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The social security of irregular migrant workers, as compared to the social security of nationals who engage in undeclared work

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Preface

This doctoral thesis is part of an international and multi-disciplinary research programme called Cross Border Welfare State. The Cross Border Welfare State programme investigates the relationship between immigration, social security and integration. It is clustered around six topics. The first two topics deal with access to social security for two different groups of migrants: asylum-seekers and irregular migrant workers. The other four topics are: income requirements in immigration law; integration, social security and fundamental rights; integration, enhanced participation and return migration; and perceptions of social security and immigration. These issues are being dealt with by legal researchers from the Vrije Universiteit Amsterdam and the Katholieke Universiteit Leuven, as well as by sociological researchers from the institutes Regioplan Beleidonderzoek Amsterdam and ITS Nijmegen. The research of the four legal researchers is being carried out as doctoral research projects, whereas the sociological research is being carried out by postdoctoral investigators. The programme is financed by the Dutch Stichting Instituut GAK. The aim is to assist national and European legislators in making informed choices concerning the legal position of migrants in social security systems.

I have striven to state the law as it stood on 1 December 2010. Exceptionally, I have also referred to legal developments that have occurred after this date. On 1 December 2010, I also accessed all internet links referred to in this research for the last time.

Acknowledgment

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Since English is not my mother tongue, I put the proof-read into the hands of a master of his craft: Philip Lucien. Many thanks to you, Philip, for your excellent language revision and our good cooperation. In this context I also want to give my sincere thanks to Bart Deceuninck, who made the language revision possible.

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Contents

Abbreviations

Admin L.R.	Administrative Law Reports (Canada)
AKW	Algemene Kinderbijslagwet (General Child Benefits Act) (The Netherlands)
All E.R.	All England Law Reports (England)
Alta. L.R.	Alberta Law Reports
Anw	Algemene nabestaandenwet (General Survivor's Benefits Act) (The Netherlands)
AOW	Algemene Ouderdomswet (General Old Age Pension Act) (The Netherlands)
AP	Additional Protocol
Arr. Cass.	Arresten Hof van Cassatie (Judgments of the Court of Cassation) (Belgium)
Arr. R.v.S.	Arresten Raad van State (Judgments of the Council of State) (Belgium)
AWBZ	Algemene Wet Bijzondere Ziektekosten (General Exceptional Medical Expenses Act) (The Netherlands)
BCLI Report	British Columbia Law Institute Report
B.L.R.	Business Law Reports (Canada)
B.S.	Belgisch Staatsblad (Belgian State Gazette)
BSN	Burgerservicenummer (Citizen Service Number) (The Netherlands)
B.Z.	Buitengewone zitting (Extraordinary session) (Belgium)
c.	chapter
C97	Migration for Employment Convention
C102	Social Security (Minimum Standards) Convention
C121	Employment Injury Benefits Convention
C128	Invalidity, Old-Age and Survivors' Benefits Convention
C130	Medical Care and Sickness Benefits Convention
C143	Migrant Workers (Supplementary Provisions) Convention
C168	Employment Promotion and Protection against Unemployment Convention
C183	Maternity Protection Convention
CAD	Canadian Dollar
CarswellAlta	Carswell Alberta Cases
CarswellNat	Carswell National Law Reports (Canada)
CarswellOnt	Carswell Ontario Cases
CarswellQue	Carswell Quebec Cases
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
C.C.E.L.	Canadian Cases on Employment Law
CCTB	Canada Child Tax Benefit
CDB	Child Disability Benefit (Canada)
C.E.B. & P.G.R.	Canadian Employment Benefits and Pension Guide Reports
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CHC	Community Health Centre (Canada)
C.L.L.C.	Canadian Labour Law Cases
COA	Centraal Orgaan opvang asielzoekers (Central Agency for the Reception of Asylum-Seekers) (The Netherlands)

CoE	Council of Europe
COM	Commissievergadering (Meeting of the Commission) (Belgium)
Cowp.	Cowper's King's Bench Reports (England)
CPP	Canada Pension Plan
C.R.	Criminal Reports (Canada)
CRC	Convention on the Rights of the Child
C.R.C.	Consolidated Regulations of Canada, 1978
CRIV	Voorlopige versie van het Integraal Verslag (Provisional version of the integral protocol) (Belgium)
CRPD	Convention on the Rights of Persons with Disabilities
CSA	Children's Special Allowance (Canada)
C.T.C.	Canada Tax Cases
CTHB	Convention on Action against Trafficking in Human Beings
CTOC	Convention against Transnational Organized Crime
CTOC-P1	Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime
CUB	Canadian Umpire Benefit (decision of the Umpire under the EI Act)
CVZ	College voor Zorgverzekeringen (Health Care Insurance Board) (The Netherlands)
D.L.R.	Dominion Law Reports (Canada)
DmfA	Déclaration multifonctionelle/multifunctionele Aangifte (multifunctional declaration system) (Belgium)
DIMONA	Déclaration immédiate/onmiddellijke aangifte (Immediate declaration system) (Belgium)
D.T.C.	Dominion Tax Cases (Canada)
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECMW	European Convention on the Legal Status of Migrant Workers
ECR	European Court Reports
EEA	European Economic Area
EI	Employment Insurance (Canada)
E.R.	English Reports (England)
EU	European Union
EUCFR	The Charter of Fundamental Rights of the European Union
EUR	Euro (European currency)
FAO	Fonds voor Arbeidsongevallen (Labour Accident Fund) (Belgium)
FBZ	Fonds voor de Beroepsziekten (Occupational Diseases Fund) (Belgium)
FC	Federal Court (for neutral citation) (Canada)
F.C.	Canada Federal Court Reports
FCA	Federal Court of Appeal (for neutral citation) (Canada)
FEDASIL	Federaal Agentschap voor de opvang van asielzoekers (Federal Agency for the Reception of Asylum-Seekers) (Belgium)
FOD	Federale Overheidsdienst (Federal Public Service) (Belgium)
F.T.R.	Federal Trial Reports (Canada)
GAINS	Guaranteed Annual Income System (Canada)
GBA	Gemeentelijke basisadministratie (municipal database) (The Netherlands)

GIS	Guaranteed Income Supplement (Canada)
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICMW	International Convention on the Protection of All Migrant Workers and Members of Their Families
I.C.R.	Industrial cases reports (England)
IFH	Interim Federal Health (Canada)
ILO	International Labour Organisation
INSZ	Identificatienummer van de Belgische sociale zekerheid (Social Security Number) (Belgium)
IOAW	Inkomensvoorziening Oudere en gedeeltelijk Arbeidsongeschikte werkloze Werknemers (Act on Income Provisions for Older, Partially Disabled Unemployed Persons) (The Netherlands)
IOAZ	Inkomensvoorziening Oudere en gedeeltelijk Arbeidsongeschikte gewezen Zelfstandigen (Act on Income Provisions for Older, Partially Disabled Formerly Self-Employed Persons) (The Netherlands)
I.R.L.R.	Industrial Relations Law Reports (England)
IRPA/R	Immigration and Refugee Protection Act/Regulations (Canada)
IVA	Inkomensvoorziening Volledig Arbeidsongeschikten (Benefit for Permanently and Fully Disabled Employees Scheme) (The Netherlands)
JTT	Journal des tribunaux du travail (Belgian law journal)
KSZ	Kruispuntbank van de Sociale Zekerheid (Crossroads Bank for Social Security) (Belgium)
LJN	Landelijk Jurisprudentie Nummer (National Case Law Number) (The Netherlands)
LMR	Labour Market Re-entry (service) (Canada)
LOE	Loss of Earnings (benefit) (Canada)
LRI	Loss of Retirement Income (benefit) (Canada)
N.B.R.	New Brunswick Reports
NCBS	National Child Benefit Supplement (Canada)
NEL	Non-Economic Loss (benefit) (Canada)
Nfld. & P.E.I.R.	Newfoundland and Prince Edward Island Reports
N.R.	National Reporter (Canada)
O.A.C.	Ontario Appeal Cases
OAS	Old Age Security (Canada)
OCCS	Ontario Child Care Supplement for Working Families
OCMW	Openbare Centra voor Maatschappelijk Welzijn (Public Centres for Social Welfare) (Belgium)
ODSB	Ontario Disability Support Program
OHIP	Ontario Health Insurance Plan
OJ	Official Journal of the European Union
ONWSIAT	Ontario Workplace Safety and Insurance Appeals Tribunal
O.R.	Ontario Reports
Q.B.D.	Queen's Bench Division (England), Law Reports
QPIP	Quebec's Parental Insurance Plan
QPP	Quebec Pension Plan

R151	Migrant Workers Recommendation
(R)ESC	(Revised) European Social Charter
Rev.dr.étr	Revue du droit des étrangers (Belgian law journal)
R.F.L.	Report of Family Law (Canada)
RIZIV	Rijksinstituut voor ziekte- en invaliditeitsverzekering (National Sickness and Invalidity Insurance Institute) (Belgium)
RKW	Rijksdienst voor Kinderbijslag voor Werknemers (National Office for Family Allowances for Employees) (Belgium)
R.P.R.	Real Property Reports (Canada)
R.S.C.	Revised Statutes of Canada, 1985
R.S.O.	Revised Statutes of Ontario, 1990
R.S.Q.	Revised Statutes of Quebec
RSZ	Rijksdienst voor Sociale Zekerheid (National Social Security Office) (Belgium)
RVA	Rijksdienst voor Arbeidsvoorziening (National Employment Office) (Belgium)
Rva 2005	Regeling verstrekkingen asielzoekers en andere categorieën vreemdelingen 2005 (Regulation on Services for Asylum-Seekers and Other Categories of Aliens) (The Netherlands)
Rvb	Regeling verstrekkingen bepaalde categorieën vreemdelingen (Regulation on Services for Certain Categories of Aliens) (The Netherlands)
RVP	Rijksdienst voor Pensioenen (National Office for Pensions) (Belgium)
S.C.	Statutes of Canada
SCC	Supreme Court of Canada (for neutral citation)
S.C.R.	Canada Law Reports, Supreme Court of Canada
Sched.	Schedule
SIN	Social Insurance Number (Canada)
SIS-kaart	Sociale identiteitskaart (Social Security Card) (Belgium)
S.O.	Statutes of Ontario
Soc. Kron.	Sociaalrechtelijke kronieken (Belgian law journal)
Sofi-nummer	Sociaal-fiscaal nummer (Social Fiscal Number) (The Netherlands)
SOR	Statutory Orders and Regulations (Canada)
S.Q.	Statutes of Quebec
Stb	Staatsblad (State Journal) (The Netherlands)
Stcrt	Staatscourant (State Gazette) (The Netherlands)
Supp.	Supplement
Tax A.B.C.	Tax Appeal Board Cases (Canada)
T.C.J.	Tax Court Judge (Canada)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
T.L.R.	Times Law Reports (England)
UCCB	Universal Child Care Benefit (Canada)
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN Doc	Documents of the United Nations
U.K.	United Kingdom
U.S.	United States of America

Wajong	Wet arbeidsongeschiktheidsvoorziening jonggehandicapten (Disablement Assistance Act for Disabled Young Persons) (The Netherlands)
WAO	Wet op de Arbeidsongeschiktheidsverzekering (Occupational Disability Insurance Act) (The Netherlands)
WAZ	Wet arbeidsongeschiktheidsverzekering zelfstandigen (Occupational Disability Insurance Act for Self-Employed Persons) (The Netherlands)
WAZO	Wet arbeid en zorg (Work and Care Act) (The Netherlands)
W.C.A.T.R.	Workers' Compensation Appeals Tribunal Reports (Canada)
Wet BIG	Wet op de beroepen in de individuele gezondheidszorg (Individual Health Care Professions Act) (The Netherlands)
Wet COA	Wet Centraal Orgaan opvang asielzoekers (Act on the Central Agency for the Reception of Asylum-Seekers) (The Netherlands)
Wet Wia	Wet werk en inkomen naar arbeidsvermogen (Work and Income According to Labour Capacity Act) (The Netherlands)
WGA	Werkhervattingsregeling Gedeeltelijk Arbeidsongeschikten (Resumption of Work for Partially Disabled Employees Scheme) (The Netherlands)
WL	Westlaw
WSI (B/AT)	Workplace Safety and Insurance (Board/Appeals Tribunal) (Canada)
WW	Werkloosheidswet (Unemployment Insurance Act) (The Netherlands)
WWB	Wet Werk en Bijstand (Work and Social Assistance Act) (The Netherlands)
WWIK	Wet Werk en Inkomen Kunstenaars (Work and Income for Artists Act) (The Netherlands)
W.W.R.	Western Weekly Reports (Canada)
ZVW	Zorgverzekeringswet (Health Care Insurance Act) (The Netherlands)
ZW	Ziektewet (Sickness Benefits Act) (The Netherlands)

Translations

(most relevant ones)

Belgium

Belgian State Gazette	Belgisch Staatsblad
Chamber	Kamer
Circular Letter	Omzendbrief
Constitutional Court	Grondwettelijk Hof
Aliens' Appeal Council	Raad voor Vreemdelingenbetwistingen
Council of State	Raad van State
Court of Arbitration	Arbitragehof
Court of Cassation	Hof van Cassatie
Crossroads Bank for Social Security	Kruispuntbank van de Sociale Zekerheid
Crossroads Bank Number	Kruispuntbanknummer, bisnummer
Crossroads Bank Registers	Kruispuntbankregisters
Disabled Person's Allowance	Tegemoetkomingen aan personen met een handicap
Federal Agency for the Reception of Asylum-Seekers	Federaal Agentschap voor de opvang van asielzoekers
Federal Public Service (federal ministry)	Federale Overheidsdienst
FPS Employment, Labour and Social Dialogue	FOD Werkgelegenheid, Arbeid en Sociaal Overleg
FPS Home Affairs	FOD Binnenlandse Zaken
FPS Social Integration, anti-Poverty Policy, Social Economy and Federal Urban Policy	POD Maatschappelijke Integratie Armoedebestrijding, Sociale Economie en Grootstedenbeleid
FPS Social Security	FOD Sociale Zekerheid
Guaranteed Family Allowance	Gewaarborgde gezinsbijslag
Immigration Service	Dienst Vreemdelingenzaken
Instruction	Instructie
Integration Income	Leefloon
Labour Accident Fund	Fonds voor Arbeidsongevallen
Labour Court of First Instance	Arbeidsrechtbank / Tribunal du travail
Labour Court of Appeal	Arbeidshof / Cour du Travail
Maximum Wage Threshold	Maximum basisjaarloon
Minimum Income for the Elderly	Inkomensgarantie voor ouderen
Minimum Income Schemes	Minimumsvoorzieningen
National Office for Family Allowances for Employees	Rijksdienst voor Kinderbijslag voor Werknemers
National Employment Office	Rijksdienst voor Arbeidsvoorziening
National Office for Pensions	Rijksdienst voor Pensioenen
National Register Number	Rijksregisternummer
National Sickness and Invalidity Insurance Institute	Rijksinstituut voor ziekte- en invaliditeitsverzekering
National Social Security Office	Rijksdienst voor Sociale Zekerheid

Notice	Bericht
Occupational Diseases Fund	Fonds voor de Beroepsziekten
Parliamentary documents	Parlementaire stukken
Public Centres for Social Welfare	Openbare Centra voor Maatschappelijk Welzijn
Public Prosecutor	Procureur des Konings van het Openbaar Ministerie
Regulation	Verordening
Relief Fund for Sickness and Invalidity Insurance	Hulpkas voor ziekte- en invaliditeitsverzekering
Report to the king	Verslaag aan de koning
Royal Decree	Koninklijk Besluit
Senate	Senaat
Social Integration	Maatschappelijke integratie
Social Security Card	Sociale identiteitskaart, SIS-kaart
Social Security Number	Identificatienummer van de Belgische sociale zekerheid, INSZ-nummer
Social Welfare Services	Maatschappelijke dienstverlening
Specifications	Preciseringen

The Netherlands

Attachment to Proceedings	Aanhangsel van de Handelingen
Central Agency for the Reception of Asylum-Seekers	Centraal Orgaan opvang asielzoekers
Central Appeals Tribunal	Centrale Raad van Beroep
Citizen Service Number	Burgerservicenummer
Council of State	Raad van State
Court of Appeal	Gerechtshof
Decree	Besluit
District Judge	Kantonrechter
Dutch Healthcare Authority	Nederlandse Zorgautoriteit
Employee Insurance Administration Institution	Uitvoeringsinstituut Werknemersverzekeringen
Employee insurance schemes	Werknemersverzekeringen
Explanatory Memorandum	Memorie van Toelichting
Explanatory Note	Nota van Toelichting
General insurance schemes	Volksverzekeringen
General Public Prosecutor	Procureur-Generaal
Guidelines	Circulaire
Health Care Insurance Board	College voor Zorgverzekeringen
Immigration and Naturalisation Service	Immigratie- en Naturalisatiedienst
Inspection Service for Work and Income	Inspectie Werk en Inkomen
Local executives	Colleges van Burgemeesters en Wethouders
Ministry of Finance	Ministerie van Financiën
Ministry of Health, Welfare and Sport	Ministerie van Volksgezondheid, Welzijn en Sport
Ministry of Security and Justice	Ministerie van Veiligheid en Justitie
Ministry of Social Affairs and Employment	Ministerie van Sociale Zaken en Werkgelegenheid
Municipal database	Gemeentelijke basisadministratie

National case law number	Landelijk Jurisprudentie Nummer
National Office for Documents of the Royal Constabulary	Nationaal Bureau Document van de Koninklijke Marechaussee
Order in Council	Algemene maatregel van bestuur
Parliamentary Papers	Kamerstukken
Regional Court	Rechtbank
Regulation	Regeling
Secretary of State	Staatssecretaris
Social Fiscal Number	Sociaal-fiscaal nummer
Social Insurance Agency	Sociale Verzekeringsbank
State Gazette	Staatscourant
State Journal	Staatsblad
Supreme Court of the Netherlands	Hoge Raad der Nederlanden
Tax Administration	Belastingdienst

Introduction

1. The problem

Population shifts have occurred since time immemorial.[1] However, numbers, patterns and impacts of migration have significantly changed. In the second half of the nineteenth century, when the more industrialised countries of the North Atlantic reached levels of wealth that exceeded those of other regions and migration towards these industrially developed countries reached a new peak, qualitative and quantitative restrictions on entry began to be introduced. These measures for the regulation of immigration created the possibility of unauthorised entry, residence and employment by aliens.[2] Since that time, countries all over the world have been confronted with these phenomena.

Reliable data on the magnitude of irregular border crossing, irregular residence and irregular employment is, by its very nature, difficult to obtain. However, it appears that irregular labour migration has received a boost in recent decades. It seems to have been on the rise since the mid-1970s and to be taking place on a larger scale than ever before – particularly towards developed countries.[3] The International Organization for Migration estimates that 10 to 15 percent of all migrants worldwide are in an irregular situation. This would amount to between 21 and 32 million migrants who are either not authorised to be or not authorised to work in a country.[4] For the European Union, it is estimated that between 4.5 and 8.4 million migrants live without authorisation in its Member States.[5] Most of these unlawfully residing migrants are assumed to be making their living by working in the country –without being authorised to do so.[6]

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[1] See *inter alia* Robin Cohen, introduction to *Theories of Migration*, ed. Robin Cohen (Cheltenham/Brookfield: An Elgar Reference Collection, 1996), p. xi; Patrick Manning, *Migration in World History* (New York/London: Routledge, 2005).

[2] Mark Miller, "Illegal Migration," in *The Cambridge Survey of World Migration*, ed. Robin Cohen (Cambridge: Cambridge University Press, 1995), p. 537.

[3] United Nations Department of Economic and Social Affairs, *International Migration Report 2002* (New York: United Nations, 2002), p. 28; United Nations Department of Economic and Social Affairs, *World Economic and Social Survey 2004 – Part II: International Migration* (New York: United Nations, 2004), p. 82; and International Labour Conference, 87th session, 1999, Report of the Committee of Experts on the Application of Conventions and Recommendations, *General Survey on the Reports on the Migration for Employment Convention (Revised) (No. 97), and Recommendation (Revised) (No. 86), 1949, and the Migrant Workers (Supplementary Provisions) Convention (No. 143), and Recommendation (No. 151), 1975* (Geneva: International Labour Office, 1999), § 289.

[4] International Organization for Migration, *World Migration Report 2010 – The future of migration: Building capacities for change* (Geneva: International Organization for Migration, 2010), p. 29.

[5] The European Commission and the European Parliament estimate that between 4.5 and 8 million migrants live unlawfully in the European Union. See the European Commission, "Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals," 16 May 2007, C6-0143/2007, § 120. See also European Parliament, "Illegal immigrants: Penalise employers, not workers," Press release, 5 November 2008. According to OECD estimates, between 5.6 and 8.4 million foreigners are in the European Union without authorisation. See Global Commission on International Migration, *Migration in an Interconnected World: New Directions for Action: Report of the Global Commission on International Migration* (Switzerland: SRO Kundig, 2005), p. 32.

[6] See European Parliament, "Illegal immigrants: Penalise employers, not workers," and Harald Lederer, "Typologie und Statistik illegaler Zuwanderung nach Deutschland," in *Migration und Illegalität*, ed. Eberhard Eichenhofer (Osnabrück: Universitätsverlag Rasch, 1999), p. 56.

The growing number of irregular migrant workers, *i.e.* unlawfully or lawfully present foreigners who engage in employment although not legally authorised to do so, increasingly impacts on host countries. In particular, the rising number of irregular migrant workers poses a challenge for national social security policy. The challenge is twofold.[7] First, irregular work by foreigners is usually undeclared work, *i.e.* work for which no social security contributions and taxes are paid.[8] This leads to lost revenue for social security funds and public finances. Second, irregular migrant workers may be confronted with the realisation of a social risk, such as the loss of income due to the birth of a child or the need for health care. This poses the question for social security of how to deal with people who have no authorisation to work in the country, and possibly also no authorisation to reside there. The responses to the first challenge are rather straightforward. The objective is to reduce undeclared work in general, and undeclared work by irregular migrant workers in particular. The measures to combat undeclared and irregular work are to a large extent known,[9] although in practice there may be constraints, such as financial constraints or lack of political will.[10]

The situation is different with respect to the second challenge, *i.e.* the social security status of irregular migrant workers. Here, preliminary investigations show that there is no uniform response and that national legislators struggle with the social security status of irregular migrant workers. Out of immigration policy considerations, some countries have almost completely excluded irregular migrant workers from statutory social security.[11] By contrast, other countries, although not pursuing an explicit policy of inclusion, treat irregular migrant workers in many respects like national workers.[12] Legal science also struggles with the question of rights, including social security rights, for foreigners with an irregular status. In the general discussion on rights for foreigners in an irregular situation, one common position is that, because irregular migrant workers are present in the country and taking up employment there without State consent, they should not be entitled to most rights.[13] By contrast with this restrictive doctrine, others argue that no importance should be attached to a foreigner's formal status: the decisive point, they claim, is that he or she is a human being and is physically present on national territory, and should therefore

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[7] Further *possible* challenges are neglected here. For instance, depending on the economic situation, irregular migrant workers may displace regular migrant workers and national workers. This may lead to higher expenditure on income replacement benefits, such as unemployment and retirement benefits.

[8] For this relationship see *inter alia* European Commission, "Communication from the Commission of 7 April 1998 on undeclared work", COM(98) 219 final, not published in the *Official Journal*, § 2.5; European Commission, "Explanatory Memorandum," § 140; International Organization for Migration, *World Migration Report 2010*, p. 29-30; International Labour Conference, 87th session, *General Survey on Conventions Nos. 97 and 143*, § 293, endnote 14; and Friedrich Schneider and Dominik Enste, "Hiding in the shadows: The growth of the underground economy," *Economic Issues*, no. 30 (March 2002).

[9] See for instance Danny Pieters, *Bringing to the surface black and grey work: A study on social security strategies to fight undeclared work*, Leuven, spring 2007, p. 33 ff; Jozef Pacolet and Frederic De Wispelaere, *Naar een observatorium ondergrondse economie* (Leuven/The Hague: Acco, 2009), p. 49 ff and pp. 147, 151; and the work of Friedrich Schneider, such as Friedrich Schneider and Benno Torgler, "Shadow economy, tax morale, governance and institutional quality: A panel analysis," *Center for Economic Studies & Ifo Institute for Economic Research Working Paper*, no. 1923 and *Institute for the Study of Labor Discussion Paper*, no. 2563 (February 2007), p. 32 ff.

[10] See *inter alia* Jozef Pacolet et al, *Zwartwerk in België – Travail au noir en Belgique* (Leuven/The Hague: Acco, 2009), pp. 119-20, 123-24.

[11] For instance, this is the case for France, the Netherlands and the United States of America.

[12] See for instance Belgium, Canada or Germany.

[13] See *inter alia* Peter Schuck and Rogers Smith, *Citizenship without consent* (New Haven: Yale University Press, 1985), pp. 131-40. They confirmed their point of view in the 1990s. See Peter Schuck and Rogers Smith, "Citizenship without consent," *Social Contract Journal*, vol. 7, no. 1 (1996), pp. 21-25.

be entitled to most rights even if he or she is in an irregular situation.[14] Some authors have especially addressed the question of social security for migrants in an irregular situation. These authors have in particular sought support from the international legal framework, most notably from international human rights law. However, this approach has also failed to produce unequivocal results.[15]

The different perspectives may not be surprising, given the conflicting priorities that exist in the context of migrants in an irregular situation. States decide who can enter, reside and work in their territory.[16] In addition, they decide to whom they will grant full membership, in the form of citizenship, in the political community. Migrants in an irregular situation by definition act without State consent and violate migration laws. They are by definition not full members of the political community. States therefore can and indeed must take action against the violation of laws and exclude migrants in an irregular situation from full participation in the political community. On the other hand, States organise the co-existence of all people within their jurisdiction. Amongst other functions, States – at least the more economically developed ones with the political will to do so – provide for people's social security, *i.e.* for arrangements shaping solidarity with people facing specific social risks. This means that they aspire to provide protection for people facing (the threat of) a lack of earnings or particular costs due to a recognised social risk, such as old age or incapacity for work.[17] What is more, States may be under international obligations to provide for an individual's social security and individuals, in turn, may have a right to enjoy social security protection. The question, however, is to what extent States have an interest in including migrants in an irregular situation in the provisions of their social security laws, or indeed are under an obligation to do so. Is it in the State's interest to provide employment income replacement benefits for female irregular migrant workers who give birth to a child? Or is it rather in the State's interest to rule that a person who acted without State consent when taking up employment in the first place is not entitled to such benefits? Is it in the State's interest to provide health care to an unlawfully residing migrant who is in medical and financial need? Or is it rather in the State's interest to put an end to such unlawful presence by deporting the migrant? Moreover, is it correct to talk about State interests in this respect, or should we rather be talking about State obligations?

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[14] See for instance the work of Linda Bosniak, who prefers the territorial conception of rights for migrants over the status-centred approach. See Linda Bosniak, "Being here: Ethical territoriality and the rights of immigrants," *Theoretical Inquiries in Law*, vol. 8, no. 2 (2007); Linda Bosniak, *The citizen and the alien: Dilemmas of contemporary membership* (Princeton/Oxford: Princeton University Press, 2006).

[15] For instance, some authors such as Ryszard Cholewinski have deduced from the international human rights instruments a State obligation to provide social assistance to enable the irregular migrant to live in dignity, whereas other authors such as Danny Pieters, Paul Schoukens and Gijsbert Vonk have discovered no such general obligation. See Ryszard Cholewinski, *Irregular migrants: Access to minimum social rights* (Strasbourg: Council of Europe, 2005), p. 46; Danny Pieters and Paul Schoukens, *Exploratory report on the access to social protection for illegal labour migrants* (Strasbourg: Council of Europe, 2004), p. 14 f; and Gijsbert Vonk, "Het recht van mensen zonder papieren op minimumvoorzieningen: De invloed van internationale grondrechtverklaringen," *Tijdschrift voor sociaal recht*, no. 4 (2005), p. 607 f. For international law and human rights based research see also, for instance, Paul Meehan, "Combating restrictions on immigrant access to public benefits: A human rights perspective," *Georgetown Immigration Law Journal*, vol. 24 (1997); and Herwig Verschueren, "Toegang to minimumvoorzieningen voor mensen zonder papieren: een aftasten van de grenzen van het Europees recht," *Tijdschrift voor Sociaal Recht*, no. 4 (2005).

[16] There are only very marginal limitations to the State's sovereignty in this respect – such as international refugee law, which, however, does not confer a right to enter a *certain* country or to receive citizenship from a country.

[17] For the definition see Danny Pieters, *Social Security: An introduction to the basic principles*, 2. ed. (Alphen aan den Rijn: Kluwer Law International, 2006), pp. 2-3.

2. Research objective and research questions

This thesis seeks to contribute to the discussion on migrants in an irregular situation outlined above. More specifically, it aims to approach the question how the legal position of irregular migrant workers could be defined in social security law. To meet this objective, I plan to break new ground and deploy a method which has not hitherto been used in legal research: I will compare the social security position of irregular migrant workers with that of nationals of the country of employment who engage in undeclared work. The reason for doing this is that I want to come up with a suggestion about the social security position of irregular migrant workers by analysing social security law itself. Up to now, legal research has usually made proposals *de lege ferenda* from an analysis of international law and fundamental rights.[18] This, as we have already seen, has not led to uniform results. Therefore, we want to investigate whether social security law itself provides answers on how to deal with irregular migrant workers.

The analysis of social security law will be carried out by investigating the current legal position of irregular migrant workers. This position will then be juxtaposed with the position of a reference group, in order to put the result in context.[19] Since preliminary investigations have shown that the employment of irregular migrant workers is usually not declared to the social security authorities,[20] our reference group will be undeclared workers. What is more, since we consider both irregular migrant workers without status and irregular migrant workers with correct residence status in the country of employment, our research will gain more insight by taking national workers, and not migrant workers with employment and residence authorisation, as the reference group. This should allow us to learn not only about the importance of residence authorisation and employment authorisation in national social security law, but also about the importance of citizenship.

By comparing the social security position of irregular migrant workers and undeclared national workers, we will see what the differences and similarities are. This relates in the first instance to the various social risks. With respect to which social risks are the two groups under investigation treated equally, similarly or differently? It also relates to the different aspects of social security law. Are there similarities or differences with respect to coverage, benefit entitlement criteria, or the payment of benefits? Besides wanting to know where the similarities and differences are, we are also interested in the reasons for them. For instance, is it due to the application of an overriding immigration interest that irregular migrant workers are excluded from the scope *ratione personae* of social security? Is it based on social security logic that irregular migrant workers or undeclared national workers are not able to fulfil benefit entitlement criteria? Is it because of the application

[18] For a rare example of research which considers different national social security approaches, see Pieters and Schoukens, *Exploratory report*.

[19] Danny Pieters calls the process of placing results in a broader context "system-internal comparison". See Danny Pieters, *Sociale-zekerheidsrechtsvergelijking ten dienste van Europa. Preadvies voor de Nederlandse Vereniging voor Rechtsvergelijking*. Reeks geschriften van de Nederlandse vereniging voor rechtsvergelijking, vol. 45 (Deventer: Kluwer, 1992), p. 38 ff.

[20] See *inter alia* European Commission, Communication, § 2.5; European Commission, "Explanatory Memorandum," § 140; International Organization for Migration, *World Migration Report 2010*, p. 29-30; International Labour Conference, 87th session, *General Survey on Conventions Nos. 97 and 143*, § 293, endnote 14; and Schneider and Enste, "Hiding in the shadows".

of international law, for example human rights law, that irregular migrant workers enjoy (particular) protection? All of this will help us to understand the current position of irregular migrant workers in social security law and to gain more insight into the logic of social security.

For the sake of completeness it should be noted that we are not comparing irregular migrant workers and undeclared national workers for the purpose of an equal treatment assessment. An equal treatment assessment, as established by case law,[21] analyses whether two groups are in a relevantly similar situation,[22] whether the treatment of the two groups is different and whether a justification for the different treatment exists. This is not the purpose of this comparison between the social security position of irregular migrant workers and undeclared national workers. Rather, the comparison should help us to learn about social security law and come up with suggestions for the social security of irregular migrant workers on the basis of these insights.

The comparison between irregular migrant workers and undeclared national workers will be conducted in three different countries, and the results will be compared between the three countries. This will give us a broader insight into the working of national social security law. In addition, the international comparison of the social security status of irregular migrant workers may produce valuable results in itself. What is more, the international legal framework will also be analysed as regards the social security position of the two groups under investigation. This will be discussed further when we describe our methodology in more detail.

As a means of working towards the research objective, the following research questions have been defined:

1) What is the social security status of an irregular migrant worker?

2) What is the social security status of a national who engages in undeclared work?

3) What are the differences and similarities in the social security status of these two groups and why are there these differences and similarities?

The research questions are built up gradually: answering questions 1 and 2 paves the way for answering question 3. With answers to these questions, it will be possible to draw conclusions about the way irregular migrant workers are treated in national social security law and in international law and to put forward suggestions about how irregular migrant workers could be treated in national social security law.

[21] See European Court of Human Rights, Judgment of 23 July 1968, *Case "Relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium*, Application nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, which has served as a reference for the equal treatment assessment for many national and international courts.

[22] See European Court of Human Rights, Judgment of 18 February 1991, *Fredin v. Sweden (No. 1)*, Application no. 12033/86; or European Court of Human Rights, Judgment of 16 March 2010, *Carson and others v. United Kingdom*, Application no. 42184/05. Case law also talks about analogous or comparable situations. See for instance European Court of Human Rights, Judgment of 29 April 2008, *Burden v. United Kingdom*, Application no. 13378/05.

3. Definitions

For the sake of the law comparison, the above research questions are posed in purely functional terms, without any references to national legislation.[23] This means that the necessary starting-point in this thesis will be to define with great care the concepts which will be used throughout.

Social security: a statutory system based on the principle of solidarity, which provides protection against (the threat of) a lack of earnings or against particular costs in case of the occurrence of a recognised social risk.[24] For the delineation of social risks as a starting-point will be taken the contingencies enumerated in International Labour Organization (ILO) Convention No. 102, which contains minimum standards of social security. These contingencies are: medical care, sickness, unemployment, old age, employment injury,[25] family, maternity, invalidity and death. In addition to these risks, need, *i.e.* the lack of means necessary for a decent existence, will be taken on board as a further contingency. This investigation will not cover the social risk of becoming dependent on care, *i.e.* loss of autonomy or dependency. This is because preliminary investigations revealed no additional value for our research – not least because the risk of care is often already covered by national social security schemes for the risks of medical care, employment injury and need. For the sake of completeness it should be mentioned that education is not considered as a social risk for the purposes of this research. Thus the following contingencies will be included in our research: old age, death, incapacity for work, unemployment, medical care, family and need.[26]

Social security status: a person's legal position, rights and duties in social security.

Work: paid physical or mental activity for an employer. Self-employment, *i.e.* work for oneself, is not covered by the research. Public sector work will be excluded too. The terms 'work' and 'employment', as well as the terms 'worker' and 'employee', will be used synonymously in this research.

Undeclared work: work performed without the social security authorities being informed *and* without social security contributions being paid, despite the obligation to do both these things. The terms 'undeclared work', 'black-economy work' and 'informal work' will be used synonymously. The term 'social security authorities' means all authorities and institutions carrying out tasks for the administration of social security. These may be specialised administrative bodies or bodies created for another purpose, but with a particular social security role, such as tax authorities.

Work that is declared to the social security authorities, but for which the level of income is underreported, is not considered as undeclared work and will hence be excluded from our research. In addition, individuals may engage in work for which they do not have the proper licence or qualification, such as work in the food sector, carpentry or plumbing. This is also excluded from our definition of undeclared work. Finally, no particular attention is paid to work that is not lawful

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[23] See Konrad Zweigert and Hein Kötz, *Introduction to comparative law*, 3. ed., trans. Tony Weir (Oxford: Clarendon Press, 1998), p. 34.
[24] Pieters, *Social Security: An introduction,* pp. 2-3.
[25] This includes occupational diseases. See Article 32 ILO Convention No. 102.
[26] This structure follows that in Danny Pieters, *The social security systems of the member states of the European Union* (Antwerp/Oxford/New York: Intersentia, 2002) and Danny Pieters, *The social security systems of the states applying for membership of the European Union* (Antwerp/Oxford/New York: Intersentia, 2003).

as regards its nature, as might be the case for drug dealing or prostitution. These exclusions will enable us to maintain a proper basis of comparison.

National: a person who possesses the citizenship of the country of employment. For the purposes of our research, the concepts of 'nationality/national' and 'citizenship/citizen' are used interchangeably. I am aware that nationality and citizenship are sometimes attributed different meanings: for instance, nationality may refer to ethnicity or national identity. However, this is not relevant to this research. Nationality and citizenship will therefore be used synonymously.

Irregular migrant worker: a non-national who is working in a country although he or she is not allowed to do so, simply because he or she is not a national. Working without being allowed to do so means working in contravention to national legislation on permission to work in the country. A non-national who possesses a work permit only for a particular (type of) work and is engaging in another activity for which he or she does not have permission to work, will not be considered as an irregular migrant worker for the purposes of our research.

In order to fall within our definition of irregular migrant worker, the non-national may be in the country in contravention or in accordance with legislation on permission to stay in the country. A non-national who is unlawfully present and working unlawfully could be, for instance, a person who entered the country illegally and has never possessed the right to stay or work in the country. However, it could also be a person who entered the country lawfully, but is staying and working unlawfully after the expiry of a visa or after an expulsion decision. Similarly, a non-national who is lawfully present but working unlawfully could be, for instance, a person whose residence permit does not allow him or her to work.

Although the term 'migrant' might suggest that such a person has crossed borders him- or herself, this is not necessarily true. Economically active non-nationals born in the country of immigration may also fall within the working definition of an irregular migrant worker.

Asylum-seekers, also called refugee claimants, may basically also be irregular migrant workers. However, since the social security of asylum-seekers is being specifically investigated in another doctoral research project in the framework of the Cross Border Welfare State programme,[27] I will not deal with irregular migrant workers who have the status of refugee claimants in the country of employment.

I am aware that there is a discussion about the use of the correct terms to describe foreigners who stay and/or work without legal authorisation. In particular the use of the term 'illegal' in this context is often criticised due to its connotation of criminality and because it facilitates dehumanisation.[28] International organisations seem increasingly to be using the terms 'irregular migrants' and 'irregular migrant workers' to indicate irregularities with respect to the authorisation

[27] For more information, see the doctoral thesis of my colleague Lieneke Slingenberg of the Institute for Constitutional and Administrative Law at the VU University Amsterdam.

[28] See *inter alia* Cholewinski, *Irregular migrants*, p. 8 ff and Kees Groenendijk, introduction to *Irregular migration and human rights: Theoretical, European and international perspectives*, ed. Barbara Bogusz, Ryszard Cholewinski, Adam Cygan and Erika Szyszczak (Leiden/Boston: Martinus Nijhoff, 2004), p. xviii f. For another point of view see Pieters and Schoukens, *Exploratory Report*, p. 3 and Catherine Dauvergne, *Making people illegal: What globalization means for migration and law* (Cambridge: Cambridge University Press, 2008), p. 4.

to stay and/or the authorisation to work in the country.[29] Therefore, and because the term 'irregular' appears to describe the problem at stake properly, we will mainly work with this expression. However, when dealing with other expressions in original documents and in order to avoid awkward repetition, we will sometimes replace the term 'irregular' with other expressions. It is important to make it clear here that we do not attach a different meaning to these alternative expressions. That is to say, the expressions 'irregular migrant worker', 'unauthorised migrant worker', 'undocumented migrant worker' and 'illegal migrant worker' will be used synonymously.

4. Methodology and structure

We have already outlined the basic idea of this research. To recall, the basic aim is to compare the current social security status of irregular migrant workers with that of undeclared national workers in order to come up with suggestions on how to deal with irregular migrant workers in social security law. To work towards this objective and to address the above-formulated research questions, the following steps will be taken.

In **Part I** of this thesis, the international legal framework[30] will be analysed with regard to the social security status of irregular migrant workers and undeclared national workers. This analysis serves various purposes. First, it will give us a better understanding of the current position of irregular migrant workers and of undeclared national workers in national social security law. This current position will be investigated later on in Part II. Second, it will give us a better understanding of the results of our law comparison. That is to say, similarities and differences in the social security status of the two investigated groups among the investigated countries may be explained by international legal obligations. The law comparison will be conducted in Part III. Finally, the analysed international legal obligations set out the framework within which suggestions on the social security treatment of irregular migrant workers are put forward. The suggestions will be made in the final considerations in Part IV. More details on the scope and method of the analysis of the international legal framework will be set out in the introduction to Part I.

In **Part II**, the social security status of irregular migrant workers and undeclared national workers will be analysed in three selected countries: Belgium, the Netherlands and Canada, including the Canadian province of Ontario.[31] With a view to the law comparison, which will be carried out in Part III, the analysis in Part II follows the same pattern for every investigated country. Social risk by social risk, the legal position of first irregular migrant workers and then undeclared national workers will be analysed. At the end of the national analysis, the legal position of the two groups under investigation will be compared. More information on the method of these country investigations will be provided in the introduction to Part II.

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[29] This is true for, among other organisations, the Council of Europe, the United Nations, the International Labour Organization and the International Organization for Migration. See also Cholewinski, *Irregular migrants*, p. 8 ff. However, the European Union still appears to prefer the use of the expression "illegal". See in particular the latest documents of the European Union, such as Directive 2009/52 on sanctions against employers of illegally staying third-country nationals.

[30] I do not differentiate between international and supranational legislation. The term 'international legislation' covers both concepts.

[31] For the reasons for this selection see the introduction to Part II.

In **Part III**, the results of Part II will be brought together. To be more precise, a law comparison will be conducted amongst the investigated countries. The law comparison serves two purposes: first, to see how the social security status of irregular migrant workers compares internationally; and, second, to see how the national differences and similarities between the social security of irregular migrant workers and the social security of undeclared national workers compare internationally. More information on the comparative law method will be given in the introduction to Part III.

Parts I to III will allow us to answer the three research questions, *i.e.* what is the social security status of the two groups under investigations, what are the differences and similarities, and why are there these differences and similarities of social security status? Based on these insights, in **Part IV** we intend to come up with suggestions for the social security treatment of irregular migrant workers. In other words, on the basis of the results of our law comparison and within the boundaries set by international law, we will try to develop a concept for how irregular migrant workers could be treated in national social security law.

Part I: International legal framework

Introduction

This Part investigates to what extent international legislation[32] deals with the social security status of irregular migrant workers and nationals who do not declare their work to the social security authorities. To this end, multilateral instruments from the United Nations (UN), the International Labour Organization (ILO), the Council of Europe (CoE) and the European Union (EU) will be analysed.

The different sources of law are reflected in the structure of this Part. It is divided into four chapters, each dealing with a different international organisation. The first two chapters concern the United Nations and the International Labour Organization, as a specialised agency of the United Nations. Their instruments have a universal scope of application. The last two chapters cover instruments of the Council of Europe and of the European Union, which are restricted in their territorial scope of application.

Other international organisations are not considered. These include the World Trade Organization (WTO). For the purposes of this thesis, the only treaty of the World Trade Organization that could be relevant is the General Agreement on Trade in Services (GATS). The so-called 'Mode 4' of this Treaty also covers the provision of services by service suppliers of one Member State, through the presence of natural persons of a Member State in the territory of any other WTO Member State. This includes self-employed and posted workers. Whether migrant workers under an employment contract who are not posted also fall within the scope of the GATS is disputed, let alone the question whether the 'National Treatment' principle, which is a kind of non-discrimination principle, can be applied in the field of social security.[33]

The law to be investigated comprises, most notably, human rights law and social security standard-setting law. Instruments dealing with the coordination of social security will not be included. This is because inclusion would simply go beyond the scope of this research. Multilateral instruments dealing specifically with refugees and stateless persons are likewise not covered. Recognised refugees and stateless persons normally have a right to stay and work in a country and therefore do not fall within our concept of irregular migrant workers. Another specific category amongst aliens is asylum-seekers. However, they are not the focus of this thesis, since their international social security status is investigated in another doctoral thesis in the framework of the Cross Border Welfare State programme.[34] By contrast, victims of human trafficking are taken into consideration. Irregular migrant workers may also be such victims, and we then need to ask what the international instruments that specifically deal with this issue say about their social security status. International legal instruments dealing with the social security position of workers in particular occupations are not covered by this research either. This relates, for instance, to ILO Convention No. 165 concerning Social Security for Seafarers. Instruments dealing with atypical forms of work are only considered if they are of particular relevance for irregular migrant workers or undeclared

[32] I do not differentiate between international and supranational legislation. The term 'international legislation' covers both concepts.

[33] See Nicola Yeates, "The General Agreement on Trade in Services (GATS): What's in it for social security?" *International Social Security Review*, vol. 58, no.1 (2005), pp. 13, 18, 19.

[34] See the thesis of Lieneke Slingenberg at the Institute for Constitutional and Administrative Law of the VU University Amsterdam.

workers. According to the ILO and other sources, this seems to be the case for home work and domestic work.[35]

The objects of our investigation are, in principle, only legally binding instruments. This means instruments which, once they have been ratified or have come into force, impose enforceable obligations upon Contracting States to the treaty or upon Member States of the organisation. Non-binding instruments are only taken into consideration for the interpretation of legally binding ones. However, one legal document is taken into account although it does not explicitly having a binding effect: the Universal Declaration of Human Rights. We will explain the reason for its inclusion later on.

Accordingly, the following pieces of international legislation will be investigated in this Part:

UN Universal Declaration of Human Rights
UN International Covenant on Economic, Social and Cultural Rights
UN International Covenant on Civil and Political Rights
UN International Convention on the Elimination of All Forms of Racial Discrimination
UN International Covenant on Economic, Social and Cultural Rights
UN Convention on the Elimination of All Forms of Discrimination against Women
UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UN Convention on the Rights of the Child
UN Convention on the Rights of Persons with Disabilities
UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the Convention against Transnational Organized Crime

ILO Migration for Employment Convention C97
ILO Migrant Workers (Supplementary Provisions) Convention C143
ILO Social Security (Minimum Standards) Convention C102
ILO Employment Injury Benefits Convention C121)
ILO Invalidity, Old-Age and Survivors' Benefits Convention C128
ILO Medical Care and Sickness Benefits Convention C130
ILO Employment Promotion and Protection against Unemployment Convention C168
ILO Maternity Protection Convention C183

CoE (Revised) European Social Charter
CoE European Convention on Human Rights

[35] Both activities are performed in private households – and are therefore much more hidden. Concerning domestic work, it seems that in many industrialised countries migrant workers, many of whom lack a correct legal status, are employed in domestic work. Moreover, domestic work is often not declared to the social security authorities. The non-declaration of work appears to be a problem in the context of home work too. See, for instance, International Labour Conference, 99th session, 2010, Report IV(1), *Decent Work for Domestic Workers* (Geneva: International Labour Office, 2010), pp. 1, 26; International Labour Conference, 82nd session, 1995, Report V(1), *Home Work* (Geneva: International Labour Office, 1994), p. 8; International Labour Conference, 90th session, 2002, Report of the Director-General, Report VI, *Decent Work and the Informal Economy* (Geneva: International Labour Office, 2002), p. 24; and José Luis Daza, "Informal economy, undeclared work and labour administration," Social Dialogue, Labour Law and Labour Administration Department, *Working Paper No. 9* (Geneva: International Labour Office, June 2005), pp. 38-39.

CoE European Convention on the Legal Status of Migrant Workers
CoE European Code of Social Security
CoE Convention on Action against Trafficking in Human Beings

EU Charter of Fundamental Rights of the European Union
EU Directive 2001/55 on temporary protection in the event of a mass influx of displaced persons
EU Directive 2003/109 on long-term residents
EU Directive 2004/81 on victims of trafficking in human beings
EU Directive 2008/115 on returning illegally staying third-country nationals
EU Directive 2009/52 on sanctions against employers of illegally staying third-country nationals
EU Decision 2003/578 on guidelines for the employment policies of the Members States.

It should be mentioned that the analysed instruments already represent a selection. To be more precise, a pre-analysis took place, in which a number of instruments such as ILO Labour Inspection Convention C81 or ILO Home Work Convention C177 were excluded on the grounds of their lack of relevance for the social security position of the two groups under investigation.

In our analysis of legal instruments, comments by international courts and supervisory bodies will be taken into consideration. However, comments by national courts or national authorities will be excluded. Such national application of international obligations is discussed in Part II of this thesis, when dealing with Belgium, Canada and the Netherlands.

The analysis of the legal instruments will focus on two questions: do irregular migrant workers and nationals who engage in undeclared work fall within the personal scope of application of the instrument in general or of the relevant provisions in particular? And, if so, what does the legal instrument say about the social security status of these two groups of workers? When we examine social security we are primarily interested in what rights are conferred. However, we also take account of any statements in international law on the duties connected with social security, *i.e.* obligations to affiliate with social security or to pay contributions. Statements on the prevention and elimination of irregular work or undeclared work are also taken into consideration, but only insofar as they are relevant for determining the social security status of the two groups under investigation.

When dealing with European Union law, we will only examine the social security status of irregular migrant workers who do not have citizenship of a European Union Member State. In other words, only third-country nationals are taken into account. This is because citizens of Member States of the European Union usually do have the right to take up employment in another European Union Member State and reside lawfully there – leaving aside exceptions which may exist, in particular, in the context of the transitional periods for the free movement of workers from newly acceded Union Member States.

Particular attention will always be paid to non-discrimination clauses. Here, the question is whether these clauses allow for a comparison between the social security position of irregular migrant workers and of nationals who work in the black economy. Alternatively, it can be asked whether the social security status of irregular migrant workers can be compared with that of nationals in general or of regular migrant workers. If a non-discrimination provision allows for such a comparison, we are interested to know whether supervisory bodies have already interpreted these clauses in such a way.

At the end of this Part, two tables will be included. The first table will give an overview of the status of ratification of the investigated instruments as well as of relevant reservations made to the instruments. Both ratifications and reservations will be illustrated in particular with respect to the three investigated countries. The second table will give a concise overview of the rights explicitly granted or denied under international law with regard to social security. The two tables will allow the reader to quickly grasp the relevance of the investigated legal instruments for the social security position of the two groups of workers in the three investigated countries.

