cases ECtHR, *Djeroud v. France*, Appl. no. 13446/87, Decision of 23 January 1991; *Beldjoudi v. France*, Appl. no. 12083/86, Judgment of 26 March 1992; *Nasri v. France*, Appl. no. 19465/92, Judgment of 13 July 1995; *Boughanemi v. France*, Appl. no. 22070/93, Judgment of 24 April 1996.

549 Case C-467/02, *Cetinkaya* (EU:C:2004:708); Case C-373/03, *Aydinli* (EU:C:2005:434); Case C-502/04, *Torun* (EU:C:2006:112).

550 See ECtHR, *Munir Johana v. Denmark,* Appl. no. 56803/18, and *Kahn v. Denmark*, Appl. no. 26957/19, Judgments of 12 January 2021. Both cases concerned the expulsion, following repeated convictions, of a person who had been living legally for decades in Denmark. The first applicant was born in 1994 in Denmark; the second applicant came to live there in 1990 at the age of four.

The reinforced return policies in the Union focus particularly on rejected asylum seekers, although the 'deportation turn' that has taken place in the early 2000s has a broader scope.[551] The toolbox of the EU's return policies comprises a wide range of measures, including readmission agreements with third countries that are conditioned by the EU's concessions in terms of aid and visa facilitation.[552] The alternative method of terminating illegal stay – namely, through regularization of the person concerned – is increasingly discouraged and, in any case, not systematically considered a policy option.[553]

Establishing the distinction between legal and illegal stay on state territory, between wanted and unwanted foreigners, is one of the fundamentals of immigration law.[554] Effectively enforcing this distinction is an entirely different matter. Although States are empowered to use force for that purpose – that is, to conduct deportations, or 'removals', as the EU prefers to call them – many obstacles can and do arise. The authorities may not be aware of the person being present in the first place. Even if he or she is under their effective control, or is actually willing to cooperate with the return procedure, international law requires a degree of cooperation on the part of the country of destination. If the latter questions the duty to admit the deportee – be it for undetermined nationality, lack of proper documentation, insufficient means of transportation, or any other reason – the deportation must be stalled, potentially even indefinitely.[555] This inter-state principle of non-intervention opens up a space for agency on the part of irregular migrants and their advocates, who may intentionally create obstacles to deportation – much to the annoyance of the authorities and politicians who have promised to be more effective on returns.

551 Gibney, 'Asylum and the Expansion of Deportation in the United Kingdom', 43 *Government and Opposition* (2008) 146.

552 Morticelli, 'The External Dimension and the Management of Irregular Migration in the EU', in M. Kotzur et al. (eds), *The External Dimension of EU Migration and Asylum Policies* (2020) 59; Carli, 'Readmission Agreements as Tools for Fighting Irregular Migration: An Appraisal Twenty Years on from the Tampere European Council', *Freedom, Security & Justice: European Legal Studies* no. 1 (2019) 11.

553 K. F. Hinterberger, *Regularisierungen irregulär aufhältiger Migrantinnen und Migranten* (2020), at 143–146.

554 Bast, 'Zur Territorialität des Migrationsrechts', in F. von Harbou and J. Markow (eds), *Philosophie des Migrationsrechts* (2020) 17, at 21–25.

555 Ellermann, 'The Limits of Unilateral Migration Control: Deportation and Interstate Co-operation', 43 *Government and Opposition* (2008) 168.

But such practical difficulties are not the whole of the matter. Not infrequently, migrants have been staying illegally with full knowledge of the authorities, who tolerated their presence either de facto or de jure. Moreover, there exists a considerable number of bona fide irregular migrants who are legally entitled not to be deported, as to do so would constitute a violation of Human Rights. The causes of rights-based obstacles to deportation are manifold. They relate, for example, to the serious illness of the person concerned. Other irregular migrants may have a strong claim not to be deported based in the principle of non-refoulement, yet fail to meet all requirements to achieve the status of international protection in the EU. The present chapter is specifically concerned with legal obstacles to deportation that follow from the fact that irregular migrants tend to develop social ties in the host country, including family ties, which may be as strong as those of regular migrants.[556] This is particularly true in respect of irregular migrants who have been staying for extended periods.

EU legislation only vaguely addresses claims of 'non-removables' to respect their social ties developed in the country of residence, and their interest in living together with family members. Pursuant to the general terms of Art. 5 of the Return Directive, Member States 'shall take due account of' the best interest of the child and of family life when implementing the Directive. Note that social ties other than family are not mentioned in this Article. The Return Directive merely permits States not to enforce a final return decision due to 'specific circumstances of the individual case' (Art. 9(2) Return Directive), without setting a maximum time for the deferral of enforcement ('for an appropriate period').[557] Moreover, the Return Directive recognizes Member States' discretion to grant a regular immigration status 'at any moment' of the return procedure (Art. 6(4) Return Directive).[558]

In summary, EU law as it stands does not require a return decision to be withdrawn, or not to be issued in the first place, on the grounds of social or family ties in the country of residence. The ensuing legal evaluation will discuss the extent to which the claims of irregular migrants not to be

556 Cf. 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 442.

557 Cf. CJEU, Case C-546/19, *BZ* (EU:C:2021:432), at para. 59.

558 Ibid., at para. 57.

deported, and consequently claims to have their presence regularized, are supported by Human Rights law.[559]

5.2 Legal evaluation

5.2.1 General framework: protection of migrants' family and social ties

The rights to marry and found a family and to conduct a family life free of arbitrary interference are firmly protected in Human Rights law (see, *inter alia*, Art. 12 and 16 UDHR, Art. 17 and 23 ICCPR, and, regarding discrimination against women, Art. 16(1) CEDAW). However, Human Rights catalogs are more reticent in recognizing and protecting the specific interests of migrant families – that is, families partly or entirely composed of foreign nationals. Such interests include the choice of the place where family life is conducted and not to being separated by measures terminating a residence. As regards the latter, Human Rights law provides for certain guarantees against arbitrary expulsion (see, inter alia, Art. 13 ICCPR, Art. 22 ICRMW, Art. 4 Protocol No. 4 ECHR and Art. 1 Protocol No. 7 ECHR). None of these, however, explicitly recognizes family unity as a protected interest.

The UN Convention on the Rights of the Child (CRC) and the UN Migrant Workers Convention (ICRMW) stand out in this regard. The CRC states that, in order to ensure that a child shall not be separated from his or her parents against their will, applications for family reunifications 'shall be dealt with by States Parties in a positive, humane and expeditious manner' (Art. 10(1) CRC). The ICRMW is even more explicit in requiring States to 'take appropriate measures to ensure the protection of the unity of the families of [regular] migrant workers' (Art. 44(1) ICRMW) and 'to facilitate the reunification of [such] migrant workers with their spouses … as well as with their minor dependent unmarried children' (Art. 44(2) ICRMW). Moreover, the ICRMW calls on State Parties intending to expel a regular migrant that 'account should be taken of humanitarian considerations and of the length of time that the person concerned has already resided in the State of employment' (Art. 56(3) ICRMW). These carefully circumscribed provisions demonstrate that a self-standing Human Right to respect the family unity of migrants has not yet gained recognition

559 In Chapter 6 we will discuss the Human Rights requirements relating to the status of those 'non-removables' during their stay in the EU.

in universal Human Rights law, even leaving aside the ICRMW's low number of ratifications from the Global North.[560] An important step in this direction is the commitment by UN Member States in the Global Compact for Migration to devise pathways for regular migration 'in a manner that upholds the right to family life' (GCM, Objective 5, para. 21), and, more specifically, 'to facilitate access to procedures for family reunification for migrants at all skills levels through appropriate measures that promote the realization of the right to family life' (para. 21, point i).