1. United Nations

1.1. Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) is a legally non-binding instrument, which was adopted by the General Assembly of the United Nations in 1948.[36] Over the past decades, there has been some discussion as to whether the UDHR nevertheless has become legally binding. Some have argued that the whole Declaration is binding on States on the basis of custom;[37] others have contested this view and have not considered the Declaration as being part of customary international law;[38] others again have been of the opinion that only some, particular human rights of the Declaration are customary law and therefore binding.[39] Besides considering the Declaration as part of customary international law, it has also been brought forward that the UDHR is an interpretation of the Charter of the United Nations and that it therefore should be legally binding as being part of the Charter.[40] Clarity on this issue has not been reached. But there seems to be a tendency amongst international scholars to nowadays regard certain parts of the Declaration as customary international law. This relates, most notably, to the prohibition of torture, slavery and racial discrimination.[41]

1.1.1. Rights related to social security

The UDHR stipulates in Article 22 that "[e]veryone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation [...]". Moreover, Article 25 reads that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control".

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[36] Universal Declaration of Human Rights, UN General Assembly Resolution 217A (III), 10 December 1948, UN Doc A/810.

[37] See Myres McDougal, Harold Lasswell and Lung-chu Chen, *Human rights and world public order* (London: Yale University Press, 1980), pp. 274, 325, 388.

[38] This opinion has been in particular expressed in former decades. See, for instance, Hugh Thirlway, *International customary law and codification* (Leiden: Sijthoff, 1972), pp. 10-11.

[39] See, for instance, Matthias Herdegen, *Völkerrecht*, 9. rev. ed. (Munich: C.H.Beck, 2010), pp. 369-70.

[40] See Thirlway, *International customary law and codification*, p. 11. Others have argued that the General Assembly of the UN does not have the competence to give an authoritative interpretation to the UN Charter. See Egon Schwelb, "The influence of the Universal Declaration of Human Rights on international and national law," in *International human rights: Problems of law, policy and practice*, 4. ed., ed. Richard Lillich, Hurst Hannum, James Anaya and Dinah Shelton (New York: Aspen Publishers, 2006), p. 147.

[41] See, *inter alia*, Herdegen, *Völkerrecht*, pp. 369-70; Timothy Hillier, *Principles of public international law*, 2. ed. (London/Sydney: Cavendish, 1999), pp. 295-96; Peter Malanczuk, *Akehurst's modern introduction to international law*, 7. rev. ed. (London/New York: Routledge, 1997), p. 213.

1.1.1.1. Irregular migrant workers

According to the wording, the rights under Articles 22 and 25 are granted to everyone. A further distinction of any kind is not made. In particular, there is no distinction as to nationality or as to immigration status.

Against the background of the social security of irregular migrant workers, it catches ones eye that the right to social security under Article 22 is afforded to everyone as a member of society. By doing so, Article 22 is the only provision in the UDHR in which the expression 'as a member of society' is added to the wording 'everyone'. Is this evidence that there must be a link with society? And if so, a link of which kind? Legal scholars have not paid attention to this phrase. But we know that it was due to a clerical error, why the term 'social security' was split of from its list in Article 25 and can be found in Article 22.[42] Originally 'security' in Article 25 was meant to be 'social security'. But the word 'social' was inadvertently left out. Therefore, 'social security' was inserted in the umbrella Article 22. And as a consequence, a new meaning had to be found for social security under Article 22. This new meaning seems to be a broader concept, in the sense of human dignity, development of one's personality or social justice.[43] The concept of social security which resembles the one of this doctoral thesis can therefore be found in Article 25. And Article 25 only states that everyone has the right to it, without making a link to being member of society.

However, in 1985, some decades after the adoption of the Universal Declaration of Human Rights, the General Assembly of the UN adopted the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live.[44] This legally non-binding Declaration further specifies, restricts and extends human rights of aliens. Whereas the Declaration confirms the unrestricted application of certain civil rights, such as the right to life, the right to family and private life or the prohibition of torture to all aliens, it confines the application of, in particular, social rights only to aliens lawfully residing in the territory of a State. This is, most notably, the case for the rights to social security, social services, medical care and health protection.[45] But these rights are not only being made subject to a lawful presence. They are also being made subject to a general compliance with the laws of the State in which they reside or are present.[46] Therefore one could easily argue that States do not have to grant these social rights to aliens who are violating alien employment laws. This would mean that both groups of irregular migrant workers are excluded from the human rights to social security, social services, medical care and health protection: those foreigners with an unauthorised stay and an unauthorised work are explicitly excluded; and those with lawful stay, but with unauthorised work are implicitly excluded.

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[42] For an in depth explanation of this clerical error see Johannes Morsink, *The Universal Declaration of Human Rights: Origins, drafting and intent* (Philadelphia: University of Pennsylvania Press, 1999), p. 191 ff.

[43] *Ibid*., pp. 209-10; and Bård-Anders Andreassen, "Article 22," in *The Universal Declaration of Human Rights: A common standard of achievement*, ed. Gudmundur Alfredsson and Asbjørn Eide (The Hague/Boston/London: Martinus Nijhoff, 1999), p. 475.

[44] See Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, Annex to the UN General Assembly Resolution 40/144, 13 December 1985, UN Doc A/RES/40/144.

[45] Article 8 (1) (c) Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live.

[46] Article 8 (1) in conjunction with Article 4 Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live.

It is interesting to remark that one of the main reasons for elaborating this Declaration was exactly to address the uncertainty surrounding the application of the International Bill of Human Rights[47] to aliens. Whereas some commentators argued that the wording 'everyone' leaves not doubt that non-citizens are also addressed, others saw in the lack of the ground 'nationality' as a prohibited ground for discrimination in the relevant international treaties evidence that non-citizens are not included (more on discrimination later on).[48] The 1985 Declaration was then intended to bring an end to this ambiguity.

1.1.1.2. Nationals who engage in undeclared work

As illustrated, the right to social security under Articles 22 and 25 is granted to everyone. These Articles do not lay down any preconditions, such as that a person must have been affiliated with the social security authorities or must have paid social security contributions in order to enjoy the right.

A look at the drafting process of the UDHR reveals that there was a proposal for a paragraph under the right to social security, which should state that every person has "the duty to co-operate with the state [...] in the promot[ion of] his own social security". Later on this paragraph was shortened to the phrase "with the participation of beneficiaries". But also this phrase was eventually not taken over.[49] This draft paragraph could have served as evidence that individuals must cooperate, must affiliate with social security, in order to enjoy their right. It however did not find its way to the final version.

In general, we can see that the drafting discussion on the right to social security was overshadowed by an ideological debate. In brief, the Soviet Union pushed for social security at State expense. Therefore, the Soviet delegation pleaded for a right to 'social insurance' – which in their Constitution meant protection at State expense. Western countries, first and foremost the United States and the United Kingdom, wanted to avoid a link to State expense. And so they were worried that a right to 'social insurance' could be interpreted as 'not being obliged to contribute to its funding'. The delegation from the United Kingdom, for instance, argued against the use of the term since they did not want to give the impression that workers did not need to pay contributions for unemployment insurance, which they did have to do in the United Kingdom. In the end, the more neutral term 'social security' was agreed on.[50]

This debate illustrates that the right to social security under the UDHR was eventually intended to leave States enough room for designing their social security. In particular, it does not prescribe a certain funding mechanism. So, if a country like the United Kingdom makes the enjoyment of rights subject to the payment of contributions, the UDHR does not preclude this. In other words, against the background of the drafting process, an individual who does not pay contributions and is

[47] The International Bill of Human Rights consists of the Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights 1966 and the International Covenant on Civil and Political Rights 1966.
[48] For more information on this historical debate see Carmen Tiburcio, *The human rights of aliens under international and comparative law* (The Hague/Boston/London: Martinus Nijhoff, 2001), p. 56.
[49] Morsink, *The Universal Declaration of Human Rights*, p. 201.
[50] *Ibid*., p. 201 ff.

hence denied rights under national social security could not invoke the right to social security in order to be entitled to benefits.

1.1.2. Non-discrimination

Article 1 UDHR reads: "[a]ll human beings are born free and equal in dignity and rights". Article 2 UDHR complements the first Article by stating that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. [...]". Article 7 completes the protection against discrimination under the UDHR by ruling that "[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination".

Article 2 UDHR does not explicitly prohibit a distinction as to nationality when granting the rights set forth in the Declaration. The ground 'national origin' is sometimes interpreted to be tantamount to nationality or citizenship. But in fact, it refers to national characteristics. This becomes clear from the *travaux préparatoires*.[51] The question whether the grounds nationality or citizenship should be included was discussed intensively during the drafting process of the UDHR. Eventually, it was neither explicitly added as a prohibited ground, nor was it to be understood as part of the concept 'national origin'.

In the context of irregular migrant workers and nationals who are undeclared workers, one could also think of discrimination on the ground of immigration status, *i.e.* residence or work status. However, this ground cannot be found as a prohibited ground in the UDHR. It was also not discussed when drafting the UDHR.

The list of prohibited grounds under Article 2 UDHR is not exhaustive. This could serve as an argument to regard citizenship or immigration status as further prohibited grounds for discrimination. Still, since the Declaration is not legally binding and there is no supervision mechanism, it is not clear whether or not this assumption is true. The 1985 Declaration of the UN General Assembly which further specifies human rights of aliens, prohibits discrimination on the basis of citizenship on only one occasion: Article 5 (1) (c) states that aliens should be "equal before the courts, tribunals and all other organs and authorities administering justice".[52] However, a general prohibition for discrimination based on nationality cannot be found in the 1985 Declaration.

[51] See Morsink, *The Universal Declaration of Human Rights*, p. 104. See also UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *International provisions protecting the human rights of non-citizens*, study prepared by Baroness Elles, Special Rapporteur, UN Doc E/CN.4/Sub.2/392/Rev.I (1980) I (New York: United Nations, 1980), § 114.

[52] This right is made subject to the domestic law and international obligations.

1.1.3. Summary and comparison

The Universal Declaration of Human Rights grants to everyone the right to social security and the right to a standard of living adequate for the health and the well-being. A 1985 UN General Assembly Declaration, which is legally not binding, but can be considered as an interpretation of the UDHR, excludes unlawfully present aliens from the right to social security, social services and health. Implicitly also unlawfully working aliens were excluded. Such kind of interpretation has not been issued in relation to nationals who are undeclared workers. However, drafting documents of the UDHR reveal that it was not the intention to establish an absolute right to benefits, *e.g.* irrespective of the payment of contributions. So, both groups under investigation cannot derive rights from the right to social security under the UDHR. Let alone the question whether the UDHR's right to social security is legally binding.

The UDHR's equality and non-discrimination provisions do not explicitly allow for assessing discrimination on the basis of nationality or immigration status. And against the background of the drafting history of the UDHR and the 1985 Declaration of the General Assembly, it is difficult to argue that these grounds may also be prohibited on the basis that the list of suspect grounds under Article 2 UDHR is illustrative only.

1.2. International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is a legally binding treaty.[53] It was adopted by the General Assembly of the United Nations in 1966. The implementation of the Treaty is observed by the Committee on Economic, Social and Cultural Rights – a committee consisting of independent experts. Comments issued by the Committee are legally non-binding on Contracting States.[54] All three countries under investigation, *i.e.* Belgium, Canada and the Netherlands, ratified the Covenant.

1.2.1. Rights related to social security

Article 9 ICESCR obliges State Parties to "recognize the right of everyone to social security, including social insurance". In addition, Articles 11 and 12 lay down "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing" and "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health". In Article 10 one can find the right of families to protection. Article 10 (2) states that "[s]pecial protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits".

1.2.1.1. Irregular migrant workers

The Covenant itself grants the rights set out in Articles 9 to 12 to everyone. However, as illustrated above, in 1985 the UN General Assembly adopted the legally non-binding Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live. With this Declaration the General Assembly intended to end ambiguities about the application of the ICESCR and other treaties to non-citizens. In doing so, it further distinguished between aliens lawfully and unlawfully present in a country. The latter were excluded from all human rights to social security, social services, medical care and health protection. Moreover, the Declaration makes the enjoyment of these rights also subject to the condition that aliens "observe the laws of the State in which they reside or are present".[55] This could be interpreted that States are entitled to exclude aliens from social security, when they are working in contravention of national legislation.

Besides this sort of interpretation given by the UN General Assembly, the Committee on Economic, Social and Cultural Rights has provided guidelines for States Parties on the application of the ICESCR. Concerning rights related to social security, four so-called General Comments

[53] International Covenant on Economic, Social and Cultural Rights, UN General Assembly Resolution 2200A (XXI), 16 December 1966, United Nations, *Treaty Series*, vol. 993, no. 14531.
[54] Some authors argue that the Committee's opinions nonetheless have considerable legal weight. See Matthew Craven, *The International Covenant on Economic, Social, and Cultural Rights: A perspective on its development* (Oxford: Clarendon Press, 1995), p. 91.
[55] Article 8 (1) in conjunction with Article 4 Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live.

have been issued.[56] The first two were produced in the 1990s and concerned the right to adequate housing and the right to adequate food.[57] There, the issue of irregularly residing and/or working foreigners was not explicitly addressed. However, what we can find are confirmations that the respective human rights should be applied to everyone. Regarding the right to adequate food one can read that "[e]very State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger" and that "[t]he right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement".[58] On the matter of the right to adequate housing, the Committee is of the opinion that "[t]he right to adequate housing applies to everyone" and that "individuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors".[59] This could be seen as indication that irregular migration status is irrelevant. However, an explicit confirmation that the use of the word 'everyone' means that migrants with an irregular immigration status are also included has not been given in these two Comments.

As opposed to the first two General Comments, the later two expressly dealt with irregular migrants. General Comment No. 14 on the right to health, which was published in 2000, rules that "States are under the obligation to *respect* the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum-seekers and illegal immigrants, to preventive, curative and palliative health services".[60] And in 2008, General Comment No. 19 on the right to social security was issued.[61] Also here illegal migrants were expressly taken into consideration when it comes to health care. Section 37 stipulates that "[a]ll persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency medical care".

It must be appreciated that the Committee on Economic, Social and Cultural Rights addressed the issue of irregular migrants. Unfortunately, in doing so it used an imprecise language. This will be illustrated in the following.

The first question to be asked is what does 'refrain from denying or limiting equal access to health services' or 'entitlement to medical care' exactly mean? Is it about getting treated? Or is it about getting the costs of treatment covered – in particular, in case the irregular migrant does not have sufficient means? Some would argue that there is no point in making this distinction. They would

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[56] General Comment No. 7 deals in particular with the problem of forced evictions. I therefore do not consider it as relevant for social security, as understood in this thesis. See Committee on Economic, Social and Cultural Rights, *General Comment No. 7: The right to adequate housing (Art.11(1)): forced evictions*, UN Doc E/1998/22 (New York: United Nations, 1997).

[57] Committee on Economic, Social and Cultural Rights, *General Comment No. 4: The right to adequate housing (Art.11(1))*, UN Doc E/1992/23 (New York: United Nations, 1991); and Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The right to adequate food (Art.11)*, UN Doc E/C.12/1999/5 (New York: United Nations, 1999).

[58] Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The right to adequate food (Art.11)*, §§ 6, 14.

[59] Committee on Economic, Social and Cultural Rights, *General Comment No. 4: The right to adequate housing (Art.11(1))*, § 6.

[60] Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health (Art.12)*, UN Doc E/C.12/2000/4 (New York: United Nations, 2000), § 34.

[61] Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The right to social security (Art.9)*, UN Doc E/C.12/GC/19 (New York: United Nations, 2008).

say that of course it is always about the payment of the treatment. What should be the reason of a health care provider to not treat someone if the person pays for it – directly or via insurance? Yet to my mind, it is worth making this distinction in the context of aliens with an irregular immigration status. On the one hand, a State could deny access to health care, by ordering health care providers not to treat such foreigners, who are acting against the law. Or a State could limit the access by imposing the obligation to report treatment of irregular migrants to immigration authorities. On the other hand, a State could guarantee the access in case health care providers are reluctant to treat irregular migrants. And there may be reasons why health care providers refuse treatment. For instance, they could argue that they do not want to support the continuation of an unlawful presence of an alien. Or health care providers could be afraid that their costs are not covered if the treatment is not immediately paid in cash – for instance if the irregular migrant provides payment by check, credit card or health insurance. I am aware that some – not all – of these arguments are not valid in life threatening situations. However, the basic distinction between treatment and cost coverage remains valid. And it would be interesting to know what the Committee had in mind when it commented on the right to health (Article 12) and the right to social security (Article 9).

As illustrated before, under the General Comment on the Right to Social Security the Committee considers all persons, irrespective of their nationality, residency or immigration status, entitled to primary and emergency medical care. Against the background of the scope of the right to social security it is likely that the Committee intended to ensure payment of medical treatment. The introduction to General Comment No. 19 reads:

> "[t]he right to social security encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, inter alia, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents."[62]

So it is about the protection against unaffordable access to health care and not just against non-access to health care. This seems to be evidence that 'entitlement to primary and emergency medical care' under section 37 of General Comment No. 19 should be interpreted as covering the costs of the treatment.

Under the General Comment on the Right to Health it is more difficult to say whether there is also the obligation for State Parties to pay, as a last resort, the costs of medical treatment for irregular migrants. On the one hand, according to the Committee, accessibility has also an economic dimension. This means that "health facilities, goods and services must be affordable for all".[63] And State Parties have the obligation "to provide those who do not have sufficient means with the necessary health insurance and health-facilities and to prevent any discrimination on internationally prohibited grounds".[64] These comments by the Committee could serve as an argument that also with regard to irregular migrants the State is under the obligation to cover the costs of the medical treatment.

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[62] *Ibid*., § 2.
[63] Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health (Art.12)*, § 12 (b).
[64] *Ibid*., § 19.

But on the other hand, the obligation of State Parties to refrain from denying or limiting equal access for all persons, including illegal immigrants, from health services is an obligation to *respect* – as opposed to the obligation to *protect* or the obligation to *fulfil*. This trichotomy is according to the Committee inherent in all human rights. The Committee notes that

> "[t]he obligation to *respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to *protect* requires States to take measures that prevent third parties from interfering with article 12 guarantees. Finally, the obligation to *fulfil* requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health."[65]

Under the obligation to *fulfil*, the Committee understands, for instance, the provision of a public, private or mixed health insurance system which is affordable for all.[66] It is interesting to look what the Committee considers as violations of these obligations. As an example of a violation of the obligation to *respect* the General Comment names the "denial of access to health facilities, goods and services to particular individuals or groups as a result of de jure or de facto discrimination".[67] A violation of the obligation to *fulfil* would be, for instance, the "insufficient expenditure or misallocation of public resources which results in the non-enjoyment of the right to health by individuals or groups, particularly the vulnerable or marginalized".[68]

All these statements in the General Comment on the Right to Health provide a mixed picture. And they leave the question open whether in refraining from denying or limiting equal access of illegal immigrants to preventive, curative and palliative health services, State Parties are required to pay the costs of the health services, in case the illegal immigrant cannot do so.

This brings us to another question: what is to be understood under 'preventive, curative and palliative health services' in General Comment No. 14 and 'primary and emergency medical care' under General Comment No. 19? A clear definition of these terms is not provided in the respective Comments. In particular, primary care would have needed further clarification. Primary care could be the first point of consultation for patients; or it could be all non-hospital care. General Comment No. 19 does not give an answer. By contrast, General Comment No. 14 does so, by giving a definition of primary health care and referring to the Declaration of Alma-Ata on Primary Health Care.[69] But is this definition then also decisive for General Comment No. 19?

The fact that the Committee used the concept 'preventive, curative and palliative health services' in one General Comment and the concept 'primary and emergency medical care' in the other, makes it even more important to exactly know what 'refrain from denying or limiting equal access to health services' and 'entitlement to medical care' mean. If both concepts of access mean the same, for instance irregular migrants should get treated and should get the costs of the treatment paid for, then there might be some contradiction. This is because 'preventive, curative and palliative health services' is certainly not always the same as 'primary and emergency medical

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[65] *Ibid*., § 33.
[66] *Ibid*., § 36.
[67] *Ibid*., § 50.
[68] *Ibid*., § 52.
[69] Alma-Ata Declaration, Report of the International Conference on Primary Health Care, Alma-Ata, 6-12 September 1978, in World Health Organization, "Health for All" Series, no. 1, (Geneva: WHO, 1978). For the definition see Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health (Art.12)*, fn. 9.

care'. For instance, the care of a patient who is referred to a hospital for the treatment of pain is usually not considered as primary care. But it can be classified as palliative care. Is according to the Committee an irregular migrant now entitled to such a treatment or not?

Finally, one could also ask what the term 'illegal immigrants' under General Comment No. 14 means. Does illegality refer to entrance, presence or work or all? And is the term 'immigrant', as opposed to migrant, a sign for addressing aliens who are not only present, but who are residing for a longer period of time in the country of which they are no citizens of?

So, at the end of the day it is not clear what the right to health for individuals with an irregular immigration status really comprises.

Moreover, there is another big weakness of these General Comments. The Committee consisting of experts does not explain how it reaches its conclusions: how come that the Committee finds a right to this and that degree of health care for individuals irrespective their immigration status? There is no explanation at all. And then one can find him- or herself in the situation where he or she can ask: has this really been provided for in the legal text? *Paul Schoukens* has warned on many occasions that, in general, a lack of explanation combined with an extensive interpretation carries the danger that the legal value of a convention will be undermined. Contracting States may challenge the guidance of the Committee and may no longer follow it.[70] In particular in the context of non-citizens with an irregular status of stay or work in a country, Contracting States may be interested to know how the Committee reached its conclusions. This is because the UN General Assembly, and therefore also the Contracting States, explicitly excluded in 1985 non-citizens with an unlawful stay from the right to medical care. But this 1985 declaration is not mentioned with one single word in the Committee's General Comments No. 14 or No. 19. This could be regarded as an obvious neglect of the will of the Contracting States and indeed carries the danger that States are not following this guidance.

If we analyse the rest of General Comment No. 19 on the right to social security, we can see that there is no further reference made to individuals with an irregular immigration status. Sometimes there is a reference made to non-nationals. But then it is not clear whether non-nationals with an irregular residence status or migrant workers who work in violation of immigration laws are included.

Recently, in May 2009, the Committee issued General Comment No. 20 on the principle of non-discrimination. There the Committee noted that the Covenant rights apply to everyone, including non-nationals regardless of legal status or documentation.[71] This is the first explicit statement by the Committee on the applicability of *all* the Covenant's rights to migrants with an irregular legal status. But what does it mean? Does it mean that irregular migrants can derive the same rights from the Covenant as citizens of the Contracting State? Let me give an example. The Committee interpreted in its General Comment No. 19 that the right to social security includes that "[i]n the case of loss of employment, benefits should be paid for an adequate period of time and at the

[70] See Paul Schoukens, "The right to access health care: health care according to international and European social security law instruments," in *International health law: Solidarity and justice in health care*, ed. André den Exter (Antwerp/Apeldoorn: Maklu, 2000), p. 33 and Paul Schoukens, "Recht op gezondheidszorg volgens het internationale socialezekerheidsrecht," *Tijdschrift voor gezondheidsrecht*, vol. 13, no. 2 (2008/2009), p. 107.

[71] Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (Art.2(2))*, § 30.

expiry of the period, the social security system should ensure adequate protection of the unemployed worker, for example through social assistance".[72] Is it then the intention of the Committee to apply this kind of interpretation one-to-one to irregular migrant workers? Shall they, for instance, receive unemployment benefits although they are not allowed to take up employment in the country? To my mind every social right and every aspect of the right needs further elaboration as to the meaning for non-nationals unauthorised to stay or work or both in a country. And if we look at the General Comments on the right to health and on the right to security, we can see that the Committee used to take a more differentiated approach.

A further sort of interpretation of the Covenant is given by the Committee in its Concluding Observations on State Reports. Besides highlighting positive and negative aspects of implementation of the Covenant, Concluding Observations provide for suggestions and recommendations to the State Parties.

In two of its Concluding Observations, the Committee referred to General Comment No. 14 in the context of the right to health of irregular migrants. In 2007, the Committee noted with concern that in Belgium "access to health-care facilities, goods and services for persons belonging to vulnerable and disadvantaged groups, such as undocumented migrant workers and members of their families, is limited to access to urgent medical care".[73] Therefore the Committee recommended Belgium, against the background of the General Comment on the Right to Health, "to adopt all appropriate measures to ensure that persons belonging to vulnerable and disadvantaged groups, such as undocumented migrant workers and members of their families, have access to adequate health-care facilities, goods and services, on an equal basis with legal residents of the State party".[74] And in 2008, the Committee noted "with concern that in spite of the introduction of the [French] Universal Health Care Coverage (*Couverture Maladie Universelle*, CMU) in July 1999, persons belonging to disadvantaged and marginalized groups, such as asylum-seekers and undocumented migrant workers and members of their families, continue to encounter difficulties in gaining access to health care facilities, goods and services, due to lack of awareness concerning their rights, the complexity of administrative formalities, such as the requirement of continuous and legal residence in the territory of the State party, and language barriers".[75] Consequently, the Committee urged France, in line with General Comment No. 14, "to adopt all appropriate measures to ensure that persons belonging to disadvantaged and marginalized groups, such as asylum-seekers and undocumented migrant workers and members of their families, have access to adequate health care facilities, goods and services".[76] The Committee's comments on the Belgian and French State Reports indicate that the General Comment No. 14's statement on access to health care for illegal migrants indeed relates to cost or insurance coverage. Furthermore, the Committee held that it considers the limitation to urgent medical care for irregular migrant workers as not adequate. But what is adequate according to the Committee? In the case of Belgium it is the access to adequate health care on an equal basis with legal residents. In the case of France it is just the access to adequate health care. From these recommendations no general rule for adequacy can be deduced.

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[72] Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The right to social security (Art.9)*, § 16.

[73] Committee on Economic, Social and Cultural Rights, *Concluding Observations: Belgium*, UN Doc E/C.12/BEL/CO/3 (New York: United Nations, 2008), § 21.

[74] *Ibid*., § 35.

[75] Committee on Economic, Social and Cultural Rights, *Concluding Observations: France*, UN Doc E/C.12/FRA/CO/3 (New York: United Nations, 2008), § 26.

[76] *Ibid*., § 46.

It is interesting to observe that in the Committee's comments on Belgium the point of reference for an illegal resident's access to health should be the health care provided to a legal resident. This poses a few questions. Why is it the legal resident and not the national who should be the point of reference in Belgium? Reasons for this decision are not given. Moreover, what type of legal resident should be the point of reference? In Belgium, for instance, insurance based on residence in the country depend, amongst other factors, on the immigration status.[77] So is the point of reference a migrant worker with a permanent residence permit of with a temporary one? Unfortunately, the Committee was not precise enough.

In 2004, the Committee made an interesting comment on the State Report of Greece. It remarked that it is "concerned that low income persons, the Roma, and documented and undocumented immigrants and their families may not have access to social services".[78] This concern expresses the view that undocumented migrants should have access to social services. Unfortunately, we do not know what kind of services the Committee had in mind. Also the accompanying documents, such as the State Report of Greece, do not shed light on this issue.

In the same year, the Committee commented on the social situation of irregular migrants in Spain. In more detail, while the Committee welcomed that "undocumented immigrants residing in the State party enjoy a number of fundamental rights and freedoms, including the right to basic social services, health care and education, on the condition that they register with their local municipality, the Committee remains concerned about the precarious situation of the large number of those undocumented immigrants who only enjoy a limited protection of their economic, social and cultural rights".[79] Therefore the Committee encouraged Spain "to promote the legalization of undocumented immigrants so as to enable them to enjoy fully their economic, social and cultural rights".[80] This is a remarkable conclusion. The Committee could also have suggested to do away with registration obligations in order to enable the full enjoyment of social rights. Instead it recommended legalisation of aliens with an irregular immigration status – which would be a much more far reaching measure. In fact, legalisation would put irregular migrants on equal footing in social security with certain types of regular migrants and would have effects beyond social security. Is that what the Committee had in mind?

End 2010, the Committee criticised the Netherlands for its treatment of undocumented migrants. In more detail, the Committee observed that "undocumented migrants, including families with children, are not entitled to a basic right to shelter and are rendered homeless after their eviction from reception centres".[81] The Committee expressed also its concern that "although undocumented migrants are entitled to healthcare and education, in practice they cannot always have access to either".[82] Therefore the Committee urged the Netherlands to "meet its core obligations under the Covenant and ensure that the minimum essential level relating to the right to housing, health and education is respected, protected and fulfilled in relation to undocumented migrants".[83]

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[77] See Part IIa of this thesis on Belgium.
[78] Committee on Economic, Social and Cultural Rights, *Concluding Observations: Greece*, UN Doc E/C.12/1/Add.97 (New York: United Nations, 2004), § 15.
[79] Committee on Economic, Social and Cultural Rights, *Concluding Observations: Spain*, UN Doc E/C.12/1/Add.99 (New York: United Nations, 2004), § 7.
[80] *Ibid*., § 24.
[81] Committee on Economic, Social and Cultural Rights, *Concluding Observations: The Netherlands*, UN Doc E/C.12/NDL/CO/4-5 (New York: United Nations, 2010), § 25.
[82] *Ibid*.
[83] *Ibid*.

On some occasions the Committee expressed its satisfaction about the level of health care provided to irregular migrants. This was the case in the Concluding Remarks on the State Report of Italy, where the Committee welcomed that the "National Sanitary Plan (PSN 2003-05) has extended its coverage to illegal immigrants, so that they can receive preventive medical treatment as well as urgent and basic treatment".[84] Or in the Concluding Remarks on the State Report of Sweden, where it noted "with appreciation the efforts taken to continue ensuring the high standard of health in the State party and that health care is accessible to all, including undocumented persons".[85] However, these statements are of less value for our investigation, since the Committee did not express its idea of the limits of health care to irregular migrants.

Worth mentioning are also comments of the Committee on State Reports of migrant worker sending countries, such as the Philippines or Tajikistan. The Committee expressed its concerns about the social situation of migrants, in particular those with an irregular migration status, in the receiving countries.[86] As to the Philippines, the Committee recommended the government to implement effective policies to protect the rights of its overseas workers, irrespective of the immigration status, by, amongst other measures, "[i]mproving existing services, such as counselling and medical assistance, provided by the Office for the Legal Assistance for Migrant Workers Affairs and diplomatic missions in countries of destination". In other words, the Committee encouraged the Philippines in its approach to protect its overseas workers also in social security matters. The strategy of the Committee seems to be twofold: on the one hand it advocates for more rights of migrant workers in receiving countries; and on the other hand it calls on sending countries to provide for protection of their migrating citizens. Against the background of the lack of social rights of Filipino workers in many Arab countries, this seems to be a valid strategy. However, providing social protection under the social security regime of the sending State always bears the risk that black-economy work in the receiving State is facilitated. This should be also kept in mind.

1.2.1.2. Nationals who engage in undeclared work

The International Covenant on Economic, Social and Cultural Rights itself talks about *everyone* who is entitled to social security, to an adequate standard of living or to the highest attainable standard of physical or mental health. As illustrated above, guidance for the application of the Covenant is given by the Committee on Economic, Social and Cultural Rights.

In General Comment No. 4 (right to adequate housing), General Comment No. 12 (right to adequate food) and General Comment No. 14 (right to health), individuals who perform undeclared work are not addressed. But – as mentioned in the subchapter on irregular migrant workers – these General Comments work with an inclusive language, such as 'everyone' or 'every man, women and child'. This leaves of course room to regard nationals who do not declare their

[84] Committee on Economic, Social and Cultural Rights, *Concluding Observations: Italy*, UN Doc E/C.12/1/Add.103 (New York: United Nations, 2004), § 10.
[85] Committee on Economic, Social and Cultural Rights, *Concluding Observations: Sweden*, UN Doc E/C.12/SWE/CO/5 (New York: United Nations, 2008), § 10.
[86] See Committee on Economic, Social and Cultural Rights, *Concluding Observations: Philippines*, UN Doc E/C.12/PHL/CO/4 (New York: United Nations, 2008), § 21 and Committee on Economic, Social and Cultural Rights, *Concluding Observations: Tajikistan*, UN Doc E/C.12/TJK/CO/1 (New York: United Nations, 2006), § 17.

work to the social security authorities as also being protected by these human rights. However, there is no absolute certainty in this matter.

A different approach is taken in General Comment No. 19 on the right to social security. People working in the informal economy are explicitly addressed. In particular, the Committee on Economic, Social and Cultural Rights expressed the view that everyone has the right to social security, including those who traditionally face difficulties in exercising this right, such as persons working in the informal economy.[87] The Committee considers "all economic activities by workers and economic units that are – *in law or in practice* – not covered or insufficiently covered by formal arrangements [emphasis added by the author]" as informal economy.[88] This definition is taken over from the conclusions of the General Conference of the International Labour Organization (ILO), meeting in its 90th session in 2002 on decent work and the informal economy.[89] It has been correctly remarked by commentators of the ILO conclusions that this concept of informal economy comprises two different situations: working situations which are not covered by the law; and working situations which are covered by the law, but where there is no compliance with the law.[90] Concerning social security in Europe and North-America, the first refers to certain types of work which are not covered by (parts of) social security in a country – for instance, casual work or part-time work. The second working situation is of more interest for us. In the context of social security, this is exactly about work that has not been declared to the social security authorities, although there is the obligation to do so. So, the working definition of undeclared work in this thesis falls under the concept of informal economy used by the ILO and by the Committee on Economic, Social and Cultural Rights in General Comment No. 19.

The Committee expresses the opinion that State Parties must ensure that persons working in the informal economy are also covered by social security. Measures suggested to cover these workers reach from "removing obstacles that prevent such persons from accessing informal social security schemes" to "ensuring a minimum level of coverage of risks and contingencies" to "respecting and supporting social security schemes developed within the informal economy".[91] From these recommended measures it seems that the Committee only addresses informality due to a lack of legal regulation. Whether the Committee also promotes social security for those who work in the black economy becomes not so clear from this wording.

In General Comment No. 19, the Committee also addresses the normative content of the right to social security by elaborating on the various social risks. When it comes to the social risk of unemployment, the Committee makes an explicit reference to workers in the informal economy. In more detail, it notes that "[t]he social security system should also cover other workers, including part-time workers, casual workers, seasonal workers, and the self-employed, and those working in atypical forms of work in the informal economy".[92] Also here one gets the impression that it is

[87] Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The right to social security (Art.9)*, § 31.
[88] *Ibid*., § 34.
[89] General Conference of the International Labour Conference, *Resolution concerning Decent Work and the Informal Economy*, adopted on 1 June 2002 at the 90th session (Geneva: International Labour Office, 2002), § 3.
[90] José Luis Daza called this informality due to a lack of a formal reference point and informality due to non-conformity with a legal reference point. See José Luis Daza, "Labour inspection and the informal economy," *Labour Education*, no. 140-41 (2005), p. 16.
[91] Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The right to social security (Art.9)*, § 34.
[92] *Ibid*., § 16.

about workers who fall outside the personal scope of application of formal social security arrangements; and not about workers who do not comply with registration and contribution payment obligations under social security. So, whereas the definition of informal economy in General Comment No. 19 does also include black-economy work, the Committee did not seem to have this phenomenon in mind when using the term informal economy throughout the Comment.

Without expressly referring to the informal economy, the Committee makes some interesting observations when discussing the social risk of employment injury. It notes in section 17 that "[e]ntitlement to benefits should not be made subject to the length of employment, to the duration of insurance or to the payment of contributions".[93] So, here the Committee expresses its opinion that entitlement to benefits should not be linked to the payment of contributions. This suggestion may pave the way for undeclared workers to qualify for employment injury benefits. With a reference to ILO Convention No. 121, the Committee recommends that the benefits provided should include coverage of the costs and the loss of earnings from the injury or morbid condition and the loss of support for spouses or dependants in case of death of the breadwinner.

The opinion that employment injury benefits should not be linked to the payment of contributions is corroborated in the section on workers inadequately protected by social security (part-time, casual, self-employed and homeworkers) – section 33. There it reads: "[w]here social security schemes for such workers are based on occupational activity, they should be adapted so that they enjoy conditions equivalent to those of comparable full-time workers. Except in the case of employment injury, these conditions could be determined in proportion to hours of work, contributions or earnings, or through other appropriate methods".[94] From sections 17 and 33 of the General Comment it follows that from the Committee's point of view employment injury benefits are the only benefits where for the enjoyment of these benefits a link to contributions should not be made.

Under the social risk of old age, the Committee advocates that State Parties should provide "non-contributory old-age benefits, social services and other assistance for all older persons who, when reaching the retirement age prescribed in national legislation, have not completed a qualifying period of contributions [...]".[95] So if a worker or a resident has not accumulated sufficient periods of contribution, the Committee suggests that alternative benefits which are not based on contribution payment should be provided. The reasons for not having accumulated sufficient contributions are not addressed in the General Comment. And this although the reasons may be quite different ones. For instance, a worker may not have completed a qualifying period of contributions because he/she stopped working for (a) period(s) of time, because his/her work was not subject to a retirement pension scheme (*e.g.* part-time work) or because he/she did not officially declare his or her work to the social security authorities. One can see that the reasons are manifold, but the Committee treats them equally. As a consequence, the Committee also recommends providing black-economy workers – who did not accumulate sufficient periods of contributions due to their non-declaration of their work – old age benefits which are not based on contributions. This might be considered as a reward for black-economy work. Other options for workers who did not complete a qualifying period of contributions when reaching the pensionable age were not considered by the Committee. And there are some. Some which, depending on the

[93] *Ibid*., § 17.
[94] *Ibid*., § 33.
[95] *Ibid*., § 15.

reason, seem to be more appropriate. For instance, for workers who cannot complete qualifying periods due to long periods of absence from the labour market because of caring for an old or ill dependant the possibility of fictive periods could be considered. Or, and this relates to black-economy workers, the retroactive payment of contributions in order to qualify for a retirement pension would be an option.

I already mentioned before, that according to the Committee the right to social security, like every human right, imposes three types of obligations on State Parties: an obligation to respect, an obligation to protect and an obligation to fulfil. The second, *i.e.* the obligation to protect, requires State Parties to prevent third parties from interfering with the right to social security. This includes, pursuant to the Committee, "adopting [...] legislative and other measures [...] to restrain third parties from [...] failing to pay legally required contributions for employees or other beneficiaries into the social security system".[96] Like in some other sections,[97] here the Committee implicitly acknowledges that the enjoyment of the right to social security can be influenced by the fact contributions have not been paid correctly: third parties can interfere with the right to social security – for instance, if they do not pay legally required contributions. This is an important observation. Black-economy worker do not per se have a right to social security. Their social security can be made subject to the payment of contributions. Only with regard to employment injury benefits, the Committee explicitly ruled that entitlement must not depend on the payment of contributions – see above.

Aside from General Comment No. 19, the Committee has commented on the issue of informal work and social security in a few Concluding Observations on State Reports. States are requested to report under Article 6 – the right to work – on "work in the informal economy [...], including its extent and the sectors with a large percentage of informal workers, and the measures taken to enable them to move out of the informal economy, as well as on measures taken to ensure access by informal workers, in particular older workers and women, to basic services and social protection".[98] Under Article 9 – the right to social security – State Parties shall "[p]rovide information on social security programmes, including informal schemes, to protect workers in the informal economy, in particular in relation to health care, maternity and old age".[99] Unfortunately, it is not so clear which aspects of the concept of informal economy State Parties should report on: working situations which are not covered by the law; or working situations which are covered by the law, but where there is no compliance with the law. It seems that reporting under Article 6 should focus on black-economy work, whereas reporting under Article 9 should address those sectors of the economy which are not covered by social security legislation. However, State Parties in their State Reports and the Committee in its Concluding Observations are dealing with this concept without making a clear distinction. As a whole, it appears that when States are reporting about sectors of the economy which do not (yet) belong to the scope of application of social security legislation, the Committee recommends extending social security protection to the

[96] *Ibid*., § 45.
[97] See §§ 15, 22, 25, 32, 33 and 36.
[98] Committee on Economic, Social and Cultural Rights, *Guidelines on treaty-specific documents to be submitted by State Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights*, UN Doc E/C.12/2008/2 (New York: United Nations, 2009), § 16.
[99] *Ibid*., § 32. Here the Reporting Guidelines refer to §§ 16, 34 of General Comment No. 19. These sections have been discussed above and it was concluded that the Committee only seems to refer to sectors of the economy which are not covered by social security law.

informal sector.[100] By contrast, when it is about black-economy work, the Committee usually advises to take measures to regularise the informal sector.[101] One of the very rare moments where the Committee unambiguously articulated its opinion on social security in the black economy has been the Concluding Observations on Germany. There the Committee was concerned "that [Germany] has not adequately addressed the issue of illegal workers who are employed in the 'shadow economy', such as workers in households, hotel and catering industries, agriculture and the cleaning and building industries, who do not enjoy any rights or protection and do not get paid regularly or adequately".[102] The recommendation made by the Committee was that Germany takes "the necessary legislative and administrative measures to oblige employers to respect labour legislation and to declare the persons they employ, in order to reduce the number of illegal workers who do not enjoy the minimum protection of their rights to social security and health care".[103]

It is worth mentioning that on one occasion the Committee criticised a State for suspending for a period of twelve month the registration with the employment bureau for persons working in the informal sector.[104] Here it would have been interesting to know why the Committee criticised this sanction against black-economy work.

1.2.2. Non-discrimination

Article 2 (2) ICESCR states that "[t]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[105]

Like Article 2 of the Universal Declaration on Human Rights, Article 2 (2) ICESCR does not enumerate nationality or citizenship as prohibited grounds for discrimination.[106] Other suspect grounds which may be of interest in the context of irregular migrant workers and nationals who

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[100] See for instance Committee on Economic, Social and Cultural Rights, *Concluding Observations: Zambia*, UN Doc E/C.12/1/Add.106 (New York: United Nations, 2005), § 43 in conjunction with Committee on Economic, Social and Cultural Rights, *Initial reports submitted by States Parties under Articles 16 and 17 of the Covenant, Addendum: Zambia*, UN Doc E/1990/5/Add.60 (New York: United Nations, 2003), §§ 82-83.

[101] See Committee on Economic, Social and Cultural Rights, *Concluding Observations: Italy*, UN Doc E/C.12/1/Add.103 (New York: United Nations, 2004), §§ 19, 41 in conjunction with Committee on Economic, Social and Cultural Rights, *Fourth periodic reports submitted by States Parties under Articles 16 and 17 of the Covenant, Addendum: Italy*, UN Doc E/C.12/4/Add.13 (New York: United Nations, 2003), § 93 ff.

[102] Committee on Economic, Social and Cultural Rights, *Concluding Observations: Germany*, UN Doc E/C.12/1/Add.68 (New York: United Nations, 2001), § 20.

[103] *Ibid*., § 38.

[104] Committee on Economic, Social and Cultural Rights, *Concluding Observations: Bosnia and Herzegovina*, UN Doc E/C.12/BIH/CO/1 (New York: United Nations, 2006), §§ 16, 37 in conjunction with Committee on Economic, Social and Cultural Rights, *Initial reports submitted by States Parties under Articles 16 and 17 of the Covenant, Addendum: Bosnia and Herzegovina*, UN Doc E/1990/5/Add.65 (New York: United Nations, 2005), § 95 ff.

[105] To reaffirm the equal rights of men and women, Article 3 continues: "[t]he States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant." However, this equality provision is of no particular relevance for our investigation.

[106] For a discussion on the meaning of the suspect ground 'national origin' see above subchapter 1.1.2. Interestingly, Belgium seemed to consider national origin as nationality and therefore made a declaration to the ICESCR. See Table I at the end of this Part I.

engage in undeclared work – such as the status of residence or work under immigration laws – are mentioned neither.

The question is whether the list under Article 2 (2) ICESCR is an open one, so that discrimination based on other grounds is also forbidden. An investigation of the drafting materials does not shed light on this question: the issue of exhaustive or illustrative listing was not addressed.[107] However, the Committee on Economic, Social and Cultural Rights has taken a clear point of view on this issue. It is of the opinion that the list of prohibited grounds in Article 2 (2) ICESCR has to be interpreted as an illustrative one. This becomes clear from the Committee's Concluding Observations on State Reports and was affirmed in May 2009 in General Comment No. 20.[108] Moreover, in this General Comment the Committee expressed its view that nationality should be regarded as a further suspect ground for discrimination.[109] Also this can be regarded as a confirmation of existing practice, since the Committee already referred previously in both Concluding Observations and other General Comments to nationality as a prohibited ground for discrimination.[110] Migration status is not mentioned in General Comment No. 20 as a further suspect ground. But some years ago, the Committee remarked in General Comment No. 16 on the Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights that migration status is a ground on which differentiation shall be prohibited.[111]

Interesting too, in General Comment No. 20 the Committee for the first time pronounced on the permissible scope of differential treatment. It concluded that

> [d]ifferential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realised and the measures or omissions and their effects. A failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all resources that are at the State party's disposition in an effort to address and eliminate the discrimination, as a matter of priority".[112]

These conditions under which differential treatment can be justified remind us of the criteria developed in this context by the European Court of Human Rights and, in the meantime, taken

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[107] See for instance the Annotations on the text of the draft International Covenants on Human Rights: United Nations, Official Records of the General Assembly, 10th session, Annexes, UN Doc A/2929, Agenda Item 28, Part II (New York: United Nations, 1955), Annotations to Article 2.

[108] Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (Art.2(2))*, UN Doc E/C.12/GC/20 (New York: United Nations, 2009, § 15.

[109] *Ibid*., § 30.

[110] See, most notably, Committee on Economic, Social and Cultural Rights, *Concluding Observations: Libyan Arab Jamahiriya*, UN Doc E/C.12/1/Add.15 (New York: United Nations, 1997), § 16; Committee on Economic, Social and Cultural Rights, *Concluding Observations: Kuwait*, UN Doc E/C.12/1/Add.98 (New York: United Nations, 2004), § 13; Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The right to social security (Art.9)*, § 36.

[111] Committee on Economic, Social and Cultural Rights, *General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (Art.3)*, UN Doc E/C.12/2005/3 (New York: United Nations, 2005), § 10.

[112] Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (Art.2(2))*, § 13.

over by many other national and international courts.[113] It is an important step in the interpretation of the Covenant on Economic, Social and Cultural Rights that clear criteria have been established against which situations can be tested as to their compliance with the principle of non-discrimination. Up to now, the Committee used to denounce State practices as discriminatory, without conducting any assessment and without giving any reasons.[114] These criteria can therefore serve as a valuable guideline. It remains to be seen which consequences this will have for the social security of irregular migrant workers and nationals who work in the black economy. Thus far, equal treatment in relation to the social security of these groups has hardly played any role in the supervision activities of the Committee. Only with regard to health care for migrants with an irregular immigration status, the Committee was concerned about their equal access to health services. This has already been discussed in subchapter 1.2.1.1.

1.2.3. Summary and comparison

The International Covenant on Economic, Social and Cultural Rights makes no distinction of any kind and grants the human right to social security, and other related rights, to everyone. Further guidance on the application of the Covenant has been given by the Committee on Economic, Social and Cultural Rights, which observes compliance with this Treaty. In May 2009, this Committee expressed the opinion that the Covenant rights apply to non-nationals, regardless of legal status and documentation. However, as illustrated in this subchapter, the value of this guidance is somewhat unclear. And this understanding is in conflict with another sort of interpretation on the Covenant, issued by the General Assembly. In 1985, the General Assembly adopted the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live. This Declaration, which was intended to end ambiguities about the application of the ICESCR and other treaties to non-citizens, excluded unlawfully present aliens from the human rights to social security, social services, medical care and health protection.

A more nuanced or should we say 'confused' approach towards social security rights for irregular migrants can be found in the past years' commentaries of the Committee on Economic, Social and Cultural Rights. In General Comments Nos. 14 and 19, the Committee held that the right to health comprises the obligation of State Parties to refrain from denying or limiting equal access for all persons, including illegal immigrants, to preventive, curative and palliative health services. In addition, according to the Committee, the right to social security entails the entitlement of all persons, including irregular migrant workers, to primary and emergency medical care. What is more, in the context of migrants with an irregular migration status the Committee has criticised on some occasions State Parties for limiting the access to health care to cases of emergency and for existing difficulties in gaining access to health care. It therefore recommended the provision of adequate access, access on an equal footing with legal migrants or legalisation. As illustrated in this subchapter, the language used by the Committee in its General Comments and Concluding

[113] See European Court of Human Rights, Judgment of 23 July 1968, *Case "Relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium*, Application nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64.

[114] See for instance Committee on Economic, Social and Cultural Rights, *Concluding Observations: Libyan Arab Jamahiriya*, UN Doc E/C.12/1/Add.15 (New York: United Nations, 1997), § 16; Committee on Economic, Social and Cultural Rights, *Concluding Observations: Kuwait*, UN Doc E/C.12/1/Add.98 (New York: United Nations, 2004), § 13; Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The right to social security (Art.9)*, § 36.

remarks is often somewhat ambiguous and leaves many questions open. Moreover, it remains unclear from where the Committee derives the conviction that irregular migrants are entitled to health care of a certain degree. The same goes for the Committee's opinion that the Covenant in its whole is applicable to non-nationals with an irregular legal status. This is of particular relevance in the light of above-mentioned 1985 Declaration of the General Assembly, which expressly excludes migrants with an irregular residence status from social rights.

Also undeclared work has on some occasions been addressed by the Committee on Economic, Social and Cultural Rights: most notably, in General Comment No. 19 on the right to social security and in a few Concluding Observations on State Reports. Unfortunately, the Committee uses the term 'informal economy' to describe two phenomena: black-economy work and work that is *ex lege* not covered by social security. And since the Committee does not make a clear distinction when using this term, plain conclusions are difficult to draw. What we know for sure is that the Committee acknowledges that incorrect payment of contributions may affect the right to social security. Only in conjunction with employment injuries, the Committee is of the opinion that the payment of contributions shall not have an impact on the entitlement to benefits. Black-economy work in general is criticised by the Committee. Countries with large parts of the population working in the black economy are usually recommended to take measures to regularise the informal sector.

The ICESCR's non-discrimination provision does not mention nationality or immigration status as prohibited grounds of discrimination. The Committee on Economic, Social and Cultural Rights took the view that the list of suspect grounds is illustrative only and that nationality shall be added as a further ground. Concerning the social security of irregular migrant workers and black-economy workers, there have hardly been any statements of the Committee concerning non-discrimination. Only when it is about the right to health for irregular migrants, the Committee urged on some occasions equal treatment with regular migrants or equal access for all persons.

It is interesting to compare the Committee's comments on aliens with an irregular immigration status and on individuals who perform undeclared work. Regarding the first, the Committee is particularly concerned with guaranteeing access to health care. In the context of the non-payment of contributions, by contrast, the Committee focuses on the entitlement to social security benefits in the context of labour accidents. The probing question is: why? Why does the Committee have a different focus? And why should irregular migrants have access to health care, whereas the access to labour accident benefits should not be made subject to the payment of contributions? Unfortunately, the answers are not given.

My conclusions are mainly drawn on the basis of the work of the Committee on Economic, Social and Cultural Rights. However, one has to keep in mind that these conclusions may have some shortcomings. In particular, the Committee has not provided comprehensive guidance, *i.e.* General Comments, to all provisions of the ICESCR which are relevant for this work. For instance, there is no General Comment to Article 10. And therefore no comment on the right for mothers to paid leave or leave with adequate social security benefits. Neither has the Committee commented on all aspects of Article 11 – the right of everyone to an adequate standard of living. So we do not know the Committee's point of view on these rights with regard to irregular migrant workers and nationals who engage in undeclared work.

End of 2008, the General Assembly adopted an Optional Protocol to the ICESCR, which allows for individual complaints to the Committee.[115] When coming into force, this mechanism may lead to complaints which shed more light on the situation of irregular migrant workers and nationals who engage in undeclared work.[116]

[115] See Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN Doc A/RES/63/117, 10 December 2008.

[116] The Optional Protocol will enter into force when ratified by ten State Parties. As of December 2010, three States have ratified this Optional Protocol.

1.3. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights, which forms the sister document to the ICESCR, was adopted by the UN General Assembly in 1966.[117] It is a legally binding treaty too. Implementation of the Treaty is monitored by the Human Rights Committee, consisting of independent experts. Comments by the Committee are not legally binding upon State Parties to the Covenant.[118] All three countries, Belgium, Canada and the Netherlands, ratified this Treaty.

1.3.1. Rights related to social security

As the name suggests, the ICCPR is designed to protect civil and political rights. Social rights are not covered by the Treaty. They are addressed by the sister treaty, the ICESCR. Nevertheless, civil rights may also have consequences for a person's social security. For instance, the right to life may be relevant for medical assistance in life-threatening situations. Therefore, in particular the following rights may be of interest: Article 6 (1), ruling that "[e]very human being has the inherent right to life. This right shall be protected by law"; Article 7, which stipulates that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"; Article 23 (1), declaring that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State"; and Article 24(1), laying down that "[e]very child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State".

Like the other treaties of the International Bill of Human Rights, *i.e.* the UDHR and the ICESCR, the ICCPR grants the rights set forth in Articles 6, 7, 23 and 24 to everyone. In General Comment No. 15, the Human Rights Committee expressed its opinion on the position of aliens under the Covenant. It held that, in general, the rights set forth in the Covenant apply to everyone, irrespective of nationality.[119] Exclusions of the enjoyment of above-mentioned civil rights because of irregularities in one's immigration status have not been made. Not in General Comment No. 15, not on other occasions. It must also be noted that there is no indication that above-mentioned rights *a priori* do not apply to individuals who work in the black economy.

In the course of time, the Human Rights Committee has recognised that above-mentioned civil rights have a social aspect.

The protection of the right to life requires State Parties to take positive measures too. In particular, the Committee considers it to be "desirable [...] to reduce infant mortality and to increase life

[117] International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200A (XXI), 16 December 1966, United Nations, *Treaty Series*, vol. 999, no. 14668.
[118] Commentators of the Covenant nevertheless advocate that interpretation issued by the Human Rights Committee should be recognised as an 'authoritative interpretation'. See See Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2. rev. ed. (Kehl am Rhein/Strasbourg/Arlington,Va.: Engel, 2005), p. xxvii.
[119] Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant*, UN Doc HRI/GEN/1/Rev.8, 179-81 (New York: United Nations, 1986), § 1.

expectancy, [...] to eliminate malnutrition and epidemics".[120] This social aspect is also taken into consideration, when the Human Rights Committee comments on State Reports. For instance, in its Concluding Observations on the Canadian report in 1999, the Committee was "concerned homelessness has led to serious health problems and even to death". Therefore, the Committee recommended Canada to "take positive measures required by article 6 to address this serious problem".[121]

In General Comment No. 19, the Human Rights Committee confirmed the socio-economic aspect of Article 23 – the protection of the family. The Committee demands that State Parties' reports "should indicate how the necessary protection is granted to the family by the State and other social institutions, whether and to what extent the State gives financial or other support to the activities of such institutions".[122]

Also with regard to the rights of the child, the Committee held in General Comment No. 17 that the measures to protect and promote the right may also be economic, social and cultural. For instance, "every possible economic and social measure should be taken to reduce infant mortality and to eradicate malnutrition among children".[123] The social dimension is also reflected in the Committee's comments on State Reports. For example, in the Concluding Observations on Canada's State Report, the Human Rights Committee was "concerned that differences in the way in which the National Child Benefit Supplement for low-income families is implemented in some provinces may result in a denial of this benefit to some children. This may lead to non-compliance with article 24 of the Covenant".[124]

Less pronounced is the social aspect of Article 7 ICCPR – the prohibition of torture and cruel, inhuman and degrading treatment and punishment. It seems that this aspect can only be found in conjunction with Article 10 (1) ICCPR. Article 10 (1) reads: "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". The Committee noted in this regard, that the "prohibition in article 7 is complemented by the positive requirements of article 10, paragraph 1, of the Covenant".[125] In its case law, the Committee made clear that Articles 7 and 10 (1) include an obligation for State Parties to guarantee detainees with a certain standard of living, by providing, *inter alia*, food, water, clothing and medical treatment.[126]

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[120] Human Rights Committee, *General Comment No. 6: The right to life (Art.6)*, UN Doc HRI/GEN/1/Rev.8, 166-67 (New York: United Nations, 1982), § 5. The use of the term 'desirable' is considered by some commentators as evidence that this obligation is rather soft law, than hard law; meaning that, for instance, the non-achievement of a sufficient reduction of the infant mortality rate would not amount to a violation of the right to life. See Nowak, *U.N. Covenant on Civil and Political Rights,* p. 124, fn. 17.

[121] Human Rights Committee, *Concluding Observations: Canada*, UN Doc CCPR/C/79/Add.105 (New York: United Nations, 1999), § 12.

[122] Human Rights Committee, *General Comment No. 19: Protection of the family, the right to marriage and equality of the spouses (Art.23)*, UN Doc HRI/GEN/1/Rev.8, 188-89 (New York: United Nations, 1990), § 3.

[123] Human Rights Committee, *General Comment No. 17: Rights of the child (Art.24)*, UN Doc HRI/GEN/1/Rev.8, 183-85 (New York: United Nations, 1989), § 3.

[124] Human Rights Committee, *Concluding Observations: Canada*, UN Doc CCPR/C/79/Add.105 (New York: United Nations, 1999), § 18.

[125] Human Rights Committee, *General Comment No. 20: Replaces General Comment 7 concerning prohibition of torture and cruel treatment or punishment (Art.7)*, UN Doc HRI/GEN/1/Rev.8, 190-92 (New York: United Nations, 1992), § 2.

[126] See Nowak, *U.N. Covenant on Civil and Political Rights*, p. 182. He refers to the individual communications on the basis of the first Optional Protocol with the Nos. 255/1987, 334/1988, 414/1990, 458/1991, 564/1993, 571/1994, 609/1995, 610/1995, 653/1995 and 668/1995.

To sum up, certain civil right under the ICCPR have a social dimension. However, thus far this dimension has hardly been attributed any meaning for the social security of irregular migrant workers or nationals who engage in undeclared work. In more detail, my analysis of the commentary of the Human Rights Committee – *i.e.* the General Comments, the Concluding Observations of State Reports and the case law based on individual complaints – has revealed that the social security of black-economy workers has not been an issue. The social security of foreigners with an irregular migration status, by contrast, has been discussed – although admittedly on a very limited scale. It concerned undocumented foreigners, who were detained for immigration purposes. In the light of the obligations under Articles 7 and 10 ICCPR, the Committee expressed on some occasions its concern about unsatisfactory detention conditions; in particular, the lack of adequate food and medical care.[127] What is more, sometimes the Committee was worried about the situation of unaccompanied minors who are illegally residing in the territory of a State Party. Against the background of the protection guaranteed under Article 24 ICCPR, the Committee therefore recommended to "develop specific procedures to address the needs of unaccompanied children and to ensure their best interests in the course of any immigration and related proceedings".[128] Whether such procedures shall include measures related to social security remains however unclear.

There have been some more individual complaints in the context of imminent deportations of irregular migrants, which could have been of interest for our research. For example, when claimants complained about the financial hardship, which was caused by the prohibition to take up work and the denial of basic social services.[129] Or when claimants alleged that they would die or their health would deteriorate in case of deportation, since the required medical treatment or medication could not be obtained in the country of origin.[130] Unfortunately, the Committee did not decide in the merits of these cases.

1.3.2. Non-discrimination

The ICCPR comprises two over-arching non-discrimination provisions: Article 2 (1) and Article 26. Article 2 (1) stipulates that "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights

[127] See Human Rights Committee, *Concluding Observations: France*, UN Doc CCPR/C/FRA/CO/4 (New York: United Nations, 2008), § 18; Human Rights Committee, *Concluding Observations: Italy*, UN Doc CCPR/C/ITA/CO/5 (New York: United Nations, 2006), § 15. Also individual complaints have been lodged in this regard. However, due to various reasons, such as non-exhaustion of domestic remedies, the Human Rights Committee has not pronounced on the merits. See, for instance, Human Rights Committee, *Decision to Communication Nos. 1255/2004, 1256/2004, 1259/2004, 1260/2004, 1266/2004, 1268/2004, 1270/2004, 1288/2004, Saed Shams, Kooresh Atvan, Shahin Shahrooei, Payam Saadat, Behrouz Ramezani, Behzad Boostani, Meharn Behrooz, Amin Houvedar Sefed v. Australia*, UN Doc CCPR/C/90/D/1255,1256,1259, 1260,1266,1268,1270&1288/2004 (New York: United Nations, 2007).

[128] Human Rights Committee, *Concluding Observations: Slovenia*, UN Doc CCPR/CO/84/SVN (New York: United Nations, 2005), § 15; Human Rights Committee, *Concluding Observations: Greece*, UN Doc CCPR/CO/83/GRC (New York: United Nations, 2005), § 17.

[129] Human Rights Committee, *Decision to Communication No. 1429/2005, A., B., C., D. and E. v. Australia*, UN Doc CCPR/C/92/D/1429/2005 (New York: United Nations, 2008), § 5.2.

[130] See Human Rights Committee, *Decision to Communication No. 1324/2004, Shafiq v. Australia*, UN Doc CCPR/C/88/D/1324/2004 (New York: United Nations, 2006), § 5.3; and Human Rights Committee, *Decision to Communication No. 1494/2006, Chadzjian et al v. The Netherlands*, UN Doc CCPR/C/93/D/1494/2006 (New York: United Nations, 2008), § 4.

recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". By contrast, Article 26 forbids discrimination in general – not only in relation to the rights set forth in the ICCPR. It reads: "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

Nationality or immigrations status – grounds which are of interest for this investigation – are not included into the Covenant's lists of prohibited grounds. However, there is little doubt that these lists are illustrative only.[131] The Human Rights Committee indeed confirmed that nationality can also be a prohibited ground.[132] To be more precise, the Committee considered nationality to fall into the category 'other status'.[133] By contrast, immigration status – for instance status as a temporary resident compared to a permanent resident or to an alien without immigration status – has not explicitly been declared as a suspect ground under Articles 2 (1) and 26 ICCPR. However, since the Human Rights Committee regarded distinctions between employed and unemployed persons[134] or between different professional groups[135] as falling under the Covenant's non-discrimination provisions, it would be also conceivable that differentiation as to immigration status will be covered.

According to the Human Rights Committee, differentiation based on suspect grounds is not *per se* prohibited. If the criteria for a differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant, such differentiation will not constitute forbidden discrimination.[136] So, also the non-discrimination principle under the ICCPR knows a justification for differential treatment.

As illustrated before, Article 26 ICCPR constitutes an independent non-discrimination provision; meaning that also discrimination which is unrelated to the rights laid down in the Covenant is prohibited. Therefore, also discrimination in the field of social security falls under the scope of Article 26. And indeed, in a number of cases the Human Rights Committee had to deal with differential treatment in social security. Examples are differential treatment of former Dutch citizens as to their pension entitlements under different bilateral social security agreements[137] or

[131] See United Nations, Official Records of the General Assembly, 10th session, Annexes, UN Doc A/2929, Agenda Item 28, Part II (New York: United Nations, 1955), § 181. See also Nowak, *U.N. Covenant on Civil and Political Rights*, pp. 46, 47, 626, 627.
[132] See Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant*, §§ 1-2.
[133] Human Rights Committee, *Decision to Communication No. 196/1985, Gueye et al v. France*, UN Doc CCPR/C/35/D/196/1985 (New York: United Nations, 1989), § 9.4.
[134] Human Rights Committee, *Decision to Communication No. 418/1990, Araujo-Jongen v. The Netherlands*, UN Doc CCPR/C/49/D/418/1990 (New York: United Nations, 1993).
[135] Human Rights Committee, *Decision to Communication No. 500/1992, Debreczeny v. The Netherlands*, UN Doc CCPR/C/53/D/500/1992 (New York: United Nations, 1995).
[136] Human Rights Committee, *General Comment No. 18: Non-discrimination*, UN Doc HRI/GEN/1/Rev.8, 185-88 (New York: United Nations, 1989), § 13.
[137] Human Rights Committee, *Decision to Communication No. 658/95, Van Oord v. The Netherlands*, UN Doc CCPR/C/60/D/658/1995 (New York: United Nations, 1997).

differential treatment between Senegalese and French citizens who both served in the French army as to their pension rights.[138]

An analysis of the Human Rights Committee's commentaries does hardly reveal anything about the social security of irregular migrant workers and black-economy workers. As yet, it seems that their social security has not been at stake in individual complaints under the First Optional Protocol. In its General Comments too, the Committee is silent on this issue. Only in the Committee's Concluding Observations on State Reports, we can find some statements by the Committee.

In 2008, the Committee was concerned that in Japan women account for 70 percent of informal workers and are as such excluded from a number of social security benefits, such as paid family leave, maternity protection or family allowance. This was seen as alarming in the light of the Covenant's non-discrimination provisions under Articles 2 (1), 3 and 26. Therefore, the Committee called on Japan to "take measures to promote the recruitment of women as formal workers".[139] Once more, the exact meaning of the term informal economy is not obvious. There are however indications that the Committee referred to employment which is *ex lege* not covered by social security: first, Japan struggles with an increasing number of part-time workers – most of them are women – which are not always covered by social security.[140] And second, numbers on the black economy, *i.e.* on work that is not declared to authorities, are difficult to obtain, let alone the possibility to make a distinction according to the sex. So, it seems that the Committee's demand to promote the recruitment of women as formal workers in order to enable the enjoyment of social protection does not or not only apply to women who work in the black economy.

In 2005, the Human Rights Committee expressed its concern about "the lack of full protection of the rights of registered and unregistered migrant workers in Thailand, particularly with regard to liberty of movement, access to social services and education, and access to personal documents".[141] This concern arose against the background of the principle of non-discrimination as stipulated in Article 2 (1) and 26 ICCPR. The Committee's response was that "[m]igrant workers should be afforded full and effective access to social services, educational facilities and personal documents, in accordance with the principle of non-discrimination".[142] This observation by the Committee leaves a few questions open: what are exactly unregistered migrant workers? Is it, for instance, about regular migrant workers who do not declare their work to authorities? Or is it about irregular migrant workers? What is more, should access to social services also be granted to

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[138] Human Rights Committee, *Decision to Communication No. 196/1985, Gueye et al v. France*, UN Doc CCPR/C/35/D/196/1985 (New York: United Nations, 1989).

[139] Human Rights Committee, *Concluding Observations: Japan*, UN Doc CCPR/C/JPN/CO/5 (New York: United Nations, 2008), § 13.

[140] See Noel Gaston and Tomoko Kishi, "Part-time workers doing full-time work in Japan," *Journal of the Japanese and International Economies*, vol. 21, no. 4 (2007), pp. 436, 439; Japan Federation of Bar Associations, "Alternative report to the fifth-periodic report of Japan on the International Covenant on Civil and Political Rights," Human Rights Committee, p. 95 ff. Available at: http://www2.ohchr.org/english/bodies/hrc/hrcs92.htm; Japanese Workers' Committee for Human Rights, Japan Lawyers Association for Freedom, Japan Association for Social Justice and Human Rights and League Demanding State Compensation for the Victims of the Public Order Maintenance Law, "The human rights report for conveying the real condition in Japan: Counter report against the 5th Japanese government periodic report on the International Covenant on Civil and Political Rights," Human Rights Committee, p. 91 ff. Available at: http://www2.ohchr.org/english/bodies/hrc/hrcs92.htm.

[141] Human Rights Committee, *Concluding Observations: Thailand*, UN Doc CCPR/CO/84/THA (New York: United Nations, 2005), § 23.

[142] *Ibid*.

these unregistered migrant workers? In its instructions the Committee does no longer distinguish between registered and unregistered. Which social services are meant in the context of Thailand? And with whom shall equal treatment be provided, since this is an observation under the non-discrimination principle? These questions are neither answered by the State Report on which this Concluding Observations are based.

1.3.3. Summary and comparison

The International Covenant on Civil and Political Rights comprises some civil rights which may be relevant for a person's social security, like the right to life. These rights are granted to everyone. The Covenant does not exclude irregular migrant workers or nationals who engage in undeclared work from the personal scope of application of these rights. Also the Human Rights Committee, which observes compliance with the Covenant, has not expressed the view that these two groups are excluded from the enjoyment of these rights. On the contrary, the Committee regarded on some very few occasions the social security of irregular migrants as protected under the Covenant. This related to irregular migrants who were detained for immigration purposes and where the Committee considered the detention conditions as unsatisfactory. Sometimes the Committee was also concerned about the situation of unaccompanied children with an irregular migration status and urged the State Parties to address the needs of the children. However, whether the Committee had measures of social security in mind is not clear.

The International Covenant on Civil and Political Rights includes non-discrimination provisions too. Nationality, although not explicitly mentioned in the Covenant, has been recognised by the Committee as a suspect ground of discrimination. And since the list of suspect grounds under the Covenant is not exhaustive, differential treatment based on other grounds, such as the status under immigration laws, might also be prohibited – if it is not based on reasonable and objective criteria and not pursuing a legitimate aim. The Human Rights Committee has thus far hardly pronounced on discrimination in the context of an irregular migrant's or a black-economy worker's social security. Only in some very few Concluding Observations on State Reports there might have been a reference to the social security of these two groups of workers. However, due to the vague language used by the Committee, this cannot be said with absolute clarity.

1.4. Other core international human rights instruments

Besides the International Bill of Human Rights, the United Nations adopted some more human rights instruments. These instruments deal with particular human rights issues, such as inhuman or degrading treatment, or particular vulnerable groups, such as children. This limitation in their personal or material scope of application makes them less relevant for our investigation. Nevertheless, this subchapter will provide a concise overview over the treaties' impact on the social security of irregular migrant workers and nationals who work in the black economy. It is worth mentioning that all these treaties, except for the Convention on the Rights of Persons with Disabilities, have been ratified by all countries under investigation, *i.e.* by Belgium, Canada and the Netherlands. The Convention on the Rights of Persons with Disabilities has to date, out of the three countries, only been ratified by Belgium and Canada.

1.4.1. International Convention on the Elimination of All Forms of Racial Discrimination

The oldest of these conventions, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), requires in Article 5 (e) Contracting States to "prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of [...] [t]he right to housing; [t]he right to public health, medical care, social security and social services".[143] Nationality is not mentioned as a prohibited ground. Quite the contrary, pursuant to Article 1 (2) ICERD, the Convention "shall not apply to distinctions, exclusions, restrictions or preferences made [...] between citizens and non-citizens". Nevertheless, the Committee on the Elimination of Racial Discrimination, which monitors the implementation of the Convention, held on many occasions that it does not mean that the ICERD is not applicable to non-citizens.[144] And indeed, there are good reasons to assume that also non-citizens are meant to be protected against racial discrimination.[145]

In 2004, the Committee on the Elimination of Racial Discrimination issued a legally non-binding General Comment on the discrimination against non-citizens. There, the Committee not only advanced the opinion that the Convention is applicable to non-citizens, but also that non-citizens with an irregular status under national migration laws are protected. In more detail, in section 7 of General Comment No. 30, the Committee recommended that State Parties shall "[e]nsure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens".[146]

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[143] Article 5 (e) (iii) and (iv) International Convention on the Elimination of All Forms of Racial Discrimination, UN General Assembly resolution 2106 (XX), 21 December 1965, United Nations, *Treaty Series*, vol. 660, p. 195.

[144] See, most notably, Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30: Discrimination against non citizens*, UN Doc CERD/C/64/Misc.11/Rev.3 (New York: United Nations, 2005).

[145] *Cholewinski* reports that the *travaux préparatoires* reveal that the drafters intended to protect both citizens and non-citizens from racial discrimination. See Ryszard Cholewinski, *Migrant workers in international human rights law: Their protection in countries of employment* (Oxford: Clarendon Press, 1997), p. 63.

[146] Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30: Discrimination against non citizens*, § 7.

In past years, the Committee increasingly addressed in its, also legally non-binding, Concluding Observations on State Reports the social situation of irregular migrant workers. What is striking is that in the Committee's comments racial discrimination is not necessarily an issue. Often it is the pure lack of social security for undocumented migrants that is criticised – without the slightest hint of racial discrimination. Let me give some examples. In 2008, the Committee was concerned – in the light of Article 5 (e) ICERD – about the dire living conditions of undocumented Haitian migrants in the Dominican Republic. It recommended, against the background of General Recommendation No. 30, to ensure those migrants an adequate standard of living, in particular access to health services, sanitation and drinking water.[147] In 2007, the Committee criticised Canada. In more detail, the Committee expressed its concern that "undocumented migrants [...], particularly those whose application for refugee status is rejected but who cannot be removed from Canada, are excluded from eligibility for social security and health care".[148] Therefore the Committee urged Canada "to take necessary legal and policy measures to ensure that undocumented migrants [...] whose asylum applications have been rejected are provided with access to social security, health care and education [...] in line with article 5 (e) of the Convention".[149] It is curious that the Committee on the Elimination of Racial Discrimination criticises State Parties for facts where no racial discrimination is involved. At least, it is not reported that racial discrimination played a role in the denial of access of undocumented migrants to social security.

To my mind the Convention was clearly designed to combat racial discrimination, which means, pursuant to Article 1 (1) of the Convention, any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin. That national origin does not mean nationality becomes apparent from Article 1 (2) ICERD, which stipulates that this Convention shall not apply to distinctions, exclusions, restrictions or preferences between citizens and non-citizens. The Committee held that Article 1 (2) ICERD does not preclude to fight racial discrimination against non-citizens. And rightly so: non-citizens are more likely to be victims of racial discrimination and their exclusion would have undermined the value of the Convention. Moreover, it also seemed to be the intention of the drafters to protect citizens and non-citizens alike against racial discrimination. However, the application of the protection against racial discrimination to non-citizens is something different than the prohibition of discrimination based on nationality. As far as I see it, the latter is not provided for in the International Convention on the Elimination of Racial Discrimination. However, the Committee regards discrimination on the basis of nationality with regard to social rights as prohibited under the Convention. *Vandenhole* rightly asked on which legal basis the Committee considers discrimination according to nationality as forbidden under the Convention.[150] In Articles 1 and 5 ICERD nationality is no suspect ground and the list of prohibited grounds is exhaustive. So the legal basis of the Committee's opinion is dubious.

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[147] Committee on the Elimination of Racial Discrimination, *Concluding Observations: Dominican Republic*, UN Doc A/63/18 (New York: United Nations, 2008), § 115.
[148] Committee on the Elimination of Racial Discrimination, *Concluding Observations: Canada*, UN Doc A/62/18 (New York: United Nations, 2007), § 84
[149] *Ibid*.
[150] See Wouter Vandenhole, *Non-Discrimination and equality in the view of the UN human rights treaty bodies* (Antwerp/Oxford: Intersentia, 2005), p. 92.

Racial discrimination of nationals who work in the black economy has never been an issue for the Committee. It can be assumed that if there is racial discrimination in this context, it will constitute a violation of the ICERD – there is nothing to be said against such a conclusion.

Against the background of the objectives of our investigation we can conclude that racial discrimination is forbidden. The lack of an immigration status is according to the Committee no reason to not apply the Convention. Without much doubt, the same can be said for workers who do not declare their work. This means that race, colour, descent, or national or ethnic origin can basically be no reasons for differential treatment in social security. The Committee goes even further and criticises discrimination on the basis of nationality too. For instance, when it is about the denial of social security and health services for undocumented migrants.

1.4.2. Convention on the Elimination of All Forms of Discrimination against Women

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) prohibits discrimination on the basis of sex. Amongst other obligation, it obliges State Parties to eliminate discrimination against women in the field of social security.[151]

According to the Committee on the Elimination of Discrimination against Women, female non-citizens, including those with an irregular migrant status, are also protected against discrimination on the ground of sex.[152] On some occasions the Committee pronounced explicitly on the situation of female non-citizens with an irregular immigration status: most notably, in its legally non-binding General Recommendation No. 26 on women migrant workers. Undocumented women migrant workers are defined by the Committee as migrant workers who are without a valid residence or work permit.[153] Section 26 lays down that host countries shall ensure non-discrimination and equal rights of women migrant workers, by taking a number of measures. Amongst them, the obligation to protect the basic human rights of undocumented women migrant workers, regardless of the lack of immigration status.[154] What these basic human rights are as regards social security is somewhat intricately formulated: it is stipulated that "[u]ndocumented women migrant workers must have access to legal remedies and justice [...] if they [...] face deprivation of fulfilment of basic needs, including in times of health emergencies or pregnancy or maternity, or if they are abused physically or sexually by employers or others".[155] This is about access to justice to enforce the rights. This presupposes, of course, that they have the rights to fulfilment of needs in case of health emergencies, pregnancy, maternity or abuse. But this seems to be taken for granted here. Another measure which is recommended in order to ensure equal treatment is the responsibility of the host country to provide victims of abuse with relevant emergency and social services, regardless of their immigration status.[156] Unfortunately, there is no further specification as to what emergency and social services are.

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[151] Article 11 (1) (e); Article 11 (2) (b) and (c); Article 12 (1); Article 13 (a); and Article 14 (2) (b), (c) and (h) Convention on the Elimination of All Forms of Discrimination against Women, UN General Assembly resolution, 34/180, 18 December 1979, United Nations, *Treaty Series*, vol. 1249, no. 20378.
[152] Committee on the Elimination of Discrimination against Women, *General Recommendation No. 26 on women migrant workers*, CEDAW/C/2009/WP.1/R (New York: United Nations, 2008), §§ 1, 4.
[153] *Ibid.*, § 4.
[154] *Ibid.*, § 26 (l)
[155] *Ibid.*, § 26 (l).
[156] *Ibid.*, § 26 (i).

The Committee on the Elimination of Discrimination against Women regularly addresses the precarious social situation of women employed in the informal sector. In 2008 to 2010, the Committee noted this problem in several non-binding Concluding Observations, such as on the State Reports of Bolivia, Burundi, Cameroon, Guatemala, Haiti, Madagascar, Morocco, Mongolia, Myanmar, Nigeria, Rwanda, Tanzania or Turkey. In particular, the Committee is concerned about the high number of women working in the informal sector where they have no access to social security.[157] However, it seems to be unlikely that the Committee talked about undeclared work, when using the term 'informal economy'. In other words, it is more likely that it is about work that is not covered by social security law, rather than about work that is covered by law, but where there is no compliance with the law. This can be deduced, not least, from the recommendations to the State Parties. There the Committee suggests providing a regulatory framework for the informal sector in order to ensure social protection or to adopt legislative, administrative and other measures guaranteeing access to social security for women workers in the informal economy.[158] So, black-economy work does not seem to be addressed.

To sum up, the CEDAW bans discrimination on the basis of sex. The Convention itself does not particularly deal with the situation of women working in the black economy or women working in violation of immigration laws. The Committee which monitors compliance with the Convention addressed the situation of the latter category, *i.e.* undocumented women workers. It held that the Convention is applicable to them too. Moreover, the Committee expressed the opinion that non-discrimination shall by ensured by, amongst other measures, guaranteeing undocumented women migrant workers access to legal remedies and justice in times of health emergencies, pregnancy or maternity; and that victims of abuse are granted relevant emergency and social services. As to women working in the black economy no statement seems to be made by the Committee.

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[157] Committee on the Elimination of Discrimination against Women, *Concluding Observations: Bolivia*, UN Doc CEDAW/C/BOL/CO/4 (New York: United Nations, 2008), § 36; Committee on the Elimination of Discrimination against Women, *Concluding Observations: Burundi*, UN Doc CEDAW/C/BDI/CO/4 (New York: United Nations, 2008), § 33; Committee on the Elimination of Discrimination against Women, *Concluding Observations: Cameroon*, UN Doc CEDAW/C/CMR/CO/3 (New York: United Nations, 2009), § 36; Committee on the Elimination of Discrimination against Women, *Concluding Observations: Guatemala*, UN Doc CEDAW/C/GUA/CO/7 (New York: United Nations, 2009), § 29; Committee on the Elimination of Discrimination against Women, *Concluding Observations: Haiti*, UN Doc CEDAW/C/HTI/CO/7 (New York: United Nations, 2009), § 34; Committee on the Elimination of Discrimination against Women, *Concluding Observations: Madagascar*, UN Doc CEDAW/C/MDG/CO/5 (New York: United Nations, 2008), § 28; Committee on the Elimination of Discrimination against Women, *Concluding Observations: Morocco*, UN Doc CEDAW/C/MAR/CO/4 (New York: United Nations, 2008), § 28; Committee on the Elimination of Discrimination against Women, *Concluding Observations: Mongolia*, UN Doc CEDAW/C/MNG/CO/7 (New York: United Nations, 2008), § 31; Committee on the Elimination of Discrimination against Women, *Concluding Observations: Myanmar*, UN Doc CEDAW/C/MMR/CO/3 (New York: United Nations, 2008), § 36; Committee on the Elimination of Discrimination against Women, *Concluding Observations: Nigeria*, UN Doc A/63/38 (New York: United Nations, 2008), § 332; Committee on the Elimination of Discrimination against Women, *Concluding Observations: Rwanda*, UN Doc CEDAW/C/RWA/CO/6 (New York: United Nations, 2009), § 33; Committee on the Elimination of Discrimination against Women, *Concluding Observations: Tanzania*, UN Doc A/63/38 (New York: United Nations, 2008), § 132; Committee on the Elimination of Discrimination against Women, *Concluding Observations: Turkey*, UN Doc CEDAW/C/TUR/CO/6 (New York: United Nations, 2010), § 33; and Committee on the Elimination of Discrimination against Women, *Concluding Observations: Uganda*, UN Doc CEDAW/C/UGA/CO/7 (New York: United Nations, 2010), § 33.

[158] See Concluding Observations on Guatemala, § 30; Concluding Observations on Haiti, § 35; Concluding Observations on Madagascar, § 29; Concluding Observations on Morocco, § 29; Concluding Observations on Myanmar, § 37; Concluding Observations on Tanzania, § 133; and Concluding Observations on Uganda, § 34.

1.4.3. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[159] does not shed much light on the central questions of our investigations. Leaving aside the matter of non-refoulement, one can ask whether the non-provision of medical treatment amounts to cruel, inhuman or degrading treatment; so that a right to medical treatment can be derived from this Convention. However, the Convention is silent on this issue. Also the Committee does not deal with this subject in particular. What we can find are statements by the Committee criticizing harsh detention conditions, in particular long-term detention, for undocumented migrants.[160]

1.4.4. Convention on the Rights of the Child

The Child Rights Convention (CRC), which stipulates human rights according to the special needs of children, includes a number of rights related to social security.[161] Most notably the right to health,[162] the right to social security (including social insurance)[163] and the right to an adequate standard of living.[164] Moreover, Article 2 CRC forbids discrimination with respect to the rights set forth in the Convention.[165]

The Committee on the Rights of the Child, which is the Convention's monitoring body, advanced the view that the enjoyment of the rights stipulated in the Convention must be available to all persons under the age of eighteen – irrespective of their nationality, immigration status or statelessness.[166] The Committee deduced this point of view from the wording of Article 2 (1) CRC – the Convention's non-discrimination provision. There it is written that the Contracting States must respect and ensure the rights set forth in the Convention without discrimination to 'each child within their jurisdiction'.

On some occasions the Committee expressly dealt with the social security of children with an irregular migration status or children whose parents lack of a regular migration status. To give some examples, in its remarks on the State Report of the then Netherlands Antilles the Committee

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[159] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN General Assembly resolution 39/46, 10 December 1984, United Nations, *Treaty Series*, vol. 1465, no. 24841.

[160] See Committee against Torture, *Concluding Observations: Greece*, UN Doc A/56/44 (New York: United Nations, 2001), §§ 87-88.

[161] Convention on the Rights of the Child, UN General Assembly resolution 44/25, 20 November 1989, United Nations, *Treaty Series*, vol. 1577, no. 27531.

[162] Article 24 CRC.

[163] Article 26 CRC. The Netherlands made the reservation that Article 26 "shall not imply an independent entitlement of children to social security, including social insurance." See Table I at the end of this Part.

[164] Article 27 CRC.

[165] Once again, Belgium seemed to consider national origin to be equal to nationality and therefore made a declaration to this Article. It declared that "non-discrimination on grounds of national origin does not necessarily imply the obligation for States automatically to guarantee foreigners the same rights as their nationals." For more information see Table I at the end of this Part.

[166] See, most notably, the legally non-binding General Recommendation No. 6. Committee on the Rights of the Child, *General Recommendation No. 6: Treatment of unaccompanied and separated children outside their country of origin*, CRC/GC/2005/6 (New York: United Nations, 2005), § 12.

was "concerned that undocumented children do not have access to [disability] care".[167] Concerning Greece, the Committee urged that the State Party must "ensure that [...] illegal immigrant children have access to [...] health services, including psychological care".[168] And as a reaction to the Korean State Report the Committee recommended to "amend domestic laws, in particular those on [...] social welfare, to include specific provisions which ensure equal access to services for all foreign children, including those of undocumented migrant workers.[169]

Article 2 CRC – the non-discrimination provision – has also been invoked by the Committee, when commenting on the social security of irregular migrant children in State Parties to the Convention. Article 2 CRC itself does not list nationality or migration status as prohibited grounds. But since the list is illustrative only, there is nothing which would prevent the Committee from considering distinctions based on other grounds as prohibited too. Worth mentioning is the Concluding Observation to the State Report of Sweden, where the Committee noted with concern "that the principle of non-discrimination is not fully implemented for the children of illegal immigrants". It therefore recommended "to the State party that it review its policies, with a view to expanding the services available to illegal-immigrant children beyond the provision of emergency health services".[170] Entitlement to emergency health care for irregular migrant children was also not appropriate in Andorra. In more detail, "[i]n light of article 2 of the Convention, the Committee, while welcoming the information that the children of seasonal workers residing illegally in the State party are in practice provided with emergency health care, recommends that the State party take the necessary steps to allow these children access to basic and other social services such as health care and education".[171] A real non-discrimination test has unfortunately not been applied by the Committee. In other words, we know the opinion of the Committee, but not how it reached it. Are children always to be treated equally as to social security – in particular as to health care and social services? Or are there any situations when a distinction is justified, such as when the distinction is reasonably and objectively justified?

In contrast to irregular migrant children, the Committee has not commented on children of black-economy workers or children who are already working and who themselves do not declare their work to the social security authorities. In particular the first scenario seems to be problematic. What if children, who are not insured against the costs of health care due to their parents' undeclared work, need health care which the parents cannot afford? The children themselves can hardly be blamed for the black-economy work of their parents. Here it has to be remarked that on other occasions the Committee criticised State Parties for their overall low level of health insurance coverage, which also affects children. It therefore urged to ensure that all children are adequately insured in order to have access to health services, in accordance with the Child Rights Convention's right to health.[172] The question is: can a State Party be blamed when black-economy

[167] Committee on the Rights of the Child, *Concluding Observations: Netherlands Antilles*, UN Doc CRC/C/15/Add.186 (New York: United Nations, 2002), § 46.
[168] Committee on the Rights of the Child, *Concluding Observations: Greece*, UN Doc CRC/C/15/Add.170 (New York: United Nations, 2002), §§ 68-69.
[169] Committee on the Rights of the Child, *Concluding Observations: Korea*, UN Doc CRC/C/15/Add.197 (New York: United Nations, 2003), §§ 58-59.
[170] Committee on the Rights of the Child, *Concluding Observations: Sweden*, UN Doc CRC/C/15/Add.101 (New York: United Nations, 1999), § 11.
[171] Committee on the Rights of the Child, *Concluding Observations: Andorra*, UN Doc CRC/C/15/Add.176 (New York: United Nations, 2002), § 29.
[172] Committee on the Rights of the Child, *Concluding Observations: Columbia*, UN Doc CRC/C/COL/3 (New York: United Nations, 2006), §§ 67-69.

work of the parent leads to non-insurance of the child? Since the Committee has not addressed the matter of undeclared work, we do not know the Committee's point of view on this issue.

To conclude, the Convention on the Rights of the Child protects every child. The Committee on the Rights of the Child confirmed that this also includes children with an irregular migration status or children whose parents have an irregular status in the country where they live. With regard to children of black-economy workers or children who work themselves in the black economy, the Committee has not delivered such a confirmation. It is worth mentioning that whenever the Committee criticised State Parties for insufficient social protection of irregular migrant children, it referred in first instance to medical care. Other fields of social security, such as parental benefits or survivor's pensions, seem not to be mentioned.

1.4.5. Convention on the Rights of Persons with Disabilities

In 2006, the General Assembly adopted the Convention on the Rights of Persons with Disabilities (CRPD).[173] According to Article 1, its purpose is to promote, protect and ensure the full and equal enjoyment of all human rights by all persons with disabilities and to promote respect for their inherent dignity. To achieve this objective, the Convention lays down, amongst other rights, a right to health (Article 25) and a right to an adequate standard of living and social protection (Article 28). These rights guarantee equal treatment with persons without disabilities and special protection for person with disabilities. For instance, disabled persons shall be provided with the same range, quality and standard of free or affordable health care as provided to other persons. And on the other hand, disabled persons shall receive those health services needed because of their disability. What is more, Contracting States shall pay particular attention to the most vulnerable groups – women with disabilities (Article 6) and children with disabilities (Article 7).

Non-citizens, let alone irregular migrant workers, are not explicitly addressed in the Convention when it comes to social security. Neither are persons who engage in undeclared work. The Convention entered into force in May 2008. Up to December 2010, the Committee on the Rights of Persons with Disabilities has not commented on compliance with the Convention.

Pursuant to Article 1 of the Convention, persons with disabilities include "those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others". This concept makes the Convention less applicable to persons who are participating in the labour market, such as irregular migrant workers or nationals who work in the black economy. However, it cannot be completely excluded that also workers fall under the concept of persons with disabilities of the Convention. Moreover, the Convention may be of relevance for the social security of disabled children of workers. Then one can ask, for instance, which reference group the drafters of the Convention had in mind when pledging the State Parties to provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons?[174] Individuals without impairments, but with an irregular immigration status? Or individuals without impairments and with a regular immigration

[173] Convention on the Rights of Persons with Disabilities, UN General Assembly resolution 61/106, 13 December 2006, UN Doc A/61/611.
[174] Article 25 (a) Convention on the Rights of Persons with Disabilities.

status? Maybe these answers will be given in future by the Committee on the Rights of Persons with Disabilities.

1.5. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW)[175] is often considered as a human rights treaty particularly for migrant workers. Yet, as will be shown, the Treaty does not only provide for rights, but also aims to prevent and eliminate irregular migration and work. The ICMW is legally binding and was adopted in 1990. Compliance with the Treaty is observed by the Committee on Migrant Workers. Decisions of the Committee are not binding upon Contracting Parties. Thus far, all three investigated countries, *i.e.* Belgium, Canada and the Netherlands, have *not* ratified the Convention.

1.5.1. Rights related to social security

The objective of the drafters of the ICMW was ambitious: to bring about the international protection of the rights of *all* migrant workers and their families.[176] However, in this approach a clear distinction is made between the rights for all migrant workers, including irregular ones, on the one hand, and the rights for only regular migrant workers on the other hand. The rights for all migrant workers and their families are laid down in Part III (Articles 8 to 35) of the Treaty; and additional rights for migrant workers and family members who are documented or in a regular situation are regulated in Part IV (Articles 36 to 56). Moreover, Part V (Articles 57 to 63) lays down provisions for particular categories of migrant workers, such as frontier workers, seasonal workers or self-employed workers – this Part, however, also only applies to regular migrant workers.

In Part III, Articles 27 and 28 ICMW lay down rights related to social security. Article 27 stipulates that

> "1. With respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. The competent authorities of the State of origin and the State of employment can at any time establish the necessary arrangements to determine the modalities of application of this norm.
> 2. Where the applicable legislation does not allow migrant workers and members of their families a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances."

And Article 28 reads:

> "Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment."

[175] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, UN General Assembly resolution 45/158, 18 December 1990, United Nations, *Treaty Series*, vol. 2220, no. 39481.
[176] See Preamble to the UN Migrant Workers Convention.

Against the background of this research, also Article 25 ICMW might be of interest too. It stipulates that migrant workers shall enjoy equal treatment with nationals in respect of remuneration and other conditions of work, such as safety and health. Pursuant to paragraph 3 of Article 25, "States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of such irregularity".

Also Part IV, applicable only to regular migrant workers and their family members, contains relevant provisions for a person's social security. Pursuant to Article 43 (1) (e) and Article 45 (1) (c) ICMW, migrant workers and their family members shall enjoy equal treatment with nationals in their "[a]ccess to social and health services, provided that the requirements for participation in the respective schemes are met". And Article 54 (1) (b) and (c) ICMW rules that "[w]ithout prejudice to the terms of their authorization of residence or their permission to work and the rights provided for in articles 25 and 27 of the present Convention, migrant workers shall enjoy equality of treatment with nationals of the State of employment in respect of [u]nemployment benefits and [a]ccess to public work schemes intended to combat unemployment".

1.5.1.1. Irregular migrant workers

The Preamble to the ICMW makes some enlightening statements on its approach to cope with the phenomenon of irregular migration. The recitals 12, 13 and 14 read as follows:

> "The States Parties to the present Convention,
>
> Bearing in mind that the human problems involved in migration are even more serious in the case of irregular migration and convinced therefore that appropriate action should be encouraged in order to prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental human rights,
>
> Considering that workers who are non-documented or in an irregular situation are frequently employed under less favourable conditions of work than other workers and that certain employers find this an inducement to seek such labour in order to reap the benefits of unfair competition,
>
> Considering also that recourse to the employment of migrant workers who are in an irregular situation will be discouraged if the fundamental human rights of all migrant workers are more widely recognized and, moreover, that granting certain additional rights to migrant workers and members of their families in a regular situation will encourage all migrants and employers to respect and comply with the laws and procedures established by the States concerned [...]."

From this it becomes apparent that the UN Convention primarily approaches the issue of irregular migration using a human rights perspective: the human rights of migrants who clandestinely cross borders are to be respected in the fight against this phenomenon, and by ensuring the human rights of irregular migrant workers the employment of them will be discouraged. The granting of additional rights for migrant workers in a regular situation is justified by the fact that it will encourage migrant workers and employers to comply with national laws.

The Convention provides for a legal definition of the concept of irregular migrant workers. Pursuant to Article 5 (a) ICMW, migrant workers and their family members are "considered as

documented or in a regular situation if they are authorised to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party". And if they do not comply with these conditions, they are regarded as "non-documented or in an irregular situation" – see Article 5 (b) ICMW. Since both authorisation to stay and authorisation to work are required, the Convention already regards migrant workers who lack one of these authorisations as to be in an irregular situation. In other words, not only migrant workers who stay unlawfully and work unlawfully in a country – what we consider as category A – are irregular workers for the purposes of the ICMW, but also migrant workers who stay lawfully but work unlawfully – category B. For the determination of irregularity, the Convention refers to national legislation and international legislation to which the State is party. So, it basically depends on the national situation whether a migrant worker falls under the category 'documented or in a regular situation' of the ICMW or not. It is also important to note that for the purposes of the ICMW migrant workers are all persons who are to be engaged, are engaged or have been engaged in a remunerated activity in a State of which they are no nationals. This is a rather broad definition. For instance, it already covers people who are about to leave the country of origin.[177] And it covers a great number of different types of work, such as frontier work, seasonal work or self-employment.[178] As mentioned before, the Convention not only protects regular or irregular migrant workers, but also their family members. Article 4 ICMW regards as family members the following persons: spouses, persons in a relationship which under national law produces effects equivalent to marriage, dependent children and other dependent persons who are recognised as family members under national legislation or international law to which the State is party. Also their status in the country of employment of the migrant worker can be regular or irregular.

1.5.1.1.1. Article 27 (1) ICMW

As illustrated in the previous subchapter, migrant workers, including irregular ones, are guaranteed under Article 27 (1) ICMW the same treatment with nationals of the country of employment with respect to social security. The value of this provision is however far from being clear, since equal treatment is only granted insofar as migrant workers fulfil the necessary national and international requirements. Does this mean that if a State Party makes social security benefits subject to a regular status of stay or work, this is prohibited under this provision? Or does such a requirement still fall under the competence of the State Party? The Committee on Migrant Workers, which held its first session in March 2004, has not yet addressed this question. By contrast, commentators have done so. But they have thus far not provided a clear answer to the meaning of this provision.[179] *Michael Hasenau*, who is one of the few who takes a clear point of view, argues that Article 27 (1) ICMW does not preclude State Parties from excluding irregular migrant workers from social security. He bases this position on two arguments: first, the provision leaves the determination of qualifying conditions for social security benefits to State Parties, except for discrimination on the ground of nationality. And second, the first draft of the Convention included

[177] See Article 1 (2) ICMW.
[178] This is because Articles 2 (2) ICMW, which defines particular types of workers, is not limited to regular workers. With the only exception of seafarers and workers on an offshore installation – see Article 3 (f) ICMW.
[179] See, most notably, Cholewinski, *Migrant workers*, pp. 165-66; Dirk Vanheule, Marie-Claire Foblets, Sander Loones and Steven Bouckaert, "De betekenis van de V.N.-Arbeidsmigrantenconventie van 18 december 1990 in het geval van ratificatie door België," *Journal des tribunaux du travail*, no. 894 (2004), p. 355.

in Article 27 (1) ICMW the phrase "who are documented or are in a regular situation.[180] Both arguments are to my mind not convincing. The ground of nationality could, under certain circumstances, be invoked by an irregular migrant worker to compare his/her situation with the one of a national. And concerning his second argument, it is correct that there has been some discussion about whether to grant the right to equal treatment in social security to regular migrant workers only or to all migrant workers. However, eventually it was agreed to delete the phrase 'who are document or are in a regular situation" and to leave the provision in Part III, and not, as it has been suggested by some governmental representatives, to move the provision to Part IV.[181] Therefore, Article 27 (1) ICMW, which is not limited to regular migrant workers only and which is part of Part III, must be fully applicable to all migrant workers and their family members, irrespective of their immigration status. But *Hasenau* is right when he points to the discretion that is explicitly granted under Article 27 (1) first sentence ICMW to Contracting States to determine the qualifying conditions for social security coverage.[182] This paves in my opinion the way for differences in a person's social security status according to his/her immigration status. Also the second sentence of Article 27 (1) ICMW, namely that the country of origin and the country of employment can at any time establish the necessary arrangements to determine the modalities of application of this norm, would allow for deviating from the principle of equal treatment in social security, as stipulated in Article 27 (1) first half of the first sentence ICMW.

By the way, it is also rather unclear what the term social security exactly comprises. For instance, does social security only refer to the technique of social insurance or are social assistance schemes also addressed?[183] Attempts by some governmental representatives to provide for a definition of the Convention's concept of social security were eventually rejected. It was argued that it would be nearly impossible to define social security, since it has many different meanings in national legislation.[184] Surprisingly, the possibility to refer to already existing international social security instruments was not considered.

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[180] Michael Hasenau, "Setting norms in the United Nations System: The Draft Convention on the Protection of the Rights of All Migrant Workers and their Families in Relation to ILO in standards on migrant workers," *International Migration* vol. 28, no. 2 (1990), p. 143.

[181] See in particular Open-ended Working Group on the Drafting on an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, *Report of the Open-ended Working Group on the Drafting on an International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, UN Doc A/C.3/42/1 (22 June 1987); and Open-ended Working Group on the Drafting on an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, *Report of the Open-ended Working Group on the Drafting on an International Convention on the Protection of the Rights of All Migrant Workers and Their Families*., UN Doc A/C.3/42/6 (9 October 1987).

[182] See also Marius Olivier who takes the point of view that the discretion granted to State Parties under Article 27 (1) makes it "possible that more onerous conditions for entitlement may be imposed on irregular migrants". Marius Olivier, "Regional overview of social protection for non-citizens in the Southern African Development Community (SADC)," International Institute for Social Law and Policy, *Report commissioned by the World Bank*, May 2009, p. 132.

[183] For this criticism see Marius Olivier, "Regional overview," p. 132. See also Ockert Dupper, "Migrant workers and the right to social security: An international perspective," in *Access to social security for non-citizens and informal sector workers: An international, South African and German perspective*, ed. Ulrich Becker and Marius Olivier (Stellenbosch: African Sun Media, 2008), p. 29. Ockert Dupper expresses his doubts whether non-contributory benefits are included in the concept of social security under Article 27 (1) ICMW's.