The remainder of this section will be focused on Art. 8 ECHR and the relevant case-law of the ECtHR, since a right to respect for the unity of migrant families has clearly emerged in the regional context of Europe. This jurisprudence is immediately relevant for the construction of Art. 7 EU-CFR, which literally mirrors Art. 8 ECHR (cf. Art. 52(3) EU-CFR).

A right to family unity first gained recognition in expulsion cases, especially in cases affecting second-generation immigrants – that is, descendants of post-colonial or labor migrants who came to live in Northern or Western Europe between the post-War era and the mid-1970s. Building on earlier decisions of the EComHR[561] and a pioneer judgment in 1988,[562] the ECtHR held that such expulsions interfere with the right to family laid down in Art. 8(1) ECHR.[563] The right to stay implied in this provision is not unconditional, being subject to the limitations set out in Art. 8(2) ECHR. The ECtHR has assumed a broad understanding of the public interests listed therein, including general economic considerations and requirements of effective migration control.[564] At the same time, however,

560 On the positive obligations of States to facilitate family reunifications, see V. Chetail, *International Migration Law* (2019) 124–132, and D. C. Schmitt, *Familienzusammenführung und Rechtsschutz in Deutschland und den USA: Eine rechtsvergleichende Betrachtung unter Berücksichtigung des Völker- und Europarechts* (2020) 29–54, each with references to scholarly opinions and jurisprudence of the relevant treaty bodies.

561 See, e.g., EComHR, *Alan, Khan und Singh v. UK*, Appl. no. 2991/66 and 2992/66, Decision of 15 July 1967; *X v. UK*, Appl. no. 9088/80, Decision of 6 March 1982; for discussion, see M. Caroni, *Privat- und Familienleben zwischen Menschenrecht und Migration* (1999) 210 et seq.

562 ECtHR, *Berrehab v. the Netherlands*, Appl. no. 10730/84, Judgment of 21 June 1988.

563 ECtHR, *Mustaquim v. Belgium*, Appl. no. 12313/86, Judgment of 18 February 1991; *Beldjoudi v. France*, Appl. no. 12083/86, Judgment of 26 March 1992; *Nasri v. France*, Appl. no. 19465/92, Judgment of 13 July 1995.

564 See, e.g., ECtHR, *Berrehab v. the Netherlands*, Appl. no. 10730/84, Judgment of 21 June 1988, at para. 26; on more recent case-law, see *Osman v. Denmark*, Appl.

the ECtHR has insisted that any interference with the right to family life must be 'necessary in a democratic society', meaning that a 'fair balance' must be struck between the private and public interests involved. In the course of the 1990s, the ECtHR consolidated this jurisprudence, which has now matured into settled case-law.[565] The cornerstone of this doctrine is that expulsion of a family member is lawful only if due consideration was given to all relevant circumstances of the individual case. To this effect, the ECtHR has established a list of criteria States must take into account, the so-called *Boultif/Üner* criteria, which include, among other things, the strength of the social and family ties that would be severed were the person forced to leave the host country.[566] Accordingly, the proportionality test required by Art. 8 ECHR has both a procedural and a substantive dimension, in that the authorities must conduct a complete assessment of the case and the resulting decision must be 'fair' in the eyes of the ECtHR.[567]

The jurisprudence of the ECtHR is similar in respect of claims to family reunification – that is, when the family member refers to Art. 8 ECHR in order to be authorized to enter the country and join the sponsor (who may or may not be a migrant him/herself).[568] In this context, however, the ECtHR usually accepts a higher degree of discretion on the part of the States (a 'margin of appreciation'), placing particular emphasis on the territorial jurisdiction of States that implies, under general international

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no. 38058/09, Judgment of 14 June 2011, at para. 58; *J.M. v. Sweden*, Appl. no. 47509/13, Decision of 8 April 2014, at para. 40.

565 For a summary, see P. Boeles et al., *Public Policy Restrictions in EU Free Movement and Migration Law: General Principles and Guidelines* (2021) 19–23.

566 ECtHR, *Boultif v. Switzerland*, Appl. no. 54273/00, Judgment of 2 August 2001, at para. 48; *Üner v. the Netherlands*, Appl. no. 46410/99, Grand Chamber Judgment of 18 October 2006, at para. 57–58; *Maslov v. Austria*, Appl. no. 1638/03, Grand Chamber Judgment of 23 June 2008, at para. 68.

567 Commentators have observed a recent trend in ECtHR case-law toward a more process-based review, which accepts a wider margin of appreciation of national courts in making the substantive assessment; see Feihle, 'Asylum and Immigration under the European Convention on Human Rights: An Exclusive Universality?', in H.P. Aust and E. Demir-Gürsel (eds), *The European Court of Human Rights: Current Challenges in Historical Perspective* (2021) 133, at 153–155.

568 Given the complexities of migration laws and migrant biographies, it may anyway be difficult in practice to make the distinction between termination of stay and non-admission, e.g., in cases regarding claims to readmission, renewal of residence permits, or reunification of 'tolerated' migrants.

law, the power to refuse the admission of 'aliens'.[569] Regardless of this, the ECtHR recognizes that Art. 8 ECHR also entails positive obligations that may give rise to a well-founded claim to family reunification – that is, a right to admission to preserve or establish a normal family life. The 'fair balance' test conducted by the Court is essentially the same as in expulsion cases. Such a claim was first deemed well-founded in the *Sen* case (2001), which concerned minors in complex transnational family relations.[570] Further successful petitions were decided in the following years,[571] although it should be noted that in a large number of cases the Court dismissed the claims and referred to the margin of appreciation accorded to the Convention States.[572] Nonetheless, in order to lawfully reject an application for family reunification, States are under the two-fold obligation to conduct an individual assessment and to arrive at a substantially 'fair' decision.

In summary, the ECtHR's jurisprudence on Art. 8 ECHR has established a Human Right to family unity, which means a right to maintain or establish the unity of a migrant family.[573] This right is not an unconditional one but, rather, is subject to limitations for reasons of public policy that States may pursue while observing the principle of proportionality.

A more complicated issue concerns the extent to which migrants' social ties other than those established in the context of family relations are protected in Human Rights law. Universal Human Rights treaties are basically silent on the topic, apart from the vague references to 'humanitarian considerations' and the duration of residence in Art. 56(3) ICRMW. In this regard, the ECtHR was even more a pioneer than in relation to migrant families. In its case-law on Art. 8 ECHR, the Court has developed a far-reaching scope of protection based on the right to respect for one's private life.

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569 ECtHR, *Abdulaziz, Cabales und Balkandali v. UK*, Appl. no. 9214/80, 9473/81 and 9474/81, at para. 67; *Ahmut v. the Netherlands*, Appl. no. 21702/93, Judgment of 28 November 1996, at para. 63.

570 ECtHR, *Sen v. the Netherlands*, Appl. no. 31465/96, Judgment of 21 December 2001.

571 ECtHR, *Tuquabo-Tekle v. the Netherlands*, Appl. no. 60665/00, Judgment of 1 December 2005; *Nolan and K. v. Russia*, Appl. no. 2512/04, Judgment of 12 February 2009, at para. 83 et seq.; recently, in the context of international protection, see ECtHR, *M.A. v. Denmark*, Appl. no. 6697/18, Grand Chamber Judgment of 9 July 2021.

572 M.-B. Dembour, *When Humans Become Migrants* (2015), at 122.

573 Cf. M.A.K. Klaassen, *The Right to Family Unification: Between Migration Control and Human Rights* (2015), at 95–97 and 378, highlighting the inconsistencies of the case-law.

Again, this approach has first come to the fore in the context of expulsions. Young adults from the second generation of immigrants represent the critical case. The scope of protection derived from the notion of 'family life' was, at times, too narrow to cover this group of settled migrants: While the family ties connecting them to their parents had typically weakened, they were sometimes too young to have established their own family. Nevertheless, their interest in staying in the country in which they were born or had received their primary education did not appear less legitimate than that of other settled migrants. Hence, the Court recognized that this interest may be covered by the notion of 'private life' which, according to the Court, is a broad concept that encompasses the right to establish and develop relationships with other human beings, including relationships of a professional or business nature.[574] Accordingly, any expulsions interfering with a migrant's 'private life' must meet the *Boultif/Üner* criteria. In most cases concerning second generation immigrants, however, the Court continued to refer to their 'family life' – or, in generic terms, to 'private and family life' – to trigger Art. 8 ECHR.[575]

The conceptual breakthrough to an independent Human Rights guarantee was eventually brought about by the *Slivenko* case decided in 2003. The Court held that the applicants, a family of Russian origin living in the newly independent Latvian Republic, were removed from the country where they had developed 'the network of personal, social and economic relations that make up the private life of every human being'.[576] Henceforth, the Court would consider the totality of social ties an essential aspect of the 'private life' of a person within the meaning of Art. 8(1) ECHR.[577] Thus, the interest of any migrant in staying in the country where such ties exist is protected by Human Rights – subject, of course, to the limitations set out in Art. 8(2) ECHR.

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574 ECtHR, *C. (Chorfi) v. Belgium*, Appl. no. 21794/93, Judgment of 7 August 1996, at para. 25; from the more recent case-law, see ECtHR, *Pajic v. Croatia*, Appl. no. 68453/13, Judgment of 23 February 2016, at para. 61.

575 See, e.g., ECtHR, *Mehemi v. France*, Appl. no. 25017/94, Judgment of 26 September 1997, at para. 27; *Jakupovic v. Austria*, Appl. no. 36757/97, Judgment of 6 February 2003, at para. 22.

576 ECtHR, *Slivenko v. Latvia*, Appl. no. 48321/99, Grand Chamber Judgment of 9 October 2003, at para. 96.

577 ECtHR, *Onur v. UK*, Appl. no. 27319/07, Judgment of 17 February 2009, at para. 46; *Levakovic v. Denmark*, Appl. no. 7841/14, Judgment of 23 October 2018, at para. 34.

The premises and implications of this doctrine are still subject to discussion in legal scholarship. Some have argued that the doctrine applies only to a narrow category of migrants, who are defined by being 'de facto citizens' (*faktische Inländer*, in German) or by their 'rootedness' (*Verwurzelung*, a term widely used by German courts) after an extensive period of lawful stay.[578] We consider this a misrepresentation of the ECtHR's case-law, which does not reserve the protection of one's private life to a privileged class of migrants, even if this may have originally motivated the jurisprudence. The ECtHR's conceptual point of departure is the question of whether a 'private life' (as defined by the Court) de facto exists, irrespective of the migration history, immigration status or duration of stay of the person concerned.[579] Whether the migrant's interest in maintaining his or her social ties actually prevails must be settled by balancing all relevant factors, rather than by determining that he or she belongs to a predefined category for which such balancing was reserved in the first place. Accordingly, given that virtually all migrants will, after a certain period of stay, develop some kind of social ties in the host country, the ECtHR has recognized a (conditional) right to abode in all but name.[580]

5.2.2 Specific issue: integration requirements restricting family reunifications

(1) The above analysis revealed that States must always provide justification if they interfere with the right to family unity. Such justification requires striking a 'fair balance' between the private and public interests involved.

Applying this standard to integration requirements, there is no doubt that the ECtHR accepts 'ensuring effective integration' as a policy goal that serves public interests recognized in Art. 8(2) ECHR. In this context,

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578 Cf. D. Thym, *Migrationsverwaltungsrecht* (2010) 250–253 and 255; F. Fritzsch, *Der Schutz sozialer Bindungen von Ausländern* (2009) 148–189, arguing that lawful stay constitutes an inherent limitiation (*immanente Schranke*) of Art. 8 ECHR.

579 On the corresponding approach in respect of 'family life', see ECtHR, *Mengesha Kimfe v. Switzerland*, Appl. no. 24404/05, at para. 62, and *Agraw v. Switzerland*, Appl. no. 3295/06, at para. 45, Judgments of 29 July 2010.

580 On the parallel discussion of a right to abode in German constitutional law, see E. Weizsäcker, *Grundrechte und freiwillige Migration* (2007) 89–100; J. Bast, *Aufenthaltsrecht und Migrationssteuerung* (2011) 206–212.

the Court has specifically referred to 'preserving social cohesion' as a legitimate aim of migration policy.[581] The *Boultif/Üner* criteria and their application by the Strasbourg Court confirm this finding.[582] A lack of socio-cultural integration on the part of the migrant is regularly held against him or her when assessing whether a 'fair balance' has been struck. In some instances, the Court has even attributed excessive importance to such factors,[583] triggering criticism from commentators that it is employing an overly simplified, unidirectional model of migrants' integration.[584] In effect, restrictionist policies in the guise of 'integration measures' will only fail to satisfy the ECtHR if the relevant framework preempts the required balancing of interests or when the latter is systematically biased toward non-admission outcomes.

(2) This margin of appreciation granted by the Strasbourg Court in the context of family reunification is crucial to understanding the complex interplay between Human Rights and the FR Directive. From the outset, scholars have detected a tension between two competing paradigms of integration, both of which have found their way into the text of the Directive: a liberal approach according to which migrant integration is best fostered by granting a secure residence status ('integration qua rights'), and a restrictive approach according to which such a status should be reserved for migrants who prove their successful integration ('rights qua integration').[585] The optional 'integration requirements' pursuant to Art. 7(2) of the Directive reflect the latter approach.