[184] Open-ended Working Group on the Drafting on an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, *Report of the Open-ended Working Group on the Drafting on an International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, UN Doc A/C.3/37/1 (11 June 1982), §§ 24-26; Open-ended Working Group on the Drafting on an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, *Report of the Open-ended Working Group on the Drafting on an*

1.5.1.1.2. Article 27 (2) ICMW

Article 27 (2) ICMW is about refunding of social security contributions. Such refunding should be considered, first, if migrant workers are not allowed for benefits and, second, on the basis of the treatment granted to nationals of the country concerned who are in similar circumstances. The latter condition has not yet been clearly defined. In more detail, the meaning of the phrases 'on the basis of the treatment' and 'who are in similar circumstances' is ambiguous and leaves to my mind room for two interpretations. On the one hand, it could mean that migrant workers shall receive a refund, if nationals, who are also not allowed for benefits (*similar circumstances*), get a refund. In other words, migrant workers should be treated equally with nationals. On the other hand, it would be also possible that the passage 'who are in similar circumstances' refers to the payment of contributions; so that migrant workers and nationals are in similar circumstances if they both contribute to social security. Therefore, migrant workers shall receive a refund, if nationals, who have also contributed, get a benefit. Both interpretations are possible. But the consequences would be completely different. Take for instance the Swiss General Old Age and Surviving Dependant's Pensions Act, which is one of the very few social security schemes which provides for reimbursement of contributions. This scheme refunds employees' and employers' contributions to non-citizens, who are not covered by bilateral social security agreements.[185] So this reimbursement scheme is only in force for non-citizens. In other words, Swiss nationals cannot get their contributions reimbursed. They instead receive their benefits. So, if Article 27 (2) ICMW must be understood as a strict non-discrimination provision, *i.e.* contribution refund for migrant workers whenever there is contribution refund for nationals, irregular migrant workers would not be protected by this provision. However, if the phrase 'on the basis' in Article 27 (2) ICMW is not to be read as a strict non-discrimination provision and if 'in similar circumstances' does not refer to being also not allowed for a benefit, but to having also contributed to social security, irregular migrant workers would fall within the scope of the Convention's protection. This problem has thus far neither been addressed by the Committee on Migrant Workers, nor by commentators.[186]

Despite these ambiguities, it is undisputed that Article 27 (2) ICMW applies to regular and irregular migrant workers alike. This is because the provision is part of Part III of the Convention, which explicitly protects the rights of all migrant workers, irrespective of their status. However, there are good reasons to assume that the practical impact of this provision for irregular migrant workers will be rather low. First, it will be difficult for irregular migrant workers to contribute to social security. Under most national social security schemes it is simply not possible for non-nationals with an irregular status of residence and work to pay contributions. Nevertheless, here one can argue that irregular migrant workers could have exceptionally contributed to social security, could have contributed to social security during periods when they had a regular status of residence and work in the country, or could have contributed after undeclared work has been

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International Convention on the Protection of the Rights of All Migrant Workers and Their Families, UN Doc A/C.3/42/1 (22 June 1987), §§ 255-56.

[185] See Gijsbert Vonk and Klaus Kapuy, "Three approaches to refunding social insurance contributions to temporary migrant workers: Is there an attractive policy alternative?" *European Journal of Social Security*, vol. 10, no. 3 (2008), pp. 228, 236.

[186] Some commentators, such as *Hasenau*, consider this provision as a non-discrimination provision, *i.e.* reimbursement only if available for nationals, but do not discuss the second possible interpretation. See Hasenau, "Setting norms," p. 144.

revealed. However, there is also a second reason. Most countries do not refund social security contributions. The Swiss General Old Age and Surviving Dependant's Pensions Act, which was mentioned before, is one of the very few schemes which provides for reimbursement – and this only for non-citizens. The decisive point is thus to know how Article 27 (2) ICMW shall be interpreted. If it is to be interpreted as a non-discrimination provision, as illustrated above, refund for irregular migrant workers would be only possible if it is provided for nationals. But there hardly exist any social security schemes which reimburse nationals. So there could also be no reimbursement for irregular migrant workers. And finally, there is a third reason why the practical impact of Article 27 (2) ICMW will be low: the weak language. This Article stipulates that 'States concerned shall examine the possibility of reimbursing interested persons'. 'Shall examine the possibility' is something different than 'shall' – which is used in Article 27 (1) and Article 28 ICMW. It only obliges State Parties to explore the possibilities of refund, but not to actually refund. So when State Parties after having explored the possibilities come to the conclusion that contribution refund, for instance, is incompatible with the principle of protection and solidarity, on which social security is based, from my point of view, these States would have complied with Article 27 (2) ICMW.

1.5.1.1.3. Article 28 ICMW

This brings us to a further provision on social security under Part III ICMW – Article 28. We have already heard that this provision calls for a right to receive medical care that is urgently required for the preservation of life or the avoidance of irreparable harm to health on the basis of equal treatment with nationals of the state concerned. Since this provision is placed in Part III, it is also applicable to irregular migrant workers. Somehow redundant seems to be therefore the second sentence of Article 28 ICMW, which stipulates that such emergency medical care shall not be refused by reason of any irregularity of stay or employment. However, it can be regarded as an explicit confirmation of its applicability to irregular migrant workers and their family members.

The exact scope of this right to emergency medical care is not determined. There is no universal list of medical conditions which require emergency treatment. Nor is there a reference to national legislation. Nor is there any explanation as to the role of the attending doctors. The *travaux préparatoires* do not reveal anything. Also the first Concluding Observations on Article 28 ICMW, issued by the Committee on Migrant Workers, do not shed light on this question.[187]

It is interesting to note that the right to emergency medical treatment is only granted on the basis of equal treatment with nationals. It is not an absolute right; meaning that if nationals do not have a right to emergency medical assistance, irregular migrant workers would have it neither. In many countries, there is a right to medical assistance in life threatening situations. And Article 28 ICMW certainly intends to make sure that this right is also guaranteed, even if a non-citizen lacks permission to stay or work in that country. For countries without such legal guarantees, on the other hand, the equal treatment condition has the effect that non-citizens are not treated better than citizens.

[187] See Committee on Migrant Workers, *Concluding Observations: Ecuador*, UN Doc CMW/C/ECU/CO/1 (New York: United Nations, 2007), §§ 39-40; Committee on Migrant Workers, *Concluding Observations: Azerbaijan*, UN Doc CMW/C/AZE/CO/1 (New York: United Nations, 2009), §§ 30-31; and Committee on Migrant Workers, *Concluding Observations: Algeria*, UN Doc CMW/C/DZA/CO/1 (New York: United Nations, 2010), § 19.

So, Article 28 ICMW establishes an entitlement to emergency medical care for irregular migrant workers and their family members. As illustrated before, in 2008 General Comment No. 19 to the ICESCR's right to social security was published. According to the Committee on Economic, Social and Cultural Rights, the right to social security under the ICESCR includes primary and emergency medical care for all persons irrespective their immigration status. This point of view goes beyond what is provided for under the ICMW. So there is an international tendency to guarantee more than emergency medical treatment. Still, this has been an opinion of the ICESCR. Here, in the UN Migrant Workers Convention, by contrast, this entitlement is written in the text itself.

Linda Bosniak has criticised, in the context of the right to emergency medical care, that there is no protection for irregular migrant workers to actually exercise their rights.[188] There is nothing which would preclude that health care providers inform or are obliged to inform immigration authorities about a patient with an irregular immigration status. Such a lack of guarantees could deter irregular migrant workers in practice from exercising their rights.

1.5.1.1.4. Article 25 ICMW

I already mentioned before that Article 25 ICMW might be of interest for a person's social security, despite the fact that it is in the first instance about equal work and employment conditions for migrant workers. But let us have a closer look at this provision. It reads:

> "1. Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and:
> (a) Other conditions of work, that is to say, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions of work which, according to national law and practice, are covered by these terms;
> (b) Other terms of employment, that is to say, minimum age of employment, restriction on home work and any other matters which, according to national law and practice, are considered a term of employment.
>
> 2. It shall not be lawful to derogate in private contracts of employment from the principle of equality of treatment referred to in paragraph 1 of the present article.
>
> 3. States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of such irregularity."

The question for our investigation is now whether this provision says that employment contracts with irregular migrant workers are legally binding. This would then lead to the question whether they have also effect on a third party, like a social security administration. If so, this could mean that irregular migrant worker could be insured under those social security schemes which link insurance to work under an employment contract. *Hasenau* has interpreted this provision as granting a "far-reaching right by declaring the work contract entered into by a migrant worker

[188] See Linda Bosniak, "Human rights, state sovereignty and the protection of undocumented migrants under the international Migrant Workers' Convention," in *Irregular migration and human rights: Theoretical, European and international perspectives*, ed. Barbara Bogusz, Ryszard Cholewinski, Adam Cygan and Erika Szyszczak (Leiden/Boston: Martinus Nijhoff, 2004), 336, 337.

whose status is irregular as legally binding" – without discussing possible consequences for social security.[189] Indeed, pursuant to the words of the third paragraph, the employer shall not be relieved of *any* legal or contractual obligations. This suggests that the contract between the employer and the irregularly working employee shall be legally binding. If so, does this affect or even bind national social security legislation, which insures individuals who are working under an employment contract? Article 25 ICMW itself does not provide an answer. It basically talks about working conditions and terms of employment which are not related to the concept of social security as understood in this work.[190] To my mind, Article 25 ICMW unequivocally declares employment contracts as legally binding between employer and employee, irrespective of the latter's immigration status. Therefore, Contracting States are not allowed to render null and void such contracts. And contractual rights and duties would arise for employer and employee. Whether also third parties, such as statutory social security institutions, are affected, would, to my mind, depend on national law. If national law provided for third-party effect of employment contracts, then this could also have consequences for statutory social security. However, in my opinion it would in no way prevent national legislators from excluding irregular migrant workers from social security – for instance by ruling that migrants who stay or work in the country in contravention of immigration laws are not insured under social insurance or are excluded from receiving social security benefits. But, as said, it would prevent national legislators from declaring employment contracts with irregular migrants as having no legal consequences. And if national law recognised that the legal consequences of the employment contract also affect the relationship between employee and statutory social security administration, then there would influence the employee's social security. Here Article 27 (1) ICMW might come into play, which stipulates that migrant workers shall enjoy equal treatment with nationals in social security, as long as national requirements are fulfilled. When we have a legally binding employment contract and no explicit exclusion of irregular migrant workers from social security, then there is nothing which would prevent to require the application of the principle equal treatment. Usually irregular migrant worker do not declare their work. It therefore should be equal treatment between irregular migrant workers and nationals who work in the black economy.

1.5.1.1.5. Other provisions

The other provisions of the ICMW on social security, *i.e.* Article 43 (1) (e), Article 45 (1) (c) and Article 54 (1) (b) and (c), are not applicable to irregular migrant workers. These provisions are placed in Part IV of the Convention and therefore can be only enjoyed by regular migrant workers and their family members.

1.5.1.2. Nationals who engage in undeclared work

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families covers migrant workers only. A migrant worker is defined in Article 2 (1) ICMW as a persons "who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national". Concerning social security, the ICMW

[189] Hasenau, "Setting norms," p. 140.
[190] Health and safe working conditions are related to social security. But this rather relates to prevention, than to rights which emanate from the realisation of a social risk, which is the focus of this work.

addresses the rights of economically active non-citizens in the State of employment. Nationals who engage in undeclared work, by contrast, are for the purpose of this research by definition individuals who have the citizenship of the country in which they work. Therefore, the ICMW does not say anything about their social security.

Situations in which nationals of the country of employment come under the social security protection of the Convention do not exist. Not if an individual moves to his or her own country in order to work there. And also not if a frontier worker resides in a neighbouring State and works in his or her own country. The latter is so because pursuant to Article 2 (2) (a) ICMW, frontier workers are migrant workers, and therefore non-citizens of the State of employment, who retain their habitual residence in a neighbouring State to which they regularly return.

1.5.2. Non-discrimination

The ICMW contains a number of non-discrimination provisions. Some are of a general nature; others apply to certain areas, such as remuneration, work conditions, social security or education. Regarding social security, the specific non-discrimination provisions of Part III, in particular Article 27 and Article 28 ICMW, have already been discussed before. Hence the focus of this subchapter will be the general non-discrimination principles, *i.e.* Article 1 (1) and Article 7 ICMW.

Article 1 (1) ICMW stipulates that

> "[t]he present Convention is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status".

And Article 7 ICMW reads:

> "States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status."

Both Articles provide for non-discrimination of migrant workers and their family members in relation to the rights set forth in the Convention. So they are no substantive, free standing non-discrimination principles. Both Articles exemplarily list the same prohibited grounds for discrimination. The difference is the addressee: While Article 7 obliges State Parties, Article 1 is considered to address other actors, such as employers or companies, too.[191]

[191] See *Cholewinski*, who refers to the Working Group report of October 1986. Cholewinski, *Migrant workers*, p. 155 and Open-ended Working Group on the Drafting on an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, *Report of the Open-ended Working Group on the Drafting on an International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, UN Doc A/C.3/41/3 (10 October 1986), § 108.

Concerning the reference group, there is a difference between the general non-discrimination clauses of Articles 1 (1) and 7 ICMW and the specific non-discrimination clauses, such as Articles 25, 27 or 28. While the latter provide for equal treatment between migrant workers and nationals, the general non-discrimination provisions demand equal treatment amongst migrant workers. For instance, the suspect ground 'nationality' under Articles 1 (1) and 7 ICMW means that there must not be any discrimination in relation to the rights set forth in the Convention between migrant workers of different nationalities or ethnic origins.[192]

For the purpose of this investigation, it is relevant to ask whether Articles 1 (1) and 7 ICMW also forbid discrimination between regular and irregular migrant workers. The list of prohibited grounds of these general non-discrimination provisions is not exhaustive. The notion 'other status' could theoretically be regarded as immigration status.[193] Therefore, the provision, basically, could be invoked in order to examine unequal treatment between an irregular migrant worker (or a group of irregular migrant workers) and an regular migrant worker (or a group of regular migrant workers). Thus far, the Committee has not done so. However, it must be recalled that the Convention itself distinguishes between regular and irregular migrant workers and their family members concerning the rights set forth in it. Part III ICMW grants rights to both groups of migrant workers alike. So, there is equal treatment between regular and irregular migrant workers as well as the members of their family. But Part IV of the Convention provides for additional rights for migrants with a regular status in the country of employment. This distinction can be explained by the difficulties in the drafting of the Convention to reach a common position on the issue of rights for irregular migrant workers and their family members.[194] Hence the distinction is a compromise. A compromise which led to a deviation from the principle of equal treatment of migrant workers, as stipulated in the Convention itself.

1.5.3. Fight against irregular migration and irregular work

The Convention contains a separate chapter which mainly aims at preventing and eliminating irregular migration. This is Part VI (Articles 64 to 71) – "Promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and member of their families". The chapter lays down some principles on the fight against irregular migration and irregular employment. These principles relate most notably to co-operation between Contracting States in connection with international migration (Article 64), to the establishment and maintenance of an administration which deals with international migration (Article 65), to limitations in the recruitment of workers in another State (Article 66), to co-operation between Contracting States for the return of migrant workers (Article 67) and to the termination of irregular

[192] For instance, in its Concluding Observations to the Syrian State Report, the Committee was concerned about the different treatment between Arabic and non-Arabic migrant workers in their ability to access employment, health care, housing and education. See Committee on Migrant Workers, *Concluding Observations: Syria*, UN Doc CMW/C/SYR/CO/1 (New York: United Nations, 2008), §§ 23-24.

[193] For another point of view see Catherine Dauvergne. She writes that "given the specific attention elsewhere in the Convention to lack of status it may also plausibly be argued that this omission [author's note: the omission of irregular migration status among the enumerated prohibited grounds] was deliberate and ought to be read as an exclusion". See Catherine Dauvergne, *Making people illegal: What globalization means for migration and law* (Cambridge: Cambridge University Press, 2008), p. 23.

[194] See Bosniak, "Human rights," p. 321 ff.

situations, in particular through regularisations (Article 69). As to the latter, there is no demand to regularise, but the Convention emphasises the option.

In the context of regularisation, it is interesting to mention the Committee on Migrant Workers' Concluding Observations on Azerbaijan. There the Committee expressed its concern about the "very high percentage of migrant workers who are in irregular situation, without adequate working conditions and social security benefits".[195] As a reaction, "[t]he Committee recommend[ed] that the State party increase its efforts and adopt appropriate measures, in accordance with the Convention, in particular with article 69, to ensure that this situation does not persist, including the possibility of regularizing the situation of these migrant workers, taking into account the duration of their stay in Azerbaijan and other relevant considerations".[196] So, the Committee did not recommend equal treatment with nationals concerning working conditions (Article 25 ICMW) and social security (Article 27 ICMW). Instead it recommended, with a reference to Article 69 ICMW, regularisation. Is this an indication of the weaknesses and ambiguities of, in particular, Article 27 ICMW – which have been identified before?

The key provision of Part VI is Article 68. Article 68 (1) ICMW calls on Contracting States to "collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation". To this end, State Parties shall take measures against misleading information concerning migration, take measures to detect and eradicate illegal movements, impose sanctions against facilitators of such movements, and impose sanctions on anyone who uses violence, threads or intimidation against irregular migrant workers and their families.

That not only migrant receiving countries have a responsibility to prevent illegal migration, but also migrant sending countries, is illustrated in the Concluding Observations on the State Report of the Philippines.[197] The Committee was concerned about the large number of Filipino workers who reside or work irregularly abroad. So it recommended enhancing its efforts to prevent irregular migration of Filipino nationals.[198] It is noteworthy that at the same time the Committee recommended to the Philippines to "continue to provide assistance to irregular Filipino migrants in need of protection".[199] Since decades, the Philippines pursue a policy of promoting the welfare of overseas Filipino workers.[200] This includes the provision of welfare services and social insurance. As to the latter, for instance, voluntary retirement, disability or health insurance are offered.[201] While in the beginning coverage required to produce an approved employment contract, these

[195] Committee on Migrant Workers, *Concluding Observations: Azerbaijan*, UN Doc CMW/C/AZE/CO/1 (New York: United Nations, 2009), § 44.
[196] *Ibid*., § 45.
[197] Committee on Migrant Workers, *Concluding Observations: Philippines*, UN Doc CMW/C/PHL/CO/1 (New York: United Nations, 2009).
[198] *Ibid*., §§ 39-40.
[199] *Ibid*., § 40.
[200] See already the Letter of Instructions no. 537 of President Ferdinand Marcos to the Secretary of Labor for the creation of a Welfare and Training Fund for Overseas Workers in the Department of Labor. Issued on 1 May 1977 in Manila. Available at: http://www.pinoy-abroad.net/img_upload/9bed2e6b0cc5701e4cef28a6ce64be3d/loi537_and_its_irr.pdf.
[201] Attempts to mandatory insure Filipino overseas workers under these statutory social insurance schemes have so far not been successful. See Philippine Social Security System, "Extending social security coverage to overseas Filipinos: The SSS experience" (paper presented at the 16th ASEAN Social Security Association Board Meeting, September 2005), pp. 2, 7. Available at: http://www.asean-ssa.org/sss9.pdf.

preconditions were softened over time.[202] This had the effect that also irregular migrant workers abroad can subscribe to voluntary statutory social security in the Philippines. The UN Committee on Migrant Workers seems to approve this practice – while at the same time urging for firmer action against irregular migration. Indeed, Filipino workers abroad may lack social security protection, such as in Arabic countries. And their acquired rights are not always protected, for instance because of a lack of international agreements for the coordination of social security. But the practice to protect irregular migrant workers abroad may pose serious problems. Not only that it encourages the continuation of the status quo, *i.e.* irregular residence or irregular work or both, it also provides an incentive for regular migrant workers to take up undeclared work abroad. The latter because it saves the Filipino worker a lot of money: the workers does not pay social security contributions and taxes in the country of employment, while at the same he/she is socially protected at a much lower rate at home.

But let us come back to Article 68 of the ICMW. Its second paragraph requires Contracting States to take measures against irregular employment, including employer sanctions. The second sentence of this provision stipulates that "[t]he rights of migrant workers vis-a-vis their employer arising from employment shall not be impaired by these measures". From the drafting discussion to the Convention, it becomes clear that it was the intention to only protect rights which "had already accrued at the point such employment was terminated owing to its illegality".[203] Concerning social security, this would mean that no migrant worker can derive rights from this provision. But once rights have been built up, the fight against irregular work may not result in a loss of these rights – such as due to an export ban or due to the prohibition to pay out benefits to unlawfully present foreigners. However, since it is about the rights vis-a-vis the employer, the field of application for statutory social security will be limited. Yet there are examples where Article 68 (2) ICMW may be relevant. For instance, the Dutch wage continuation payments in case of sickness, which are considered to be part of the statutory social security system.[204]

At the end of Part VI, there is one provision which relates to the social security of an irregular migrant worker and his/her family members. Article 71 ICMW reads:

> "1. States Parties shall facilitate, whenever necessary, the repatriation to the State of origin of the bodies of deceased migrant workers or members of their families.
>
> 2. As regards compensation matters relating to the death of a migrant worker or a member of his or her family, States Parties shall, as appropriate, provide assistance to the persons concerned with a view to the prompt settlement of such matters. Settlement of these matters shall be carried out on the basis of applicable national law in accordance with the provisions of the present Convention and any relevant bilateral or multilateral agreements."

Part VI is applicable to both regular and irregular migrant workers. Since Article 71 ICMW just talks about migrant workers and makes in contrast to Article 69 or Article 70 no distinction

[202] *Ibid*., pp. 2-3.
[203] Open-ended Working Group on the Drafting on an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, *Report of the Open-ended Working Group on the Drafting on an International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, UN Doc A/C.3/43/7 (17 October 1988), § 112.
[204] For more information see Part IIc of this thesis on the Netherlands.

between regular or irregular ones, one can assume that both categories of migrant workers are addressed. This view is supported by the *travaux préparatoires*.[205]

This provision, in particular the issue of death compensation, was rather disputed during the drafting of the Convention. Some suggested letting this matter continue to be regulated bilaterally,[206] others advocated dealing with death compensation in a separate provision, in another part of the Convention.[207] Eventually, the provision on death compensation continued to be part of the Convention. But reference was made to national law and relevant international law.[208] Therefore, irregular migrant workers can only derive very limited rights from this clause. They have no right to death compensation. But they may be assisted by Contracting States with a prompt settlement. The settlement itself shall be carried out on the basis of national legislation – within the realm of statutory or occupational social security or through private life insurance arrangements. This shall be in accordance with bilateral and multilateral obligations of the State concerned. However, because the clause 'as appropriate' was included, State Parties do not have a duty to provide assistance. Only when appropriate, such assistance shall be rendered.

1.5.4. Summary and comparison

The UN Migrant Workers Convention explicitly provides legal guarantees for migrant workers in an irregular situation and members of their families in the country of employment. These guarantees can be considered as the basic rights which should be granted to every migrant worker. Among these basic rights there are some which relate to an irregular migrant worker's social security. These are the principle of equal treatment with nationals of the State of employment (subject to some conditions), the possibility of reimbursement of contributions (subject to the treatment of nationals), the right to emergency medical care (subject to the treatment of nationals) and the provision of assistance for a prompt settlement of compensation in relation to the death of an irregular migrant workers and his/her family members. In addition, the Convention comprises rights which under certain circumstances may be relevant for social security. For instance, the instruction that employment contracts with irregular migrant workers shall be legally binding between employer and employee; or the instruction that rights of irregular migrant workers vis-a-vis their employers shall not be impaired by measures against illegal migration and illegal work.

More than in any other international treaty, the legal position of irregular migrant workers in social security has been specified. However, there is some uncertainty about the exact interpretation of the relevant provision. For example, does the principle of equal treatment with nationals in social security forbid the exclusion of irregular migrants from social security? Or would such exclusion fall under the exception that irregular migrant workers must fulfil national requirements? In

[205] Open-ended Working Group on the Drafting on an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, *Report of the Open-ended Working Group on the Drafting on an International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, UN Doc A/C.3/43/7 (17 October 1988), § 159.
[206] *Ibid*., § 157.
[207] *Ibid*., § 159.
[208] See in particular Open-ended Working Group on the Drafting on an International Convention on the Protection of the Rights of All Migrant Workers and Their Families, *Report of the Open-ended Working Group on the Drafting on an International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, UN Doc A/C.3/44/1 (19 June 1989), §§ 24-32.

addition, some of the provisions are formulated in weak language. They talk about 'the examination of the possibility' or 'the provision of assistance only if appropriate'. This also leaves a lot room for the application. So that it can be asked what the practical effect will eventually be. But the practical effect may sometimes also be doubted because some provisions are hardly applicable – contribution reimbursement, for instance. It appears that contribution refund shall only be considered for irregular migrant workers if it is for nationals. Yet contribution refund for nationals is very unusual in national social security. So, while it provides, without doubt, for more legal certainty that the position of irregular migrant workers has expressly been addressed in the UN Migrant Workers Convention, this positive effect may be undermined by ambiguous and weak language as well as by lack of fields of application.

The provisions on social security under the UN Migrant Workers Treaty are not applicable to nationals of the State of employment. This entails that a person who crosses international borders in order to work in his/her own country is not covered. As a consequence, the Treaty has no effect on the social security of persons who work in the black economy of the country of which they are nationals.

This may mean that irregular migrant workers are put in a more favourable position by international law than workers who are nationals of the country of employment and work in the black economy. Even if the national is a frontier worker in his or her own country, no protection is granted under the ICMW. One might argue of course that the ICMW aims at guaranteeing non-national workers in some respects a similar legal status as nationals. Therefore the relevant social security rights for irregular migrant workers under the Convention are only guaranteed on the basis of the treatment of nationals (see Articles 27 and 28 ICMW). The question is however which nationals are taken as the reference group: the position of a national who declares his or her work may be different under national social security law from the position of a national who performs black-economy work. Therefore, if not the latter is taken as the reference group for equal treatment, irregular migrant workers who perform black-economy work may enjoy more rights than nationals who do not declare their work.

Finally, it must also be mentioned that the UN Migrant Workers Treaty has so far been mostly ratified by migrant workers sending countries. And in Europe, only Albania, Bosnia and Herzegovina and Turkey decided to ratify it.

1.6. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the Convention against Transnational Organized Crime

In 2000, the General Assembly of the United Nations adopted the Convention against Transnational Organized Crime (CTOC) as well as the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (CTOC-P1).[209] Belgium, Canada, the Netherlands as well as the European Community are Parties to both the Convention and the Protocol, meaning that they are legally bound by these documents. Implementation of the documents is reviewed by the Conference of the Parties.

The CTOC commits State Parties to prevent and combat transnational organised crime by taking a series of measures, such as the creation of domestic offenses, the adoption of frameworks for mutual legal assistance, extradition, law enforcement cooperation and technical assistance and training. The CTOC-P1 particularly focuses on trafficking in human beings. Besides prevention and combat of this phenomenon, the Protocol aims "to protect and assist the victims of such trafficking, with full respect for their human rights".[210]

This Protocol is of limited relevance for our research because it targets a very particular group: victims of trafficking in persons. Trafficking in persons is defined as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation".[211] As opposed to the Protocol against the Smuggling of Migrants, supplementing the Convention against Transnational Organized Crime,[212] there is no requirement that the victim of human trafficking must be a non-national of the country where he/she is located. What however is required is that the offence is transnational in nature.[213] An offence is 'transnational in nature', pursuant to Article 3 of the Convention, if:

> "(a) It is committed in more than one State;
> (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
> (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
> (d) It is committed in one State but has substantial effects in another State."

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[209] United Nations Convention against Transnational Organized Crime, UN General Assembly resolution 55/25, 15 November 2000, United Nations, *Treaty Series*, vol. 2225, no. 39574, and Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, UN General Assembly resolution 55/25, 15 November 2000, United Nations, *Treaty Series*, vol. 2237, p. 319.
[210] Article 2 (b) CTOC-P1.
[211] Article 3 (a) CTOC-P1.
[212] Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, UN General Assembly resolution 55/25, 15 November 2000, United Nations, *Treaty Series*, vol. 2241, p. 507.
[213] Article 4 CTOC-P1.

This basically does not prevent that also nationals of the country of employment who do not declare their work can be victims of human trafficking. For instance, when a women, who is citizen of country A, is forced by means of violence to sell sexual services in country A, but where the perpetrator is part of an organised criminal groups that engages in criminal activities in other countries too. However, the requirement of a transnational element limits the field of application for victims who are nationals of the country of employment. In practice, trafficking in persons will be mostly about migrants, not having the citizenship of the destination country.

As for social security, Article 6 CTOC-P1 is relevant. It reads:

> "3. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of:
> (a) Appropriate housing; [...]
> (c) Medical, psychological and material assistance; and
> (d) Employment, educational and training opportunities.
>
> 4. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care."

And Article 7 CTOC-P1 continues:

> "1. In addition to taking measures pursuant to article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.
>
> 2. In implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors."

Let us begin with Article 7 CTOC-P1. This provision does not prescribe to provide victims of trafficking in persons a residence authorisation, but only requires State Parties to *consider* respective measures. In other words, State Parties have a margin of appreciation whether or not they grant legal residence. The same goes for work authorisations – which will be discussed below. As a consequence, victims of human trafficking may continue to have an unlawful presence and unlawful work after being identified as a victim.[214] Here it should be remarked that the Protocol in general does not prescribe certain requirements or a specific procedure, whereby the status of a victim as such can be established.[215] This is completely left to the Contracting States.

However, once a person is regarded as a victim of trafficking in persons, however this is done, the person may benefit from measures aimed at the physical, psychological and social recovery (Article 6 (3) CTOC-P1). Once more, it is striking that a rather weak language is used: there is no obligation to provide those measures; Contracting States shall only *consider* the provision. The Legislative Guides to the Protocol, which assist States in ratifying and implementing the Protocol, talk about paragraph 3 as an 'optional element', containing some discretion for the State Parties, in

[214] Protection from prosecution for unlawful stay or unlawful work is not guaranteed under the Protocol.
[215] See also United Nations Office on Drugs and Crime, *Legislative Guides for the implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (New York, United Nations, 2004), p.289.

contrast to mandatory provisions of the Protocol.[216] Some commentators sharply criticised that the drafters of the Protocol could not agree on a more mandatory tone with regard to the Protocol's protection provisions.[217] Others pointed to the fact that the differences in social economic development and available resources amongst States, would not have allowed for obligatory provisions in this field.[218]

So, Contracting States to the Protocol are only required to consider the implementation of measures to provide for the physical, psychological and social recovery of victims. The Legislative Guides name a few reasons, apart from humanitarian considerations, why such implementation should nevertheless be done: amongst them the provision of support, shelter and protection for victims increases the likelihood that they will be willing to cooperate with national authorities in criminal investigations;[219] and by addressing the social, educational, psychological and other needs of victims as soon as they are discovered, costs may be saved in not having to deal with them at a later stage.[220]

Article 6 (3) CTOC-P1 suggests in particular the provision of medical and material assistance and employment opportunities. Further specification of the scope of these services has not been given. The obligation to consider the implementation of measures for the physical, psychological and social recovery of victims applies to all States where a victim is located, whether a country of origin, transit or destination.[221]

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[216] *Ibid*., pp. 283, 287. The Legislative Guidelines are no authoritative interpretation. However, they are of great weight in assisting State Parties in ratifying and implementing the Convention and the Protocols thereto.

[217] See *inter alia* Anne Gallagher, "Human rights and the new UN Protocols on Trafficking and Migrant Smuggling: A preliminary analysis," *Human Rights Quarterly*, vol. 23, no. 4 (2001), pp. 990-91.

[218] See David McClean, *Transnational organized crime: A commentary on the UN Convention and its Protocols* (Oxford: Oxford University Press, 2007), p. 19 and United Nations Office on Drugs and Crime, *Legislative Guides*, pp. 287-88.

[219] However, support shall, according to the Legislative Guides, not be made conditional upon cooperation of the victim with national authorities.

[220] United Nations Office on Drugs and Crime, *Legislative Guides*, p. 288.

[221] *Ibid*., pp. 283, 288 and Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, UN Doc A/55/383/Add.1 (New York: United Nations, 2002), § 71.

2. International Labour Organization

2.1. Migration for Employment Convention

Long before the United Nations General Assembly adopted in 1990 the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the International Labour Organization (ILO), a specialised agency of the UN, elaborated the Convention concerning Migration for Employment. The revised version (C97) was adopted in 1949 by the International Labour Conference.[222] The Convention was accompanied by the Recommendation concerning Migration for Employment (R86).[223] Unlike the Convention, the Recommendation is legally not binding. Supervision of the Convention is carried out by the Committee of Experts on the Application of Conventions and Recommendations – in short: the Committee of Experts. Decisions and opinions issued by the Committee of Experts are legally not binding. Belgium and the Netherlands ratified Convention No. 97. Canada, by contrast, did not do so.

2.1.1. Rights related to social security

The Migration for Employment Convention focuses on the organisation and facilitation of migrant work. At its core there is an equal treatment clause between migrant workers and nationals – Article 6. This provision will be discussed below, in the subchapter on non-discrimination. Other provisions of Convention No. 97 with relevance for social security – although to a limited extent – are Articles 5 and 7 (2) C97. Article 7 (2) C97 requires State Parties to "ensure that the services rendered by its public employment service to migrants for employment are rendered free". Article 5 C97 urges State Parties to maintain appropriate medical services at departure, during the journey and on arrival to migrants for employment and their family members.

2.1.1.1. Irregular migrant workers

Article 11 (1) C97 stipulates that "[f]or the purpose of this Convention the term migrant for employment means a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment". This provision clearly limits the personal scope of application. Only those who are 'regularly admitted' fall under this definition. But what does this phrase exactly mean? Are migrants who have an authorisation to enter and reside in a country regularly admitted? Or does admitted also refer to the authorisation to take up work in a country?

The Committee of Experts expressed in its Second General Survey on the Reports on C97, R86, C143 and R151 of 1999 the view that regularly admitted for employment refers to the correct entry into the host country. In paragraph 105 the Committee writes "[t]he provisions of Convention No.

[222] Convention concerning Migration for Employment (Revised), 1 July 1949, Convention No. 097, available at: http://www.ilo.org/ilolex/english/convdisp1.htm.
[223] Recommendation concerning Migration for Employment (Revised 1949), 1 July 1949, Recommendation No. 086, available at: http://www.ilo.org/ilolex/english/recdisp1.htm.

97, Recommendation No. 86 and Part II of Convention No. 143 deal only with the protection of migrant workers who have been "regularly admitted" for the purposes of employment. That is to say, individuals who have entered a country illegally are not covered by these provisions".[224] This indicates, conversely, that individuals who have entered a country legally, but reside or work there illegally would be covered.

The literal interpretation of Article 11 (1) C97 supports the view of the Committee. According to the second sentence of this provision only persons 'regularly admitted as a *migrant for employment* [emphasis added by the author]' are covered. And 'migrant for employment' is defined in the first part of this sentence as 'a person who migrates from one country to another *with a view to being employed* [emphasis added by the author]'. Therefore, the second part of the sentence must be read as 'regularly admitted as a person who migrates from one country to another with a view to being employed'. There must be the intention or the prospect of being employed, but the regular admission refers to the process of migration. So this literal interpretation arrives at the same result as the one suggested by the Committee in its second General Survey on Migrant Workers: individuals who have entered a country illegally are not covered by these provisions. Illegal presence and illegal work, by contrast, do not appear to be the decisive factors.

In the other ILO Migrant Workers Convention – Convention No. 143 –, the concept of migrant for employment/migrant worker also knows a restriction to persons regularly admitted as migrants for employment/migrant workers.[225] In the drafting process of Convention No. 143, the Netherlands remarked that "[i]t is a serious omission not to refer in Article 8 [now Article 11] to the lawfulness of the stay, which is a *sine qua non*".[226] Also this serves as evidence that it is not the lawful stay, but the lawful entry which is meant by the words 'regularly admitted'.

But does this mean that migrants who stay and work illegally in a country are protected under the social security provisions of Convention No. 97, as long as they have entered the country legally? Not really. It is true that, for instance, a person who has been admitted as a temporary migrant worker and who continues to work in the host country after the expiry of his/her residence and work authorisation would fall under the term 'migrant for employment', since he/she entered the country legally with a view to being employed. But, basically, this does not lead to entitlements under the Articles 5 and 7 (2) C97.

In more detail, the provision of medical services under Article 5 C97 relates to the departure, the journey and the arrival of the migrant and his/her family members. During the immigration process, permission to enter the country is required. For the time thereafter, Article 5 is no longer applicable. So there is no way an irregular migrant worker can benefit from this provision.

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[224] See International Labour Conference, 87th session, 1999, Report of the Committee of Experts on the Application of Conventions and Recommendations, *General Survey on the Reports on the Migration for Employment Convention (Revised) (No. 97), and Recommendation (Revised) (No. 86), 1949, and the Migrant Workers (Supplementary Provisions) Convention (No. 143), and Recommendation (No. 151), 1975* (Geneva: International Labour Office, 1999), § 105

[225] This is true for Part II of ILO Convention No. 143, to which the definition of Article 11 C143 applies.

[226] International Labour Conference, 60th session, 1975, Report V(2), *Migrant Workers* (Geneva: International Labour Office, 1975), p. 19 (opinion of the Netherlands).

The next relevant provision, Article 7 (2) C97, urges State Parties to "ensure that the services rendered by its public employment service to migrants for employment are rendered free".[227] Basically, the provision applies to irregular migrant workers who entered the country lawfully. But what is the content of this clause? It just says that those services which are provided to a migrant worker must be provided for free. It does not say that employment services must be provided.[228] So, national legislation which does not render employment services to irregular migrant workers is in compliance with Convention No. 97. Nevertheless, this clause may under certain circumstances affect irregular migrant workers: if under national legislation migrant workers without authorisation to reside and/or to work in the country are able to receive employment services, they must get it for free, provided that they have entered the country in a legal way. Still, there will hardly be any field of application. If we are not talking about employment services in connection with the recruitment of workers (see footnote 227), public employment services *are* predominantly free. This is already State practice. In addition, it is also an international obligation laid down in Article 1 (1) of the ILO Employment Service Convention (C88).[229]

To sum up, while certain types of irregular migrant workers may be covered by Convention No. 97, there is little to no impact on them in the field of social security.

2.1.1.2. Nationals who engage in undeclared work

We have seen that a migrant for employment is considered as "a person who migrates from one country to another with a view to being employed [...] and includes any person regularly admitted [...]". The Convention does not require that the migrant is a citizen of another country than the host country. But it requires that, first, the person *migrates* and, second, the person is regularly *admitted*. The question is if this implies that the migrant must have another nationality than the one of the country of employment. As to *migration*, there is no definition of this notion provided. Moreover, there is nothing which would preclude that the process of moving from one country to settle in another, where one is a citizen of, is considered as migration. However, concerning *admission*, it is usually inherent to the concept of citizenship that people are allowed to enter their home country. Of course, this does not mean that they are not subject to an examination at entry. Only if they prove to be citizens they are allowed to enter. But such an examination at entry can hardly be qualified as admission. Citizens have their right to enter the territory. They do not need an admission. They only need to identify themselves.

As a consequence, individuals who have crossed international borders in order to work in their home country would not be covered by Convention No. 97. This means that this Convention is not applicable to nationals of a country who engage in undeclared work.

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[227] This provision is accompanied by Article 4 Annex I and Article 4(1) Annex II to C97, which require free services by employment services in connection with the recruitment, introduction or placing of migrants for employment. These provisions are less relevant for this research, since they apply to recruited workers only, *i.e.* those who have a concrete offer of employment prior to entry into the host country

[228] See also International Labour Conference, 87th session, *General Survey on Conventions Nos. 97 and 143*, § 167 ff.

[229] Convention concerning the Organisation of the Employment Service, 9 July 1948, Convention No. 088, available at: http://www.ilo.org/ilolex/english/convdisp1.htm.

2.1.2. Non-discrimination

As mentioned before, the key provision of Convention No. 97 is the equal treatment clause – Article 6. It reads:

> "1. Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals in respect of the following matters:
> [...]
> (b) social security (that is to say, legal provision in respect of employment injury, maternity, sickness, invalidity, old age, death, unemployment and family responsibilities, and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:
> (i) there may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;
> (ii) national laws or regulations of immigration countries may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension;
> (c) employment taxes, dues or contributions payable in respect of the person employed [...]."

The equal treatment with nationals in relation to social security must be granted to 'immigrants lawfully within its territory'. One can see that in contrast to the other provisions of C97 which entitle 'migrants for employment', Article 6 relates to 'immigrants lawfully within its territory'. Unlike for the first category, a legal definition for the latter is not provided. It can be assumed that the lawfulness refers to national legislation: immigrants who are within the territory of a Contracting State in compliance with its legislation must be afforded equal treatment with nationals in social security. In some areas, such as North America, the term 'immigrant' is used for migrants with a long-term or permanent residence status. However, the Committee of Experts made clear that the expression 'immigrant' in Article 6 C97 refers to both temporary and permanent migrants.[230]

So, the limitation of the personal scope of application of Article 6 goes beyond the limitation of the other provisions of Convention No. 97. It is not the unauthorised entry which leads to exclusion, it is the unlawful presence on the soil of the host country. Therefore a migrant worker who entered a country lawfully, but thereafter resides there unlawfully will not be protected by the non-discrimination clause. However, since Article 6 talks about being lawfully within the national territory, migrant workers who lack work authorisation seem to be covered, as long as they are lawfully present – this is what we call category B irregular migrant workers. Commentators and the Committee of Experts have not pronounced on this issue.[231]

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[230] International Labour Conference, 87th session, *General Survey on Conventions Nos. 97 and 143*, §§ 107, 108, 431.

[231] Without distinction as to unauthorised stay and unauthorised work, the Committee and commentators talk about irregular or illegal migrants to which Article 6 is not applicable. See International Labour Conference, 66th session, 1980, Report of the Committee of Experts on the Application of Conventions and Recommendations, *General Survey of the Reports relating to Conventions Nos. 97 and 143 and Recommendations Nos. 86 and 151 concerning migrant workers* (Geneva: International Labour Office, 1980), § 36. See also Cholewinski, *Migrant workers,* p. 133 and fn. 278.

In the context of a later convention, the Equality of Treatment (Social Security) Convention No. 118,[232] the Committee of Experts made some interesting remarks. It noted:

> "As regards coverage, the most typical forms of discrimination appear to be exclusion from coverage on non-nationals as such, conditional coverage and optional coverage, the latter being reserved for nationals only. In this connection it should be borne in mind that the principle of equality of treatment implies the abolition of discrimination based on a person's nationality. Consequently, a requirement of lawful residence in the country or of lawful authorisation to be in employment does not appear to be contrary to this principle; where such conditions are imposed the difference in treatment does not appear to be motivated by the alien status of the persons concerned but rather by their legal position under regulations governing entry into and residence in the country, or access to employment."[233]

The equal treatment principle to which the Committee referred to is laid down in Article 3 (1) of Convention No. 118. It reads.

> "Each Member for which this Convention is in force shall grant within its territory to the nationals of any other Member for which the Convention is in force equality of treatment under its legislation with its own nationals, both as regards coverage and as regards the right to benefits, in respect of every branch of social security for which it has accepted the obligations of the Convention."

So, State Parties to the Convention are not precluded under the equal treatment principle of Convention No. 118 to exclude nationals of other State Parties who have no authorisation to stay and work on the territory of the State Party. Remarkable is the argumentation of the Committee. It regards the exclusion of irregular migrant workers as not being motivated by differentiation according to citizenship, but by differentiation according to legal position. Therefore, equality of treatment between citizens and non-citizens cannot be invoked. The Committee expressed this opinion in its General Survey of the Reports relating to the Equality of Treatment (Social Security) Convention in 1977. Since then no further General Survey on this Convention has been issued. One can ask whether this opinion is still valid and reflects the contemporary interpretation of Article 3 (1) C118. The answer seems to be yes. In the following decades, the Committee again and again referred to its Survey of 1977 in general, and to its findings on the requirement of a lawful residence or work status in a State Party in particular. For example, in its General Survey on Social Security Protection in Old Age of 1989, the Committee cited paragraph 57 of the General Survey of 1977.[234] Another example is the General Survey on Migrant Workers of 1999, where the Committee noted that "[t]he conclusions of [the General Survey of 1977] remain generally valid".[235]

This later statement brings us to the question whether these findings under Convention No. 118 are also relevant for Convention No. 97. The underlying principle is the same in both equal treatment

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[232] Convention concerning Equality of Treatment of Nationals and Non-Nationals in Social Security, 28 June 1962, Convention No. 118, available at: http://www.ilo.org/ilolex/english/convdisp1.htm. The Netherlands originally ratified Convention No. 118, but denounced it later on. Belgium and Canada never ratified this instrument.

[233] International Labour Conference, 63rd session, 1977, Report of the Committee of Experts on the Application of Conventions and Recommendations. *General Survey of the Reports relating to the Equality of Treatment (Social Security) Convention, 1962 (No. 118)* (Geneva: International Labour Office, 1977), § 57.

[234] See International Labour Conference, 76th session, 1989, Report of the Committee of Experts on the Application of Conventions and Recommendations. *General survey of the reports relating to the Social Security (Minimum Standards) Convention (No. 102), 1952, the Invalidity, Old-Age and Survivors' Benefits Convention (No. 128) and Recommendation (No.131), 1967, in so far as they apply to old-age benefits* (Geneva: International Labour Office, 1989), § 53 and Endnote 9.

[235] See International Labour Conference, 87th session, *General Survey on Conventions Nos. 97 and 143*, § 435.

clauses: equality of treatment between immigrants (of other Contracting States) with own nationals. We already mentioned in the previous paragraph that the Committee noted in its General Survey on Migrant Workers of 1999, where the Committee commented on Conventions No. 97 and No. 143, that "[t]he conclusions of [the General Survey of 1977] remain generally valid".[236] In addition, when discussing the principle of equal treatment in social security under Conventions No. 97 and No. 143, the Committee stated that "[a]ccount should also be taken of the provisions of the Equality of Treatment (Social Security) Convention, 1962 (No. 118), although there is one major difference between this instrument and Conventions Nos. 97 and 143".[237] The difference to which the Committee refers to is the principle of reciprocity. All this could be seen as evidence that, similar to Article 3 (1) of Convention No. 118, Article 6 of Convention No. 97 does not prohibit differentiation in social security according to residence or work authorisation.

What is also worth mentioning are the limitations to the principle of equal treatment of Article 6 C97 – in particular the limitation under Article 6 (1) (b) (ii) C97. This provision stipulates that, first, concerning benefits or portions of benefits which are payable wholly out of public funds, and, second, concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension, national laws or regulations of immigration countries may prescribe special arrangements. Concerning the first situation, the Committee, for instance, held on many occasions that the limitation under Article 6 (1) (b) (ii) C97 allows to make the grant of non-contributory benefits to foreigners conditional upon a period of residence in the country, as opposed to own nationals.[238] Some even suggest that the limitation under Article 6 (1) (b) (ii) C97 allows to restrict non-contributory benefits financed out of public funds only to nationals.[239] The second situation where exception from the equality of treatment is permitted under Article 6 (1) (b) (ii) C97 has not received much attention. Since benefits paid out wholly from public funds are excluded under the first situation, the second situation seems to address allowances which are paid fully or partly from social insurance funds to persons not qualifying for the social insurance benefit. Such a constellation exists for example in Belgium, where persons not qualifying for the family allowance benefit under the social insurance, may qualify for the family allowance of last resort for indigent parents. Both benefits are paid out of the same social insurance fund, which is financed by employers' contributions.

2.1.3. Fight against irregular migration

The fight against irregular migration is clearly not the focus of Convention No. 97. Only two provisions in the Annexes are devoted to it: Article 8 Annex I and Article 13 Annex II. They identically stipulate that "[a]ny person who promotes clandestine or illegal immigration shall be subject to appropriate penalties". This is rather a principle than a detailed instruction and leaves a lot room for the concrete application. It is however plain that persons who promote illegal

[236] *Ibid*.
[237] *Ibid*., § 432. See also International Labour Conference, 66th session, *General Survey on Conventions Nos. 97 and 143*, § 303.
[238] See International Labour Conference, 87th session, *General Survey on Conventions Nos. 97 and 143*, § 431; and International Labour Conference, 66th session, *General Survey on Conventions Nos. 97 and 143*, § 307.
[239] See Cholewinski, *Migrant workers*, p. 113, who refers to International Labour Conference, 52nd session, 1968, Report of the Director General (Part I), *The ILO and Human Rights* (Geneva: International Labour Office, 1968), p. 54.

immigration shall be subject to penalties. It is not about persons who promote unauthorised work of lawfully present migrants.

2.1.4. Summary

To sum up, the Migration for Employment Convention focuses on the organisation and facilitation of migrant work. In doing so, the equal treatment between migrant workers and nationals in social security plays a prominent role. However, this equal treatment clause is only applicable to migrant workers who are lawfully present in the country of employment. The lawfulness of work, by contrast, is not required. Still, the Committee of Experts noted in the context of the Equality of Treatment (Social Security) Convention No. 118 that it does not consider the exclusion of persons with work authorisation from national social security as being a matter of discrimination based on nationality. It is rather discrimination based on legal status and thus not covered by the obligation to treat migrant workers and nationals equally. The Committee also confirmed that these conclusions in the context of Convention No. 118 are valid for Convention No. 97.

Besides equal treatment, only Article 7 (2) C97, which urges State Parties to render employment services for free, may bear, although admittedly very limited, relevance for irregular migrant workers. The provision does not constitute a right to enjoy employment services, but it wants to make sure that once they are delivered, they should be delivered for free. Irregular migrant workers may benefit from this provision as long as they have entered the country legally.

2.2. Migrant Workers (Supplementary Provisions) Convention

In 1975, the International Labour Conference adopted a further convention on migrant workers: Convention No. 143 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers – in short: Migrant Workers (Supplementary Provisions) Convention.[240] This Convention supplemented ILO Convention No. 97. Like Convention No. 97, Convention No. 143 was accompanied by a recommendation: Recommendation No. 151 concerning Migrant Workers.[241] This legally non-binding Recommendation further specifies the measures to be taken under the Convention and advises the adoption of additional minimum standards for migrant workers. None of our investigated countries has so far ratified ILO Convention No. 143.

2.2.1. Rights related to social security

Convention No. 143 comprises two Parts.[242] One titled 'migrants in abusive conditions' and the other one 'equality of opportunity and treatment'. Upon ratification, States are free to exclude one of these two Parts. Part I (Articles 1 to 9) deals with the prevention and elimination of illegal immigration and illegal employment. However, it includes two provisions which confer rights with possible relevance for a person's social security: Article 1 and Article 9 (1). Article 1 stipulates that "[e]ach Member for which this Convention is in force undertakes to respect the basic human rights of all migrant workers". And Article 9 (1) reads:

> "Without prejudice to measures designed to control movements of migrants for employment by ensuring that migrant workers enter national territory and are admitted to employment in conformity with the relevant laws and regulations, the migrant worker shall, in cases in which these laws and regulations have not been respected and in which his position cannot be regularised, enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits."

The Part II of C143 (Articles 10 to 14) requires State Parties to provide equal treatment to migrant workers with nationals of the country of employment. Its key provision, Article 10, will be discussed below in the subchapter on non-discrimination.

And at the end of Recommendation No. 151 to Convention No. 143, one can find a recommendation with respect to migrant workers who leave the country of employment. Paragraph 34 (1) reads as follows:

> "A migrant worker who leaves the country of employment should be entitled, irrespective of the legality of his stay therein [...]
> (b) to benefits which may be due in respect of any employment injury suffered;
> (c) in accordance with national practice [...]

[240] Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, 24 June 1975, Convention No. 143, available at: http://www.ilo.org/ilolex/english/convdisp1.htm.
[241] Migrant Workers Recommendation, 24 June 1975, Recommendation No. 151, available at: http://www.ilo.org/ilolex/english/recdisp1.htm.
[242] The last Part, final provisions, not included.