The case-law of the CJEU has had to navigate this tension ever since the first case on the Directive was decided in 2006.[586] The EU Court held that the very point of the FR Directive is that it goes beyond the obligations under the ECHR, in that it lays down a clearly defined individual right to reunification with members of the sponsor's core family, without

581 ECtHR, *M.A. v. Denmark*, Appl. no. 6697/18, Grand Chamber Judgment of 9 July 2021, at para. 165.

582 Murphy, 'The Concept of Integration in the Jurisprudence of the European Court of Human Rights', 12 *European Journal of Migration and Law (EJML)* (2010) 23, at 27–28.

583 See, e.g., ECtHR, *Boughanemi v. France*, Appl. no. 27275/95, Judgment of 24 April 1996, at para. 44.

584 Farahat, 'The Exclusiveness of Inclusion: On the Boundaries of Human Rights in Protecting Transnational and Second-Generation Migrants', 11 *European Journal of Migration and Law (EJML)* (2009) 253.

585 Groenendijk, 'Legal Concepts of Integration in EU Migration Law', 6 *European Journal of Migration and Law (EJML)* (2004) 111.

586 CJEU, Case C-540/03, *Parliament v. Council* (EU:C:2006:429).

discretion on the part of the Member States.[587] Accordingly, the Directive represents a liberal political choice to promote family reunification.[588] To this end, the FR Directive preventively addresses potential Human Rights violations by defining a legal status vesting its holder with rights based in EU law that partly exceed what is necessary to comply with Human Rights obligations. The 'fair balance' between individual and public interests is struck in favor of the individual by virtue of a legislative framework set by the EU. In the context of the present study, we call such an approach 'overinclusive legislative balancing' that ensures outcomes that comply with Human Rights.

One cannot fail to observe, however, that in certain contexts the FR Directive does not counteract the danger of Human Rights violations in that it recognizes a margin for manoeuvre to reject applications for family reunification. The blunt discretion granted in Art. 7(2) is but one example of the Directive being 'underinclusive', as it apparently does not rule out unfairly weighing the interests involved. The CJEU has responded to this danger by establishing a general rule of interpretation, according to which all conditions, exclusions, and discretionary clauses of the FR Directive must be construed in the light of the fundamental rights and, more particularly, in light of the right to respect for family life enshrined in both the ECHR and the EU Charter.[589] This rule of interpretation may even force reconstruction of (thereby effectively overruling) the strict wording of certain provisions that seemingly exclude individual assessment of an application or that invite Member States to do so. According to the CJEU, EU legislation must never be construed in such a way as to fall short of the standards of Human Rights law.[590] In addition, the 'fair balance' test established by the ECtHR is mirrored in EU law's doctrines of proportionality and effectiveness. While in the latter line of reasoning the EU Court argues on the basis of legislative choices crystalized in the Directive's main objective to promote family reunification, in substance the statutory

587 Ibid., at para. 60.
588 CJEU, Case C-578/08, *Chakroun* (EU:C:2010:117), at para. 43.
589 CJEU, Case C-540/03, *Parliament v. Council* (EU:C:2006:429), at para. 58; Case C-578/08, *Chakroun* (EU:C:2010:117), at para. 44.
590 CJEU, Case C-540/03, *Parliament v. Council* (EU:C:2006:429), at para. 105–107; Case C-403/09 PPU, *Detiček* (EU:C:2009:810), at para. 34 and 54–55; Cases C-356/11 and C-357/11, *O., S. and L.* (EU:C:2012:776), at para. 76–78.

argument made by the CJEU converges with the constitutional argument based on fundamental rights.[591]

This general approach determined the path for the CJEU's leading case on integration requirements pursuant to Art. 7(2) FR Directive, decided in 2015.[592] The Court confirmed that a Member State – the Netherlands, in the instant case – may establish a requirement to pass a 'civic integration' examination prior to entry, which involves testing basic knowledge of the language and society of the host State.[593] However, the CJEU stressed that Art. 7(2) must be interpreted strictly and in line with the principle of proportionality.[594] The conditions of application of such a requirement must not make it impossible or excessively difficult to exercise the right to family reunification: that is to say, it must not form an insurmountable obstacle for the concrete person.[595] Accordingly, Member States' schemes must not automatically exclude persons who have demonstrated their willingness to pass the examination and have made every effort to achieve that objective.[596] An assessment on a case-by-case basis is required, taking into account individual circumstances, such as the age, illiteracy, level of education, economic situation or health of a sponsor's relevant family members.[597]

In view of the combined effects of the ECtHR's 'fair balance' jurisprudence and the EU legislature's approach of 'overinclusive legislative balancing', the present legal framework should do a good job in protecting migrants' right to family unity in the EU. However, 'integration measures' pursuant to Art. 7(2) FR Directive are a weak spot, as this provision enables Member State to pursue assimilationist and restrictionist policies that potentially violate Human Rights. The CJEU has mitigated this threat in stipulating that Member States must not automatically exclude persons who fail to meet formal integration tests. In practical terms, however,

591 This convergence, and the transformative potential of taking the Charter seriously, are underrated in Thym's reconstruction of the Court's case-law; see Thym, 'Between "Administrative Mindset" and "Constitutional Imagination": The Role of the Court of Justice in Immigration, Asylum and Border Control Policy', 44 *European Law Review (E.L.Rev.)* (2019) 139, at 145–148.

592 CJEU, Case C-153/14, *K. and A.* (EU:C:2015:453); for a similar ruling on language requirements in the context on the Association Agreement with Turkey, see Case C-138/13, *Dogan* (EU:C:2014:2066), at para. 38.

593 CJEU, Case C-153/14, *K. & A.* (EU:C:2015:453), at para. 53–54.

594 Ibid., at para. 50–51.

595 Ibid., at para. 59 and 71.

596 Ibid., at para. 56.

597 Ibid., at para. 58.

reinstating the 'fair balance' requirement on a case-by-case basis offers insufficient assurance that integration measures will not serve as an instrument of selective non-immigration policies.[598] The Court's approach fails to address the structural biases and hidden restrictionist agendas of integration narratives and practices. In this regard, the CJEU does not consider the competing concepts and goals of integration policies – sweepingly asserting that the stated aim of 'facilitating the establishment of connections in the host State' is genuine,[599] but not reviewing whether less burdensome alternatives would be available (such as language training after the arrival[600]). As a result, a narrative of legitimate national closure, and of discretionary inclusion, continues to prevail both at national and supranational levels.[601]

5.2.3 Specific issue: protection of settled migrants' right to abode

(1) Our analysis has detected a trend toward securitized policies of expulsion, including measures targeting settled migrants. Such measures interfere with the right to respect for private life as defined in the ECtHR jurisprudence. While the Strasbourg Court has always acknowledged that preventing crime and fighting terrorism are legitimate aims within the meaning of Art. 8(2) ECHR,[602] securitized policies of expulsion are likely to give rise to Human Rights violations, particularly when expulsion is

598 A requirement established by the CJEU; see ibid., at para. 57.

599 For a similar line of reasoning, see Case C-579/13, *P and S* (EU:C:2015:369), at para. 13. The CJEU also held that making an entitlement to housing assistance dependent on a language requirement does not amount to an indirect discrimination on grounds of ethnic origin pursuant to Art. 21 EU-CFR, provided that it applies without distinction to all third-country nationals; see CJEU, Case C-94/20, *KV* (EU:C:2021:477), at para. 56 and 63.