(ii) to reimbursement of any social security contributions which have not given and will not give rise to rights under national laws or regulations or international arrangements: Provided that where social security contributions do not permit entitlement to benefits, every effort should be made with a view to the conclusion of bilateral or multilateral agreements to protect the rights of migrants."

2.2.1.1. Irregular migrant workers

Article 11 C143 defines the concept 'migrant worker'. This concept does only include persons who are regularly admitted as migrant workers. However, Article 11 expressly stipulates that this definition is just applicable to Part II of the Convention. For Part I, which primarily deals with the prevention and elimination of illegal immigration and work, this restriction does not apply. As a consequence, Article 1 and Article 9 (1) C143, both being part of Part I, protect migrant workers with an irregular legal status in the country of employment.[243]

2.2.1.1.1. Article 1 C143

Article 1 C143 rules that the basic human rights of all migrant workers must be respected. The Convention itself does not further specify what these basic human rights are. Neither does the accompanying recommendation. The one which pronounced on the meaning of this clause was the Committee of Experts, in particular in its two General Surveys on the situation in Contracting States and Non-contracting States concerning the two ILO conventions and two ILO recommendations related to migration. In the first General Survey, dating back to 1980, the Committee refers to the International Covenant on Civil and Political Rights and exemplarily mentions those human rights which it considers as the basic ones. These are the right to life, the protection against torture, cruel, inhuman or degrading treatment or punishment, the right to liberty and security of person and protection against arbitrary arrest and detention, and, if criminal proceedings are brought prior to expulsion, the right to fair trial. The Committee explicitly confirmed that these basic rights should be granted to every migrant worker, including those who are unlawfully in the country.[244] The second General Survey of 1999 suggested that Article 1 C143 is about the fundamental human rights as laid down in the UN human rights instruments, such as the UDHR, the ICCPR, the ICESCR and the ICMW.[245] Moreover, the Committee refers to the ILO Declaration on Fundamental Principles and Rights at Work and, in particular, to its paragraph 2.[246] There the following fundamental rights are stipulated: freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, and the elimination of discrimination in respect of employment and occupation.

The exemplary listing of fundamental human rights and the reference to other international instruments in this domain give some guidance on what Article 1 C143 is about. But it is certainly no clear delineation. The first form of guidance, *i.e.* the exemplary listing, does not tell us whether the right to social security or the right to health must also be considered as being part of the basic human rights. This is because the list itself neither explicitly nor implicitly provides information

[243] See also International Labour Conference, 87th session, *General Survey on Conventions Nos. 97 and 143*, § 295 ff.
[244] International Labour Conference, 66th session, *General Survey on Conventions Nos. 97 and 143*, § 257.
[245] See also International Labour Conference, 87th session, *General Survey on Conventions Nos. 97 and 143*, § 296.
[246] *Ibid*.

on the fundamental consensus, on which the list is built. There will be little discussion about the inclusion of the right to life to the basic human rights. But I can imagine that the inclusion of the right to collective bargaining could be contested. So it is difficult to say whether and to what extent the right to social security belongs to these basic human rights.

The second form of guidance provided by the Committee of Experts is the reference to fundamental human rights contained in other international instruments. Yet most of these instruments do not distinguish between fundamental and 'normal' human rights. An exception is the UN Migrant Workers Convention, to which the Committee also referred. This UN Convention, as we have seen, distinguishes between basic rights available to all migrant workers and additional rights for regular migrant workers only. So, one can argue that Article 1 C143, which demands basic human rights for all migrant workers, is a general clause, which has been further specified in Part III of the ICMW. This point of view is supported by the fact that the rights to which the Committee of Experts has exemplarily referred to in its General Surveys as being basic human rights, would all be covered in Part III ICMW.[247]

Nevertheless, there is something to be said against it: that is the ILO Convention No. 143 itself. While Part I applies to all migrant workers, Part II refers to only those lawfully within the territory or those regularly admitted. Therefore, and this has been confirmed by the Committee of Experts,[248] there must be a difference between the basic human rights under Article 1 C143 and those granted under Part II. Equal treatment with nationals in matters of employment and occupation, social security, trade union and cultural rights and individual and collective freedoms[249] under Part II is only granted to migrant workers lawfully within the territory. Therefore, they cannot be basic human rights. But what about the UN Migrant Workers Convention which grant to *all* migrant workers equal treatment with nationals as to remuneration and conditions of work or, if national requirements are fulfilled, as to social security? What I want to say is that ILO Convention No. 143 grants equal treatment in social security to lawfully present migrants only, whereas the UN Migrant Workers Convention provides for equal treatment for all, including unlawful staying migrants. A reference for the basic human rights under Article 1 C143 to Part III of the ICMW may therefore, in relation to equal treatment, be in contradiction to Article 10 C143. Whether there is indeed a contradiction depends on the exact meaning of the two non-discrimination provisions. Article 10 C143, as will be illustrated below, has been attributed, by and large, the same scope as Article 6 (1) (b) C97. This Article rather clearly defines the content of the non-discrimination provision and provides for explicit exceptions from the principle of equal treatment, such as for benefits solely or partly publicly funded. However, we do not know whether there may be other reasons which justify unequal treatment. By contrast, Article 27 (1) ICMW is formulated quite ambiguously and it is not clear which margin of appreciation State Parties actually have. Therefore, it cannot be excluded that the content of the non-discrimination provisions of the ILO migrant worker treaties deviates from the content of the non-discrimination

[247] Only with regard to 'freedom of association and the effective recognition of the right to collective bargaining', which was cited by the Committee as an example of a basic human right, it is not sure whether this is covered by Article 26 (1) ICMW. This Article grants the rights to all migrant workers to freely join any trade union and association and to take part in meetings and activities of them. One can discuss whether 'join an association' includes also the right to form it; and whether 'taking part in meetings and activities' includes collective bargaining. *Cholewinski* and *Hasenau* do not see these rights included under Article 26 (1) ICMW. See Cholewinski, *Migrant workers*, pp. 164-65; and Hasenau, "Setting norms," pp. 138-39.

[248] International Labour Conference, 87th session, *General Survey on Conventions Nos. 97 and 143*, § 297.

[249] Individual and collective freedoms refer to freedoms such as freedom of assembly, information, opinion and expression, on which the full exercise of trade union rights depends. *Ibid*., § 444.

clause of the UN migrant worker instrument. The consequence would be that there is not necessarily a contradiction between providing equal treatment one time only to lawfully present migrant workers and the other time to all migrant workers. Anyway, since we do not know the exact content, we do not know whether there is a conflict.

To my mind, however, it still makes sense to interpret Article 1 C143 as conferring those basic rights to all migrants which have been later established in Part III of the UN Migrant Workers Convention. This would also provide for more coherence between the UN and ILO protection systems for migrant workers. Yet such a reference shall not be possible whenever Part III of the UN Convention guarantees rights to all migrant workers, which are reserved to lawfully present migrant workers under the ILO Convention only. In other words, whenever such an interpretation of Article 1 C143 would be in contradiction to the rest of the ILO Convention.

2.2.1.1.2. Article 9 (1) C143

The second right of Part I C143 with relevance for the social security of irregular migrant workers is Article 9 (1). As illustrated above, it stipulates that migrant workers who are not respecting the laws on entrance into the country and admission for employment and whose situation cannot be regularised should enjoy equal treatment for themselves and their family in relation to rights arising out of past employment as regards social security. This provision expressly addresses irregular migrant workers. The words of the clause and the comments of the Committee of Experts leave no doubt that migrant workers who are unlawfully present or unlawfully employed or both should benefit from Article 9 (1) C143.[250] However, a restriction is made to those migrant workers who cannot be regularised. The provision implicitly insists that those who can be regularised shall be regularised and are then protected under Part II of C143.

Article 9 (1) C143 does not specify with whom equal treatment shall be provided. The Committee of Experts argues that equal treatment with nationals cannot be the intention. This is because equal treatment with nationals is provided for in Part II, under Article 10. And since States are free to exclude either Part I or Part II on ratification, it "would require States which are not in a position to accept Part II, but could accept Part I, to grant illegally employed migrant workers equal treatment with nationals in respect of rights arising under past employment [...] even when they do not grant such equal treatment to regularly employed migrant workers".[251] Therefore, the Committee is of the opinion that Article 9 (1) C143 requires equal treatment with migrants who are regularly admitted and lawfully employed. This conclusion is convincing.

Article 9 (1) C143 provides for 'equality in respect of rights arising out of past employment'. The central question is: must equality be provided for already acquired rights or for the process of acquiring rights? The difference is huge. In the first case, it is decisive how a State Party treats irregular migrant workers after they have built up rights in the course of employment. That is to say, an irregular migrant worker who was able to build up social security rights, despite his or her irregular status when performing work, must be treated equally to a regular migrant worker when it comes to the enjoyment of these rights. When regular migrant workers get their benefits paid out in the country of employment or when they get their benefits exported, then this must be also

[250] *Ibid.*, § 302 ff.
[251] *Ibid.*, § 303.

possible for irregular ones. But what if Article 9 (1) C143 refers to equality in the process of building up rights? Then irregular migrant workers enjoy a much broader protection: they must be treated equally to regular migrant workers in social security related to employment. For instance, if regular migrant workers are covered by statutory retirement or disability insurance, so must irregular migrant workers. This would suggest that State Parties are precluded from requiring a lawful residence or a lawful work status for being insured.

Commentators have paid almost no attention to the precise interpretation of the words 'rights arising out of past employment'. It is not discussed whether this relates to already acquired rights or the acquiring of rights. The drafting history of the Convention too does not shed light on the correct interpretation – not least because Article 9 was introduced at a very late stage in the adoption process.[252]

The Committee of Experts has not expressly pronounced on this issue. Some comments lead to the assumption that it is about the enjoyment of already acquired rights,[253] whereas others put an emphasis on the acquiring process.[254] In other words, the Committee makes no distinction. This might be interpreted that the Committee of Experts regards both the process of acquiring rights and the enjoyment of acquired rights as being subject to equal treatment and thus covered by Article 9 (1) C143.

Anyway, according to the Committee, the equal treatment with regular migrant workers would preclude Contracting States to exclude irregular migrant workers from social security, as long as regular ones are included. The Committee noted in this regard that

> "some countries have pointed out that migrant workers in an irregular situation are entitled to employment injury benefits [...]. Article 9 (1) of the Convention does not, however, appear to be applied if benefits are conditional upon being legally employed or resident in the country, as is the case in *France*, for example, or holding a valid work permit, as is the case in *Lebanon* and the *United Kingdom*. These conditions would deprive Article 9 (1) of its principal effect."[255]

[252] See International Labour Conference, 60th session, 1975, *Record of Proceedings* (Geneva: International Labour Office, 1976), §§ 48-49.

[253] The Committee noted that pursuant to this clause "migrant workers in an irregular situation have the right to *enjoy* rights arising out of past employment [emphasis added by the author]". In addition, the Committee held that "the provision refers only to the rights which the worker *has acquired* by virtue of his or her period of employment and by fulfilling the other qualifying conditions required in the case of migrants in a regular situation [emphasis added by the author]". Moreover, it considered this clause to be in connection with § 34 of Recommendation 151, which is about the enjoyment of already acquired rights. See International Labour Conference, 87th session, *General Survey on Conventions Nos. 97 and 143*, §§ 304, 306, 307.

[254] The Committee leaves no doubt that Article 9 (1) C143 refers to periods of legal employment and employment abroad too, when determining entitlement to benefits. It noted: "The considerations above refer to social security rights arising out of a period of illegal employment. However, Article 9 (1) refers to 'rights arising out of past employment' in general. In the context of social security, this must be understood, in particular for the purpose of acquiring rights to long-term benefits, as covering also any period of legal employment in the country concerned which may have preceded the illegal employment, as well as past employment in another country which would normally be taken into consideration, on the basis of bilateral or multilateral international agreements, *when calculating entitlement to benefits* [emphasis added by the author]". So here the Committee referred to establishment of entitlement – this goes beyond the protection of already acquired rights. See International Labour Conference, 87th session, *General Survey on Conventions Nos. 97 and 143*, § 308.

[255] See International Labour Conference, 87th session, *General Survey on Conventions Nos. 97 and 143*, § 307.

So, the explicit requirement of lawful residence or lawful work – be it for insurance under a social security scheme or for disbursement of benefits – would deprive the clause of its principal effect. This can only mean that such a precondition is not compatible with Article 9 (1).

The Committee of Experts, moreover, noted that some jurisdictions do not make entitlement to social security benefits subject to a regular migration status. It is the affiliation with the scheme and the payment of contributions that triggers entitlement. In such cases the Committee suggested that irregular migrant workers must be treated equally with regular migrant workers who work in the black economy. In more detail, the Committee regards a regular migrant worker who omits to pay social security contributions to be in the same position as an irregular one who does not pay contributions. Therefore, if this regular migrant worker gets the chance to regularise his or her situation by having him or her or the employer paying back contributions, then the same rule must be applied to irregular migrant workers. According to the Committee, this may be of particular relevance for employment injury benefits.[256]

This is an interesting comparison between regular and irregular migrant workers who both evade paying social security contributions. The Committee did not take nationals who work in the black economy as the reference group. This is understandable since it is regular migrant workers to whom Article 9 (1) in the eyes of the Committee refers to – see above. Nevertheless, it is a valuable comparison for our research: an international monitoring committee interpreted a very specific equal treatment provision in specific circumstances as not obliging equality of treatment with regular migrant workers per se, but with those regular migrant workers who evade contribution payment too.

2.2.1.1.3. Paragraph 34 R151

A provision which protects the social security of migrant workers who leave the country of employment is paragraph 34 of Recommendation No. 151. This provision is not legally binding. Even so, it is a recommendation, formulating further standards in the field of migrant work. Paragraph 34 comprises two distinctive recommendations as for migrant workers who leave the country. First, they should be entitled, irrespective of the legality of their stay therein, to benefits which may be due in respect of an employment injury suffered. Second, they should be entitled, in accordance with national practice, to contribution reimbursement. Irregular migrant workers are explicitly included into the personal scope of application of this provision.

Concerning benefits for employment injuries, this is about the export of benefits to which a worker has already become entitled. The wording of paragraph 34 (1) (b) R151 leaves no room for other interpretation. The Committee of Experts also advanced the opinion that this Recommendation addresses the problem of non-payment of benefits to individuals residing abroad and thus relates to the maintenance of acquired rights.[257] Accordingly, irregular migrant workers fall within the scope of this Recommendation, if they were entitled to employment injury benefits in the country of employment. In such cases, the ILO recommends to export these benefits.

[256] International Labour Conference, 66th session, *General Survey on Conventions Nos. 97 and 143*, §§ 267-68.
[257] See International Labour Conference, 87th session, *General Survey on Conventions Nos. 97 and 143*, § 562.

As for reimbursement of social security contributions, the Recommendation reminds us of Article 27 (2) ICMW – which has been discussed in subchapter 1.5.1.1.2. There it was also recommended that migrant workers should get their social security contributions reimbursed if, first, migrant worker are not allowed for benefits and, second, on the basis of the treatment granted to nationals in similar circumstances. Here, under Recommendation No. 151, reimbursement shall be considered if, first, the contributions have not given and will not give rise to rights and, second, if reimbursement is in accordance with national practice. The two provisions seem to resemble each other. But when it comes to irregular workers, there might be a difference. That is to say, when there is a reimbursement scheme in place for foreigners, but not for nationals. Let me once more refer to the Swiss General Old Age and Surviving Dependant's Pensions Act. This Act provides for contribution refund for non-citizens who are not covered by bilateral social security agreements.[258] Imagine that it would be possible for irregular migrant worker to contribute to the Swiss old age and survivor's pension scheme. Then, according to the ILO Recommendation, these irregular migrant workers should be able to recover their contributions, because reimbursement is in accordance with national practice. On the other hand, pursuant to the UN Migrant Workers Convention, migrant workers shall only be able to get their contributions refunded on the basis of the treatment which is granted to nationals who are in similar circumstances. If this condition is to be interpreted as a non-discrimination provision, *i.e.* refund for migrant workers only if refund for nationals, then irregular migrant workers would not be protected by the UN Migrant Workers Convention. This is because nationals cannot get their contributions reimbursed under the Swiss scheme. They instead receive their benefits. In this regard the 1990 UN Convention provides less protection than the 1975 ILO Recommendation. However, it must be borne in mind that the ILO Recommendation is in contrast to the UN Convention not legally binding. In addition, it must be recalled that the practical impact of both contribution reimbursement provisions will be rather low. This is because examples of contribution refund are scarce in national legislation[259] and because irregular migrant workers usually cannot contribute to social security.

2.2.1.2. Nationals who engage in undeclared work

Article 11 C143 stipulates that for the purposes of Part II, the term migrant worker is used for a person who migrates or has migrated from one country to another with a view to being employed and includes only a person who is or has been regularly admitted as a migrant worker. For Part I, by contrast, no legal definition exists. The intention of the definition was to confine the application of Part II to regularly admitted migrant workers. This was not necessary for Part I, since it deals with irregular forms of migration. One can therefore assume that the first part of the definition under Article C143 also applies to Part I. That is to say, that also for Part I migrant workers are persons who migrate or have migrated from one country to another. Possession of a citizenship other than the citizenship of the country to which the person migrated to is not required. Also the term migration does not imply that it must be about individuals who do not have the citizenship of the country of employment. This would make it possible to regard citizens, who move (back) to their country of citizenship for employment, as migrant workers under Part I. However, since Part I deals with illegal migration and illegal work, most of its provisions are not applicable to

[258] See Vonk and Kapuy, "Three approaches," pp. 228, 236.
[259] It is also telling that the Committee of Experts observed in its General Survey of 1980 that "[g]overnments have in general not touched on this matter in their reports". See International Labour Conference, 66th session, *General Survey on Conventions Nos. 97 and 143*, § 484.

nationals who by definition are allowed to enter, stay and work in their home country. This is also true for Article 9 (1) C143, which protects the rights of irregular migrants arising out of past employment.[260] Still, one provision would affect also nationals who move to their home country for employment: Article 1 C143. As mentioned before, it stipulates that each Contracting State undertakes to respect the basic human rights of all migrant workers.

The content of Article 1 C143 was already discussed in the context of irregular migrant workers. It was shown that neither the Convention nor the Recommendation further specifies its meaning. This gap has been tried to be filled by the Committee of Experts. In doing so, black-economy work has been no issue. There is no reference that evading social security contributions leads to an exclusion from the enjoyment of basic human rights. However, there has also been no explicit confirmation that undeclared workers should benefit from basic human rights.

In the context of irregular migrant workers I suggested, against the background of the opinion of the Committee of Experts, that Part III of the UN Migrant Workers Convention, which lays down the basic human rights for all migrant workers, could be the point of reference for Article 1 C143. In other words, under Article 1 C143 migrants shall enjoy those basic human rights stipulated in Part III ICMW – provided that this would not be in contradiction to C143 itself. However, the UN Migrant Workers Convention only regards non-nationals in the country of employment as migrant workers. Therefore, many of the provisions would not be applicable to people who migrate to a country of which they are nationals of. This is in particular true for social security-related provisions, like Articles 27, 28, 43, 45 and 54 ICMW, which demand equality of treatment between migrant workers and nationals of the country of employment. As a consequence, Article 1 C143 does not seem to have much relevance for individuals, who move (back) to their country of citizenship for employment.

2.2.2. Non-discrimination

Article 10 C143, the non-discrimination provision, is at the heart of Part II – the part on equality of opportunity and treatment. The clause reads:

> "Each Member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory".

The provision simply talks about equal treatment which shall be granted to migrant workers. It, however, does not say with whom equal treatment shall be guaranteed. This is done in paragraph 2 Recommendation No. 151, which further elaborates the content of the Convention. According to this Recommendation nationals of the country of employment shall be the reference group.

Like under the equal treatment provision of ILO Convention No. 97, equal treatment with nationals is only provided for migrant workers and family members lawfully within its territory. This means that only those who are lawfully present in the country of employment must be

[260] Neither is § 34 Recommendation No. 151, due to its link to Article 9 (1) of the Convention, applicable to migrants who are citizens of the country in which they work in.

guaranteed equal treatment. The lawfulness of work does not play a role. That is to say, migrants working without authorisation are not excluded of Article 10 C143, as long as they have a lawful stay in the country (category B irregular migrant workers). However, as already illustrated before, the Committee of Experts does not consider the exclusion of migrants working without authorisation from national social security legislation as being a matter of equal treatment based on nationality. It is rather a differentiation according to legal status. The Committee made these observations in the context of Convention No. 118. But it held that its observations on the Equality of Treatment (Social Security) Convention are also valid for the Migrant Workers (Supplementary Provisions) Convention.

The equal treatment principle of ILO Convention No. 143 is a mere restatement of already existing equal treatment provisions, in particular of Article 6 ILO Convention No. 97 and Article 3 (1) of Convention No. 118.[261] Therefore Article 10 C143 must be interpreted in the light of these other equal treatment provisions, which are much more detailed. This relates to all the technical details, like the exceptions from the principle of equal treatment.[262]

2.2.3. Fight against irregular migration and irregular work

Part I of ILO Convention No. 143 is devoted to the prevention and elimination of illegal migration and illegal work.[263] To this end State Parties to the Convention shall seek to determine whether there are activities on their territory which are related to the illegal employment of migrants – be it in the State itself or in other States (Article 2); shall adopt measures to suppress clandestine movements of migrants for employment and illegal employment of migrants and measures against organisers of clandestine migration and against employers of workers who have immigrated in illegal conditions (Article 3); shall exchange information between and within the Contracting States (Article 4); shall provide for sanctions in respect of illegal migration and illegal employment of migrant workers (Article 6); and shall consult employee and employer organisations (Article 7). Article 8 protects legally resident migrants who lose their employment. In such cases the mere fact that they get unemployed shall not lead to an irregular situation. Article 9 – besides equality of treatment for rights arising out of past employment, which has already been discussed above – rules that the costs of expulsion shall not be borne by the worker and his or her family. Moreover, this Article stipulates that nothing in the Convention shall prevent Contracting States from giving persons who are illegally residing or working in a country the right to stay and to work.

Irregular migration and irregular work are not clearly defined in the Convention itself. Based on, in particular, Article 2 (1) and Article 6 (1) C143, the Committee of Experts regards irregular migration as migration contravening relevant national or international legislation and including both clandestine migration and illegal/illicit migration. The first means migration in which the border controls for exit or the border controls for entry are evaded. The latter refers to apparently

[261] International Labour Conference, 60th session, *Record of Proceedings*, § 53.
[262] See International Labour Conference, 87th session, *General Survey on Conventions Nos. 97 and 143*, § 432 ff.; and International Labour Conference, 66th session, *General Survey on Conventions Nos. 97 and 143*, § 303 ff.
[263] Part I is titled 'Migrations in Abusive Conditions'. Some governments complained that this title is misleading. The United States suggested to call it instead 'Convention on Illegal and Clandestine Migration'. See International Labour Conference, 60th session, *Record of Proceedings*, p. 792 (opinion of the United States).

lawful exit and entry, in which the migrant conceals his or her true intention.[264] Irregular work is considered by the Committee to be any employment that is not in conformity with national legislation. This implies that it is eventually the national legislators which define the precise scope of irregular work.[265]

The Committee of Experts has issued valuable guidelines for the fight against irregular forms of migration and work, based on the information it has retrieved from ILO Member States. The Committee observed that there exist three types of measures against illegal migration and illegal work: those directed at the irregular migrant worker, those punishing organisers or facilitators or illegal migration, and those penalizing recruiters and employers of illegal work.[266] ILO Convention No. 143 does not provide for sanctions against irregular migrant workers.[267] But the Committee recognised that migrant workers themselves also have a duty to participate in the process of preventing and eliminating illegal migration and work, for instance by carrying the respective documents always with them.[268] By contrast, sanctions targeting at the demand of irregular labour are included in the Convention. They may be of an administrative, a civil or a penal nature. The Committee noted that there is no obligation to apply all three different types of sanctions simultaneously – although this would not be precluded by the Convention.[269] Worth mentioning are the comments of the Committee to Article 6 (2) C143. This provision stipulates that "[w]here an employer is prosecuted by virtue of the provision made in pursuance of this Article, he shall have the right to furnish proof of his good faith". The Committee remarked that this clause shall neither be interpreted as reversing the burden of proof, nor as placing an obligation on the employer to check the legal status of aliens before hiring them. It is left at the discretion of the Contracting States to interpret the exact scope of this provision.[270]

While Part I of Convention No. 143 lays down a broad framework for preventing and elimination illegal migration and illegal work, it does not address the problem of undeclared work. The evasion of social security contributions by migrant worker – nationals or non-nationals – is not targeted under the Convention. Also in the comments of the Committee of Experts it plays no role.

2.2.4. Summary and comparison

Illegal migration was on the rise in the 1960s and 1970s, when the ILO drafted Convention No. 143. As a consequence of this, one of the two major Parts of the Convention is dedicated to the prevention and elimination of unauthorised migration and work. The second part deals with equal treatment of those migrant workers who are lawfully present in or regularly admitted to the country of employment. Still, Convention No. 143 comprises some safeguard clauses also for irregular migrant workers. Most notably, the guarantee of basic human rights to all migrant workers irrespective of their status; and the equality of treatment in respect of rights arising out of past employment as regards social security for those irregular migrant workers and their family members whose legal status cannot be regularised. However, it is rather unclear what the drafters

[264] International Labour Conference, 87th session, *General Survey on Conventions Nos. 97 and 143*, § 318.
[265] *Ibid*., § 346.
[266] *Ibid*., § 337.
[267] *Ibid*., § 338.
[268] *Ibid*., § 352.
[269] *Ibid*., § 336.
[270] *Ibid*., § 355.

had in mind when they referred to 'basic human rights' and to 'rights arising out of past employment'. The Committee of Experts tried to give some guidance on the interpretation of these provisions. But this guidance was only provided to a limited extend. This is not surprising, since the Committee itself has no competence to interpret ILO instruments. The only body entrusted with authoritative interpretation of ILO conventions is the International Court of Justice. But it has never done so. Therefore the Committee of Experts tried to fill this gap, in particular by producing General Surveys. These comments by the Committee tell us that the basic human rights, which should be enjoyed by all migrant workers, are those contained in the international instruments adopted by the UN and the ILO in this domain. In addition, the Committee exemplarily mentions some of these rights which it regards as fundamental. I have demonstrated in this subchapter that in particular the Committee's reference to Part III of the UN Migrant Workers Convention might be of importance. This would harmonise the fundamental human rights which shall be enjoyed by all migrant workers irrespective of their legal status between the relevant UN and ILO instruments. However, such a reference to another legal instrument for the purpose of interpreting Article 1 C143 shall only be possible as long as there is no contradiction to the Convention No. 143 itself. Concerning equality of treatments as for rights arising out of past employment in the field of social security the central question is whether this guarantee only relates to already acquired rights or it relates also to the process of acquiring rights. The Committee did not ask itself this question. It seems however that it assumes both situations covered by Article 9 (1) C143. This opinion I do not share. I have shown that there are good reasons to assume that the Convention only protects those rights which have already been acquired.

Another provision which protects social security rights of all migrant workers can be found in the legally non-binding Recommendation No. 151. There it is suggested that benefits for employment injuries, which have become due, shall be exported. This is about the enjoyment of rights to which a migrant worker has already become entitled to. Another part of the provision proposes contribution reimbursement if the contributions have not given and will not give rise to rights and if this is in accordance with national practice. As illustrated in this subchapter, the practical relevance of this recommendation seems to be rather low. This is because there is hardly any national practice for contribution reimbursement and irregular migrant workers mostly do not have the possibility to contribute to social security.

In Part II, which deals with the rights of migrant workers regularly admitted to the country of employment, non-discrimination between migrant workers and nationals is the focus. Under Article 10 migrant workers shall enjoy equality of opportunity and treatment in social security. This provision is only applicable to migrants lawfully present in the country of employment. Still, there is no precondition of lawful employment. This suggests that aliens who work in a country although not authorised to do so enjoy equality of treatment as long as they are staying lawfully. However, the Committee of Experts regards differentiation in national social security legislation according to the legal status of foreigners as not being a matter of nationality. Therefore such a differentiation would not be covered by the obligation to treat migrant workers equally to nationals in social security.

Unlike the UN Migrant Workers Convention, ILO Convention No. 143 does not require employment in a country where one is not a national of in order to be considered as a migrant worker. This would theoretically make it possible to assume nationals who (re)migrate to their country of citizenship for work as being protected under the Convention. Nevertheless, this

investigation has shown that, due to various reasons, the provisions relevant for this research are not applicable to nationals.

As mentioned before, the first part of the Convention is dedicated to the prevention and elimination of irregular activities of migrant workers. The Convention addresses both irregular migration and irregular employment. Undeclared work, by contrast, is not dealt with.

It is striking that the number of countries that has ratified the Convention is very low. Only twenty-three countries have ratified it, Belgium, Canada and the Netherlands being not one of them. This means that only every eight ILO Member State has done so.[271]

[271] See Table I at the end of this Part.

2.3. Social Security (Minimum Standards) Convention and related instruments

The Social Security (Minimum Standards) Convention lays down minimum standards in the major branches of social security.[272] These are medical care, sickness, unemployment, old age, employment injury, family, maternity, invalidity and survivor's benefits. Contracting States have the possibility to accept at least three branches of social security upon ratification,[273] allowing for gradual implementation of the standards in other fields of social security. The standards relate, most notably, to the quantitative level of social security protection in a country, the qualifying conditions, the level of benefits and the periods of entitlement. Belgium and the Netherlands, which have ratified the Convention, have accepted all branches of social security.[274] The Social Security (Minimum Standards) Convention, also known as Convention No. 102, is, like all ILO conventions, legally binding upon the State Parties. It was adopted in 1952.

Over the years, the ILO adopted a number of instruments further elaborating the social security standards enshrined in Convention No. 102. That is to say, these instruments raised the standard of protection for selected branches of social security. In chronological order, the following relevant instruments were adopted:

- Employment Injury Benefits Convention (C121) and Employment Injury Benefits Recommendation (R121) were adopted;[275]
- Invalidity, Old-Age and Survivors' Benefits Convention (C128) and Invalidity, Old-Age and Survivors' Benefits Recommendation (R131);[276]
- Medical Care and Sickness Benefits Convention (C130) and Medical Care and Sickness Benefits Recommendation (R134);[277]
- Employment Promotion and Protection against Unemployment Convention (C168) and Employment Promotion and Protection against Unemployment Convention (R176);[278]
- Maternity Protection Convention (C183) and Maternity Protection Recommendation (R191).[279]

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[272] Convention concerning Minimum Standards of Social Security, 28 June 1952, Convention No. 102, available at: http://www.ilo.org/ilolex/english/convdisp1.htm.

[273] At least one of the accepted parts must be unemployment, old age, employment injury, invalidity or survival.

[274] See Table I at the end of this Part.

[275] Convention concerning Benefits in the Case of Employment Injury, 8 July 1964, Convention No. 121, available at: http://www.ilo.org/ilolex/english/convdisp1.htm; and Recommendation concerning Benefits in the Case of Employment Injury, 8 July 1964, Recommendation No. 121, available at: http://www.ilo.org/ilolex/english/recdisp1.htm.

[276] Convention concerning Invalidity, Old-Age and Survivors' Benefits, 29 June 1967, Convention No. 128, available at: http://www.ilo.org/ilolex/english/convdisp1.htm; and Recommendation concerning Invalidity, Old-Age and Survivors' Benefits, 29 June 1967, Recommendation No. 131, available at: http://www.ilo.org/ilolex/english/recdisp1.htm.

[277] Convention concerning Medical Care and Sickness Benefits, 25 June 1969, Convention No. 130, available at: http://www.ilo.org/ilolex/english/convdisp1.htm; and Recommendation concerning Medical Care and Sickness Benefits, 25 June 1969, Recommendation No. 134, available at: http://www.ilo.org/ilolex/english/recdisp1.htm.

[278] Convention concerning Employment Promotion and Protection against Unemployment, 21 June 1988, Convention No. 168, available at: http://www.ilo.org/ilolex/english/convdisp1.htm; and Recommendation concerning Employment Promotion and Protection against Unemployment, 21 June 1988, Recommendation No. 176, available at: http://www.ilo.org/ilolex/english/recdisp1.htm.

[279] Convention concerning the revision of the Maternity Protection Convention (Revised), 1952, 15 June 2000, Convention No. 183, available at: http://www.ilo.org/ilolex/english/convdisp1.htm; and Recommendation concerning

The Netherlands adopted all of these ILO conventions, except for Convention No. 168. Belgium ratified only Convention No. 121, whereas Canada accepted none of these treaties. As will be shown, these conventions follow the basic patterns elaborated in Convention No. 102. Therefore they will all be discussed together.

2.3.1. Population covered and qualifying conditions

One of the main ideas behind the social security standard-setting conventions is that a minimum percentage of the population in the Contracting States shall be protected in case of occurrence of one of the contingencies.

ILO Convention No. 102 requires Contracting States to protect 'prescribed classes of persons' constituting not less than a specified percentage of employees or residents in the country. 'Prescribed classes of persons' refer to employees, economically active population or residents and are to be determined by national law. But though the Convention leaves it to the Contracting States to define the prescribed classes of persons to be protected, it rules that a certain percentage of employees or residents must be protected. For instance, Article 9 C102 stipulates that for medical care

> "[t]he persons protected shall comprise
> (a) prescribed classes of employees, constituting not less than 50 per cent. of all employees, and also their wives and children; or
> (b) prescribed classes of economically active population, constituting not less than 20 per cent. of all residents, and also their wives and children; or
> (c) prescribed classes of residents, constituting not less than 50 per cent. of all residents [...]."

The prescribed classes and also the percentage of employees or residents to be covered vary amongst the different branches of social security.[280]

The next generation of social security standard-setting instruments followed this approach of Convention No. 102. But since they raise the standards, they require a higher percentage of coverage. For instance, under Convention No. 168 the persons protected against the risk of unemployment shall comprise prescribed classes of employees, constituting not less than 85 percent of all employees, in place of 50 percent under Convention No. 102.[281] Convention No. 121 on employment injury benefits even requires national legislation to protect all employees and Convention No. 183 on maternity protection to protect all employed women.[282] However, Contracting States are allowed to exclude not further specified categories of employees, which put into perspective the meaning of the term 'all'.[283]

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the revision of the Maternity Protection Recommendation, 1952, 15 June 2000, Recommendation No. 191, available at: http://www.ilo.org/ilolex/english/recdisp1.htm.

[280] The other provisions under Convention No. 102 which prescribe the percentage of residents or employees to be covered are Article 15 (sickness benefits), Article 27 (old-age benefits), Article 33 (employment injury benefits), Article 41 (family benefits), Article 48 (maternity benefits), Article 55 (invalidity benefits) and Article 61 (survivors' benefits).

[281] See Article 21 (a) C102 and Article 11 (1) C168.

[282] See Article 4 (1) C121 and Article 2 (1) C183.

[283] See Article 4 (2) (d) C121 and Article 2 (2) C183.

There are also minimum standards for entitlement criteria for benefits. These minimum standards mostly relate to the maximum duration of qualifying periods. For instance, Convention No. 168 stipulates that the qualifying period for unemployment benefits "shall not exceed the length deemed necessary to prevent abuse".[284] Other provisions are more concrete and prescribe qualifying periods of a certain maximum period of time. Convention No. 102, for instance, requires Contracting States to secure maternity benefits to protected persons who have fulfilled at least a qualifying period of three months of contribution or employment or one year of residence.[285] These minimum standards, however, are very basic; so that the national legislators have a wide room for action.

2.3.1.1. Irregular migrant workers

State Parties to the ILO social security standard-setting instruments are basically free to define the scope *ratione personae* of their national social security legislation. Nonetheless, Contracting States must ensure that those persons protected by national social security law constitute a certain percentage – up to 100 percent – of all *residents*, *employees* or the *economically active population*. For compliance with these standards, it is therefore relevant to know whether irregular migrant workers must be taken into consideration when calculating the percentage of coverage. This is even more crucial when the instruments prescribe that all employees or all residents are to be covered. Hence it is to ask whether irregular migrant workers are also regarded as employees, part of economically active population or residents.

The conventions only provide for a legal definition of the term resident. According to this definition, residents are considered as persons ordinarily resident in the territory of a Contracting State.[286] The Committee of Experts held that the term 'ordinarily' is used to exclude all those who are only occasionally or temporarily present in a Contracting State.[287] Migrants with an irregular residence status, however, can also be present in a country on a not only occasional or temporary basis. So, the notion 'ordinarily' says nothing about the legality of residence.

However, the Committee of Experts addressed the question of legality of residence. In the General Survey on Social Security Protection in Old-Age of 1989, the Committee argues that the ILO conventions which deal with migrant workers, *i.e.* Conventions Nos. 97 and 143, grant equal treatment in social security only to immigrants lawfully within the territory. Therefore, so the Committee, "the term 'resident' is intended by Conventions Nos. 102 and 128 to be read as including only those non-nationals who are lawfully resident in the country of immigration".[288] Obviously, the Committee strives towards a consistent application of the ILO conventions in social security. This makes sense. What would be the alternative? To interpret the migrant workers conventions as excluding unlawfully residing aliens from equal treatment in social security, while interpreting social security standard-setting conventions as including them for the protection under social security? This would be a contradictory guidance for State Parties to the conventions. It therefore must be appreciated that the Committee interpreted the rather general terms of

[284] Article 17 (1) C168.
[285] Article 43 C102.
[286] See Article 1 (1) (b) C102; Article 1 (d) C128; and Article 1 (d) C130.
[287] See International Labour Conference, 76th session, *General survey on Convention Nos. 102 and 128*, § 53.
[288] *Ibid*.

Convention No. 102 and No. 128 like it did. The only thing to be said against it is a statement made by the International Labour Conference at its 92nd session in 2004. It then adopted a legally non-binding Resolution concerning a Fair Deal for Migrant Worker in a Global Economy. In paragraph 28 of the Conclusions one can read:

> "Consistent with effective management of migration, due consideration should be given to the particular problems faced by irregular migrant workers and the vulnerability of such workers to abuse. It is important to ensure that the human rights of irregular migrant workers are protected. *It should be recalled that ILO instruments apply to all workers, including irregular migrant workers, unless otherwise stated*. Consideration should be given to the situation of irregular migrant workers, ensuring that their human rights and fundamental labour rights are effectively protected, and that they are not exploited or treated arbitrarily [emphasis added by the author]."[289]

The equal treatment clauses of the migrant workers Conventions Nos. 97 and 143 state otherwise: only those immigrants who are lawfully within the territory shall be able to enjoy equal treatment. By contrast, in Convention No. 102 and all other social security standard-setting conventions we cannot find such a statement. Therefore – according to the opinion of governments, employer organisations and worker organisations of ILO Member States expressed in the Conference plenary – these conventions must be applied to irregular migrant workers. Applicability in the context of standard-setting instruments, in my opinion, can only mean that they fall into the prescribed classes of persons to be protected by national social security law. Such interpretation, however, would conflict with the one given by the Committee of Experts. Here it must be recalled that both institutions have no competence under the ILO Constitution to authoritatively interpret conventions. This task is solely assigned to the International Court of Justice.[290] So which kind of guidance should be followed by State Parties? To my mind there is one major argument in favour of the guidance provided by the Committee of Experts: the Committee made a clear and argued statement on the exclusion of unlawfully residing aliens of the concept 'resident' under Conventions Nos. 102 and 128. The statement of the International Labour Conference, by contrast, was of a rather general nature, still leaving room for interpretation. Interpretation, for instance, as for the meaning of the phrase 'unlike otherwise stated'. Maybe also a comment of the Committee of Experts can be considered as an otherwise statement.

The Committee of Experts gave its opinion on irregular migrant workers in the context of ILO Conventions Nos. 102 and 128. Since the notion of resident is the same under Convention No. 130, *i.e.* the Medical Care and Sickness Benefits Convention, there are good reasons to assume that the Committee's guidance is also valid for this Convention. The Conventions Nos. 121, 168 and 183, by contrast, do not work with the concept of residence.

As opposed to the concept of 'residents', no guidance is given on the meaning of the terms 'employees' and 'economically active population' with respect to irregular migrants. The conventions and the accompanying recommendations do not include a legal definition and the Committee of Experts is silent on whether these concepts also include non-nationals in an irregular situation. Maybe the statement in the 2004 Resolution of the International Labour Conference – *i.e.* ILO instruments apply to all workers, including irregular migrant workers – could serve as guidance.

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[289] International Labour Conference, *Resolution concerning a Fair Deal for Migrant Worker in a Global Economy*, adopted on 16 June 2004 at the 92nd session (Geneva: International Labour Office, 2004), § 28.

[290] See Article 37 (1) Constitution of the International Labour Organisation, 1 April 1919, available at: http://www.unhcr.org/refworld/docid/3ddb5391a.html.

Whatever the legal answer to the question whether irregular migrant workers should be taken into consideration for calculating the protected population is, in practice there will be some difficulties. Irregular migrant workers usually live and work in the shadows. So it is not possible to make precise statements about their size. Only estimations can be made based on, for instance, apprehension data of irregular migrants at the border or within the country, irregular employment data from labour inspectorates or census data.

As illustrated before, the conventions also set minimum standards in respect of the qualifying conditions for benefits. Most of these standards have no relevant impact on irregular migrant workers.[291] One standard, however, may have an impact. This standard is enshrined in the Maternity Protection Convention 2000. Pursuant to Article 6 (1) C183, cash benefits are to be provided in accordance with national laws and regulations, or in any other manner consistent with national practice to women who are absent from work due to a maternity leave. Article 6 (6) C183 continues stipulating that "[w]here a woman does not meet the conditions to qualify for cash benefits under national laws and regulations or in any other manner consistent with national practice, she shall be entitled to adequate benefits out of social assistance funds, subject to the means test required for such assistance". The term 'woman' applies, according to Article 1 C183, to any female person without discrimination whatsoever. So, Article 6 C183 does not oblige Contracting States to grant paid maternity leave to a particular group of female workers. Still it could be read that if irregular women migrant workers do not qualify for maternity benefits, for instance because they do not have a lawful residence or work status in the country of employment, they must be granted adequate benefits out of social assistance funds, provided that they meet a possible required means test. Such an obligation seems to be problematic. Irregular migrant workers mostly work in the black economy, *i.e.* their work is not declared to the social security authorities and no contributions are paid. An obligation to provide maternity benefits out of social assistance funds may therefore be unfair towards all those workers who pay contributions. This issue will be discussed in more detail in the following subchapter on undeclared work.

Worth mentioning in this context, we have seen above that the ILO migrant workers Conventions C97, and implicitly, C143 provide for an exception from the equal treatment principle in social security where it concerns allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension. So, for countries which are State Parties to C183 and to one of the ILO migrant workers conventions, like it is the case for the Netherlands, Article 6 C183 would most likely not entail an obligation to grant social assistance benefits to female irregular migrant workers who engage in undeclared work.

2.3.1.2. Nationals who engage in undeclared work

Nationals who do not declare their work to the social security authorities, although obliged to do so, are by definition workers who are subject to national social security law. We have heard that the ILO social security minimum standard instruments aim at increasing the level of protection by prescribing minimum proportions of the population to be protected against the one or other

[291] I am not discussing here the difficulties that migrant workers in general may have to fulfil longer qualifying periods. It is to remark that under all but Convention No. 183, the standards for qualifying conditions only relate to protected persons.

contingency. If it were about coverage by law, undeclared workers would by definition be part of the protected population. This would be the case if the minimum standard instruments worked with pure legal concepts. Instead, the instruments largely refer to statistical criteria.[292] That is to say, social security data, such as register of insured persons or periodic employer reports on insurance, has to be utilised by Contracting States to provide information on the persons protected in practice.[293] From this it follows that undeclared workers must, by and large, not be considered as protected persons for the purposes of the ILO social security standard-setting conventions.

But that is not the end of the story. We already mentioned before that Contracting States, when reporting about their compliance with the instruments, are required to indicate the number of residents, employees and economically active persons protected by national social security schemes in relation to the total number of residents, employees and economically active persons. These numbers have to be substantiated by information on the computation of the data.[294] The question is now whether undeclared workers are to be counted by Contracting States as employees or economically active persons for calculating the total numbers. This is not just a question out of interest. No, it would tell us whether the ILO standards are suitable to make Contracting States responsible for high rates of undeclared work and consequently imply an obligation to prevent and eliminate undeclared work. What I want to say is, if State Parties to the conventions must report the working population registered with social security and put them in relation to the total officially known working population, ILO minimum standards can be more easily achieved, as if they are put in relation to the estimated total number of working population in a country. The total officially known working population includes also those who are not subject to social security law – these might be for instance part-time workers, home worker or farmers. And the estimated total number of working population would comprise the whole working population, including those who are working undeclared and are not officially known. Let me give a hypothetical example. A Contracting State's social security legislation covers all employees, except for part-time workers. The total number of employees known to the authorities is 10 million – 9.5 million people are registered with social security and 0.5 million work part-time and are registered for other purposes. In fact, it is estimated that the total numbers of people actually employed in this country is much higher. It is estimated that there are about 15 to 16 million employees working in the country. If this Contracting State needed to report to the ILO the total number of officially known employees, the percentage of protected persons for social security would be 95 percent. If it were, however, the estimated total number of employees which had to be used for computation, the coverage rate would only be between 59.38 percent and 63.34 percent. Supposed that the ILO standards for this contingency required 75 percent of coverage, the requirement to calculate the total number of employees by estimations would be appropriate to enhance the pressure on the country to combat undeclared work.

[292] See, for instance, Article 76 C102.

[293] See International Labour Conference, 76th session, *General survey on Convention Nos. 102 and 128*, § 67 and Resolution concerning the development of social security statistics, adopted by the 9th International Conference of Labour Statisticians (April-May 1957), available at: http://www.ilo.org/public/english/bureau/stat/download/res/socsec.pdf.

[294] See, for instance, International Labour Office, *Report form for the Social Security (Minimum Standards) Convention, 1952 (No. 102)* (Geneva: International Labour Office, 1980), Part III, p. 1 and Part XIV, pp. 16-17; or International Labour Office, *Report form for the Maternity Protection Convention, 2000 (No. 183)* (Geneva: International Labour Office, 2000), pp. 2-3.

So, are undeclared workers now to be counted as employees and economically active persons? The conventions themselves do not further specify it.[295] In the current understanding of the ILO, undeclared work, as we define it, is part of the bigger concept of informal work which dates back to the year 2002.[296] In this year, the General Conference of the ILO adopted a legally non-binding Resolution concerning Decent Work and the Informal Economy.[297] According to the General Conference,

> "[t]he term "informal economy" refers to all economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements. Their activities are not included in the law, which means that they are operating outside the formal reach of the law; or they are not covered in practice, which means that – although they are operating within the formal reach of the law, the law is not applied or not enforced; or the law discourages compliance because it is inappropriate, burdensome, or imposes excessive costs".[298]

Undeclared work is that part of the concept of informal work which refers to economic activities that are not covered in practice, because there is no compliance with the law.[299] The other part of the concept refers to working situations which are not covered by the law. *José Luis Daza* observed in the context of labour legislation that informality in developing countries mostly means that the law does not apply, while in developed countries it means that the law is not enforced.[300] I think this observation is also true for social security legislation.

The Resolution on informal work stipulates that the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up and the core-labour standards are applicable in the formal as well as in the informal economy.[301] This Declaration articulates principles already enshrined in the ILO Constitution and in eight core-labour standard conventions.[302] The principles concern the following fundamental rights: freedom of association and the effective recognition of the right to collective bargaining; elimination of all forms of forced or compulsory labour; effective abolition of child labour; and elimination of discrimination in respect of employment and occupation. Reference to the right to social security is not made in this Declaration on Fundamental Principles and Rights at Work. In addition, there is also no reference to social security-related ILO conventions in the Resolution concerning Decent Work and the Informal Economy.

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[295] No further information on the concepts is given in the Convention concerning Labour Statistics, 25 June 1985, Convention No. 160, available at: http://www.ilo.org/ilolex/english/convdisp1.htm; and the Recommendation concerning Labour Statistics, 25 June 1985, Recommendation No. 170, available at: http://www.ilo.org/ilolex/english/recdisp1.htm.

[296] First references to undeclared work can however be traced back to the 1980s. See for instance the Employment Policy (Supplementary Provisions) Recommendation, 26 June 1984, Recommendation No. 169, available at: http://www.ilo.org/ilolex/english/recdisp1.htm. There § 8 reads: "Members should take measures to combat effectively illegal employment, that is employment which does not comply with the requirements of national laws, regulations and practice".

[297] See International Labour Conference, *Resolution concerning Decent Work and the Informal Economy*.

[298] *Ibid*., § 3.

[299] We already talked about this concept of undeclared work of the ILO in the context of General Comment No. 19 on the right to social security by the UN Committee on Economic, Social and Cultural Rights. See subchapter 1.2.1.2.

[300] Daza, "Informal economy, undeclared work," p. 9.

[301] International Labour Conference, *Resolution concerning Decent Work and the Informal Economy*, §§ 16, 22.

[302] The Declaration applies to all ILO Members without ratification. See Article 2 Declaration on Fundamental Principles and Rights at Work. International Labour Conference, *Declaration on Fundamental Principles and Rights at Work*, adopted on 18 June 1998 at the 86th session (Geneva: International Labour Office, 1998).

The Report of the Director-General on Decent Work and the Informal Economy, on which the Conference's Resolution is based, already laid down that the application of the principles of the ILO Declaration on Fundamental Principles and Rights at Work to the informal economy must be given absolute priority by governments of the ILO Member States. But at the same time, the Report stressed the necessity to also extend basic minimum standards, on matters such as health or income security, to the informal economy.[303] Concerning the extension of the basic minimum standards, the Report provides guidance for the interpretation of ILO conventions as to their applicability in the informal economy. According to the Director-General, ILO conventions which do not explicitly refer to informal workers in the text may nevertheless be applicable to them when provided for within the framework of the ILO's supervisory system. In particular, the observations made by the Committee of Experts and the Conference Committee on the Application of Standards are considered useful in this regard.[304] However, in the context of the social security standard-setting instruments, ILO committees do not provide for the applicability of the standards to undeclared workers.