600 Moreover, integration measures may often be more effective in the host country; this was also observed by the European Commission: Communication on guidance for application of Directive 2003/86/EC, COM(2014) 210, 3 April 2014, at 16. On the practical difficulties of preparing for the tests abroad, see T. Strik et al., *The INTEC Project: Synthesis Report: Integration and Naturalisation Tests: The New Way to European Citizenship* (2010), at 33–36.

601 Strumia, 'European Citizenship and EU Immigration', 22 *European Law Journal* (2016) 417, at 434.

602 Suffice it to mention that 'the interest of public safety' and 'the prevention of disorder and crime' expressly feature in the list of Art. 8(2) ECHR.

ordered in a quasi-automatic manner or as a means of deterring other migrants.

(2) The EU legislature has thus far failed to adopt horizontal rules on expulsion. The LTR Directive is the main tool protecting settled migrants' right to abode. Like the FR Directive, the LTR Directive possesses a dual character: it results from an autonomous political choice by the EU legislature, while at the same time it mirrors and enhances Human Rights by means of EU law.[603] Embracing the first element, the CJEU has consistently held that the 'principal objective' of the LTR Directive is the integration of third-country nationals who are settled on a long-term basis in the Member States.[604] The CJEU stresses that, for that purpose, the EU legislature has established 'extensive rights attached to long-term resident status' with a view to bringing the rights of those nationals closer to those enjoyed by EU citizens.[605] The liberal choice to promote integration by creating a denizenship status consequently goes beyond what is required by Human Rights law.

However, the LTR Directive also serves the aim of protecting settled migrants' right to abode laid down in Art. 8 ECHR – in particular, by providing for reinforced protection against expulsion.[606] This is evidenced by the reference to the ECtHR's case-law in recital 16 of the LTR Directive. The criteria to be considered, pursuant to Art. 12(3) LTR Directive, before taking a decision to expel a long-term resident replicate the *Boultif/Üner* criteria. Here again, the EU legislature has chosen the approach of over-inclusive balancing. In excluding economic considerations from the equation (Art. 12(2)) and by requiring that the expellee poses 'an actual and

603 On such 'democratic iterations' of Human Rights, see S. Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (2004) 176–181. It should be noted, however, that the EU legislature has established an independent set of eligibility criteria to claim LTR status. These criteria are only partly in consonance with the *Boultif/Üner* criteria; see Çali and Cunningham, 'The European Court of Human Rights and Removal of Long-term Migrants', in B. Çali, L. Bianku and I. Motoc (eds), *Migration and the Convention on Human Rights* (2021) 159, at 163–174, demonstrating the limited importance the ECtHR attaches to long-term stay as isolated factor.

604 CJEU, Case C-571/10, *Kamberaj* (EU:C:2012:233), at para. 86; Case C-508/10, *Commission v. Netherlands* (EU:C:2012:243), at para. 66; Case C-309/14, *CGIL and INCA* (EU:C:2015:523), at para. 21.

605 CJEU, Case C-557/17, *Y.Z., Z.Z. and Y.Y* (EU:C:2019:203), at para. 63–64.

606 The Human Rights dimension of the LTR Directive is only vaguely acknowledged by the CJEU; see Case C-636/16, *López Pastuzano* (EU:C:2017:949), at para. 24.

sufficiently serious threat' to public policy or public security (Art. 12(1)), the LTR Directive copied the special legal regime protecting Union citizens and certain Turkish nationals under the EEC-Turkey Association Agreement, and thus exceeds Human Rights standards. According to this special regime, expulsion cannot be ordered automatically on general preventive grounds following a criminal conviction or as a means of deterring other foreign nationals from committing offenses.[607] This jurisprudence now applies to the LTR Directive.[608] Hence, settled migrants who have achieved long-term resident status are firmly protected, by way of EU law, against quasi-automatic expulsion schemes and other trends of securitized expulsion.

On the downside, this 'safety net' is not available to those who have failed to apply for LTR status or do not meet all conditions established in the Directive. Indeed, only a limited number of settled migrants living in the EU have acquired LTR status. Statistical comparison between States bound by the Directive shows a highly uneven application of the LTR Directive.[609] In some Member States, such as Germany, the LTR Directive has had only limited impact since national law already provided for a similar status of permanent residence. Settled migrants have little incentive to apply for a change of status. In other Member States, administrative obstacles such as high administrative fees or restrictive interpretation of eligibility criteria seem to have discouraged eligible applicants.[610]

In other instances, the limited use of the LTR Directive may be due to the fact that the conditions laid down in the Directive are too demanding for a large number of persons who have developed strong social ties in the host country. Discretionary 'integration requirements' pursuant to Art. 5(2) of the LTR Directive again seem to play an important role here.[611]

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607 CJEU, Case C-371/08, *Ziebell* (EU:C:2011:809), at para. 82–83.

608 CJEU, Case C-636/16, *López Pastuzano* (EU:C:2017:949), at para. 28; Case C-448/19, *W.T.* (EU:C:2020:467), at para. 25.

609 European Commission, Report on the implementation of Directive 2003/109/EC, COM(2019) 161, 29 March 2019, at 1. Four Member States (AT, CZ, EE, IT) account for 90 % of the LTR permits issued in 2017, with Italy alone having issued around 73 %.

610 See the first Report from the European Commission on the application of Directive 2003/109/EC, COM(2011) 585, 29 September 2011, at 5. Cf. also Case C-508/10, *Commission v. Netherlands* (EU:C:2012:243), on the Netherlands, and Case C-309/14, *CGIL and INCA* (EU:C:2015:523), on Italy; Cases C-503/19 and C-592/19, *UQ and SI* (EU:C:2020:629), on Spain.

611 See European Commission, (Second) Report on the implementation of Directive 2003/109/EC, COM(2019) 161, 29 March 2019, at 3. A majority of Member

The CJEU has yet to rule on this clause[612] but it is likely that the CJEU would employ its general approach to integration requirements mandated by the EU legislature. In its view, national immigration law may make the consolidation of the right to stay conditional upon the acquisition of knowledge of the language and society of the host State, subject to the principle of proportionality.[613] In the context of the LTR Directive, the additional requirements imposed by Member States must not jeopardize the effectiveness of the Directive – that is, compromise its principal objective of integration. Accordingly, requirements pursuant to Art. 5(2) LTR Directive must not make it impossible or excessively difficult to acquire LTR status, and States must consider the individual circumstances of the applicant. While such clarification by the CJEU could be helpful, it would presumably not suffice to counteract practices that prevent settled migrants from achieving secure status under the LTR Directive.[614]

5.2.4 Specific issue: obligations to regularize irregular migrants

(1) To what extent are the social ties, including family ties, of irregular migrants protected by Human Rights law? Part of the answer has already been discussed above: The ECtHR's case-law recognizes these private interests as falling within the scope of protection of the right to private and family life, irrespective of whether the migrants have a legal right to stay in the country in question (see section 5.2.1).[615]

States require applicants to comply with integration conditions (AT, BE, CY, EE, EL, FR, HR, IT, LT, LV, LU, MT, NL, PT, RO). In Germany, for example, level B1 of the Common European Framework of Reference for Languages is required – the same as for naturalization.