Guidance for the statisticians of Contracting States is basically provided by the International Conference of Labour Statisticians. The relevant guidelines are the Resolution concerning the Development of Social Security Statistics[305] and the Resolution concerning Statistics of the Economically Active Population, Employment, Unemployment and Underemployment.[306] The latter resolution defines the concept of economically active population as "comprising all persons [...] who furnish the supply of labour for the production of economic goods and services".[307] And employees are defined as "all persons above a specified age who during a specified brief period [...] performed some work for wage or salary, in cash or in kind [or] who, having already worked in their present job, were temporarily not at work".[308] These concepts do not work with a requirement of registration. This would indicate that undeclared work is to be taken into consideration. Yet a confirmation for this assumption cannot be found in these Resolutions. A confirmation, however, can be found in the ILO manual on concepts and methods concerning employment, unemployment and underemployment, which supplements the Resolution concerning Statistics of the Economically Active Population, Employment, Unemployment and Underemployment.[309] According to this manual, the *concept of economically active population* includes "activities which are by themselves legal, but which are conducted in an illegal fashion,

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[303] International Labour Conference, 90th session, 2002, Report of the Director-General, Report VI. *Decent Work and the Informal Economy* (Geneva: International Labour Office, 2002), p. 44.
[304] *Ibid*., p. 47
[305] Resolution concerning the development of social security statistics, adopted by the 9th International Conference of Labour Statisticians (April-May 1957).
[306] Resolution concerning statistics of the economically active population, employment, unemployment and underemployment, adopted by the 13th International Conference of Labour Statisticians (October 1982), available at: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---integration/---stat/documents/normativeinstrument/wcms_087481.pdf. The Resolution concerning statistics of employment in the informal sector, adopted by the 15th International Conference of Labour Statisticians (January 1993) is not relevant for our research, since, according to § 5 (3), the concept of informal sector under the Resolution does not comprise our concept of undeclared work. And the Guidelines concerning a statistical definition of informal employment, endorsed by the 17th International Conference of Labour Statisticians do not shed light on our question.
[307] *Ibid*., § 5. This definition refers to the United Nations System of National Accounts. For this see below, footnote 309, on the ILO manual on concepts and methods.
[308] *Ibid*., § 9.
[309] Ralf Hussmanns, Farhad Mehran and Vijay Verma, *Surveys of ecnomically active population, employment, unemployment and underemployment: An ILO manual on concepts and methods* (Geneva: International Labour Office, 1990).

such as [...] working off-the-book for tax evasion purposes or for fear of losing unemployment insurance benefits or because the employer wants to avoid social security payments or implementing other labour legislation requirements".[310] So, undeclared work is to be considered when calculating the economically active population. Concerning the *concept of employees*, no explicit confirmation can be found that undeclared workers are also to be computed as employees. Still, the relevant definition of employment in above-mentioned Resolution would suggest that it must be done so.

In practice, however, the guidance to include undeclared workers in the relevant computations might be a problem. This fact has also been acknowledged by the ILO. It held in the context of the economically active population that undeclared work "in principle, [should] be considered as economic activity. In practice, however, their measurement is problematic".[311] The ILO does not prescribe a certain method to measure the number of employees or economically active persons. Sample surveys of households, population censuses or administrative records are the most prominent examples of sources of information on the economic activities of the population.[312] One can imagine that undeclared work will be captured to a limited extent only by using these methods. By retrieving information from administrative records, undeclared work will most likely not be covered. And by applying household surveys or making use of censuses, interviewees may be reluctant – though it cannot be excluded – to state that they work, although they have not declared it to the social security authorities. The question is therefore whether Contracting Parties must include estimations on undeclared work when calculating figures for the ILO social security standard-setting conventions? In general, current methods of estimations are based on micro level analyses, such as interviews or tax auditing, or macro level analyses, such as the discrepancies between national expenditure and national income, the correlation of currency demand and tax pressure, or the relation between electricity consumption and Gross Domestic Product. But all these methods and combinations of them have serious shortcomings.[313] And to date no information has been issued by the ILO whether such estimations are to be included by Contracting Parties.

To sum up, undeclared work shall in principle be taken into account by Contracting States when providing figures on the economically active population and the employed population for the purposes of the ILO social security standard-setting instruments. In practice, however, it will be difficult to comply with this guidance when using traditional methods on measurement. Additional efforts, *i.e.* estimations on the number of undeclared work, have been thus far not required. This is somewhat surprisingly since the application of such additional methods would without doubt in certain countries, *i.e.* those with high numbers of undeclared work, make a difference.

Besides the working population, ILO conventions also refer to the resident population for achieving an adequate degree of social security coverage. Nationals who work in the black economy are – if they are not absent or only temporarily staying in the Contracting State – to be taken into consideration as residents, when calculating the percentage of covered population.

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[310] *Ibid*., p. 22; to be read in conjunction with p. 14 on the United Nations System of National Accounts.
[311] *Ibid*., p. 22.
[312] *Ibid*., p. 181.
[313] See in particular the work of Friedrich Schneider. Such as Friedrich Schneider, "Estimating the size of the Danish shadow economy using the currency demand approach: An attempt," *The Scandinavian Journal of Economics*, vol. 88, no. 4 (1986); or Friedrich Schneider and Dominik Enste, "Increasing shadow economies all over the world – fiction or reality? A survey of the global evidence of their size and of their impact from 1970 to 1995," *IMF-Staff-Paper* (Washington, D.C.: International Monetary Fund, 1998).

There is no legal reason why their undeclared work shall affect their status of resident. And also in practical terms no obstacles will arise, since there is nothing which would prevent them from being officially registered as residents. So, residents, being citizens and not declaring their work to the social security authorities, must be and can be taken into account when calculating the prescribed covered population.

We have heard that State Parties to the ILO standard-setting conventions are also obliged to comply with minimum standards for qualifying conditions. The question is now whether they affect the access of undeclared workers to social security benefits.

What strikes us first is Article 9 of the Employment Injury Benefits Convention (C121). Pursuant to the first paragraph, Contracting States shall provide persons protected under the Convention

- medical care and allied benefits in respect of a morbid condition, and
- cash benefits in respect of
  - incapacity for work resulting from such a condition and involving suspension of earnings, as defined by national law,
  - total loss of earning capacity or partial loss thereof in excess of a nationally prescribed degree, likely to be permanent, or corresponding loss of faculty, and
  - loss of support as the result of the death of the breadwinner by the category of beneficiaries, which has to be prescribed by national law.

The provision of these benefits is subject to the qualifying conditions prescribed by national law. Even so, the second paragraph stipulates that the "[e]ligibility for benefits may not be made subject to the length of employment, to the duration of insurance or to the payment of contributions: Provided that a period of exposure may be prescribed for occupational diseases". The prohibition to make use of these three eligibility criteria, in particular the last criterion, may affect the access of undeclared workers to employment injury benefits. The non-payment of contributions of/for undeclared workers must under Convention No. 121 not lead to an exclusion from medical care and cash benefits in connection with labour accidents and occupational diseases. This can be interpreted that undeclared workers shall qualify for benefits in case of labour accidents or occupational diseases, even though no contributions have been paid. Still, one has to mention that Article 9 C121 does not prohibit making entitlement for benefits subject to a correct registration with the social security scheme. What I want to say is that national legislation which, for instance, requires for entitlement to benefits the registration with the scheme, would be in compliance with Article 9 Convention No. 121.

What is more, Article 6 (6) of the Maternity Protection Convention 2000 about the provision of social assistance for women who do not meet the national eligibility criteria for maternity benefits should be mentioned. This was already discussed in the previous subchapter. Here it is important to mention that also female citizens who work in the black economy might be affected by this provision. One can think of national law which makes entitlement to maternity benefits subject to affiliation with the respective social security scheme or the payment of contributions. This would exclude women who work in the black economy from entitlement, at least when also retroactive affiliation or contribution payment is denied. They are then not able to fulfil the eligibility criteria. Hence, Article 6 (6) C183 would require Contracting States to provide for adequate benefits out of social assistance funds, provided that respective means tests are met. Must this provision be criticised for rewarding women who do not affiliate with social security and evade payment of social security contributions? I do not think so. There is a difference between cash benefits during maternity leave referred to in Article 6 (1) C183 and cash benefits out of social assistance funds

referred to in Article 6 (6) C183. First, social assistance benefits are subject to a means test. Second, in contrast to normal maternity benefits, no minimum standards as to the amount of maternity benefits out of social assistance funds are included under Convention No. 183. There were attempts to do so.[314] But respective amendments were withdrawn. So Contracting States are free to provide them at a lower rate than normal maternity benefits.

2.3.2. Non-discrimination

ILO Convention No. 102 and most of the other social security standard-setting conventions comprise the principle of equal treatment between nationals and non-nationals. We therefore have to investigate whether these clauses also provide for equal treatment between irregular migrant workers and nationals in general or nationals who work in the black economy in particular.

The relevant non-discrimination clauses read as follows:

Article 68 Convention No. 102

> "1. Non-national residents shall have the same rights as national residents: Provided that special rules concerning non-nationals and nationals born outside the territory of the Member may be prescribed in respect of benefits or portions of benefits which are payable wholly or mainly out of public funds and in respect of transitional schemes.
>
> 2. Under contributory social security schemes which protect employees, the persons protected who are nationals of another Member which has accepted the obligations of the relevant Part of the Convention shall have, under that Part, the same rights as nationals of the Member concerned: Provided that the application of this paragraph may be made subject to the existence of a bilateral or multilateral agreement providing for reciprocity."

Article 27 Convention No. 121

> "Each Member shall within its territory assure to non-nationals equality of treatment with its own nationals as regards employment injury benefits."

Article 32 Convention No. 130

> "Each Member shall, within its territory, assure to non-nationals who normally reside or work there equality of treatment with its own nationals as regards the right to the benefits provided for in this Convention."

Article 6 Convention No. 168

> "1. Each Member shall ensure equality of treatment for all persons protected, without discrimination on the basis of race, colour, sex, religion, political opinion, national extraction, nationality, ethnic or social origin, disability or age.
>
> 2. The provisions of paragraph 1 shall not prevent the adoption of special measures which are justified by the circumstances of identified groups under the schemes referred to in Article 12, paragraph 2, or are designed to meet the specific needs of categories of persons who have particular problems in the labour market, in particular disadvantaged groups, or the conclusion between States of bilateral or multilateral agreements relating to unemployment benefits on the basis of reciprocity."

[314] See, for instance, International Labour Conference, 87th session, 1999, *Report of the Committee on Maternity Protection: Revision of the Maternity Protection Convention (Revised), 1952 (No. 103), and Recommendation, 1952 (No. 95)* (Geneva: International Labour Office, 1999), § 232 (commentary of the Worker Members).

Convention No. 130 talks about equality of treatment for 'non-nationals who normally reside or work there'. An investigation of the *travaux préparatoires* reveals that the term 'normally' was intended to refer to regular situations of non-nationals concerning their residence or their work on the territory of the Contracting State in compliance with the laws thereof.[315] Migrants who reside or work unlawfully are thus not covered by the equality of treatment clause of the Medical Care and Sickness Benefits Convention.

The Social Security (Minimum Standards) Convention No. 102 requires equality between national residents and non-national residents. The term 'resident' is defined in Article 1 (b) C102 and relates to a person ordinarily resident in the territory of a Contracting State. As illustrated before, ordinary resident was used to exclude all those who are only occasionally or temporarily present in a Contracting State.[316] But since also non-nationals with an irregular residence status can stay permanently, and not only occasionally or temporarily on a Contracting State's territory, this definition does not shed light on the question whether aliens without authorisation to stay are covered. The other provisions of the conventions and the accompanying recommendations are silent too. Also an investigation of the drafting history does not bring us closer answering this question.

As illustrated before, the Committee of Experts expressed its opinion that the concept of 'resident' under Convention No. 102 only relates to lawfully residing foreigners. The International Labour Conference, by contrast, held that ILO instruments apply to all workers, including irregular migrant workers, unless otherwise stated. I expressed my preference for the specific interpretation given by the Committee of Experts. Anyway, we know that the Committee of Experts interpreted the equal treatment clause under the Equality of Treatment (Social Security) Convention No. 118 as not precluding State Parties to exclude aliens who have no authorisation to stay or work on the territory from social security. This is because the Committee considers it as differentiation according to legal status, and not differentiation according to nationality. And this finding is also relevant in the context of the Social Security (Minimum Standards) Convention No. 102. When commenting on the concept of residence under Convention No. 102, the Committee once more pointed to its interpretation on the principle of equal treatment under Convention No. 118.[317] So, even if irregular migrant workers fall under the notion of 'non-national residents' under equal treatment principle – for instance those who stay lawfully on the territory of a State Party – , the principle does not prohibit unequal treatment of irregular migrant workers, since this is no question of nationality.

Convention No. 121 urges State Parties to assure non-nationals equality of treatment with own nationals as for employment injury benefits. The Convention and the accompanying Recommendation do not provide information as to whether irregular migrant workers are protected by the equal treatment clause or as to whether nationals who work in the black economy are (part of) the reference group. Also the drafting history or the supervision activities do not tell us anything about it. So the only statement one could fall back on is the rather general one of the International Labour Conference that ILO conventions are applicable to all workers, including irregular migrant workers, unless otherwise stated.

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[315] See Conférence internationale du Travail, 75th session, 1969, Report V(1), *Révision des conventions n^os^ 24 et 35 concernant l'assurance-maladie* (Geneva: International Labour Office, 1968), p. 30, § 125.
[316] See International Labour Conference, 76th session, *General survey on Convention Nos. 102 and 128*, § 53.
[317] *Ibid*., § 53 in conjunction with endnote 10.

Similar is the situation under Convention No. 168. Article 6 C168 provides for equal treatment for the persons protected. These are, pursuant to Article 11 C168, nationally prescribed classes of employees, constituting not less than 85 percent of all employees. So, it is crucial to know whether irregular migrant workers are considered as employees or not. As illustrated in the subchapter on irregular migrant workers, thus far no interpretation has been provided. The only general statement we know is the one made by the International Labour Conference that ILO conventions are applicable to all workers, including irregular migrant workers, unless otherwise stated.

2.3.3. Summary and comparison

Convention No. 102 lays down minimum standards in social security. These standards relate, amongst other things, to the percentage of population to be covered and to the entitlement criteria for benefits. The standards have been enhanced in subsequent ILO conventions. Irregular migrant workers and nationals who do not declare their work to social security are not recognised as a special group under these conventions.

The *first* question we posed was whether the two groups must be taken into consideration when calculating the percentage of the residence or working population covered by national social security. Of course, this seems to be a rather theoretical question, since in practice both irregular migrant workers and black-economy workers usually reside and/or work in the underground and it is therefore difficult to measure their size. But the question is not without relevance. By obliging Contracting Parties to take into account irregular migrant workers and undeclared workers for the computation, for instance through estimations of their size, it may put soft pressure on States to take action in this field. Which sort of action this will be, will be discussed below.

Concerning irregular migrant workers, the Committee of Experts expressed the opinion that the concept of *residents* for the purposes of Convention No. 102 and No. 128 only comprises lawfully residing non-nationals. The consequence of excluding unlawfully residing foreigners from the concept of residents is that it is easier for a Contracting State to fulfil the required percentage of persons protected. So there is no incentive for action – neither for the provision of social security protection to unlawfully residing irregular migrant workers, nor for the fight against unlawful stay. A similar interpretation for the notion of *employee* or *economically active population* has not been given. The International Labour Conference advanced in 2004 the opinion that ILO instruments apply to irregular migrant workers too, unless otherwise stated. Unfortunately it has not been clarified whether the clause 'if otherwise stated' only refers to the instruments themselves or also to statements by the monitoring Committee. The latter would have add authority to the Committee of Expert's statement on the exclusion of unlawfully residing non-nationals from the concept of residents.

As to nationals who do not declare their work to the social security authorities, we have seen that this group basically does not fall under the concept of protected persons, since the social security standard-setting instruments work with statistical data, not with coverage by law. Concerning the other concepts, the ILO, in principle, requires taking undeclared workers into consideration when calculating the extent of the *economically active population* in a country. A similar requirement, also not explicitly confirmed, can be concluded for the computation of the total number of *employed* persons. The consequence would be that Contracting States have an incentive to fight undeclared work in order to easier achieve or maintain the required percentage of covered

population. However, in practice it will be difficult to comply with this requirement when using traditional methods on measurement. Additional efforts, *i.e.* estimations on the number of undeclared work, have been thus far not required. Concerning the *resident* population, nationals who work in the black economy are – if they are not absent or only temporarily staying in the Contracting State – to be taken into consideration. Practical problems do not arise.

A serious comparison between the situation of irregular migrant workers and undeclared national workers is not possible. This is because we do not exactly know whether migrants residing unlawfully or migrants working unlawfully in the host country are to be considered as residents, employees or part of the economically active population.

Second, the ILO conventions at issue set parameters for the qualifying criteria for social security benefits. Relevant for this research is Article 9 of the Employment Injury Benefits Convention (C121). It stipulates that eligibility for benefits in case of industrial accidents or occupational disease must not be made subject to the payment of contributions. This can be seen as an obligation to provide benefits to undeclared workers, even though no contributions have been paid.

Article 6 (6) of the Maternity Protection Convention 2000 (C183) has been identified as another relevant clause. It requires the provision of maternity benefits out of social assistance funds, for all those women absent from work, who do not qualify for the normal maternity benefit – provided that they meet a possible means test. Our investigation has shown that Contracting States, which have accepted the relevant provision, might be required under this provision to guarantee such maternity benefits out of social assistance funds also to insured irregular migrant workers and black-economy workers, who are not entitled to payment simply because of their irregular immigration status or because of their non-declaration.

Third, most of the ILO conventions under investigation comprise the principle of equality of treatment between nationals and non-nationals. This could trigger obligations for State Parties with regard to the social security position of irregular migrant workers, compared to the position of own citizens in general or own citizens who work in the black economy in particular. Our analysis, nevertheless, has shown that the value of these clauses seems to be small. The non-discrimination clause of Convention No. 130, according to the drafting materials, is not applicable to irregular migrant workers. The relevant provisions of Convention No. 102, No. 121 and No. 168 may be applicable. But then one has to bear in mind that in the context of Convention No. 118, the Committee of Experts regarded the exclusion of irregular migrant workers from social security not as a distinction according to nationality, but according to legal status. Consequently different treatment may be justified, because it is not based on a forbidden ground. The Committee of Experts explicitly referred to this finding when providing guidance for the application of Convention No. 102.

In the context of the social security minimum standard conventions, once more, the problem of interpretation is striking. The ILO conventions and recommendations are silent on the legal position of irregular migrant workers and national black-economy workers. Therefore interpretation is needed. The International Court of Justice, which is competent for interpretation, does not give guidance. This gap is filled, most notably, by commentaries of the Committee of Experts on the Application of Conventions and Recommendations. But they are no authoritative interpretation. Moreover, in some areas even the Committee does not provide guidance – for instance whether unauthorised work of foreigners is employment in the context of the minimum

standards. And in other areas, guidance by the Committee might be in conflict with other guidance, such as the one given by the International Labour Conference.

3. Council of Europe

3.1. (Revised) European Social Charter

The Council of Europe's (CoE) European Social Charter (ESC) and the Revised European Social Charter (RESC) guarantee economic and social human rights.[318] The European Social Charter originally dates from 1961, but was revised in 1996. The original and the revised document are two distinctive treaties, but they strongly resemble each other in the field of social security. Compliance with the provisions of the (R)ESC is supervised by the European Committee of Social Rights, a committee of independent experts. Conclusions of the Committee are legally not binding. Neither are recommendations of the Committee of Ministers of the Council of Europe, based on the conclusions of the European Committee of Social Rights. Both European countries under investigation, *i.e.* Belgium and the Netherlands, ratified the European Social Charter and the Revised European Social Charter.

3.1.1. Rights related to social security

In Part I, the European Social Charter and the revised document set out the rights to be guaranteed. They include, amongst other rights,[319]

- the right of employed women to protection (of maternity);
- the right of everyone to benefit from any measure enabling him to enjoy the highest possible standard of health attainable;
- the right of all workers and their dependants to social security;
- the right of anyone without adequate resources to social and medical assistance;
- the right of children and young persons to appropriate social, legal and economic protection;[320] and
- the right of migrant workers who are nationals of a Contracting Party and their families to protection and assistance in the territory of any other Contracting Party.

Part II of the Charters translates these rights into precise obligations for the Contracting States. In the following the most relevant ones for this research are cited:

> "Article 8 – The right of employed women to protection [of maternity]
> With a view to ensuring the effective exercise of the right of employed women to [the] protection [of maternity], the [Contracting] Parties undertake:
> 1. to provide either by paid leave, by adequate social security benefits or by benefits from public funds for [employed] women to take leave before and after childbirth up to a total of at least [12] fourteen weeks [...]."
>
> "Article 11 – The right to protection of health

[318] European Social Charter, 18 October 1961, ETS No .035 and European Social Charter (revised), 3 May 1996, ETS No. 163, both available at: http://conventions.coe.int.
[319] Further social rights can be found in an Additional Protocol to the European Social Charter from 5 May 1988, ETS No. 128, available at: http://conventions.coe.int. However, this Protocol bears no relevance for this research.
[320] The original European Social Charter talked about the right of mothers and children to appropriate economic and social protection.

> With a view to ensuring the effective exercise of the right to protection of health, the [Contracting] Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed inter alia:
> 1. to remove as far as possible the causes of ill-health [...].”
>
> “Article 12 – The right to social security
> With a view to ensuring the effective exercise of the right to social security, the [Contracting] Parties undertake:
> 1. to establish or maintain a system of social security;
> 2. to maintain the social security system at a satisfactory level at least equal to that required for ratification of International Labour Convention No. 102 Concerning Minimum Standards of Social Security [necessary for the ratification of the European Code of Social Security]; [...]
> 4. to take steps, by the conclusion of appropriate bilateral and multilateral agreements, or by other means, and subject to the conditions laid down in such agreements, in order to ensure:
>
> > a. equal treatment with their own nationals of the nationals of other [Contracting] Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Contracting Parties;
> > b. the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Contracting Parties.”
>
> “Article 13 – The right to social and medical assistance
> With a view to ensuring the effective exercise of the right to social and medical assistance, the [Contracting Parties] undertake:
> 1. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition; [...]
> 4. to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other [Contracting] Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11th December 1953.”

And under the Revised European Charter, Article 17 – the right of children and young persons to social, legal and economic protection – reads:

> “With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed:
> 1.
>
> > a. to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose [...].”

The Revised European Social Charter and the European Social Charter, basically, also apply to migrant workers. Still, both documents include two provisions which particularly relate to this group: Article 18 and Article 19. Article 18 secures the right to engage in a gainful occupation in the territory of another State Party to the Charters; and Article 19 guarantees the rights of migrant workers and their families to protection and assistance. Here it is relevant to mention that Article 19 (R)ESC stipulates that

> “[w]ith a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Party, the Parties undertake [...]

> 2. to adopt appropriate measures within their own jurisdiction to facilitate the departure, journey and reception of such workers and their families, and to provide, within their own jurisdiction, appropriate services for health, medical attention and good hygienic conditions during the journey; [...]
> 5. to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals with regard to employment taxes, dues or contributions payable in respect of employed persons [...]."

Ratifying States are not obliged to accept all provisions of Part II. But they must ratify at least five out of seven 'core' provisions under the ESC and at least six out of nine under the RESC. Article 12, Article 13 and Article 19 are part of these core provisions. In addition, not less than ten Articles or forty-five paragraphs under the ESC, or sixteen Articles or sixty-three paragraphs under the RESC must be accepted. It is worth mentioning that Belgium has not accepted Article 23 (the right of elderly persons to social protection) and Article 31 (the right to housing) of the Revised European Social Charter.

3.1.1.1. Irregular migrant workers

The Appendices of the original and of the revised European Social Charter, which form an integral part of the Charters,[321] explicitly refer to irregular migrant workers. The beginning of the Appendices reads as follows:

> "Without prejudice to Article 12, paragraph 4, and Article 13, paragraph 4, the persons covered by Articles 1 to 17 [and 20 to 31] include foreigners only in so far as they are nationals of other [Contracting] Parties lawfully resident or working regularly within the territory of the [Contracting] Party concerned, subject to the understanding that these articles are to be interpreted in the light of the provisions of Articles 18 and 19."

This restriction in the personal scope of application was introduced at a rather late stage of the drafting process of the original European Social Charter. Reasons for its inclusion are not documented. When drafting the Revised European Social Charter, this clause of the Appendix was subject to somewhat discussion. Most of the discussion concerned the phrase 'foreigners only in so far as they are nationals of other Contracting Parties' and therefore the principle of reciprocity. The continuation of the restriction to apply the 'new' Charter only to foreigners lawfully present and working on the soil of the Contracting Parties was widely accepted. The Parliamentary Assembly noted that "[a]s regards the scope of the revised Charter in terms of persons protected, the Assembly fully understands that it should be limited as far as foreigners are concerned to those lawfully residing or working regularly within the territory of the party concerned".[322] A Swedish expert in the Committee on the European Social Charter, which was set up to make proposals for improving the original Charter, remarked that "it is the right of a sovereign state to decide who it admits to its territory, but once somebody had been admitted he should be treated equally".[323] This comment was meant to criticise the reciprocity principle of the Charter. But at the same time it demonstrates why foreigners with an irregular migration status were regarded as being excluded from the scope *ratione personae*.

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[321] See Article 38 ESC and Article N RESC.
[322] Parliamentary Assembly, *Opinion No. 185 (1995) on the draft revised European Social Charter*, adopted on 15 March 1995, § 5.
[323] Committee on the European Social Charter, *Final activity report*, Appendix IV, Proposals examined by the Charte-Rel Committee, Group N: Extension of the scope of the Charter, 11th meeting, April 1994 (Strasbourg: Council of Europe, 1994), Proposals 76 and 77., p. 116.

The determination of 'lawful residence' and 'regular work' must be made according to national legislation. The European Committee of Social Rights considered in the context of Article 19 (8) the concept of lawful residence as "the possession [by migrant workers] of all papers legally *required by the country of residence*, including, in need be, a residence permit and a work permit [emphasis added by the author]".

So, on the whole, irregular migrant workers do not enjoy the social rights enshrined in the (R)ESC. But, as stipulated in the Appendices, the exclusion is without prejudice to *Articles 12 (4)* and *13 (4)* and does also not relate to *Articles 18* and *19*. These four provisions will be analysed in the following as to their meaning for irregular migrant workers.

As mentioned before, Article 18 is intended to facilitate the free movement of worker between State Parties, *inter alia* by simplifying formalities and abolishing or reducing charges. And Article 19 grants certain protection and assistance to migrant workers, such as for instance the protection against misleading propaganda relating to emigration and immigration. Most of these provisions under Article 18 and 19 (R)ESC apply to irregular migrant workers too. For some, however, there is the restriction that the worker has to be lawfully within the territory of the Contracting States. Concerning social security, two paragraphs under Article 19 (R)ESC bear relevance: paragraphs 2 and 5.

Article 19, paragraph 2 requires State Parties to provide appropriate services for health *during the journey* of migrant workers. The European Committee of Social Rights confirmed that this obligation only relates to the journeys of migrant workers and their families. It does not contain a duty to the provision of such health services either before or after such journeys.[324] Therefore, this provision is of no relevance for irregular migrant workers. During their journey migrants are not engaged in work in the country of destination and are thus by definition no migrant workers for the purpose of this research.

Article 19, paragraph 5 urges Contracting States to secure for workers lawfully within their territories treatment not less favourable than that of their own nationals with regard to contributions payable in respect of employed persons. This includes social security contributions related to employment.[325] The question is what the phrase 'lawfully within their territories' means. So far no kind of interpretation has given to this aspect of Article 19 (5). It is striking that Article 19 (8), by contrast, talks about 'lawfully *residing* within their territories'. This suggests that Article 19 (5) does not require lawful residence. Such an assumption is supported by the European Committee of Social Rights' interpretation of Article 13 (4) (R)ESC. There the phrase 'lawfully within' has been considered as requiring only lawful presence, *i.e.* lawful temporary stay, as opposed to lawful residence or lawful work. We will discuss this below. It could therefore be argued that also for the obligation of equal treatment in matters of social security contributions,

[324] Conclusions I, p. 83, cited in Council of Europe, *Case law on the European Social Charter* (Strasbourg: Council of Europe, 1980), p. 153.

[325] See, for instance, European Committee of Social Rights, *Conclusions XVIII-1 (Spain)*. Available at: http://www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/State/SpainXVIII1_en.pdf. It has to be noted that under Article 19 (5) (R)ESC not only contributions by workers, but also by employers in respect of these workers are covered. See Conclusions VII, p. 104 and Conclusions XI-2, pp. 149-50, cited in Council of Europe, *Migrant workers and their families: Protection within the European Social Charter*, Social Charter Monographs no. 4 (Strasbourg: Council of Europe, 1996), pp. 49-50.

only lawful presence is required. The consequence could be that a person who temporarily and lawfully stays in another Contracting State, such as a student, and who works without authorisation there, could fall within the scope of Article 19 (5). Such a foreign worker is called for the purpose of our research category B irregular migrant worker: lawful short-term presence or long-term residence, but unlawful work. However, this is speculation. We have no confirmation for such an assumption.

Article 12 (4) (R)ESC requires the State Parties to elaborate through bilateral and multilateral agreements social security coordination rules for migrant workers. But the exact conditions of this coordination are left at the discretion of the State Parties. So, Contracting States have the possibility to deviate from the requirement of lawful residence or lawful work, as laid down in the Appendices, when working out coordination instruments.

Finally, Article 13 (4) (R)ESC rules that the right to social and medical assistance must be equally applied to the own citizens and to citizens of other State Parties. But, by virtue of the wording of this provision, this equal treatment principle only applies to 'nationals of other Parties lawfully within their territories'. According to the European Committee of Social Rights this should be interpreted as a coverage of two different categories of foreigners under Article 13: first, those who are, according to the Appendices, lawfully *residing* or lawfully working[326] and, second, those who are, pursuant to Article 13 (4) (R)ESC, lawfully *present* without being lawfully residing or lawfully working.[327] As to the latter, the Committee emphasises that it is about individuals whose stay is only temporary, such as tourists or students. Because of their different situations, the two categories of foreigners do not qualify for the same protection. For those who are only lawfully present "the most appropriate form of assistance would be emergency aid to enable them to cope with an immediate state of need (accommodation, food, emergency care and clothing)".[328] This could be interpreted that certain irregular migrant workers, *viz* those who are temporarily lawfully present on the territory of another State Party and who take up work although not being allowed to do so, should be provided social and medical assistance on an equal footing with nationals. This is what we call category B irregular migrant workers. However, once more we have to recall that this is only speculation from our side.

It has been shown that the exceptions to the Appendices' requirement for lawful residence and work have hardly any impact on the social security of irregular migrant workers. Only under Article 13 (4) and Article 19 (5) (R)ESC a very specific category of irregular migrant workers enjoys equal treatment with nationals of the Contracting State of employment. These are citizens of another Contracting State of the (R)ESC, who stay lawfully but only temporarily and who take up employment although not allowed to do so. Except for that, one can conclude that according to the wording of the European Social Charter and the Revised European Social Charter, irregular migrant workers are excluded from the enjoyment of social security rights. But this is not exactly

[326] Article 1 Appendix in conjunction with Article 13 (1)-(3) (R)ESC

[327] Article 13 (4) (R)ESC. See Council of Europe, *Social protection in the European Social Charter*, Social Charter Monographs no. 7 (Strasbourg: Council of Europe, 2000), p. 79; and Conclusions XIII-4, pp. 60-61, cited in Lenia Samuel, *Fundamental social rights: Case law of the European Social Charter*, 2. ed. (Strasbourg: Council of Europe, 2002), p. 306.

[328] See Committee of Independent Experts, *European Social Charter: Conclusions XIII-4* (Strasbourg: Council of Europe, 1996), p. 62.

how the European Committee of Social Rights has interpreted the Charter. In two decisions, the Committee considered unlawfully present foreigners as being protected under the (R)ESC.[329]

In 2004, the Committee decided on a collective complaint, lodged by an international non-governmental organisation against France.[330] The claimant contested a new French law which provided for only medical treatment and cost coverage in emergencies and in life threatening situations for unlawfully present foreigners. Only unlawfully present foreigners who could establish three months continuous residence in France and could meet a means test were granted a basic health insurance. The question was whether this legislation violates Article 13 and 17 of the Revised Social Charter. Against the background of the Appendix, the Committee first turned to the applicability of the Charter to unlawfully residing aliens. It decided that the Charter, including its Appendix, must be interpreted in the light of its objective and purpose. And when determining this objective and purpose it must be taken into account that the Charter is a living human rights instrument dedicated, most notably, to human dignity and closely complementing the European Convention on Human Rights. The Committee continued that the case concerned the right to life itself and thus human dignity. Therefore, when interpreting the Appendix, denying the right to medical assistance to illegal foreigners is contrary to the Charter. In this concrete French case, the Committee found no violation of the right to medical assistance (Article 13), because France provides for emergency medical treatment. But this statement only referred to adults. With regard to the right of children, the Committee found an infringement of the right of children and young persons to medical assistance (Article 17 RESC). This was argued in the decision by referring to the UN Child Rights Convention and stating that children should receive more than just emergency medical treatment. It is interesting to remark that from the report transmitted from the European Committee of Social Rights to the Committee of Ministers it becomes clear that one of the main reasons for reaching this conclusion was the fact that children following their parents cannot be blamed for not having the required permits.[331]

This decision was not taken unanimously. Six of the thirteen members of the Committee found that there was no violation of Article 17. In the dissenting opinions to this decision, some members recalled that both provisions, paragraph 1 of the Appendix and Article 13 (4), explicitly cover only nationals lawfully residing or lawfully present. And "by their wording, both provisions are unambiguous".[332] By taking this decision, the Committee "creates new obligations for a State Party not foreseen at the time of ratification of this provision". Therefore, "the Committee [...] misunderstands its function in the supervisory procedure". "[I]t is not the role of the Committee to

[329] A foretaste of these decisions can already be found at European Committee of Social Rights, *European Social Charter (Revised): Conclusions 2004* (Strasbourg: Council of Europe, 2004), p. 10 (general introduction). There the Committee stated "The Committee notes that the Parties to the Charter (in its 1961 and revised 1996 versions) have guaranteed to foreigners not covered by the Charter rights identical to or inseparable from those of the Charter by ratifying human rights treaties – in particular the European Convention of Human Rights – or by adopting domestic rules whether constitutional, legislative or otherwise without distinguishing between persons referred to explicitly in the Appendix and other non-nationals. In so doing, the Parties have undertaken these obligations. Whereas these obligations do not in principle fall within the ambit of its supervisory functions, the Committee does not exclude that the implementation of certain provisions of the Charter could in certain specific situations require complete equality of treatment between nationals and foreigners, whether or not they are nationals of member States, Party to the Charter."

[330] European Committee of Social Rights, Decision of 8 September 2004, *FIDH v. France*, Collective Complaint no. 14/2003.

[331] The report itself is not published. But see Matti Mikkola, "Social human rights of migrants under the European Social Charter," *European Journal of Social Security*, vol. 10, no. 1 (2008), pp. 56-57.

[332] See dissenting opinion of Mr Stein Evju, joined by Ms Polonca Koncar and Mr Lucien Francois, attached to the Committee's decision.

alter the precise wording of the text of the revised European Social Charter for merely social motives".[333] On the other hand, there were also members of the Committee who issued a dissenting opinion against the decision that there was no violation of Article 13. In the eye of one member, the French law discriminates in two ways adult migrants with an unlawful residence status in their access to medical assistance: first, "between nationals and foreigners without entitlement because they fail to meet the residence or means conditions". And second "between illegal immigrants satisfying the means conditions and those who do not".[334]

I agree with the critical comments of some members of the Committee as for a violation of Article 17 RESC. Sure, there may be good reasons to consider it a desirable result that children irrespective of their immigration status and irrespective whether they are nationals of other Contracting Parties or not are entitled to more than just medical treatment in cases of emergency. Yet there is no legal basis for this in the (Revised) European Social Charter. The relevant provision in the Charter and the Appendix to the Charter are clear and unambiguous: these rights do not apply to foreigners unlawfully present in a Contracting State and to foreigners not nationals of other Contracting States. Any interpretation against the explicit wording appears to be in violation of the well established international interpretation rules. Article 31 (1) of the Vienna Convention on the Law of Treaties,[335] which sets out the general rule of interpretation, reads: "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". So, the textual, the contextual and the teleological interpretation method should be used in order to interpret an international legal norm. However, the general rule makes clear that the interpretation should be in "accordance with the ordinary meaning to be given to the terms of the treaty." In case of the Charter's relevant provisions, the ordinary meaning is unambiguous. Any interpretation against the text would therefore infringe the general rule of interpretation, as set out in the Vienna Convention on the Law of Treaties. An interpretation like this by the European Committee of Social Rights poses the question what else could the drafting State Parties have written in the Charter in order to make it more clear? And how can States which want to accede the Charter trust any longer the wording of this document?

In 2009, the European Committee of Social Rights handed down a further decision, where unlawfully present children were found to fall within the Charter's scope *ratione personae*.[336] The collective complaint related to the Dutch policy to not provide for shelter for unlawfully present children. The Committee found that this policy violated Article 31 (2) RESC, the right to housing to prevent and reduce homelessness, and Article 17 (1) (c) RESC, the right of children and young persons temporarily or definitively deprived of their family's support to protection and special aid from the state. The arguments why unlawfully present children should fall within the scope *ratione personae* of the Charter were partly the same, partly very similar to the arguments brought forward in above-analysed 2004 decision. Remarkable this time was that the decision was taken unanimously.[337]

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[333] See dissenting opinion of Mr Rolf Birk, attached to the Committee's decision.
[334] See dissenting opinion of Mr Tekin Akillioğlu, attached to the Committee's decision.
[335] Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, *Treaty Series*, vol. 1155, p. 331.
[336] European Committee of Social Rights, Decision of 20 October 2009, *DCI v. the Netherlands*, Collective Complaint no. 47/2008.
[337] For an analysis of this decision see Lieneke Slingenberg, "Illegale kinderen en het Europees Sociaal Handvest," *Asiel en Migrantenrecht*, no. 2 (2010).

3.1.1.2. Nationals who engage in undeclared work

Nationals who do not declare their work to the social security authorities are not explicitly addressed by the (Revised) European Social Charter. We know that the only group excluded as a whole from the personal scope of application of the Charter are aliens who reside or work unlawfully in the Contracting State. What is more, the single provisions of the Charter often only apply to certain people, and thus excluding others. For instance, the right of migrant workers and their families to protection and assistance (Article 19) is not granted to nationals of the Contracting State. Or the right of employed women to protection (of maternity) (Article 8) does not apply to self-employed women. An explicit or even implicit exclusion of nationals who do not declare their work, however, cannot be found in the Charter.

The European Committee of Social Rights has so far not dealt with social security rights of undeclared workers. But we can see that in recent years the Committee has increasingly asked Contracting States to provide information on undeclared work when reporting on Article 12 (1) – the right to social security. To be more precise, the Committee wanted to know how Contracting States deal with non-payment of social security contributions by employers, how much undeclared work takes place and what they are doing to combat this phenomenon.[338] Contracting States replied to these questions by providing information on penalties for non-payment of contributions by employers and fines for forging documents concerning the payment of contributions. Furthermore they presented general measures, outside social security legislation, for the prevention and elimination of undeclared work, such as obligatory registration of employment contracts. With reference to the lack of numbers, information on the extent of undeclared work in the country has hardly been issued.[339] The Committee regarded such kind of information as sufficient. Cases of non-compliance with the right to social security (Article 12) – and, in more detail, with the obligation to establish and maintain a system of social security (Article 12 (1)) – because of weak or even no measures against undeclared work and against the non-payment of social security contributions are not known. But one has to remark that there are no cases of non-compliance with Article 12 (1) at all in the Committee's case law.[340] Nonetheless, the recent interest of the Committee in undeclared work may be regarded as a sign that the Committee cares about the protection of workers, about the financial stability of social security funds and about compliance with national social security laws. And this may be suited to create a soft pressure on the States for action in this field.

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[338] See European Committee of Social Rights, *European Social Charter (Revised): Conclusions 2002* (Strasbourg: Council of Europe, 2002), p. 199 (comments on Slovenia); European Committee of Social Rights, *European Social Charter (Revised): Conclusions 2004* (Strasbourg: Council of Europe, 2004), p. 62 (comments on Bulgaria), p. 162 (comments on Estonia), p. 363 (comments on Lithuania), p. 530 (comments on Slovenia).
European Committee of Social Rights, *European Social Charter: Conclusions XV-1 Addendum 1* (Strasbourg: Council of Europe, 2001), comments on Poland and Luxembourg; European Committee of Social Rights, *European Social Charter: Conclusions XV-1 Addendum 2* (Strasbourg: Council of Europe, 2001), comments on Germany.
European Committee of Social Rights, *European Social Charter*: *Conclusions XVI-1* (Strasbourg: Council of Europe, 2002), p. 648 (comments on Turkey).

[339] See for instance European Committee of Social Rights, *European Social Charter (Revised): Conclusions 2006* (Strasbourg: Council of Europe, 2006), comments on Bulgaria and on Estonia.

[340] See Lenia Samuel, *Fundamental social rights: Case law of the European Social Charter*, 2. ed. (Strasbourg: Council of Europe, 2002), p. 286; or Andrzej Marian Świątkowski, *Charter of Social Rights of the Council of Europe* (Alphen aan den Rijn: Kluwer, 2007), p.270.

Besides these statements by the European Committee of Social Rights in the context of Article 12 (1) (R)ESC – right to social security – no further reference has been up to now to the social security of undeclared workers. We can nevertheless ask ourselves if we can find something in the comments of the Committee which might have a potential impact on the social security of undeclared workers.

3.1.1.2.1. Article 8 (1) (R)ESC

Article 8 (1) (R)ESC requires State Parties to the Charter to provide maternity benefits to employed women to take leave before and after childbirth. The Charter leaves it to the States to select from three suggested techniques the most suitable one to national circumstances. Either States guarantee by law paid leave at the employer's expense, social security benefits or benefits from public funds[341] – or a combination thereof.[342] The Committee held that all paid female workers without exception benefit from Article 8 (1).[343] This however does not prevent the Contracting States to make entitlements to benefits subject to conditions.[344] Still, when there are conditions, the Committee considers itself competent to examine the reasonableness of them.[345] A period of 180 days' contributions and employment during the five years preceding the delivery, for instance, was considered too long, since it may deprive many women of maternity allowances.[346] Also the requirement to have worked with the same employer for twelve months was considered to be in violation of Article 8 (1) (R)ESC.[347] By contrast, insurance for at least twenty-six weeks plus contribution payment above a certain threshold was regarded as reasonable.[348] Unfortunately the Committee does not explain how it reaches it conclusions.[349] In other words, it does not say what the exact criteria for reasonableness are. Nevertheless, these examples illustrate that the Committee accepts that Contracting States work with requirements of being insured, being employed or having paid contributions in order to become entitled to maternity benefits, as long as the length of qualifying periods is reasonable. So there is nothing which would indicate that a State Party which does not allow an undeclared worker social security benefits, because the worker does not fulfil the national requirement of, for instance, having paid contributions, would violate Article 8 (1) (R)ESC.

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[341] Article 8 (1) (R)ESC.
[342] See Conclusions VIII, p. 124, cited in Samuel, *Fundamental social rights*, p. 212.
[343] *Ibid*., p. 214.
[344] See European Committee of Social Rights, *European Social Charter: Conclusions XV-2* (Strasbourg: Council of Europe, 2001), p. 197 (comment on France) and p. 522 (comment on Spain).
[345] *Ibid*.
[346] *Ibid*., p. 522 (comment on Spain).
[347] Committee of Independent Experts, *European Social Charter: Conclusions II* (Strasbourg: Council of Europe, 1995), p. 39 (comment on Sweden).
[348] European Committee of Social Rights, *European Social Charter (Revised): Conclusions 2005* (Strasbourg: Council of Europe, 2005), p. 71 (comment on Cyprus).
[349] See also *Ibid*., p. 227 (comments on France) and p. 318 (comment on Lithuania); and Committee of Independent Experts, *European Social Charter: Conclusions VI* (Strasbourg: Council of Europe, 1995), p. 62 (comment on United Kingdom).

3.1.1.2.2. Article 11 (R)ESC

Article 11 (R)ESC lays down the right to protection of health and requires Contracting States, *inter alia*, to remove as far as possible the causes of ill-health. This is an obligation of a general nature, which the European Committee of Social Rights tried to specify over the past decades. According to the Committee, Contracting States fulfil the requirement to remove as far as possible the causes of ill-health when they operate a health system comprising the following elements:

- public health arrangements making generally available medical and paramedical practitioners and adequate equipment to ensure proper medical care for the whole population and prevention and diagnoses of disease;
- special measures to protect the health of mothers, children and old people;
- general measures to prevent air and water pollution, food control, environmental hygiene etc; and
- the bearing by collective bodies of all, or at least a substantial part, of the costs of health care services.[350]

As to the latter, we can see that in 2001 the Committee criticised a State Party to the Charter for the fact that about 13 percent of its population must bear all of their health care costs by themselves. On that occasion the Committee remarked that in the vast majority of the Contracting Parties, 98-100 percent of the population is covered by a health care system which bears the costs.[351] The Committee, however, does not put forward further requirements as to how such a system shall be organised. From this and the other comments of the Committee, we therefore cannot deduce any guidance with respect to the treatment of undeclared workers under a national health system.

3.1.1.2.3. Article 12 (R)ESC

Article 12 (R)ESC guarantees the right to social security by obliging Contracting States to establish or maintain a system of social security (1) and by maintaining the social security system at a satisfactory level (2). As for the first requirement, the European Committee of Social Rights considers compliance when there is a social security system in place which "covers certain major risks" and "covers a significant percentage of the population and at least offers effective benefits in several areas".[352] The undertakings of paragraph 2, as a rule, are assumed to be fulfilled when State Parties to the Charter have ratified ILO Convention No. 102 (for the ESC) or the CoE Code (for the RESC) and when the respective supervisory Committees attest compliance. These standard-setting instruments also include social security coverage of a certain percentage of the residence or working population – see subchapter 2.3. above. In the assessment of the Committee itself, there is nothing which would lead us to any conclusions about the prescribed treatment of undeclared workers under national social security, which go beyond that what was already mentioned before in subchapter 3.1.1.2.

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[350] *Ibid*., p. 267; and Conclusions I, p. 59, cited in Samuel, *Fundamental social rights*, p. 263.

[351] European Committee of Social Rights, *European Social Charter: Conclusions XV-2 Addendum 1* (Strasbourg: Council of Europe, 2001) (comment on Cyprus).

[352]Committee of Independent Experts, *European Social Charter: Conclusions XIII-4* (Strasbourg: Council of Europe, 1996), p. 37.

3.1.1.2.4. Article 13 (R)ESC

Article 13 (R)ESC obliges Contracting States, with a view to the right to social and medical assistance, to ensure that any person who is without adequate resources to be granted adequate assistance, and, in case of sickness, the care necessitated by his or her condition. From the very beginning, the Committee made clear that this obligation binds State Parties to grant social and medical assistance as a right. It is not at the discretion of the State and its authorities to render assistance; it is a subjective right of the person in need.[353] Undeclared workers have by definition income from work. This, in many cases, prevents that they lack sufficient resources to provide for the necessities of life. The problem however is that they do not declare their work. This might put them in the position to successfully apply for social and medical assistance, although they are not in need. The European Committee of Social Right has to date not dealt with this issue. However, since Article 13 (1) (R)ESC explicitly protects only those without adequate resources, it can be assumed that workers who are not needy, but who conceal their real income from the social security authorities are not protected.

3.1.2. Non-discrimination

Equal treatment provisions are analysed in this thesis in order to see what they say about the equality of treatment between irregular migrant workers on the one hand and regular migrant workers or nationals, in particular those who do not declare their work, on the other hand. The original and the revised European Social Charter comprise a general principle of non-discrimination. In the 1961 document, the principle can be found in the Preamble, stating that "[c]onsidering that the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin". And in the 1996 document, Article E similarly lays down that the "enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status". These non-discrimination clauses only relate to the rights enshrined in the Charter. They cannot be applied independently. But as we have seen, irregular migrant workers are basically excluded from the enjoyment of the Charter's rights. As a consequence, these workers are also not protected by the Preamble of the ESC or by Article E of the RESC. In the Explanatory Report to the Revised European Social Charter this was confirmed. The Report explains that Article E "must not be interpreted so as to extend the scope ratione personae of the revised Charter which is defined in the appendix to the instrument and which includes foreigners only in so far as they are nationals of other parties lawfully resident or working regularly within the territory of the Party concerned".[354]

So, according to the wording of the (R)ESC and of the Explanatory Report to the RESC, the Charter does not comprise the obligation to equality of treatment in social security between irregular migrant workers on the one hand and regular migrant workers or nationals, in particular those who do not declare their work, on the other hand. But we already heard that the European Committee of Social Rights nonetheless considered unlawfully present foreigners as being

[353] See Conclusions I, p. 64, cited in Samuel, *Fundamental social rights*, p. 306.

[354] Council of Europe, *European Social Charter: Collected texts*, 6. ed., p. 191. Available at: http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ESCCollectedTexts_en.pdf.

protected by the Charter in the field of health care. It therefore cannot be excluded that in the eyes of the Committee the non-discrimination principle may be invoked in connection with other Charter rights, as long as they concern human dignity.

3.1.3. Summary and comparison

Irregular migrant workers are, by and large, due to their irregular status of residence or work expressly excluded from the scope *ratione personae* of the (Revised) European Social Charter. Even so, this has not deterred the European Committee of Social Rights, in specific situations to derive social security rights from the Charter for unlawfully residing foreigners. The argument was that the case at stake concerned the right to life and thus human dignity. And human dignity is the fundamental value and the core of positive European human rights law, including the Charter. Therefore unlawfully residing foreigners were regarded to be protected by the RESC. In more detail, the Committee found the right of children and young persons to medical assistance (Article 17 RESC) as being violated by national legislation, which only grants a basic health insurance to those unlawfully present foreigners who can establish three months continuous residence and meet a means test. In addition, the Committee found the withholding of shelter for homeless children unlawfully present in the Contracting State as violating the right to housing to prevent and reduce homelessness (Article 31 (2) RESC) and the right of children and young persons temporarily or definitively deprived of their family's support to protection and special aid from the state (Article 17 (1) (c) RESC).

By contrast, nationals who perform undeclared work are not explicitly excluded from the personal scope of application of the (Revised) European Social Charter. This, however, does not automatically mean that substantive rights to social security can be derived. The *right to health* or the *right to social security* impose minimum standards to be met when establishing and maintaining national health care and social security. From none of these minimum requirements an obligation can be deduced to provide benefits to workers who have not declared their work or for whom the work has not been paid. The *right to social and medical assistance* calls for an individual right to assistance for all those without adequate resources. It can be assumed that also undeclared workers who are actually in need, despite income from their black-economy work, enjoy this right. The *right of employed women to protection (of maternity)* includes the obligation for State Parties to grant maternity benefits. National qualifying conditions for benefit entitlement, relating to insurance, employment or the payment of contributions, are accepted by the European Committee on Social Rights, as long as they are reasonable. This tells us that undeclared women workers who have not paid contributions cannot, if national legislation requires the payment of contributions for entitlement to benefits, derive a right to maternity benefits from the (Revised) European Social Charter.

In recent years, the European Committee of Social Rights began to ask State Parties to the Charters to provide information on the non-payment of social security contributions in particular and on undeclared work in general. The Committee did not carry out a thorough assessment when receiving this information. But it demonstrates that it takes the issue of undeclared work in the field of social security seriously. And this may have some impact on the Contracting States to take action in this area.

3.2. European Convention on Human Rights

In 1950, the Member States of the Council of Europe adopted the European Convention on Human Rights (ECHR).[355] To ensure observance of the obligations undertaken by the State Parties, the European Commission of Human Rights and the European Court of Human Rights were set up. With the coming into force of the Additional Protocol No. 11 in 1998, the Commission was abolished and a full-time European Court of Human Rights replaced the part-time Court. Final judgments of the Court are legally binding on CoE Member States,[356] which have all ratified the ECHR.

3.2.1. Rights related to social security

The European Convention on Human Rights comprises a number of civil and political rights. Amongst these rights are the right to life (Article 2), the prohibition of torture and inhuman or degrading treatment (Article 3), or the right to respect for private and family life (Article 8). With the adoption of the First Additional Protocol to the Convention in 1952, an economic right, namely the protection of property (Article 1 of the Protocol), was added.[357] Social rights, by contrast, are not part of the ECHR and its Protocols.

Nevertheless, in the course of time, the European Court of Human Rights regarded certain aspect of social security as falling under the protection of the Convention. In the following I will shortly outline under which conditions statutory social security matters fall within the scope of Convention rights and when violations are observed.[358] I will confine myself to Convention rights which have proved to be relevant for the access to benefits.

According to the case law of the Court, Article 1 of the First Additional Protocol – the right to protection of property – does not create a right to acquire property. But if a Contracting State has legislation in force that provides for the payment of a social security benefit, whether or not conditional on the payment of contributions, that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of the First Additional Protocol for persons satisfying its requirements.[359] It is important that the benefits are payable as of right and not only a purely discretionary basis. Once a case comes within the scope of Article 1, it is to ask whether there has been an interference with the right. The Court held, for instance, that late

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[355] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 005, available at: http://conventions.coe.int.

[356] Article 46 ECHR as amended by Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, 11 May 1994, ETS No. 155, available at: http://conventions.coe.int.

[357] See Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, ETS No. 009, available at: http://conventions.coe.int.

[358] For an analysis of the Court's case law in social security matters see Klaus Kapuy, "Social security and the European Convention on Human Rights: How an odd couple has become presentable," *European Journal of Social Security*, vol. 9, no. 3 (2007), 225 ff; and Mel Cousins, *The European Convention on Human Rights and social security law* (Antwerp/Oxford/Portland: Intersentia, 2008). For an overview of the European Court of Human Rights case law as to social security see Klaus Kapuy, Danny Pieters and Bernhard Zaglmayer, *Social security cases in Europe: The European Court of Human Rights* (Antwerp/Oxford: Intersentia, 2007).

[359] See European Court of Human Rights, Decision of 6 July 2005, *Stec and Others v. United Kingdom*, Application no. 65731/01, 65900/01, § 54.

payment,[360] reduction[361] or termination[362] of benefits amounted to an interference with the right to peaceful enjoyment of possessions. Such interference may lead to a violation of Article 1, if it cannot be justified, *i.e.* if a fair balance is not struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

The right to family life, as set out in Article 8 ECHR, does not impose on Contracting States a positive obligation to provide for maternity benefits, parental leave benefits or child benefits. But by granting these benefits, States are able to demonstrate their respect for family life within the meaning of Article 8 ECHR. Therefore such benefits fall within the scope of this provision.[363] There is no case law telling us what interference with respect to family benefits could be like. Paragraph 2 of the Article 8, however, justifies interference in accordance with the law which are "necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

Under the right to life (Article 2 ECHR) and under the prohibition of inhuman or degrading treatment (Article 3 ECHR), Contracting States have not only an obligation to refrain from the intentional and unlawful taking of life and from inflicting inhuman or degrading treatment, but also to take adequate measures to protect life and to prevent the subjection of individuals to such treatment.[364] Despite positive obligations, these provisions, as any other provision under the Convention, cannot be interpreted as conferring a right to any given standard of living or a right to obtain financial assistance from a Contracting State.[365] However, the Court is of the opinion that "a complaint about a wholly insufficient amount of pension and other social benefits may, in principle, raise an issue under Article 3 of the Convention which prohibits inhuman or degrading treatment".[366] And concerning medical care, the Court took the position that "an issue may arise under Article 2 of the Convention where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally".[367] However, to date such violations have not been found.

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[360] European Court of Human Rights, Judgment of 12 July 2005, *Solodyuk v. Russia*, Application no. 67099/01, § 29.
[361] European Court of Human Rights, Decision of 22 September 2005, *Goudswaard-Van der Laans v. The Netherlands*, Application no. 75255/01.
[362] European Court of Human Rights, Judgment of 12 October 2004, *Asmundsson v. Iceland*, Application no. 60669/00, § 40.
[363] See European Commission of Human Rights, Decision of 4 March 1986, *Andersson and Kullmann v. Sweden*, Application no. 11776/85; European Court of Human Rights, Judgment of 27 March 1998, *Petrovic v. Austria*, Application no. 20458/92, §§ 26, 29; European Court of Human Rights, Judgments of 25 October 2005, *Niedzwiecki v. Germany*, Application no. 58453/00 and *Okpisz v. Germany*, Application no. 59140/00, § 31 (Niedzwiecki) and § 32 (Okpisz); and European Court of Human Rights, Judgment of 31 March 2009, *Weller v. Hungary*, Application no. 44399/05, § 29.
[364] See for instance, European Court of Human Rights, Decision of 21 March 2002, *Nitecki v. Poland*, Application no. 65653/01 and European Court of Human Rights, Judgment of 23 September 1998, *A. v. The United Kingdom*, Application no. 25599/94.
[365] Established case law. See, for instance, European Court of Human Rights, Decision of 20 April 1999, *Wasilewski v. Poland*, Application no. 32734/96.
[366] European Court of Human Rights, Decision of 23 April 2002, *Larioshina v. Russia*, Application no. 56869/00.
[367] European Court of Human Rights, Judgment of 10 May 2001, *Cyprus v. Turkey*, Application no. 25781/94, § 219.

3.2.1.1. Irregular migrant workers

The European Convention on Human Rights grants the rights set forth in the Convention to everyone within the jurisdiction of a Contracting State.[368] The European Commission of Human Rights held that this means that "every person within [a State Party's] jurisdiction, regardless of their nationality or status" must be secured the rights and freedoms laid down in the Convention.[369] In a number of cases, Commission and Court were confronted with complaints of non-citizens of a State Party, who had an irregular immigration status. A few of these cases were declared admissible and sometimes even a violation of the Convention was found. However, in all these cases the applicability of the Convention to persons with an irregular migration status was no issue. It was taken for granted that they enjoy protection under the Convention.[370]

Now that we know that the Convention applies to irregular migrant workers, the question is whether they can derive rights from the Convention as for their social security.

In a few cases the European Court of Human Rights was confronted with claims of individuals with medical problems who were unlawfully residing in Contracting States and faced imminent expulsion. Due to their bad state of health, the claimants received health care from the Contracting States. Such (adequate) health care and medication was difficult or in some cases even impossible to obtain in the countries of origin. Therefore, according to the claimants, an expulsion coming along with an abrupt stop of medical treatment would have led to a serious deterioration of the status of health and would amount in a violation of the right to life (Article 2 ECHR), the prohibition of inhuman and degrading treatment (Article 3 ECHR) and the right to respect for private life (Article 8 ECHR). The Court had to decide whether aliens who are subject to expulsion can claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical assistance. The European Court of Human Rights has just once found the threat of inhuman and degrading treatment and hence a violation of Article 3 of the Convention. This was in 1997 in the case *D. v. United Kingdom*.[371] It dealt with an irregular migrant who was terminally ill and had a very poor prognosis already based on the therapy in the United Kingdom. It was estimated that the withdrawal of the current treatment would reduce the prognosis by half. Therefore, and because nursing or medical care in his country of origin could not be guaranteed, the Court found that the implementation of the decision to expulsion would expose the applicant to a real risk of dying under most distressing circumstances. However, the Court stated clearly that the circumstances of this case were very exceptional and that, in principle no right to remain in the territory of a Contracting State can be obtained in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State.[372] And indeed, this was the first and also the last time that the Court has found such exceptional circumstances.[373] So, it seems that the

[368] Article 1 ECHR.
[369] European Commission of Human Rights, Decision of 11 January 1961, *Austria. v. Italy*, Application no. 788/60.
[370] See for instance European Commission of Human Rights, Decision of 19 May 1994, *Tanko v. Finland*, Application no. 23634/94 or European Court of Human Rights, Judgment of 27 May 2008, *N. v. United Kingdom*, Application no. 26565/05.
[371] European Court of Human Rights, Judgment of 2 May 1997, *D. v. United Kingdom*, Application no. 30240/96.
[372] *Ibid.*, § 54.
[373] In all the other cases, no violations were determined. See European Court of Human Rights, Decision of 15 February 2000, *S.C.C. v. Sweden*, Application no. 46553/99; European Court of Human Rights, Judgment of 6 February 2001, *Bensaid v. United Kingdom*, Application no. 44599/98; European Court of Human Rights, Decision of 24 June 2003, *Arcila Henao v. The Netherlands*, Application no. 13669/03; European Court of Human Rights, Decision of 16 March 2004, *Nasimi v. Sweden*, Application no. 38865/02; European Court of Human Rights, Decision

prohibition of inhuman and degrading treatment and also the right to life can only be invoked by irregular migrant workers under extreme, life threatening conditions. Otherwise, there is no obligation for Contracting States to guarantee unlawfully present foreigners medical treatment and refrain from deportation. This has been confirmed by the Court in 2008, where it held that "[w]hile it is necessary, given the fundamental importance of Article 3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States".[374]

Beside above discussed case *D. v. United Kingdom*, there has been no other case where the European Court of Human Rights found in favour of an irregular migrant in the context of social security.

Nevertheless, one can ask whether certain Convention rights do have potential implications on an irregular migrant worker's social security. Let us first have a look on the right to peaceful enjoyment of possessions, stipulated under Article 1 of the First Additional Protocol. We have heard that if Contracting States have legislation in force that provides for the payment of a social security benefit, whether or not conditional on the payment of contributions, that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of the First Additional Protocol for persons *satisfying its requirements*. This would mean that irregular migrant workers can only engage Article 1 of the Protocol when they fulfil all national eligibility criteria for benefit entitlement – which would never be the case under national schemes which require a lawful residence or work status. However, the case law of the Court is somewhat ambiguous in this regard. Basically, the Court requires that all national legal requirements are met. Yet, as we will see later, when Article 14 ECHR – the principle of non-discrimination – was engaged, the Court was satisfied when the claimant fulfilled all legal requirements, except for the one about which the claimant complained to be discriminatory. And there have been also cases, where only Article 1 of the First Protocol was engaged and where the Court accepted that the impugned condition was not met.[375]

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of 22 June 2004, *Ndangoya v. Sweden*, Application no. 17868/03; European Court of Human Rights, Decision of 29 June 2004, *Salkic and Others v. Sweden*, Application no. 7702/04; European Court of Human Rights, Decision of 27 September 2005, *Hukic v. Sweden*, Application no. 17416/05; European Court of Human Rights, Decision of 7 October 2004, *Dragan v. Germany*, Application no. 33743/03; European Court of Human Rights, Decision of 25 November 2004, *Amegnigan v. The Netherlands*, Application no. 25629/04; and European Court of Human Rights, Judgment of 27 May 2008, *N. v. United Kingdom*, Application no. 26565/05. European Court of Human Rights, Judgment of 7 September 1998, *B.B. v. France*, Application no. 30930/96 was resolved in a friendly settlement.

[374] European Court of Human Rights, Judgment of 27 May 2008, *N. v. United Kingdom*, Application no. 26565/05, § 44.

[375] See European Court of Human Rights, Judgment of 12 October 2004, *Asmundsson v. Iceland*, Application no. 60669/00; European Court of Human Rights, Decision of 6 January 2005, *Hoogendijk v. the Netherlands*, Application no. 58641/00; European Court of Human Rights, Decision of 22 September 2005, *Goudswaard-Van der Laans v. The Netherlands*, Application no. 75255/01; or European Court of Human Rights, Decision of 10 January 2006, *Sali v. Sweden*, Application no. 67070/01. One might argue that these case were about the deprivation of possessions and therefore concerned not the first sentence of Article 1 First Protocol ("Every natural or legal person is entitled to the peaceful enjoyment of his possessions"), but the second one ("No one shall be deprived of his possessions"). But the Court engaged the first sentence, which it found to be the general rule compared to the second sentence, which is concerned with a particular instance of interference.

So, following the reasoning of the leading case *Stec*, the right to peaceful enjoyment of property could not be invoked to contest the ban of non-citizens with an irregular migration status from social security. At least it could not be invoked alone. But since the Court's case law is not completely consistent, it cannot be excluded with absolute certainty that also such complaints might fall within the scope of Article 1 First Protocol. If so, then it is to see whether an interference with the right to peaceful enjoyment of possessions occurred and whether a possible interference could be justified. Since there is not much case law dealing with justification of interference with the right to property in social security, we cannot say how the Court would possibly react.

An interesting case for the purposes of our research is the *Larioshina* case of 2002, which has already been mentioned before.[376] The applicant was a Russian citizen, who received an old-age pension and other social benefits. She complained, amongst other things, about the insufficient amount of her pension and the other social benefits that she receives in order to maintain a proper standard of living, as guaranteed under Article 1 First Protocol. The European Court of Human Rights did not decide on the merits of this case and instead declared the application inadmissible, *inter alia* because an assessment of the level of financial benefits would not fall under the Court's competences under the right to property. However, the Court made the interesting statement that "a complaint about a wholly insufficient amount of pension and the other social benefits may, in principle, raise an issue under Article 3 of the Convention which prohibits inhuman or degrading treatment".[377] In the case at stake the Court held that "on the basis of the material in its possession, the Court finds no indication that the amount of the applicant's pension and the additional social benefits has caused such damage to her physical or mental health capable of attaining the minimum level of severity falling within the ambit of Article 3 of the Convention".[378] The Court confirmed its findings in *Larioshina* in a fistful of other cases where applicants from Russia complained about low pension payments.[379] It recalled that a wholly insufficient amount of pension and social benefits may raise an issue under Article 3 ECHR, but could not find such. In *Budina* the Court acknowledged that the claimant's pension was not enough for clothes, non-food goods, sanitary and cultural services, and sanatorium treatment. But it was sufficient for flat maintenance, food and hygiene items. In addition, the Court took into consideration that the claimant was eligible for free medical treatment. Therefore the Court found no indication that the level of pension and social benefits was insufficient to protect the applicant from damage to her physical or mental health or from a situation of degradation incompatible with human dignity. It would be interesting to see how the complete denial of social assistance to irregular migrants would be assessed against the background of Article 3. Thus far, such cases have not been brought before the Strasbourg Court.

Possible implications of the right to family life on an irregular migrant worker's social security will not be analysed. There is no case law at all as for a violation of Article 8 with respect to social

[376] European Court of Human Rights, Decision of 23 April 2002, *Larioshina v. Russia*, Application no. 56869/00.
[377] *Ibid*., § 3.
[378] *Ibid*.
[379] See European Court of Human Rights, Judgment of 25 October 2005, *Kutepov and Anikeyenko v. Russia*, Application no. 68029/01 or European Court of Human Rights, Decision of 18 June 2009, *Budina v. Russia*, Application no. 45603/05.

security benefits.[380] Therefore, reflecting on the situations of irregular labour migrants would be nothing but pure speculation.

3.2.1.2. Nationals who engage in undeclared work

The European Court of Human Rights was already confronted with claims of people who evaded social security contributions. Most of these claims concerned an alleged violation of the right to a fair trial in the determination of criminal charges against them.[381] Questions of entitlement to social security benefits despite the non-affiliation with social security or the non-payment of contributions, however, have never been at stake.

Like for irregular migrant workers, we can nevertheless raise the hypothetical question as to whether claims for social security benefits of people who did not declare their work might fall within the scope of the right to a peaceful enjoyment of possessions. It is to recall that it is established case law that "legislation providing for the payment as of right of a welfare benefit – whether conditional or not on the prior payment of contributions – that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements".[382] So it is not the payment of contribution that generates a proprietary interest in terms of the Convention, but the fulfilment of national eligibility criteria. Therefore, a person who does not affiliate with social security and does not pay contributions, although this is required for entitlement by national legislation, does not create such proprietary interest. Still, we have heard that the Court sometimes accepted that all but the impugned eligibility requirement were fulfilled. So it cannot be completely excluded that a claim for benefit entitlement despite not having declared the work or paid the required contributions comes within the scope of the protection of property. However, coming within the scope of the provision does not mean that the Court finds an unjustified interference with the peaceful enjoyment of possessions.

3.2.2. Non-discrimination

Article 14 reads:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 14 complements the other substantive provisions of the Convention and its Protocols by having effect solely in relation to the enjoyment of the rights and freedoms safeguarded by those provisions. This dependence means that Article 14 is only applicable when the facts at issue fall

[380] By contrast, the Court dealt with cases of discrimination in the sphere of the right to family life. For more information, see below our analysis on non-discrimination, at subchapter 3.2.2.

[381] See for instance European Commission of Human Rights, Decision of 1 September 1993, *H.Ö. v. Germany*, Application no. 19929/92; European Court of Human Rights, Judgment of 22 May 1998, *Hozee v. The Netherlands*, Application no. 21961/93; European Court of Human Rights, Judgment of 23 July 2002, *Janosevic v. Sweden*, Application no. 34619/97; or European Court of Human Rights, Decision of 23 March 2006, *Jöcks v. Germany*, Application no. 23560/02.

[382] European Court of Human Rights, Decision of 6 July 2005, *Stec and Others v. United Kingdom*, Application no. 65731/01, 65900/01, § 54.

within the ambit of one or more of the Convention's provisions. However, a simultaneous violation of one of the Convention's rights and freedoms is not required. In that sense Article 14 can be seen as autonomous.[383] We have already heard that matters of social security benefits, under certain circumstances, may fall within the ambit of the right to protection of property or the right to family life. In order to fall within the scope of Article 1 First Protocol, it is necessary that, first, the benefit is payable as of right, not on purely discretionary basis and, second, the individual satisfies the requirements stipulated by law in order to have a sufficient claim to the possession. In cases concerning a complaint under Article 14 in conjunction with Article 1, pursuant to the Court in the leading case *Stec*, the "relevant test is whether, but for the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law, to receive the benefit in question".[384] And with regard to child or parental benefits, the Court found that such benefits, if granted by the State, fall within the scope of Article 8.

Concerning the prohibited grounds under Article 14, nationality is frequently held to be one of them. Also the residence status under immigration laws was considered by the Court to be a suspect ground. Since the list of suspect grounds is illustrative only,[385] further distinctions, such as the status of work under immigration laws, could also be impugned as long as they have "as its basis or reason a personal characteristic ('status') by which persons or groups of persons are distinguishable from each other".[386]

To date, no cases have been brought before the supervisory bodies in Strasbourg, where discrimination with respect to the social security of irregular migrants was at stake. Neither in comparison with black-economy workers, nor in comparison with any other group. Let me nevertheless point to three cases which involved *legally* residing foreigners. Maybe this could also have implications for irregular ones.

In two of them, *Gaygusuz v. Austria*[387] and *Koua Poirrez v. France*[388], the Court found a violation of the principle of non-discrimination based on citizenship read together with the right to property. In the *Gaygusuz* case it related to the entitlement to an emergency assistance which was somehow linked to contribution payment. The claimant paid contributions, but was refused this benefit due to a lack of Austrian citizenship. And in *Koua Poirrez* the applicant was denied access to social assistance for disabled adults; also based on the ground that he lacked French citizenship. In the third case, *Niedzwiecki v. Germany* and *Okpisz v. Germany*, there was an infringement of the principle of non-discrimination based on immigration status read together with the right to respect

[383] See *inter alia* European Court of Human Rights, Judgment of 13 June 1979, *Marckx v. Belgium*, Application no. 6833/74, § 32 and European Court of Human Rights, Judgment of 23 November 1983, *Van der Mussele v. Belgium*, Application no. 8919/80, § 43.
[384] European Court of Human Rights, Decision of 6 July 2005, *Stec and Others v. United Kingdom*, Application no. 65731/01, 65900/01, § 55.
[385] See European Court of Human Rights, Judgment of 8 June 1976, *Engel and Others v. The Netherlands*, Application nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 , § 72.
[386] European Court of Human Rights, Judgment of 7 December 1976, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Application nos. 5095/71; 5920/72; 5926/72, § 56.
[387] European Court of Human Rights, Judgment of 16 September 1996, *Gaygusuz v. Austria*, Application no. 17371/90.
[388] European Court of Human Rights, Judgment of 30 September 2003, *Koua Poirrez v. France*, Application no. 40892/98.

for family life.[389] The applicants' families were only issued with regularly renewable residence titles for exceptional purposes which did not entitle them to child benefits. Foreigners with stable residence permits, by contrast, could receive such child benefits.

Is it conceivable that irregular migrant workers could in future also rely on discrimination based on citizenship or immigration status under the Convention, when they satisfy all other eligibility requirements for social insurance or social assistance benefits? In my opinion it is certainly not impossible. But the possibility that the Court will follow such an argumentation seems to be rather low. This has to do with the fact that according to the Court's case law, a distinction is discriminatory if it has no objective and reasonable justification – that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. This was exactly what was found in *Gaygusuz*, *Koua Poirrez*, *Niedzwiecki* and *Okpisz*.

In *Gaygusuz* and *Koua Poirrez* the Court was not convinced by the arguments brought forward by the governments. The Austrian government stated that "the difference in treatment was based on the idea that the State has a special responsibility for its own nationals" and that "Austria was not bound by any contractual obligations".[390] The French government argued that a distinction is necessary to maintain "a balance between the State's welfare income and expenditures" and that "foreign nationals had not been deprived of all resources since they were entitled to [other benefits]".[391] The Court found this unpersuasive, against the background that "very weighty reasons would have to be put forward [to] regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention".[392] In the *Niedzwicki* and *Okpisz* cases, by contrast, the Court did not demand weighty reasons to justify difference in treatment based on residence status. But since the German government did not bring forward any arguments at all, the Court found a violation of the principle of non-discrimination.

However, there is a big difference between lawfully and unlawfully residing foreigners. As to the latter, State Parties to the Convention can bring forward more arguments why exclusion is objectively and reasonably justified. Moreover, very weighty reasons must be brought forward when difference in treatment is exclusively based on nationality. In the case of irregular migrant workers, even if one compares them with nationals who work in the black, it is not just nationality on which the differentiation is based on. And finally, in its *Gaygusuz* and *Koua Poirrez* judgments the Court emphasised the fact that the applicants resided lawfully in the Contracting State.[393]

In the end, I would like to make a small remark to Protocol No. 12 to the European Convention on Human Rights.[394] This Additional Protocol, which is currently in force for eighteen Council of Europe Member States, prohibits discrimination not only in conjunction with the rights set forth in the Convention, but in general. Nevertheless, I do not think that this will have more implication as

[389] European Court of Human Rights, Judgments of 25 October 2005, *Niedzwiecki v. Germany*, Application no. 58453/00 and *Okpisz v. Germany*, Application no. 59140/00.
[390] Gaygusuz Judgment , § 45.
[391] Koua Poirrez Judgment, § 43.
[392] Gaygusuz Judgment, § 42 and Koua Poirrez Judgment, § 46.
[393] See European Court of Human Rights, Judgment of 16 September 1996, *Gaygusuz v. Austria*, Application no. 17371/90, § 46 and Judgment of 30 September 2003, *Koua Poirrez v. France*, Application no. 40892/98, § 47.
[394] Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 2000, ETS No. 177, available at: http://conventions.coe.int.

to the social security of irregular migrant workers, compared to the 'old' non-discrimination protection under the Convention. The Explanatory Report to Additional Protocol No. 12 makes clear that the non-discrimination assessment will be the same as the assessment under the 'old' non-discrimination provision.[395] With the only difference that also rights not enumerated in the Convention are protected. But social security, to a large extent, is already covered through the right to property.

3.2.3. Summary and comparison

The European Convention on Human Rights, due to the European Court of Human Right's case law, has proven to be relevant for the social security of individuals in the Council of Europe Member States. The relevance, however, has been very limited, if not to say absent, when it comes to irregular migrant workers and nationals who work in the black economy. Only in the context of a terminally ill foreigner without regular residence status, the Court once found that an expulsion would expose him to a real risk of dying under most distressing circumstances and hence would amount to inhuman treatment, as prohibited under Article 3 of the Convention. Therefore the Court ruled in this very exceptional case that the applicant may continue to remain in the territory of the Contracting State in order to continue to benefit from medical assistance. However, in other similar case, no violation of Article 3 or other Convention rights was found, illustrating that the threshold for infringement is set at a very high level.

[395] See Council of Europe, *Explanatory Report to Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms* (Strasbourg: Council of Europe, 2000).

3.3. European Convention on the Legal Status of Migrant Workers

In 1977, the Council of Europe adopted the European Convention on the Legal Status of Migrant Workers (ECMW), which sets out minimum obligations for the living and working conditions of migrant workers and their families.[396] A sort of supervision is carried out by the Consultative Committee. This Committee is composed of representatives of the Contracting States and is intended as the framework in which the respective governments will be able to examine together questions related to the Convention.[397] The Netherlands ratified the ECMW. Belgium, by contrast, signed it, but has not ratified it.

3.3.1. Rights related to social security

The ECMW contains a number of provisions relating to the social security of migrant workers and their family members. All of these provisions are formulated as equal treatment principles.

Article 18 obliges Contracting Parties to grant migrant workers and their family members equality of treatment with their own nationals in the field of social security, subject to conditions required by national legislation and by bi- and multilateral agreements. Article 19 requires State Parties to render social and medical assistance to migrant workers and their families lawfully present in its territory on the same basis as to its own nationals. Article 20 stipulates that migrant workers who become a victim of an industrial accident or an occupational disease shall benefit from occupational rehabilitation on the same basis as national workers. Article 27 requires State Parties to recognise the right of migrant workers and their family members to make use of employment services under the same conditions as national workers subject to national legal provisions, regulations and administrative practice, including conditions of access. And Article 23 stipulates that migrant workers shall not be liable to higher or more burdensome contributions than nationals in similar circumstances.

3.3.1.1. Irregular migrant workers

Article 1 (1) ECMW sets out that "for the purpose of this Convention, the term 'migrant worker' shall mean a national of a Contracting Party who has been authorised by another Contracting Party to reside in its territory in order to take up paid employment". The words are unambiguous and clear: only those migrants who have both authorisation to reside and authorisation to work enjoy the rights and privileges set forth in the European Convention on the Legal Status of Migrant Workers. To date, no interpretation of this clause has been provided by the Consultative Committee.[398] We therefore can conclude that irregular migrant workers are not covered by the ECMW.

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[396] European Convention on the Legal Status of Migrant Workers, 24 November 1977, ETS No. 093, available at: http://conventions.coe.int.

[397] Council of Europe, *Explanatory Report on the European Convention on the Legal Status of Migrant Workers* (Strasbourg: Council of Europe, 1978), § 103.

[398] See the periodic reports drawn up by the Consultative Committee for the Committee of Ministers.

For the sake of completeness, I want to mention that Article 19 on social and medical assistance does not require residence in another Contracting State, but only presence. However, also there we have the explicit requirement that this presence of the migrant worker and his or her family members must be lawful.

The Convention, somewhat surprisingly, does not provide for a legal definition of the term family members. But in Article 12 on family reunion one can read in paragraph 1 that

> "the spouse of a migrant worker who is lawfully employed in the territory of a Contracting Party and the unmarried children thereof, as long as they are considered to be minors by the relevant law of the receiving State, who are dependent on the migrant worker, are authorised on conditions analogous to those which this Convention applies to the admission of migrant workers and according to the admission procedure prescribed by such law or by international agreements to join the migrant worker in the territory of a Contracting Party, provided that the latter has available for the family housing considered as normal for national workers in the region where the migrant worker is employed."

Commentators tend to give the notion 'family members' in every other context in the Convention the same meaning as the one given under Article 12 ECMW.[399] Therefore, Article 12 can be considered as an implicit legal definition. The question is now whether family members must be also authorised to reside in the host Contracting State. If one interprets just the first part as being the definition for family member, then there is no requirement of authorisation. In a nutshell, the first part would read: family members are spouses of migrant workers and the unmarried children thereof. If one, however, takes the second part into consideration – *i.e.* family members are spouses and children who are authorised to join the migrant worker –, then there is the requirement to be regularly admitted to the host country. Thus far no clarification has been given by the Consultative Committee.

3.3.1.2. Nationals who engage in undeclared work

We heard that Article 1 (1) ECMW defines a migrant worker for the purposes of the ECMW as "a national of a Contracting Party who has been authorised by another Contracting Party to reside in its territory in order to take up paid employment". What is more, in the field of social security the Convention grants migrant workers no absolute rights, but only rights in relation to the one guaranteed to citizens. For the purpose of our research, nationals who engage in undeclared work are individuals who have the citizenship of the country in which they work. From this it follows, that no rights arise under the ECMW for nationals who move to their own country and engage there in undeclared work. By the way, frontier workers are explicitly excluded from the application of the Convention – see Article 1 (2) (1) ECMW.

3.3.2. Non-discrimination

Unlike in other international treaties on the legal status of migrant workers, no general non-discrimination provision is included in the European Convention on the Legal Status of Migrant

[399] See Richard Plender, *International migration law*, 2. rev. ed. (Dordrecht/Boston/London: Martinus Nijhof, 1988), p. 253; or Jeremy McBride, *Access to justice for migrants and asylum seekers in Europe* (Strasbourg: Council of Europe, 2009), p. 11.

Workers. This has certainly to do with the fact that most of the provisions themselves are formulated as principles of equal treatment in a specific area. Additionally, the Preamble of the Convention sets out the general aim that migrant workers should be ensured, as far as possible, treatment no less favourably than workers who are nationals of the receiving State in all aspects of living and working conditions.

However, the single equal treatment clauses and the Preamble of the ECMW do not provide for an equal treatment assessment between irregular migrant workers and nationals who engage in undeclared work, since the Convention does not apply to these two groups.

3.3.3. Summary and comparison

Both irregular migrant workers and nationals who engage in undeclared work are excluded from the application of the European Convention on the Legal Status of Migrant Workers. Irregular migrant workers are explicitly excluded due to their unauthorised presence and work. And nationals who work in the black economy are not protected because the Convention only applies to workers who have the citizenship of another Contracting Party.

The only group which may enjoy protection under the ECMW are family members of a lawfully employed migrant workers, who themselves have an irregular status of residence in the host country. Under the Convention, it is not clear whether family members must also be officially admitted to the host country. If not, Contracting Parties would be required to grant them equality of treatment with their own nationals. However, this equality of treatment clause is subject to conditions required by national legislation and by bi- and multilateral agreements. As a consequence, State Parties could still require a lawful presence in their territory, before granting family members equal treatment to their own citizens.

3.4. European Code of Social Security

The European Code of Social Security (Code) is a Council of Europe instrument that sets out minimum standards for the major branches of social security.[400] The Code is accompanied by a Protocol increasing the level of minimum standards.[401] Both Code and Protocol were adopted in 1964. The European Code of Social Security was modelled upon the ILO Social Security (Minimum Standards) Convention No. 102.[402] Under the Code, the same contingencies like under ILO Convention No. 102 are covered. And also the standards relate to the same aspects of social security, such as quantitative level of protection, qualifying conditions, level of benefits or periods of entitlement.

Belgium and the Netherlands have both ratified the Code and the Protocol thereto. Belgium has accepted all Parts, *i.e.* the obligations concerning all contingencies. The Netherlands has provisionally denounced Part VI on employment injury benefits.[403]

In 1990 the Revised Code of Social Security was adopted at the meeting of the Committee of Ministers.[404] It improved standards and introduced greater flexibility. However, some twenty years after its adoption, the Revised Code has not entered into force. To date, only one country, the Netherlands, has ratified the instrument. For this reason, our research will not take the revised version into consideration.

The supervision system for compliance with the Code is based on national reporting on a regular basis. Here a close co-operation between the Council of Europe and the International Labour Organization takes place. National reports are sent by the Secretary General of the Council of Europe to the ILO Committee of Experts on the Application of Conventions and Recommendations. The ILO Committee of Experts analyses these reports and issues respective conclusions. The conclusions are then transferred to the CoE's European Committee of Experts on Standard-Setting Instruments, which discusses the ILO conclusion and prepares, on the basis of the ILO conclusions, its own conclusions. But not only the CoE supervisory body saves resources, also the Contracting States to the Code do so, by usually submitting the same report they produce for the ILO to the Council of Europe.[405]

Due to the almost identical content of the CoE Code and ILO Convention No. 102 and the common reporting and control system of the CoE and the ILO, no separate investigation of the Code will be conducted. Instead I refer to my conclusions under the subchapter on ILO Convention No. 102.

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[400] European Code of Social Security, 16 April 1964, ETS No. 048, available at: http://conventions.coe.int.
[401] Protocol to the European Code of Social Security, 16 April 1964, ETS No. 048A, available at: http://conventions.coe.int
[402] See Jason Nickless, *European Code of Social Security: Short guide* (Strasbourg: Council of Europe, 2002), p. 7.
[403] See Table I at the end of this Part.
[404] European Code of Social Security (Revised), 6 November 1990, ETS No. 139, available at: http://conventions.coe.int.
[405] See Nickless, *European Code*, pp. 24-25. The Revised Code, which is not yet into force, will end this cooperation between the ILO and CoE. Under the Revised Code a separate Commission of independent experts will be established within the CoE itself. See Article 79 ff. European Code of Social Security Revised.

3.5. Convention on Action against Trafficking in Human Beings

The Convention on Action against Trafficking in Human Beings (CTHB) aims at preventing and combating trafficking in human beings, as well as protecting the human rights of victims of trafficking. [406] It was adopted in 2005. Both Belgium and the Netherlands ratified this Council of Europe instrument.[407] Compliance with the Convention is observed by the Groups of Experts on Action against Trafficking in Human Beings (GRETA).

Trafficking in human beings is defined as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation".[408] This is exactly the same definition as the one used in the UN Protocol on Human Trafficking, which has been discussed above. A victim is defined as any natural person who is subject to human trafficking.[409] Being a non-citizen of the country of presence is not required. And there is also no condition that the offence must be transnational in nature.[410] The latter distinguishes the CoE Convention from the UN Protocol. Therefore, the human trafficking of a national of the country of employment, without being any cross-border element involved, is also covered by the CoE Convention.[411] Victims of human trafficking, within the meaning of the Convention, can thus also be nationals who do not declare their work. However, in the majority of cases it will be migrants who are victims of trafficking in human beings. Accordingly, the Convention explicitly addresses them. For instance, Article 13 and 14 CTHB on a recovery and reflection period and on a residence permit are exclusively applicable to unlawfully present foreigners.[412]

As for the social security of the victims of human trafficking, Article 12 CTHB is relevant. It reads:

> "1. Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery. Such assistance shall include at least:
>
> a. standards of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance;
>
> b. access to emergency medical treatment; [...]
>
> 2. Each Party shall take due account of the victim's safety and protection needs.
>
> 3. In addition, each Party shall provide necessary medical or other assistance to victims lawfully resident within its territory who do not have adequate resources and need such help.

[406] Convention on Action against Trafficking in Human Beings, 16 May 2005, ETS No. 197, available at: http://conventions.coe.int.
[407] See Table I at the end of this Part.
[408] Article 4 CTHB.
[409] *Ibid*.
[410] Article 2 CTHB stipulates that the "Convention shall apply to all forms of trafficking in human beings, whether national or transnational, whether or not connected with organised crime".
[411] See also Council of Europe, *Explanatory Report on the Convention on Action against Trafficking in Human Beings* (Strasbourg: Council of Europe, 2005), § 61.
[412] *Ibid*., § 62.

4. Each Party shall adopt the rules under which victims lawfully resident within its territory shall be authorised to have access to the labour market, to vocational training and education. [...]

6. Each Party shall adopt such legislative or other measures as may be necessary to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness.

7. For the implementation of the provisions set out in this article, each Party shall ensure that services are provided on a consensual and informed basis, taking due account of the special needs of persons in a vulnerable position and the rights of children in terms of accommodation, education and appropriate health care."

Article 12 must be read together with Articles 13 and 14. They stipulate:

"Article 13 – Recovery and reflection period
1. Each Party shall provide in its internal law a recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim. Such a period shall be sufficient for the person concerned to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities. During this period it shall not be possible to enforce any expulsion order against him or her. This provision is without prejudice to the activities carried out by the competent authorities in all phases of the relevant national proceedings, and in particular when investigating and prosecuting the offences concerned. During this period, the Parties shall authorise the persons concerned to stay in their territory.

2. During this period, the persons referred to in paragraph 1 of this Article shall be entitled to the measures contained in Article 12, paragraphs 1 and 2. [...]

Article 14 – Residence permit
1. Each Party shall issue a renewable residence permit to victims, in one or other of the two following situations or in both:
a. the competent authority considers that their stay is necessary owing to their personal situation;
b. the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings. [...]

3. The non-renewal or withdrawal of a residence permit is subject to the conditions provided for by the internal law of the Party."

So, during the reflection period potential victims shall not be expelled. They instead shall be granted with authorisation to stay. In two situations State Parties shall issue a temporary residence permit to victims of human trafficking: first, if their stay is considered to be necessary owing to the victim's personal situation; second, if their stay is considered to be necessary for the purpose of cooperation in investigation or criminal proceedings. In other cases, State Parties are free to decide whether or not to provide the victim with a residence permit. Concerning the permission to work, the Convention is less determined. Under Article 12 (4) CTHB, it is up to the State Parties to establish the rules under which victims have access to the labour market. The Explanatory Report to the Convention emphasises that this provision does not create a right of access to the labour market. It is for the Parties to decide. But, according to the drafters of the Convention, it is desirable that Contracting Parties take these measures in order to help victims "to reintegrate socially and more particularly take greater charge of their lives".[413]

Article 10 CTHB establishes the procedure by which a person is identified as a victim of human trafficking. Once being identified as a victim, the person must receive assistance measures, if he or

[413] *Ibid*., § 166.

she needs it.[414] According to Article 12 in conjunction with Article 13 and 14 CTHB, the extent of these assistance measures increases, with the degree of the stability of the residence status. Within the reflection period, where unlawfully present victims are protected from expulsion, victims shall be provided with emergency medical treatment and a standard of living capable of ensuring their subsistence, which includes for instance secure accommodation, psychological and material assistance. Victims who have a lawful residence status, by contrast, shall be granted necessary medical or other assistance, in case they do not have adequate resources and need help. So, in place of emergency medical treatment, lawfully residing victims shall receive necessary medical assistance. In the Explanatory Report to the Convention, we can read that lawfully residing victims are both lawfully residing foreigners and nationals.[415] Moreover, the Report makes a clear distinction between emergency medical treatment and necessary medical assistance. The latter is also described as 'full medical assistance'[416] and includes, for instance, assistance to a victim during pregnancy or with HIV/AIDS.[417] According to the Explanatory Report, emergency medical assistance for victims during the reflection period is necessary because of two main reasons: first, it is often needed for victims who have been exploited or suffered violence. Second, it may allow keeping evidence of the violence and may therefore support the victim in taking legal action.[418] Reasons for the enhanced medical assistance for all those who have a secure residence status are not given.

As for the provision with a standard of living capable of ensuring the subsistence of victims already during the reflection period, three examples are given in Article 12 (1) CTHB: appropriate and secure accommodation, psychological assistance, and material assistance. Appropriate and secure accommodation mainly aims at providing the victim an accommodation in which he or she can feel safe from the perpetrator.[419] The Explanatory Report regards special protected shelter for victims of human trafficking as especially suitable.[420] Psychological assistance is not further defined. But their required provision is motivated by the need to help the victim to overcome a possible trauma and to reintegrate the victim into society.[421] Material assistance is considered as the issue of benefits in kind, such as food and clothing, and is to be distinguished from financial aid. The reason why Contracting States are obliged to provide material assistance is that victims often lack material resources, once they escape the influence of the perpetrator.[422] Victims with a stable residence status shall, in addition, be entitled to other necessary assistance. What this means is unfortunately not said.

Finally it is important to mention that the provision of assistance to victims of human trafficking must not be conditional upon the willingness of the victim to act as a witness in investigations or criminal proceedings.[423]

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[414] Article 12 (2) CTHB ensures that the victim's need is taken into consideration when providing assistance measures. According to the Explanatory Report, this includes that due regard is given to the victim's material and financial resources. See *Ibid*., § 164.
[415] *Ibid*., § 165.
[416] *Ibid*., § 157.
[417] *Ibid*., § 165.
[418] *Ibid*., § 157.
[419] *Ibid*., § 153.
[420] *Ibid*., § 154.
[421] *Ibid*., § 156.
[422] *Ibid*., § 156.
[423] See Article 12 (6) CTHB.

4. European Union

4.1. Charter of Fundamental Rights of the European Union

In 2000, the Parliament, the Council and the Commission of the European Union (EU) proclaimed the Charter of Fundamental Rights of the European Union (EUCFR).[424] Its legal status, however, was left undecided. Later on, this Charter, slightly amended, was incorporated as Part II into the draft Constitution for Europe. After the rejection of the draft Constitution, the Charter became part of the Treaty of Lisbon.[425] Since the entry into force of the Treaty of Lisbon on 1 December 2009, the Charter of Fundamental Rights of the European Union, as amended in 2007, has been legal binding and has the same legal value as the Treaty on the Functioning of the European Union (TFEU)[426] and the Treaty on European Union (TEU).[427]

4.1.1. Rights related to social security

In Title IV, under the heading 'solidarity', the Charter comprises a number of social rights related to an individual's social security. These rights are reproduced in the following:

> "Article 33 – Family and professional life
> [...]
> 2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.
>
> Article 34 – Social security and social assistance
> 1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.
>
> 2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.
>
> 3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.
>
> Article 35 – Health care
> Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices."

These fundamental rights must be read in the context of the general provisions, as laid down in Title VII. They read as follows:

> "Article 51 – Field of application

[424] Charter of the Fundamental Rights of the European Union, *OJ* C 364, 18 December 2000.
[425] *OJ* C 303, 14 December 2007.
[426] Treaty on the Functioning of the European Union, *OJ* C 115/47, 9 May 2008, *OJ* C 83/1, 30 May 2010.
[427] See Article 6 (1) Treaty on European Union, *OJ* C 115/13, 9 May 2008, *OJ* C 83/1, 30 May 2010.

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

Article 52 – Scope and interpretation of rights and principles

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

6. Full account shall be taken of national laws and practices as specified in this Charter.

7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.

Article 53 – Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."[428]

It becomes clear that the rights set forth in the Charter are subject to a complex mechanism of limitations. First, there are the specific limitations stipulated under the single Charter rights. For instance, the rights related to social security and social assistance under Article 34 are only guaranteed 'in accordance with Union law and national laws and practices'. Commentators noted that by using these specific limitations, one of the aims of the Charter, namely a common protection of fundamental rights, has been made impossible.[429] Second, there are the general

[428] *OJ* C 83/389, 30 May 2010.

[429] See Christian Calliess, "Die Europäische Grundrechts-Charta," in *Europäische Grundrechte und Grundfreiheiten*, 2. rev. ed., ed. Dirk Ehlers (Berlin: De Gruyter Recht, 2005), p. 539 .

limitations laid down in Title VII of the Charter, such as those set out in Article 51 (1) and (2) or in Article 52 (1), (2) or (4). More on the matter of restrictions later.

4.1.1.1. Irregular migrant workers

In principle, the Charter rights apply to all persons. Only specific rights are either reserved for citizens of the European Union[430] or for third-country nationals.[431] Concerning social security-related rights, *i.e.* Articles 33 to 35 EUCFR, no restrictions as to nationality can be found. A first confirmation that the Charter also relates to irregular migrants can be found in Directive No. 2008/115 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals.[432] This Directive, which will be discussed later on, only applies to third-country nationals staying illegally on the territory of a Member State. In recital 24 of the Directive one can read that "[t]his Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union". This can be considered as confirmation that the Charter also applies to irregular migrant workers. In the following, we will have a closer look at the single relevant Charter rights and see what relevance they have for the social security of irregular migrant workers.

4.1.1.1.1. Article 34 EUCFR

Let us begin with Article 34 EUCFR – social security and social assistance. This provision contains a number of limitations. First and most important, the principles and rights enshrined in all three paragraphs are subject to Union law and national law and practice. Commentators are at one that this severely curtails the field of application of Article 34.[433] Some even suggest that this limitation has the effect that rights and principles are *a priori* only defined within the boundaries of EU law and national law and practice.[434] Second, Article 34 EUCFR only addresses the Union and the Member States when exercising Union law.[435] Since the competences of the Union in social security are rather restricted,[436] this further limits the application of Article 34 EUCFR.[437]

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[430] See for instance the citizens' rights of Chapter V – with the exception of the right to good administration.
[431] See for instance Article 18 – the right to asylum.
[432] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, *OJ* L 348/98, 24 December 2008. A reference to the EUCFR can also be found in recital 6 of Directive 2004/81/EC of 29 April 2004 on trafficking in human beings, which applies to foreigners in irregular circumstances too.
[433] Eibe Riedel, "Solidarität," in *Charta der Grundrechte der Europäischen Union*, 2. ed., ed. Jürgen Meyer (Baden-Baden: Nomos, 2006), p. 387 or Hans D. Jarass, *EU-Grundrechte* (Munich: C.H.Beck, 2005), p 73.
[434] Jarass, *EU-Grundrechte*, p 73.
[435] § 51 (1) EUCR.
[436] Competences can be seen in the field of social security coordination under Article 48 TFEU, in the field of social policy under Article 151 ff. TFEU and in the field of equal treatment obligations under Article 18 and Article 19 TFEU. In particular under the social policy chapter of the TFEU, the Union is given only limited instruments to exercise its competences. In the field of combating of social exclusion and of modernisation of social protection systems, the Union may only take measures to encourage cooperation between Member States – which takes in practice the form of the so-called 'open method of coordination'. Any harmonisation of the legislations of the Member States is however excluded. In the field of social security and social protection of workers, besides measures for cooperation, also minimum requirements for gradual implementations may be adopted by means of directives. However, for this unanimity is required in the Council. And to date there have been not such measures.

Third, and also referred to when explaining the second limitation, paragraph 1 and 3 are only about 'recognizing' and 'respecting' entitlements and rights. Commentators interpreted this as only a negative right, and not a positive one, which would put obligations on the Union.[438] *Jeff Kenner* talks about principles rather than rights, which "may be understood as only a moral obligation" and which do "not alter the status quo".[439] Fourth, in paragraph 2 it is explicitly laid down that only those who are 'residing and moving legally within the European Union' are entitled to benefits. Although the term 'legally' would need further explanation, it seems, in essence, that at least those who have no authorisation to cross borders and no authorisation to reside in a Member State are excluded from the enjoyment of this right. All these limitations contained in Article 34 EUCFR seem to make it impossible for irregular migrant workers to derive a right to benefit from social security in a Member State from it.

4.1.1.1.2. Article 35 EUCFR

Article 35 EUCFR sets out that everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national law and practice. Though formulated as a right, some commentators tend to consider it rather as principle, since, according to them, the content is general and undetermined.[440] Also the explanations to the Convention talk about a principle.[441] Whatever it is, a right or a principle, we can observe that it is just applicable under the conditions established by national law and practice. This severe restriction has already been addressed before; where it was held that the restriction may be able to make a common protection of fundamental rights impossible and to allow the rights and principles *a priori* to only to have effect within the boundaries defined by EU law and national law and practice. Moreover, Article 35 EUCFR only applies to Union activities or to Member States when implementing Union law.[442] The Union has, however, very little competence in the field of health care,[443] which further severely limits the effect of this provision.

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[437] The restriction under § 51 (1) EUCFR means that some fundamental rights have currently no practical relevance. Still, since the competences of the Union may evolve, these rights may become relevant in future. See Matthias Niedobitek, "Entwicklung und allgemeine Grundsätze," in *Handbuch der Grundrechte in Deutschland und Europa*, vol. VI/1, ed. Detlef Merten and Hans-Jürgen Papier (Heidelberg: C.F. Müller, 2010), pp. 963-64.

[438] See Riedel, "Solidarität," p. 387 and p. 390; and Christine Langenfeld, "Soziale Grundrechte," in *Handbuch der Grundrechte in Deutschland und Europa*, vol. VI/1, ed. Detlef Merten and Hans-Jürgen Papier (Heidelberg: C.F. Müller, 2010), p. 1144.

[439] Jeff Kenner, "Economic and social rights in the EU legal order: The mirage of indivisibility," in *Economic and social rights under the EU Charter of Fundamental Rights: A legal perspective*, ed. Tamara K. Hervey and Jeff Kenner (Oxford/Portland, Or.: Hart, 2003), p. 23.

[440] Jarass, *EU-Grundrechte*, p. 376.

[441] The legal status of these explanations is subject to some discussion. It seems that they are legally not binding. But since the introduction of Article 52 (7) into the Charter, the explanations shall be given due regard by the courts of the Union and the Member States. For the explanations to the 'first version' of the Charter see Praesidium of the European Convention, Note on the Draft Charter of Fundamental Rights of the European Union, 11 October 2000, CHARTE 4473/00. Available at: http://www.europarl.europa.eu/charter/pdf/04473_en.pdf. For the later, complemented explanations see Declarations concerning provisions of the Constitution, *OJ* C 310, 16 December 2004. For this particular reference see *OJ* C 310/445, 16 December 2004.

[442] See Article 51 (1) EUCFR.