612 For an extensive legal discussion, see D. Acosta Arcarazo, *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship* (2011) 203–223.

613 See CJEU, Case C-257/17, *C and A* (EU:C:2018:876), at para. 53 et seq., on Art. 15(1) and (4) of the FR Directive.

614 Cf. Böcker and Strik, 'Language and Knowledge Tests for Permanent Residence Rights: Help or Hindrance for Integration?', 13 *European Journal of Migration and Law (EJML)* (2011) 157, at 178.

615 On the procedural rights of irregular migrants in the context of expulsions and deportations, see the review of the relevant sources of Human Rights law in the Concurring Opinion of Judge Punto de Alberquerque, joined by Judge Vučinić, appended to ECtHR, *De Souza Ribeiro v. France*, Appl. no. 22689/07, Grand Chamber Judgment of 13 December 2012.

In effect, irregular migrants may have a well-founded claim to stay on the basis of Art. 8 ECHR, although this is less likely than in the case of settled migrants who are lawfully present. The leading authority is *Jeunesse v. the Netherlands*, decided by the Grand Chamber in October 2014,[616] which concerned a married couple living together with three children. The applicant, the only foreigner of the family, had been staying illegally in the Netherlands for more than 17 years, with the full knowledge of the authorities which never seriously tried to deport her. The Court found that the failure to issue a residence permit to regularize her stay amounted to a violation of Art. 8 ECHR, albeit the Court stressed the 'highly exceptional' circumstances of the case.[617] The judgment is in line with previous case-law on family reunification, in which the fact that the applicant was not lawfully resident in the responding State did not prevent the Court from determining that the State had failed to comply with its positive obligations under Art. 8 ECHR.[618]

This line of jurisprudence is complemented by another line that concerns claims to be regularized on the basis of strong social ties developed in the country of de facto residence. Such claims were first deemed well-founded in the context of former Soviet citizens of Russian origin who found themselves in a precarious legal situation in the newly independent Baltic republics. The Chamber decision in *Sisojeva v. Latvia* accepted the claim that the prolonged refusal of the Latvian authorities to grant the applicants the right to reside in Latvia on a permanent basis constituted an interference with the right to private life.[619] The Grand Chamber was more reserved, deferring to the national legal systems safeguarding Human Rights. It argued that Art. 8 ECHR cannot be construed as guaranteeing, as such, the right to a particular type of residence permit.[620] In principle, however, the Court has accepted that Art. 8 ECHR may entail a right to

616 ECtHR, *Jeunesse v. the Netherlands*, Appl. no. 12738/10, Grand Chamber Judgment of 3 October 2014.

617 Ibid., at para. 121–122; on the 'exceptional circumstances' test concerning irregular migrants, see *Butt v. Norway*, Appl. no. 47017/09, Judgment of 4 December 2012, at para. 78, with reference to previous case-law. In the latter case, the Court was satisfied that applicants' deportation from Norway would entail a violation of Art. 8 ECHR.

618 See, e.g., ECtHR, *Rodrigues da Silva and Hoogkamer v. the Netherlands*, Appl. no. 50435/99, Judgment of 31 January 2006.

619 ECtHR, *Sisojeva et al. v. Latvia*, Appl. no. 60654/00, Judgment of 16 June 2005, at para. 105.

620 ECtHR, *Sisojeva et al. v. Latvia*, Appl. no. 60654/00, Grand Chamber Judgment of 15 January 2007, at para. 90–91.

be regularized in order obtain a legal status that adequately reflects the personal, social, and economic relations of the person concerned within his or her de facto home country.[621]

This rationale was affirmed in 2012 by the Grand Chamber in the *Kurić* case, which dealt with the situation of former Yugoslav citizens in post-independence Slovenia ('the erased').[622] Despite the historical singularity of the instant case, the *Kurić* judgment is of general significance for irregular migrants.[623] The Court added another building block to its jurisprudence on Art. 8 ECHR: the doctrine that 'the positive obligations inherent in effective "respect" for private or family life or both, in particular in the case of long-term migrants' may lead to the conclusion that 'the regularisation of the residence status of [the applicants] was a necessary step which the State should have taken in order to ensure that [the adverse consequences of the applicable laws] would not disproportionately affect the Article 8 rights'.[624] Accordingly, Art. 8 ECHR is not only a potential source of a right not to be expelled or deported but also, in exceptional circumstances, of a right to be regularized.[625] The Court has thus opened a channel for Human-Rights-based 'immigration from within'.[626]

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621 From the ensuing discussion, see Thym, 'Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?', 57 *International and Comparative Law Quarterly (ICLQ)* (2008) 1; M.-B. Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (2015) 442–481; C. Costello, *The Human Rights of Migrants and Refugees in European Law* (2016) 79–83.

622 ECtHR, *Kurić et al. v. Slovenia*, Appl. no. 26828/06, Grand Chamber Judgment of 26 June 2012, at para. 356–359.

623 This has not yet been fully recognized in legal scholarship; see, e.g., 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 449; B. Menezes Queiroz, *Illegally Staying in the EU: An Analysis of Illegality in EU Migration Law* (2018) 109.

624 Ibid., at para. 358 and 359, respectively. Note that the quotes are not a mere *obiter dictum* but rather the decisive paragraphs of the GC judgment.

625 See, e.g., ECtHR, *Hoti v. Croatia*, Appl. no. 63311/14, Judgment of 26 April 2018, and *Sudita Keita v. Hungary*, Appl. no. 2321/15, Judgment of 12 August 2020, concerning stateless persons residing in Croatia and Hungary, respectively; in both cases the Court found a violation of Art. 8 ECHR due to a lack of effective and accessible procedures enabling further stay and status to be determined. See also ECtHR, *B.A.C. v. Greece*, Appl. no. 11981/15, Judgment of 13 October 2016: violation of the State's positive obligations under Art. 8 ECHR by not deciding the applicant's asylum request for more than twelve years.

(2) In the present legal framework at the EU level, irregular migrants do not benefit from either the FR Directive or the LTR Directive, since these require the lawful presence of the sponsor or the applicant respectively. Rare examples of the EU's legislative activity on matters of regularizations are the Directive on Victims of Trafficking (Directive 2004/81/EC)[627] and the Employers Sanctions Directive (Directive 2009/52/EC).[628] However, neither Art. 8 of the Directive on Victims of Trafficking nor Art. 6(5) and 13(4) of the Employers Sanctions Directive entail an enforceable right to be regularized.[629]

As explained above, the Return Directive is basically silent on the issue of a Human-Rights-based claim to regularization. It does, however, recognize that Member States may issue a residence permit at any stage of the return procedure – a decision seemingly left to the discretion of the Member States. The case-law of the CJEU on the fundamental rights of irregular migrants who are subject to return proceedings reiterates the wording of Art. 5 Return Directive, reminding Member States that, when they implement that Directive, they must 'take due account of' the best interests of the child, family life, and the state of health of the person concerned, without discussing what legal consequences such considerations might entail.[630] From the point of view of the CJEU, this provision is apparently mainly procedural in nature, in that it requires the Member States to hear the person concerned on that subject prior to the adoption

626 The term is borrowed from the French discussion in the 1960s on the widespread (and routinely legalized) practice of labor recruitment from the population of undocumented migrants (*l'immigration interne*). On the use of the concept in the present context, see Bast, 'Illegaler Aufenthalt und europarechtliche Gesetzgebung', *Zeitschrift für Ausländerrecht (ZAR)* (2012) 1, at 6.

627 Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (Directive on Victims of Trafficking).

628 Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals (Employers Sanctions Directive).

629 See Kau, 'Human Trafficking Directive 2004/81/EC', in K. Hailbronner and D. Thym (eds), *EU Immigration and Asylum Law: Commentary* (2nd ed. 2016), commentary on Art. 8, at para. 8; Schierle, 'Employers Sanctions Directive 2009/52/EC', ibid., commentary on Art. 14, at para. 12.

630 On the reluctance of the CJEU to engage with Human Rights jurisprudence in the context of the Return Directive, see T. Molnár, *The Interplay Between the EU's Return Acquis and International Law* (2021) 100–121.

of a return decision.[631] The scope of the right to be heard arguably extends, by analogy, to adverse consequences for the private life of the person concerned, which the EU legislature has failed to mention in Art. 5 of the Directive.

Regarding the consequences of compelling legal or practical obstacles to enforce a return decision, the Court has yet to clarify important aspects of the legal framework set out by the EU legislature. The Court has consistently held that Art. 6(1) Return Directive provides, principally, for an obligation on Member States to issue a return decision against any third-country national staying illegally on their territory.[632] Member States must not de facto tolerate the presence of irregular migrants, either by failing to issue a return decision in the first place[633] or by deliberately refraining from enforcing it in due time.[634] The idea of the Directive is precisely to avoid any 'gray area' between illegal and legal stay, between return and regularization.[635] Only on a temporary basis does the Return Directive, in Art. 9(2), provide for the possibility of postponing the removal of a third-country national, in which case a written confirmation of his or her situation must be provided.[636] The Court has yet to rule on the practice of certain Member States, notably Germany, of indefinitely iterating the postponement of deportations in view of persistent legal or factual obstacles (*Kettenduldung*). We concur with the legal scholarship that regards this practice as a violation of the Return Directive.[637] In particular, when persistent non-removability results from Human Rights – be it Art. 8 ECHR or, even more so, the principle of non-refoulement – the discretion under Art. 6(4) Return Directive is limited to only one possible lawful decision:

631 CJEU, Case C-249/13, *Boudjlida* (EU:C:2014:2431), at para. 48–49; Case C-82/16, *K.A. et al. (re family reunification in Belgium)* (EU:C:2018:308), at para. 102–103; see Ilareva, 'The Right to be Heard: The Underestimated Condition for Effective Returns and Human Rights Consideration', 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) 351. On the unwritten guarantee of the right to be heard in the context of the Return Directive, see above, Chapter 3 (section 3.2.4).

632 CJEU, Case C-61/11 PPU, *El Dridi* (EU:C:2011:268), at para. 35.

633 CJEU, Case C-38/14, *Zaizoune* (EU:C:2015:260), at para. 31–32.

634 CJEU, Case C-441/19, *TQ* (EU:C:2021:9), at para. 81.

635 CJEU, Case C-546/19, *BZ* (EU:C:2021:432), at para. 57.

636 CJEU, Case C-146/14 PPU, *Mahdi* (EU:C:2014:1320), at para. 88.

637 K. F. Hinterberger, *Regularisierungen irregulär aufhältiger Migrantinnen und Migranten* (2020) 161–163; Nachtigall, 'Die Ausdifferenzierung der Duldung', *Zeitschrift für Ausländerrecht (ZAR)* (2020) 271, at 276.

to regularize the status of the person concerned.[638] Given that the Member State act within a legal framework set by EU law and, hence, within the ambit of EU fundamental rights,[639] this right to be regularized is enforceable before national courts.

More recently, the CJEU has inched toward recognizing such a right in the context of unaccompanied minors. The Court held that a return decision against an unaccompanied minor must not be issued unless the authorities have verified that deportation can, in practice, be enforced. The alternative would be contrary to the requirement to protect the best interests of the child at all stages of the procedure, as laid down in Art. 5(a) of the Return Directive and Art. 24(2) of the Charter.[640] The essence of the Court's argument extends to the Human Rights of adult irregular migrants, as well: It would be unlawful to adopt or maintain a return decision which the State is satisfied cannot be enforced within a reasonable period of time.[641] The Court rightly observed: 'The [person] in question would … be placed in a situation of great uncertainty as to his or her legal status and his or her future, in particular as regards … the possibility of remaining in the Member State concerned.'[642] This reasoning echoes the ECtHR's finding of a 'legal vacuum' in which the applicants were trapped in the *Kurić* case.[643]

In view of the lack of clear guidance from EU law, the relevant policies are subject to a fragmented landscape of Member States' regulations and practices. A recent comparative study of Austrian, German, and Spanish law has demonstrated that regularization clauses are natural components

638 We concur with Acosta Acarazo, 'The Charter, Detention and Possible Regularization of Migrants in an Irregular Situation under the Returns Directive: *Mahdi*', 52 *Common Market Law Review (CMLRev.)* (2015) 1361, at 1375–1377; for a more cautious approach, see B. Menezes Queiroz, *Illegally Staying in the EU: An Analysis of Illegality in EU Migration Law* (2018) 107. Note that CJEU, Case C-562/13, *Abdida* (EU:C:2014:2453), at para. 54–55, did not rule on the consequences of a *permanent* obstacle to deportation arising from Art. 3 ECHR/Art. 19(2) EU-CFR.

639 See CJEU, Case C-441/19, *TQ* (EU:C:2021:9), at para. 45.

640 CJEU, Case C-441/19, *TQ* (EU:C:2021:9), at para. 52–54 and 80–82.

641 C. Hörich, *Abschiebungen nach europäischen Vorgaben* (2015) 92; K. F. Hinterberger, *Regularisierungen irregulär aufhältiger Migrantinnen und Migranten* (2020) 156–158.

642 CJEU, Case C-441/19, *TQ* (EU:C:2021:9), at para. 53.

643 ECtHR, *Kurić et al. v. Slovenia*, Appl. no. 26828/06, Grand Chamber Judgment of 26 June 2012, at para. 344 et passim.

of immigration law.[644] The clauses enabling individual regularizations cover a broad range of purposes, ranging from respecting the principle of non-refoulment, social ties, family unity, and particular vulnerability of migrants – all of which have some basis in international law or EU law – to reasons of public policy such as fostering employment, education, or criminal prosecution.[645] These authorizations are almost always subject to discretionary decision-making by immigration authorities.[646]

Given the prevailing focus on enforcing returns as the primary policy option in dealing with irregular migration, this situation is likely to lead to unlawful decisions that do not sufficiently consider the Human Rights of irregular migrants. The main issues of concern are the enforcement of return decisions regardless of social and family ties, and the indefinite suspension of return procedures, which keeps non-removable migrants in a legal limbo.

5.3 Recommendations

The above legal evaluations have reached the comforting conclusion that the EU does not establish mandatory policies that fall foul of its own obligation 'to respect' the private and family life of migrants. However, more efforts are required in response to Member State policies that potentially violate Human Rights. Our recommendations build on the EU's positive obligation 'to protect' these rights. EU legislation, as it currently stands, is not sufficiently specific or inclusive to counteract the trends observed in the first section of this chapter, notwithstanding the CJEU's doctrine of interpretation in conformity with fundamental rights.

As a general approach, we recommend that the EU refine its legislation to address typical situations in which violations of Art. 8 ECHR occur. The EU legislative bodies should follow the approach of 'overinclusive legislative balancing' by granting an individual right to family reunification and a right to a secure legal status, respectively, to *all* persons in critical situations. While there is no strict obligation under international law to adopt

644 K. F. Hinterberger, *Regularisierungen irregulär aufhältiger Migrantinnen und Migranten* (2020) chapter 5.

645 Ibid., at 125.

646 Lutz, 'Non-removable Returnees under Union Law: Status Quo and Possible Developments', 20 *European Journal of Migration and Law (EJML)* (2018) 50, at 46.

such an approach, the EU would more effectively prevent unlawful results in a field in which it is generally accountable due to earlier legislative activity occupying the fields of family reunification, long-term residence, and return policy.

Recommendation 1: Prohibit integration requirements that amount to violations of the right to family reunification

We recognize that discretionary requirements of socio-cultural integration laid down in the FR Directive must be construed in accordance with EU fundamental rights, which, in turn, mirror Human Rights. Pending a revision of this Directive, successful litigation strategies mobilizing national courts could further clarify the limits of using integration requirements as a means of restrictive immigration policies.

To address the issue more systematically, we recommend revising the FR Directive to circumscribe Member States' discretion through an enhanced agenda of 'overinclusive legislative balancing'. First, we recommend amending Art. 7(2) of the FR Directive with a view to abolishing policies of establishing pre-departure integration conditions. If this is not feasible politically, post-entry integration measures must be the only option whenever they would equally (or better) promote the integration of the family member. A maximum waiting period for the family members staying abroad should be established. Second, a horizontal clause should be included stipulating that integration measures or conditions established by Member States must not pursue the aim, nor have the practical effect, of preventing family reunification.

In terms of the personal scope of the FR Directive, beneficiaries of subsidiary protection need to be included, under the same conditions as Convention refugees. This systematic gap not only gives rise to violations of the right to non-discrimination pursuant to Art. 14 ECHR (see Chapter 4) but is also likely to produce substantive violations of Art. 8 ECHR.

Recommendation 2: Facilitate access to the status provided by the Long-term Residents Directive

In view of the security-driven policies of expulsions adopted by EU Member States, we recommend that the EU facilitate access to the status pro-

vided by the LTR Directive, to ensure that more settled migrants are effectively protected against expulsion.

In view of the uneven implementation of the Directive in the Union, the Commission should work with the Member States concerned and identify the grounds preventing eligible migrants from applying for, or being granted, long-term resident status. Hidden restrictive practices should be stopped and potential beneficiaries actively be encouraged. Such consistent policy would also serve as a safety net against policy changes in Member States that currently do not target settled migrants.

In addition, the requirements laid down in the Directive should be liberalized where they have the practical effect of preventing settled migrants from obtaining LTR status. We therefore recommend the following amendments. First, the EU legislature should clarify that integration conditions established by Member States in accordance with Art. 5(2) of the LTR Directive must be based on objective, non-discriminatory criteria and that the conditions of application of such criteria must not make it impossible or excessively difficult to achieve LTR status. To ensure that language requirements are proportionate in view of the purpose of facilitating the integration of long-term residents, the EU legislature should establish a maximum level according to the Common European Framework of Reference for Languages (CEFR); we suggest a level of A2. Second, in respect of the socio-economic requirements, the amended text of the Directive should explicitly state that the individual circumstances of each applicant must be considered. Third, the EU legislature should contemplate lowering the qualifying period from five years to three years, a proposal the Commission has already made relating to persons enjoying international protection in the EU.[647] In any case, for the purpose of calculating the period of legal and continuous residence, authorization to stay during the asylum procedure should be fully recognized.

Recommendation 3: Develop a comprehensive legislative framework on regularizations

Given the general trend in the Union toward policies that aim at more effective returns, it is very likely that actual Human Rights violation will occur whenever the relevant legislative framework does not provide for

647 European Commission, Proposal for a Regulation on Asylum and Migration Management, COM(2020) 610, 23 September 2020, Art. 71 and recital 39.

systematic assessment of these claims. It is imperative that the Return Directive explicitly stipulate that Member States shall 'respect' the rights to both private and family life of irregular migrants at all stages of the return procedure, rather than merely 'take due account of' the latter right. Art. 5 of the Return Directive should be amended accordingly.

Moreover, the Directive should recognize that EU law entails a right to regularization if a continuation of the return procedure would amount to a violation of Art. 7 EU-CFR/Art. 8 ECHR. To this end, the EU legislature should prohibit policies of unlimited postponement of deportations. We recommend amending the Return Directive to stipulate a strict maximum period for successive postponement of removal according to Art. 9(2) of the Return Directive; we suggest a maximum period of 18 months. This amendment would be based on Art. 79(2)(c) TFEU, which gives the EU the power to legislate on all matters related to illegal immigration and unauthorized residence. It would complement the regulation of socio-economic rights of irregular migrants, including but not limited to non-removable persons, to be defined in binding legal terms by the EU legislature (see Chapter 6).

Adopting a more comprehensive approach of replacing Member States' discretion by way of legislative balancing, the EU should work toward a legislative instrument that regulates claims to regularizations based on Art. 7 EU-CFR/Art. 8 ECHR. The Commission should draft a proposal for an EU Regularization Directive (a 'Directive of the European Parliament and the Council on common standards and procedures in Member States for regularizing illegally staying third-country nationals').[648] This new Directive should provide for minimum harmonization of the requirements for terminating the illegal stay of third-country nationals by way of regularization. The scope of the Directive should at a minimum include all persons 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). This Directive would be based on Art. 79(2)(a) and (b) TFEU – that is, the comprehensive power of the EU to define the conditions of

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648 We concur with a proposal made by K. F. Hinterberger, *Regularisierungen irregulär aufhältiger Migrantinnen und Migranten* (2020), chapter 6; Hinterberger, 'An EU Regularization Directive: An Effective Solution to the Enforcement Deficit in Returning Irregularly Staying Migrants', 26 *Maastricht Journal of European and Comparative Law (MJ)* (2019) 736; on the discussions of the topic at EU level, see Lutz, 'Non-removable Returnees under Union Law: Status Quo and Possible Developments', 20 *European Journal of Migration and Law (EJML)* (2018) 50, at 46–50.

entry and residence of third-country nationals (note that Art. 79(5) TFEU is not applicable since the beneficiaries are already present in the EU).