[443] See in particular the public health provision Article 168 TFEU (ex-Article 152 EC Treaty), to which the explanation to the Charter explicitly refers to. See Declarations concerning provisions of the Constitution, *OJ* C 310/445, 16 December 2004

4.1.1.1.3. Article 33 (2) EUCFR

Different is the situation under Article 33 (2) EUCFR. This provision is not subject to a special limitation that the right or principle must be exercised in accordance with EU and national law. Concerning social security, Article 33 (2) only stipulates that in order to reconcile family and professional life, everyone shall have the right to paid maternity leave following the birth or adoption of a child.[444] Restriction of this right can therefore only be found in Title VII. The restriction of Article 52 (2) – which rules that Charter rights which result from the Treaties[445] are subject to the conditions and limits laid down by them – does not apply. This is because, according to the explanations to the Charter, Article 33 (2) is based on Article 8 of the European Social Charter and Article 27 of the Revised European Social Charter. In addition, Article 33 (2) draws on Directive 92/85/EEC on the Introduction of Measures to Encourage Improvements in the Safety and Health at Work of Pregnant Workers and Workers who have Recently Given Birth or are Breastfeeding[446] and on Directive 96/34/EC on the Framework Agreement on Parental Leave concluded by UNICE, CEEP and the ETUC.[447,448] What is more, the limitation under Article 52 (3) does also not apply for Article 33 (2) EUCFR, because Article 33 (2) EUCFR has no equivalent under the European Convention on Human Rights.[449] What however applies to Article 33 (2) EUCFR, like it does for all other Charter rights, is the rule that it addresses, first, Union bodies and institutions and, second, Member States, but only insofar as they implement Union law.[450] In other words, "the requirement to respect fundamental rights in a Union context is only binding on the Member States when they act in the scope of Union law".[451] Under Union law we can find a provision on paid maternity leave. It is laid down in Article 11 (2) (b), (3) in conjunction with Article 8 of Directive 92/85. Pursuant to this provision, Member States shall take the necessary measures to ensure that female workers are entitled to a wage continuation payment and/or to an adequate allowance throughout their period of maternity leave. Does Article 33 (2) EUCFR now oblige Member States when implementing Directive 92/85 to grant *everyone* paid maternity leave and thus also women migrant workers who lack a regular migration status? To my mind, Article 33 (2) EUCFR basically guarantees this right also to irregular labour migrants. But I would not talk about an obligation, since we have one further restriction which should be taken into consideration: Article 52 (1) EUCFR. According to this Article, limitations may be made as

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[444] To my mind, the words 'the right to paid maternity leave and to parental leave' only allow the conclusion, that only maternity leave is the one that must be paid. For the same interpretation see Hans D. Jarass, *EU-Grundrechte* (Munich: C.H.Beck, 2005), p 365.

[445] This is only about rights which directly result from the Treaties, and not about rights derived from secondary EU law. See *inter alia* Matthias Niedobitek, "Entwicklung und allgemeine Grundsätze," p. 966.

[446] Directive 92/85/EEC of 19 October 1992 concerning the Introduction of Measures to Encourage Improvements in the Safety and Health at Work of Pregnant Workers and Workers who have Recently Given Birth or are Breastfeeding, *OJ* L 348 , 28 November 1992. Council Directive 92/85/EEC is currently subject to reform. However, as of 1 December 2010, the reference date for this doctoral thesis, the reform process has not been completed.

[447] In 2010, Council Directive 96/34/EC has been repealed by Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, *OJ* L 68/13, 18 March 2010.

[448] The ECJ confirmed that the right to parental leave was included in Article 33(2) of the Charter of Fundamental Rights among the fundamental social rights with the same objective as the right to parental leave was included in the Framework Agreement under Directive 96/34/EC. See European Court of Justice, 16 September 2010, C-149/10 (*Chatzi*), §§ 36-37. Operate part of the judgment published at *OJ* C 301/3, 6 November 2010.

[449] See Declarations concerning provisions of the Constitution, *OJ* C 310/456-458, 16 December 2004.

[450] § 51 (1) EUCFR.

[451] See Declarations concerning provisions of the Constitution , *OJ* C 310/454, 16 December 2004.

long as they are provided for by law and respect the essence of those rights;[452] and subject to the principle of proportionality, limitations may be only made if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights of others.[453] So, if made under the conditions set out under Article 52 (1), interventions with rights granted under the Charter are allowed. According to the explanations to Article 52 (1) EUCFR, the reference to general interests recognised by the Union covers the general objectives of the Union, as set out by the Treaties, and other interests protected by specific Treaty provisions.[454] In the context of paid family leave for irregular migrant workers, one might think about the objective set out in Article 3 TEU: "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime". Title IV TFEU specified this objective. In Article 79 (1) TFEU we can read that "[t]he Union shall develop a common immigration policy aimed at ensuring [...] the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings". Article 79 (2) (c) TFEU continues that for the purposes of paragraph 1, the European Parliament and the Council shall adopt measures in the area of "illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation". So, measures against irregular migration and irregular residence are objectives of general interest as recognised by the Union. This could pave the way, to justify the exclusion of irregular woman workers from paid family leave. We however do not know how the ECJ would consider such exclusion. Is it necessary to achieve the objective of general interest? Is the measure proportional?

4.1.1.2. Nationals who engage in undeclared work

As mentioned before, the Charter rights apply to everyone. This is in particular true for the rights related to a person's social security, as set out in Articles 33 to 35 EUCFR. A particular confirmation as to the applicability of the rights to workers who do not declare their work to the social security authorities, although obliged to do so, has, to date, not been issued. Still, it can be assumed that the rights basically apply to undeclared workers.

Another issue is however which rights undeclared worker can derive from Articles 33 to 35 EUCFR. Or in other words, are Member States obliged under the Charter to provide social security benefits to an undeclared worker, although the worker and/or the employer did not comply with obligations to declare the work?

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[452] The requirement to respect the essence of a right is not entirely clear. See *inter alia* Meinhard Hilf, "Die Schranken der EU-Grundrechte," in *Handbuch der Grundrechte in Deutschland und Europa*, vol. VI/1, ed. Detlef Merten and Hans-Jürgen Papier (Heidelberg: C.F. Müller, 2010), pp. 1187-88. Some commentators assume that this is a reiteration of the requirement of proportionality and refer to respective existing case law of the ECJ. See, for instance, Jarass, *EU-Grundrechte*, p. 83 referring to European Court of Justice, 13 April 2000, C-292/97 (*Karlsson and Others*) [2000] ECR I-2737, § 58. Thus far, the ECJ has avoided addressing the meaning of "the essence of rights". See European Court of Justice, 9 November 2010, C-92/09 and C-93/09 (*Volker und Markus Schecke*).

[453] The wording of the conditions under Article 52 (1) is based on the case law of the ECJ. See Declarations concerning provisions of the Constitution, *OJ* C 310/456, 16 December 2004.

[454] See Declarations concerning provisions of the Constitution, *OJ* C 310/456, 16 December 2004.

The analysis of Articles 34 and 35 EUCFR in the context of irregular migrant workers is also valid for undeclared workers. The limitation, enshrined in these provisions, that the principles and rights may only be exercised in accordance and under the conditions laid down by Union law and national law and practice, will make it impossible to regard national legislation and practice, that do not provide for benefits due to non-declaration of work or non-payment of contributions, as violating the Charter. As for Article 33 (2) EUCFR, *i.e.* the paid maternity leave for women workers, the only provision which allows interference with this right would be Article 52 (1) EUCFR. As mentioned before, under this provision limitations may be only made if provided for by law, if proportional and necessary, and if genuinely meeting objectives of general interest recognised by the Union or the need to protect the rights of others. Concerning objectives of general interest recognised by the Union, one can refer to Council Resolution on Transforming Undeclared Work into Regular Employment.[455] There it was held, amongst other things, that the fight against undeclared work should be considered as part of the overall Employment Strategy and that undeclared work has strong implications for workers, for business, for consumers, for gender equality and for social protection systems. In addition, it was recalled that transforming undeclared work into regular one would contribute to achieving full employment, strengthening social cohesion and inclusion, eliminating poverty traps and avoiding market distortions. All these objectives have their foundation in Treaties. Therefore, the fight against undeclared work serves objectives of general interest as recognised by the Union. Whether, however, the denial of benefits is a necessary and proportional measure to serve this purpose would need further investigation, in last instance by the ECJ.

4.1.2. Non-discrimination

The EUCFR contains a separate chapter on equality – Title III. In the beginning of this chapter, two general guarantees to equality and non-discrimination can be found. Article 20 sets out that everyone is equal before the law. And Article 21, the corollary and the *lex specialis* to Article 20, reads:

> "1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
>
> 2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited."

It immediately catches one's eye that the prohibited ground 'nationality' is dealt with separately. Even the ground 'national origin', which is usually part of the list of prohibited grounds of international non-discrimination clauses, is omitted in the first paragraph. Therefore anything which has to do with nationality in the widest sense is clearly separated from the other prohibited grounds. The effect of this separation seems to be that differentiation according to nationality is only prohibited between EU nationals and has no impact on third-country nationals. This is because of the relation of Article 21 (2) EUCFR with Article 18 TFEU (ex-Article 12 EC Treaty). We already heard that pursuant to Article 52 (2) EUCFR, rights recognised by the EUCFR which are based on the TEU and TFEU shall be exercised under the conditions and within the limits

[455] Council Resolution on transforming undeclared work into regular Employment, *OJ* C 260/1, 29 October 2003.

defined by those Treaties. The prohibition of non-discrimination based on nationality is already recognised by the TFEU. Article 18 TFEU, in nearly the same words as Article 21 (2) EUCFR, reads: "[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited". Also the explanations to Article 21 EUCFR read that "paragraph 2 corresponds to [ex-]Article 12 of the EC Treaty and must be applied in compliance with the Treaty".[456] The European Court of Justice has thus far interpreted Article 18 TFEU as only prohibiting discrimination between nationals of Member States of the European Union. In the *Khalil* case, for instance, ex-Article 12 EC Treaty was declared as being not applicable for a comparison between third-country nationals and nationals of the Member State where the third-country nationals are residing.[457] The *Vatsouras* case concerned possible difference in treatment between nationals of a Union Member State who are residing in another Union Member State and third-country nationals residing in this other Union Member State. The Court held that ex-Article 12 is not applicable in such situations. The ECJ stated that "[t]hat provision [ex-Article 12 EC Treaty] concerns situations coming within the scope of Community law in which a national of one Member State suffers discriminatory treatment in relation to nationals of another Member State solely on the basis of his nationality and is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries".[458] However, the Court has never provided a legal reasoning for its point of view. Therefore, some authors have expressed their dissenting opinion and regarded Article 18 TFEU as also being applicable in (certain) situations involving third-country nationals.[459] Still, the ECJ's interpretation of Article 18 TFEU is likely to have the consequence that Article 21 (2) EUCFR would be only applicable to EU citizens and would not allow for a non-discrimination assessment in relation to irregular residing or working third-country nationals.

One can still ask whether discrimination based on immigration status is forbidden under paragraph 1 of Article 21 EUCFR. 'Immigration status' is not listed as a suspect ground. Therefore the question arises whether the list is exhaustive or not. Commentators have taken the point of view that Article 21 (1) comprises an open list of prohibited discriminatory grounds.[460] This would, in theory, allow assessing under this provision possible discrimination based on immigration status. However, to date there is no case law confirming that immigration status would be regarded as a prohibited ground under Article 21 (1) EUCFR. We have already heard that the non-discrimination

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[456] See Praesidium of the European Convention, Note on the Draft Charter, p. 23. See also Declarations concerning provisions of the Constitution, *OJ* C 310/439, 16 December 2004.

[457] See European Court of Justice, 11 October 2001, C-95/99 to C-98/99 and C-180/99 (*Khalil and Others*) [2001] ECR I-7413, § 40.

[458] European Court of Justice, 4 June 2009, C-22/08 and C-23/08 (*Vatsouras and Koupatantze*) [2009] ECR I-4585, § 52.

[459] See Herwig Verschueren, "Noot onder HvJ 4 juni 2009, C-22/08 en C-23/08, Vatsouras en Koupatanze v. Arbeitsgemeinschaft (ARGE) Nürnberg 900," *Rechtskundig Weekblad* (2010-11), p. 210-11; and Pieter Boeles, "Europese burgers en derdelanders: Wat betekent het verbod van discriminatie naar nationaliteit sinds Amsterdam?" *Tijdschrift voor Europees en economisch recht*, no. 12 (2005).

[460] See for instance George Gerapetritis, "EU Charter of Fundamental Rights: Case study," *European Review of Public Law*, vol. 14, no. 1 (2002), p. 895; Mark Bell, "The right to equality and non-discrimination," in *Economic and social rights under the EU Charter of Fundamental Rights: A legal perspective*, ed. Tamara K. Hervey and Jeff Kenner (Oxford/Portland, Or.: Hart, 2003), p. 98; Christa Tobler, *Indirect discrimination: A case study into the development of the legal concept of indirect discrimination under EC law* (Antwerp/Oxford: Intersentia, 2005), pp. 51-52; or Dieter Kugelmann, "Gleichheitsrechte und Gleichheitssätze," in *Handbuch der Grundrechte in Deutschland und Europa*, vol. VI/1, ed. Detlef Merten and Hans-Jürgen Papier (Heidelberg: C.F. Müller, 2010), pp. 1007. The European Court of Justice has thus far not pronounced on this issue.

principle under Article 14 ECHR has been interpreted by the European Court of Human Rights to also prohibit discrimination based on immigration status. Whether this interpretation is also decisive for Article 21 (1) EUCFR is somewhat unclear. Article 52 (3) EUCFR stipulates that in so far as Charter rights correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR. The explanations to Article 52 (3) EUCFR do not list Article 21 (1) EUCFR under those Charter provisions which are having an equivalent under the Convention. On the other hand, according to the explanations to Article 21 (1) EUCFR, Article 14 ECHR is one of the international legal provisions, on which Article 21 (1) EUCFR is based on. Anyway, if immigration status were regarded as a prohibited ground, there would still be some further limitations to apply the principle of non-discrimination. For instance, that only discriminations by the institutions and bodies of the Union themselves and by the Member States when implementing Union law are prohibited (Article 51 (1) EUCFR). What is more, discrimination may also be justified. In this regard I want to refer to the discussion amongst commentators whether Article 52 (1) EUCFR (limitations on the principle of legal basis, proportionality, necessity etc) is applicable at all on the Charter's non-discrimination clause under Article 21.[461]

4.1.3. Summary and comparison

The Charter of Fundamental Rights of the European Union contains rights and principles related to social security. Yet these rights and principles are subject to a complex mechanism of limitations and restrictions so that at the end of the day little relevance can be concluded for the purposes of our research. To be more precise, Article 34 on social security and social assistance and Article 35 on health care make rights and entitlements subject to accordance with the rules laid down in Union law and national law and practice. This restriction seems to make it impossible to derive any right for protection for irregular labour migrants and nationals who do not declare their work. That is to say, national legislation which excludes irregular migrant workers from social security and which does not provide benefits to nationals who do not declare their work to the social security authorities defines exactly the scope of Articles 34 and 35 EUCFR and therefore cannot be in violation of the Charter provisions. A little bit different is the situation for the right to paid maternity leave under Article 33 (2) EUCFR. This provision is not subject to accordance with Union and national law and practice. And also many of the general restrictions under Title VII of the Charter do not apply. What however might be invoked is Article 52 (1) of Title VII. This provision allows limitations if provided for by law, if respecting the essence of the right, if respecting the proportionality principle, if being necessary and if meeting objectives of general interest recognised by the Union or the need to protect the rights of others. To what extent Member States may rely on this provision when restricting protection of irregular women migrant workers or undeclared workers to paid maternity leave is, due the lack of case law, not clear. It has however been demonstrated in this subchapter that both the fight against irregular migration and residence and the fight against undeclared work are recognised by the Union to be of general interest.

There is also no relevant interpretation of the Charter's non-discrimination provision. Examples of a non-discrimination assessment between the social security of irregular labour migrants on the

[461] See Jarass, *EU-Grundrechte*, p. 300 or Michael Sachs, "Artikel 21 GRCh (Art. II-81 VVE) Nichtdiskriminierung," in *Charta der Grundrechte der Europäischen Union*, 2. ed., ed. Jürgen Meyer (Baden-Baden: Nomos, 2006), p. 483.

one hand and regular migrants or nationals, in particular those who work in the black economy, on the other hand do not exist. Article 21 (2) EUCFR, which forbids discrimination on the ground of nationality, provides in any case no adequate basis for such an assessment, since nationality is only forbidden between Union-nationals. So one could possibly fall back on Article 21 (1) EUCFR, which prohibits discrimination also on other grounds. However, we do not know whether immigration status would be considered to be a suspect ground of discrimination. We also do not know whether courts would find a justification of discrimination in the context of irregular migrant workers and social security.

4.2. Secondary EU law

Amongst the legislative instruments adopted by Union institutions there are a few which bear some relevance for the social security of irregular labour migrants and nationals who work in the black economy. Most of them are only applicable to third-country nationals and have therefore no impact on undeclared workers who are nationals of the EU Member State in which they perform work. Moreover, most of these legally binding instruments are directives. As such they must be incorporated in national legislation and are thus, if their implementation has already been due, reflected in our investigation of the national situation in Belgium and the Netherlands. Because of these special circumstances, only a concise overview will be given of the instruments' impact on the social security of irregular migrant workers and nationals who work in the black economy – similar as we did it in subchapter 1.4. on other core international human rights instruments.

Let me recall a few things, which were already set out in the introduction to this Part. This research does not take account of citizens of one European Union Member State who work in another Member State. In the terminology of Union law, only the situation of third-country nationals will be investigated. What is more, bi-lateral agreements, such as the Association Agreement between the European Economic Community and Turkey, are not covered by this work. In addition, social security coordination instruments, like Regulation No. 883/2004, are also not taken into consideration. Neither is Union law dealing with the social security of workers in particular occupations, such as researchers.

4.2.1. Directive 2001/55 on temporary protection in the event of a mass influx of displaced persons

In 2001, the Council of the European Union adopted Directive 2001/55 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving such Persons and Bearing the Consequences thereof.[462] The Directive applies to situations where third-country nationals or stateless persons have to leave their country or region of origin and arrive in great numbers in the European Community. A return in safe and durable conditions must be impossible because of the situation prevailing in that country. If the Council recognises such a situation by Decision, *i.e.* the existence of a mass influx of displaced persons, temporary protection must be granted under the Directive in the Member States. The title already indicates the aim of this instrument: on the one hand establishing minimum standards for temporary protection and on the other promoting a balance of efforts between the Member States.

Pursuant to the Directive, persons enjoying temporary protection shall be granted residence permits for the entire duration of the protection.[463] From this it follows that individuals enjoying temporary protection are by definition no foreigners with an unlawful residence in the country of protection. Therefore temporary protected persons cannot be what we call category A irregular

[462] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, *OJ* L 212/12, 7 August 2001.
[463] Article 8 (1) EC Directive 2001/55.

migrant workers, *i.e.* unlawfully residing and unlawfully working in a country. Or in other words, category A workers fall outside the scope *ratione personae* of Directive 2001/55.

What is more, the Directive stipulates that persons enjoying temporary protection shall be authorised to engage in employed or self-employed activities. However, for reasons of labour market policies, priority may be given to other groups of foreigners, such as EU citizens or legally resident third-country nationals who receive unemployment benefits.[464] So, if authorisation to work in the country of protection is given, protected persons work lawfully there and hence do not fall within the scope of our research. But if priority is given to other foreigners on the labour market and persons enjoying temporary protection are refused work authorisation, there may be relevance for our research. It would mean that a third-country national who fulfils the criteria to be a protected person, but is refused work permission, fell under our category B (lawful stay, unlawful work), if he/she takes up employment. In other words, a very specific group of category B workers is able to belong to the personal scope of application of Directive 2001/55.

The question is now whether such temporary protected persons who reside lawfully, but work unlawfully in the country of protection can derive any entitlements concerning social security from Directive 2001/55. Article 12 of the Directive stipulates that "[t]he general law in force in the Member States applicable to remuneration, access to social security systems relating to employed or self-employed activities and other conditions of employment shall apply" to temporary protected persons *who were granted authorisation to work*. So, those protected third-country nationals who are not granted authorisation to work and whom we classified as category B irregular migrant workers do not enjoy the benefit of Article 12.

Article 13 (2) of Directive 2001/55 obliges Member States to make provision for temporary protected persons "to receive necessary assistance in terms of social welfare and means of subsistence, if they do not have sufficient resources, as well as for medical care". The medical care shall comprise at least 'emergency care' and 'essential treatment of illnesses'. Only persons with special needs, such as unaccompanied minors or persons who underwent serious forms of psychological, physical or sexual violence shall receive 'necessary medical care' or other assistance.[465] So, temporary protected person shall receive at least means of subsistence and emergency care and essential treatment of illnesses – more on these concepts below in the subchapter on Directive 2008/115. If they have special needs, the extent of medical care shall be greater. Temporary protected persons who work in the country of protection, although not authorised to do so, may basically also benefit from this provision. However, social and medical assistance is only provided to persons in need. Paragraph 3 of Article 13 emphasises this precondition again by setting out that, when determining the level of aid, account shall be taken of the ability of economically active temporary protected persons to meet their own needs. Therefore, temporary protected persons who work without authorisation shall only qualify for social and medical assistance if they are in fact in need.

[464] Article 12 EC Directive 2001/55.
[465] Article 13 (4) EC Directive 2001/55.

4.2.2. Directive 2003/109 on long-term residents

Directive 2003/109 Concerning the Status of Third-Country Nationals who are Long-Term Residents strives for the integration of third-country nationals who are long-term residents in the Member States.[466] To this end the Directive sets out that long-term residents shall enjoy equal treatment with nationals of the respective Member State in a number of areas, such as social security, social assistance, social protection, tax benefits, access to procedures for obtaining housing and access to employment.[467] The principle of equal treatment is regulated in Chapter II, together with the preconditions for getting long-term resident status. Chapter III regulates the preconditions for residence in a second Union Member State and guarantees also there equal treatment with nationals.[468]

According to Article 3 (1), the Directive "applies to third-country nationals residing legally in the territory of a Member State". And Article 4 (1), which determines that third-country nationals must have resided continuously within the territory of a Member State for a period of five years in order to get the long-term resident status, sets out that this residence must have been legal. In the recitals of this Directive one can read that the duration of residence should be the main criterion for acquiring the status of long-term resident. And that this residence "should be both legal and continuous in order to show that the person has put down roots in the country".[469] In the Article-by-Article commentary of the Commission in its initial proposal it becomes apparent that the ground for legality of residence is irrelevant. Third-country nationals may have been admitted to the Member State for purposes of employment, of family reunification or of any other ground. Also persons initially admitted on one ground, who change status and are residing on another ground, fall under the concept of legally residing third-country nationals. In addition, even persons who never crossed borders are covered by the Directive, *i.e.* third-country nationals who were born in the Member State and reside there without having acquired its nationality.[470] What counts is that the third-country national is residing in the Member State in compliance with its immigration laws. This entails that irregular labour migrants with an unlawful residence status, *i.e.* category A workers, enjoy no protection under Directive 2003/109. Irregular migrant workers with a lawful residence, but unlawful work status, *i.e.* category B workers, by contrast, would fall, according to the text, under the Directive's personal scope of application. However, they can only acquire rights through their legal residence. Their unlawful work does not trigger any obligations for EU Member States.

One can nevertheless ask whether Member States must confer equal treatment in social security to category B irregular migrant workers – *i.e.* lawful residence, unlawful work –, once they have acquired long-term resident status through their continuous and lawful residence. Or do Member States have a margin of appreciation to exclude them from protection due to their unlawful work status. Concerning social assistance, as defined by national law, Member States are allowed to

[466] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, *OJ* L 16/44, 23 January 2004.
[467] § 11 (1) EC Directive 2003/109.
[468] § 21 EC Directive 2003/109.
[469] Recital 6 EC Directive 2003/109. See also Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents, COM/2001/0127 final - CNS 2001/0074, § 5.9. Available at: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=EN&type_doc=COMfinal&an_doc=2001&nu_doc=0127.
[470] *Ibid.*, Article-by-Article commentary, §§ 3, 5.

limit equal treatment to core benefits. Pursuant to recital 13, this means that at least minimum income support, assistance in case of illness, pregnancy, parental assistance and long-term care must be provided. The second sentence of recital 13 stipulates, however, that "[t]he modalities for granting such benefits should be determined by national law". How must this be understood? Equality of treatment yes, but the qualifying conditions depend on national law. Would this not undermine the principle of equal treatment? In opposite to social assistance, a limitation concerning social security is not provided for under the Directive. Hence the obligation of equal treatment in social security could also apply with respect to category B irregular migrant workers. To date, the ECJ was not confronted with questions of unequal treatment under Directive 2003/109. So, it is an open question whether and under which conditions irregular migrant workers with a lawful residence status are considered in a comparable situation with nationals and whether a possible unequal treatment can be justified. The latter in particular against the background that, up to now, the ECJ has not developed a general doctrine of justification of unequal treatment.[471]

4.2.3. Directive 2004/81 on victims of trafficking in human beings

EC Directive No. 2004/81 aims to provide persons who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, and who cooperate with national authorities, with a residence permit for the duration of the relevant national proceedings.[472] Human trafficking is defined under Article 1 of the Council Framework Decision of 19 July 2002 on combating trafficking in human beings and resembles the definitions of the UN Protocol on Human Trafficking and the CoE Convention on Action against Trafficking in Human Beings.[473] By and large, Directive No. 2004/81 establishes the conditions for issuing the residence permit and the treatment which should be granted to victims. The Directive is only applicable to third-country nationals. Article 3 explicitly stipulates that, in order to belong to the personal scope of application of this Directive, it does not matter whether these third-country nationals have illegally entered the territory of the Member State. As for the protection, the Directive distinguishes between the treatment which must be granted during the reflection period and the treatment after the issue of a residence permit. The reflection period shall allow the victim to recover and escape the influence of the perpetrator in order to make a decision as to whether he or she wants to cooperate with the competent authorities. Within this period no expulsion shall be possible. Also within this period, Article 7 (1) requires Member States to guarantee third-country nationals "who do not have sufficient resources [...] standards of living capable of ensuring their subsistence and access to emergency medical treatment". After the issue of a residence permit, Member States must ensure more social protection. To be more precise, Article 9 stipulates that Member States "shall provide necessary medical or other assistance to the third-country nationals concerned, who do not have sufficient resources and have special needs, such as pregnant women, the disabled or victims of sexual violence or other forms of violence".

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[471] See for instance Thorsten Kingreen, "Gleichheitsgrundrechte," in *Europäische Grundrechte und Grundfreiheiten*, 3. rev. ed., ed. Dirk Ehlers (Berlin: De Gruyter Recht, 2009), p. 623 ff.

[472] Council Directive 2004/81/EC of 29 April 2004 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, *OJ* L 261/19, 6 August 2004.

[473] See Article 2 (c) EC Directive 2008/115.

This work deals with irregular migrant workers. In some cases, the Directive on victims of human trafficking, which grant medical treatment and a sort of social assistance, may also be relevant for them. Precondition is of course that irregular labour migrants lack sufficient resources and are victim of human trafficking.

We can see that before the issue of a residence permit, victims of human trafficking are only entitled to emergency medical treatment, whereas thereafter they enjoy, under certain circumstances, necessary medical care. So the extent of the right to health care increases with the degree of the stability of the residence status of the third-country national. This is an interesting observation and reminds us of our findings in the context of the CoE Convention on Action against Trafficking in Human Beings. Union law not only expressly links the right to medical care to a certain residence status, but it enhances the right as the stability of the residence status increases: a victim of human trafficking per se is not guaranteed any medical treatment; a victim of human trafficking who has come to the attention of public authorities and considers cooperating with national authorities is granted the right to emergency medical treatment; and, finally, a victim of human trafficking who is issued a temporary residence permit is, under certain circumstances, entitled to necessary medical assistance. So in this Directive, Union law clearly follows the logic to enhance the social protection of foreigners to the extent their stability of residence increases.

Besides medical care, victims of human trafficking who do not have sufficient resources must be granted a standard of living capable of ensuring their subsistence. This is granted before the issue of a residence permit and explicitly regardless of the immigration status. What this standard exactly is, is unfortunately not determined. It seems to be a sort of minimum social assistance. The Netherlands, for instance, does not include these victims in their general social assistance scheme (*Wet Werk en Bijstand*). But, by incorporating this EC Directive, they protect victims of human trafficking who cooperate with national authorities under a specific assistance scheme for aliens (*Regeling verstrekkingen bepaalde categorieën vreemdelingen*). There they are entitled to a financial allowance, which is, in contrast to the general social assistance scheme, not linked to 'back to work' efforts.[474]

4.2.4. Directive 2008/115 on returning illegally staying third-country nationals

The objective of EC Directive No. 2008/115 is to establish common rules concerning return, removal, use of coercive measures, detention and entry bans for unlawfully present third-country nationals.[475] The Directive is applicable to all third-country nationals staying illegally on the territory of a Member State. Illegal stay is defined as presence in a member state without fulfilling the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State.[476] Member States, however, are entitled to exclude certain illegally staying third-country nationals from the application of this Directive. This relates, for instance, to third-country nationals who are subject to return as a criminal law sanction.[477]

[474] See Part IIc of this thesis on the Netherlands.
[475] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, *OJ* L 348/98, 24 December 2008.
[476] See Article 2 (1) and Article 3 (2) EC Directive 2008/115.
[477] See Article 2 (2) EC Directive 2008/115.

Concerning the social security of illegally staying third-country nationals, Article 14 of the Directive is of particular relevance. Under the heading 'Safeguards pending return' it reads:

> "1. Member States shall, with the exception of the situation covered in Articles 16 and 17, ensure that the following principles are taken into account as far as possible in relation to third-country nationals during the period for voluntary departure granted in accordance with Article 7 and during periods for which removal has been postponed in accordance with Article 9: [...] (b) emergency health care and essential treatment of illness are provided;
>
> 2. Member States shall provide the persons referred to in paragraph 1 with a written confirmation in accordance with national legislation that the period for voluntary departure has been extended in accordance with Article 7(2) or that the return decision will temporarily not be enforced."

So, basically, Member States shall provide, as far as possible, unlawfully present third-country nationals during periods for voluntary departure or during periods of postponed removal orders with emergency health care and essential treatment of illness. As for voluntary departure, Article 7 of the Directive stipulates that Member States shall, if there is no profound reason to refrain from it, grant illegally staying third-country nationals an appropriate period for voluntary departure. The period shall be between seven and thirty days, but may be shorter or longer where necessary due to specific circumstances. And as regards the postponement of a removal, Article 9 calls upon Member States to do so whenever the principle of non-refoulement is violated and whenever the review of a return decision has a suspensory effect. Moreover, Member States may consider postponement of removal whenever the circumstances of the individual case demand it; this relates, in particular, to a person's physical or mental state or to technical reasons, such as lack of transport capacity or failure of the removal due to lack of identification.

Emergency health care and essential treatment of illness are not further specified in Directive 2008/115. However, it is striking that exactly the same terms are used as in Directive 2001/55 on temporary protection for displaced persons and Directive 2003/9 which lays down minimum standards for the reception of asylum-seekers.[478] Let us take a closer look at Directive 2003/9. There, Article 15 stipulates that "Member States shall ensure that applicants receive the necessary health care which shall include, at least, emergency care and essential treatment of illness". So, the wording of Directive 2008/115 and 2003/9 slightly differ. Whereas in Directive 2008/115 it is about 'emergency health care and essential treatment of illness', Directive 2003/9 talks about 'necessary health care which shall include, at least, emergency care and essential treatment of illness'. This could indicate that the bottom line for medical care for asylum-seekers is a little bit higher than for illegal staying third-country nationals under Directive 2008/115. Moreover, Directive 2003/9 requires that member states 'shall ensure' this kind of medical treatment, whereas Directive 2008/115 stipulates that member states 'shall ensure as far as possible' this medical care. So, the protection for illegally staying third-country nationals is formulated in much weaker terms. Many Member States have implemented the asylum reception Directive as granting asylum-seekers the usual basic statutory health insurance package or an equivalent.[479] The question is whether Member States will implement Directive 2008/115 in a similar way. The Netherlands has not yet announced its implementation measures. Belgium, by contrast, has reported to comply with the obligation under Directive 2008/115 by granting medical assistance under its social assistance laws.

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[478] See above, subchapter on Directive 2001/55, and see Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers, *OJ* L 31/18, 6 February 2003.

[479] See also Belgium and the Netherlands, as discussed in Part II of this thesis.

Article 14 of Directive 2008/115 rules that the safeguards for pending returns shall not be applicable to situations covered in Articles 16 and 17. These two provisions refer to situations of detention. Nevertheless, Article 16 stipulates that in detention particular attention shall be paid to the situation of vulnerable persons and that emergency health care and essential treatment of illness shall be provided.

As mentioned before, Member States may exclude certain unlawfully present third-country nationals from the application of this Directive, such as persons who are subject to return as a criminal law sanction. Article 4 (4) (a), however, rules that Member States shall ensure that the treatment and level of protection of the persons excluded are no less favourable than as set out *inter alia* in Article 14 (1) (b). In other words, emergency health care and essential treatment of illness shall also be ensured, as far as possible, to those unlawfully present third-country nationals who are exempted from the application of the Directive by virtue of Article 2 (2).

4.2.5. Directive 2009/52 on sanctions against employers of illegally staying third-country nationals

Directive 2009/52 prohibits the employment of illegally staying third-country nationals and lays down minimum standards for the sanctions to be taken against employers who infringe this prohibition.[480] Employment of third-country nationals who have no authorisation to work in the Member State, but who reside there in accordance with immigration laws falls outside the scope of this Directive.[481] Illegal stay is defined, for the purposes of the Directive, as presence on the territory of a Member State, without fulfilling or no longer fulfilling the conditions for stay or residence in that Member State.

Concerning the prohibition of employment, the Directive allows for one exception: when the removal of illegally staying third-country nationals has been postponed and when they are allowed to work in accordance with national law, Member States may decide not to apply the prohibition.[482] In all other cases work of illegally staying third-country nationals shall be forbidden.

As for the employer sanctions, the following rationale applies under the Directive. Employers are subject to a number of obligations. These obligations include requiring third-country nationals, before taking up employment, to hold and present a valid residence permit or other authorisation for the stay; to keep a copy or record of this permission or authorisation; and to notify the competent authorities of the start of employment of third country nationals. If the employer complies with all these obligations, he or she shall not be liable for an infringement of the prohibition to employ illegally staying third-country nationals; this release from liability is without prejudice to situations in which he or she knew that the presented residence document was a

[480] Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, *OJ* L 168/24, 30 June 2009. For the prohibition see Article 3 (1).
[481] Recital 5, last sentence Directive 2009/52.
[482] Article 3 (3) Directive 2009/52. This clause was not included in the original proposal of the Commission and has been introduced by Parliament.

forgery. Otherwise the employer will be subject to administrative or criminal sanctions, back payments or other measures.

Regarding social security, Article 6 (1) (b) stipulates that in case of infringement of the prohibition to employ illegally staying third-country nationals "Member States shall ensure that the employer shall be liable to pay [...] an amount equal to any taxes and social security contributions that the employer would have paid had the third-country national been legally employed, including penalty payments for delays and relevant administrative fines". One can ask whether the obligation to pay 'an amount equal to any social security contributions' is an obligation to actually pay contributions or a sanction. The difference could be that in the first case a person could have possibly the chance to build up entitlements for social security benefits. In the later case this would rather not be possible. The original proposal by the Commission read that "Member States shall ensure that the employer pays [...] any outstanding taxes and social security contributions, including relevant administrative fines".[483] So, then it related to the payment of contributions. But it was the Committee on Employment and Social Affairs which suggested reformulating this provision. A justification for the change was not provided.[484] In the recitals of Directive 2009/52 one can still read that the employer should be required to pay to the third-country nationals "any outstanding taxes and social security contributions".[485] Here, the original proposal of the Commission has not been amended. Reading Article 6 (1) (b) therefore together with recital 14 would indicate that Member States shall oblige culpable employers to pay back social security contributions. It would depend then on national law whether these contributions lead to entitlements under social security schemes. Recital 15 only sets out that from the back payment of remunerations, social security contributions or taxes, the third-country country national concerned should not derive a right to entry, stay and access to the labour market. Preclusion from a right to social security benefits is not provided for.

The recitals of Directive 2009/52 lay down that the Directive respects the fundamental rights and refer to the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. In particular, reference is made to the freedom to conduct a business, equality before the law and the principle of non-discrimination, the right to an effective remedy and to a fair trial and the principles of legality and proportionality of criminal offences and penalties, in accordance with Articles 16, 20, 21, 47 and 49 of the Charter.[486] From this it becomes apparent that it is principally the employer whose fundamental rights shall be respected.

[483] See European Commission, Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals {SEC(2007) 596} {SEC(2007) 603} {SEC(2007) 604}, COM 2007 (249) - COD 2007/0094. Available at: http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=EN&type_doc=COMfinal&an_doc=2007&nu_doc=0249.

[484] See European Parliament, Report on the proposal for a directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals, A6-0026/2009, 27 January 2009, Amendment 29, p. 40. Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2009-0026+0+DOC+PDF+V0//EN.

[485] Recital 14 Directive 2009/52.

[486] Recital 36 Directive 2009/52.

4.2.6. Decision 2003/578 on guidelines for the employment policies of the Members States

In 1998, the European Commission issued a legally non-binding Communication on undeclared work in order to launch a debate on the causes of this phenomenon and the policy options for combating it.[487] Undeclared work is defined as "any paid activities that are lawful as regards their nature but not declared to public authorities".[488] This definition has been kept by Union institutions up to now. In its Communication, the Commission particularly points to the threat undeclared work poses for the financing and delivery of social protection. In rather neutral terms, the Commission observes that undeclared workers lack social security protection, as long as they are not covered through a universal scheme, through a second job or through their spouse. The debate,[489] initiated by the European Commission, culminated in paying particular consideration to undeclared work when elaborating the Guidelines for Member States Employment Policies 2003-05. These Guidelines were adopted by Council Decision 2003/578, which is legally binding on the Member States.[490] Employment Policy Guideline No. 9 deals with transforming undeclared work into regular employment. It reads:

> "Member States should develop and implement broad actions and measures to eliminate undeclared work, which combine simplification of the business environment, removing disincentives and providing appropriate incentives in the tax and benefits system, improved law enforcement and the application of sanctions. They should undertake the necessary efforts at national and EU level to measure the extent of the problem and progress achieved at national level."

The Guideline concisely prescribes a policy mix of prevention and repression. A little bit more detailed is the legally non-binding Council Resolution on Transforming Undeclared Work into Regular Employment, which is based on the 1998 Commission Communication and the 2003 Council Decision.[491] There, most notably, preventive actions and sanctions aimed at eliminating undeclared work and efforts to measure the extent of the problem and the progress achieved are proposed – both in the single Member States and in cooperation with other Member States. Interesting for our investigation, point 2.5. calls on Member States

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[487] European Commission, Communication from the Commission of 7 April 1998 on undeclared work, COM(98) 219 final, not published in the *Official Journal*.

[488] *Ibid*., p. 4.

[489] Also the European Parliament reacted on the Communication of the European Commission and took part in this debate. See European Parliament Resolution of 21 September 2000 on the Commission Communication on undeclared work, *OJ* C 146/102, 17 May 2001. In § 27 of the Resolution the Parliament "[c]alls for the launching of a debate in depth on the future form of social security systems with a view to curbing undeclared work, in the light of the changes caused by the development of communications technology and the flexibilisation of employment". Against the background of this debate, the Union adopted legal instruments which support the fight against undeclared work. These are Council Resolution of 22 April 1999 on a Code of Conduct for improved cooperation between authorities of the Member States concerning the combating of transnational social security benefits and contribution fraud and undeclared work, and concerning the transnational hiring-out of workers, *OJ* C 125/1, 6 May 1999; and Council Directive 1999/85/EC of 22 October 1999 amending Directive 77/388/EEC as regards the possibility of applying on an experiment basis a reduced VAT rate on labour-intensive services, *OJ* L 277/34, 28 October 1999 . The Resolution sets out a Code of Conduct for, amongst other things, combating undeclared work in cases where at least two Member States are involved. The Directive provides the possibility for a reduced VAT rate in order to, amongst other things, reduce the incentive for the businesses to join or remain in the black economy.

[490] Council Decision 2003/578/EC of 22 July 2003 on guidelines for the employment policies of the Members States, *OJ* L 197/13, 5 August 2003.

[491] Council Resolution on transforming undeclared work into regular Employment, *OJ* C 260/1, 29 October 2003.

> "[t]o strengthen surveillance, where appropriate with the active support of the social partners, and the application of appropriate sanctions, in particular in respect of those who organise or benefit from clandestine labour, *whilst ensuring appropriate protection for the victims of undeclared work*, through cooperation between the relevant authorities (inter alia tax offices, labour inspectorates, police), according to national practice [emphasis added by the author]".

It would be interesting to know what the Council had in mind when it talked about 'victims of undeclared work'. Are employees whose work is not declared by their employers per se victims? Or are only those employees who do not know about the non-declaration victims? Or are they also victims if they know about it, but cannot do anything about it without risking their job? Or are all the others who do declare their work and pay contributions and taxes victims of undeclared work? The second question that comes to mind is what should be understood by 'appropriate protection'? Is social security protection also part of appropriate protection? Unfortunately, there is no further explanation or interpretation on point 2.5. of the legally non-binding suggestions.

For the sake of completeness it should be mentioned that in 2007, almost ten years after putting the issue up for discussion, the Commission once again produced a Communication on stepping up the fight against undeclared work.[492] Aim of this second Communication was to emphasise the policy relevance of the fight against undeclared work by making inventory of the actions undertaken in the Member States and by illustrating the scope for mutual learning about successful practices.[493] The Commission once more warned about the threat undeclared work poses for the financial basis of social security systems. Additionally, the undermining of the public trust and the credibility of social security systems was raised. As a reaction of the Commission's Communication, the European Parliament adopted a legally non-binding Resolution.[494] There the Parliament stressed, in general, the importance of respecting workers rights in the combat against undeclared work.[495] In answer to the Union's measures in the field of sanctions against employers of illegally staying third-country nationals, the Parliament called for respecting the fundamental human rights of illegal migrant workers in the informal economy.[496] Worth mentioning is point 33, where the Parliament held that it "[s]trongly believes that bringing undeclared employment relationships within the law must always include an obligation to pay contributions, on the understanding that the Member States could take steps to facilitate the necessary payments by employers". So, the regularisation of undeclared work shall, according to the Parliament, be accompanied by the obligation to retroactively pay social security contributions. The implementation of this suggestion would in those countries which make benefit entitlement dependent on the payment of contributions pave the way for workers' entitlement to social security benefits.

[492] European Commission, Communication from the Commission of 24 October 2007 on stepping up the fight against undeclared work, COM 2007 (628), not published in the *Official Journal*.
[493] *Ibid*., p. 3.
[494] European Parliament Resolution of 9 October 2008 on stepping up the fight against undeclared work, *OJ* C 9 E/1, 15 January 2010.
[495] *Ibid*., §§ D., G., O. and 30.
[496] *Ibid*., §§ 73, 80.

5. Conclusions and comparison

In this Part, we examined a number of international instruments to see what statement is made to the social security of irregular migrant workers and nationals who perform undeclared work. In particular we were interested to find out whether rights are conferred or duties are imposed with respect to social security.

Concerning rights, we wanted to see whether the international legal framework imposes an obligation to allow irregular labour migrants, despite their irregular immigration status, to become entitled to social security benefits and to get those benefits paid out. In other words, does a prohibition to exclude irregular migrant workers from social security exist? What is more, this Part of our research was meant to bring to light whether the international legal framework comprises an obligation to protect nationals who work in the black economy in the event of the occurrence of a social risk, although they did not declare their work to the social security authorities and hence did not pay contributions. In other words, is there a prohibition to refuse black-economy workers social security benefits? Our primary interest was in rights. Still, we also took account of possible statements in international law on the duties connected with social security, *i.e.* obligations to affiliate with social security or to pay contributions.

In the following, the main findings of this Part are brought together and will be analysed against the objective of our research. In a first step, conclusions will be drawn separately for each of the two groups under investigation. Thereafter, the conclusions for the two groups will be compared with each other.

5.1. Irregular migrant workers

The question for the social security protection conferred under international law to irregular migrant workers had to be answered in two steps. First, it was to see whether irregular migrant workers fall within the personal scope of application of (parts of) the respective legal instrument. And second, if this was the case, we had to investigate which rights actually can be derived from it.

Our research showed that the international legal framework in the field of social security is extremely heterogeneous with respect to its applicability *ratione personae* to irregular migrant workers. To be more precise, the following categories as for the personal scope of application can be identified:

- *Exclusion by legal text*. This first category refers to international legal documents which explicitly exclude migrants with an irregular migration status from their personal scope of application. The exclusion may concern the whole document. For instance, the CoE European Convention on the Legal Status of Migrant Workers (ECMW) does not apply irregular migrant workers and EC Directive 2003/109 on Long-Term Residents does not apply to unlawfully residing third-country nationals. But also partial exclusion is possible. Parts of the UN International Convention on the Protection of All Migrant Workers and Members of Their Families (ICMW) are not applicable to irregular labour migrants and parts of the ILO Migrant Workers (Supplementary Provisions) Conventions (C143) are not applicable to persons who are not regularly admitted as migrant workers. Even an

exclusion from a certain provision could be observed. For instance, the non-discrimination principle under the ILO Migration for Employment Convention (C97) and C143 only applies to migrants lawfully within the territory.

- *Exclusion by legal text, but inclusion suggested*. Then there are legal instruments which do also expressly exclude irregular migrant workers from coverage, but where the international supervisory body suggested otherwise. This is the case for the Revised European Charter (R)ESC. The European Committee of Social Rights deviated from the wording of the Appendix of the Charter, interpreted the Charter in the light of its supposed objective and purpose, and eventually arrived at the conclusion to extend the social security protection under the Charter also to migrants with an irregular immigration status
- *Inclusion by legal text*. Some instruments entirely include migrants with an irregular migration status into its scope *ratione personae*. This is the case for instruments which particularly deal with certain aspects of migration, like trafficking in human beings (UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, CoE Convention on Action against Trafficking in Human Beings and EC Directive 2004/81 on Victims of Trafficking in Human Beings)[497] or returning illegally staying foreigners (EC Directive 2008/115 on Returning Illegally Staying Third-Country Nationals). But also partial inclusion can be found. Parts of the UN and the ILO migrant workers conventions ICMW and C143 explicitly apply to irregular migrant workers.
- *Exclusion suggested*. Many of the investigated instruments do not make a statement on whether or not they apply to irregular migrant workers. Sometimes monitoring bodies and other institutions stepped in and expressed the opinion to not apply these instruments to foreigners with an irregular migration status. This happened for the ILO social security standard-setting Conventions No. 102 and No. 128; there the Committee of Experts issued the interpretation that only persons lawfully resident in the country of immigration should fall within the concept of residents under the conventions. But it also occurred in the context of the UN International Covenant on Economic, Social and Cultural Rights (ICESCR); there it was the UN General Assembly, which declared that social rights do not apply to foreigners unlawfully present in a country.
- *Inclusion suggested*. When the legal text itself leaves it open whether or not it applies to migrants in an irregular situation, supervisory bodies sometimes also forwarded the opinion that it does apply. This is true for the UN International Covenant on Economic, Social and Cultural Rights (ICESCR), the UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the UN Convention on the Rights of the Child (CRC). Also civil and political human rights instruments, which may be of relevance for a person's social security, have been declared applicable to irregular migrants – see the UN International Covenant on Civil and Political Rights (ICCPR) or the European Convention on Human Rights (ECHR). First indications of the applicability of social security-related rights under the EU Charter of Fundamental Rights (EUCFR) have also been observed in our investigation.
- *No suggestion*. But there are also cases where no opinion with respect to irregular migrant workers has been issued. The concepts of employees or of economically active population under the ILO social security standard-setting treaties have never been interpreted as for

[497] Concerning the UN Protocol and the CoE Convention on human trafficking, the inclusion is not made explicitly, but implicitly. For instance, by recommending or prescribing the provision of residence permits or by requiring not to enforce expulsion orders.

their meaning for irregular labour migrants. Neither is there an explicit statement as for the applicability of the UN Convention on the Rights of Persons with Disabilities (CRPD) to migrants with an irregular migration status. But also the non-discrimination principle under the ILO migrant workers Conventions C97 and C143 with respect to migrants lawfully present, but unlawfully working (category B irregular migrant workers) could be classified under this category.

This categorisation illustrates that there is a great variety of ways how international legal instruments and their supervisory bodies deal with migrants with an irregular migration status when it is about coverage. But this heterogeneity is less a problem than it appears to be on first sight. This is because many of the international instruments address different groups of people and different aspects of social security. Regarding the first we can see legal documents focusing, for instance, on children, women, victims of human trafficking or returning migrants. Concerning the latter, a clear distinction has to be made, for example, between social security standard-setting treaties and human rights treaties or between human rights treaties comprising economic and social rights and those containing civil rights. The employed techniques or underlying rights are different and consequently the obligations for Contracting Parties in relation to social security differ. However, with regard to some of the investigated instruments, the heterogeneity of the personal scope of application seems to be a problem. Take for instance Article 13 of the CoE (Revised) European Social Charter ((R)ESC), which stipulates that the

> "[w]ith a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake to apply [the right] on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953".

And compare it with Article 19 of the CoE European Convention on the Legal Status of Migrant Workers (ECMW) which sets out that

> "[each Contracting Party undertakes to grant within its territory, to migrant workers and members of their families who are lawfully present in its territory, social and medical assistance on the same basis as nationals in accordance with the obligations it has assumed by virtue of other international agreements and in particular of the European Convention on Social and Medical Assistance of 1953".

Here we have two identical obligations for Council of Europe Member States which are State Parties to both conventions, such as for instance the Netherlands. However, the latter obligation, due to Article 1 (1) ECMW, does not apply to irregular migrant workers. The first, by contrast, does apply in the eyes of the European Committee of Social Rights to migrants with an irregular immigration status. Nevertheless, we have to put into perspective that this is the opinion of a supervisory Committee. The legal text itself, *i.e.* the (R)ESC, reads otherwise. Another example of contradictory guidance is Article 18 (1) CoE ECMW and Article 27 (1) of the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW). The first provision reads:

> "[e]ach Contracting Party undertakes to grant within its territory, to migrant workers and members of their families, equality of treatment with its own nationals, in the matter of social security, subject to conditions required by national legislation and by bilateral or multilateral agreements already concluded or to be concluded between the Contracting Parties concerned".

And the latter goes:

> "[w]ith respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. The competent authorities of the State of origin and the State of employment can at any time establish the necessary arrangements to determine the modalities of application of this norm".

Once again, two norms which are more or less identical, but which have a different scope of application *ratione personae*. Under the ECMW irregular migrant workers are explicitly excluded, whereas under Article 27 ICMW irregular migrant workers are explicitly included into the scope *ratione personae*. The different territorial scope of application, *i.e.* once universal and once confined to Europe, cannot justify a diverging personal scope of application – at least not when we are talking about Member States of the Council of Europe which may bind themselves to both conventions.

We have seen now that in some instances the heterogeneity of the personal scope of application with regard to irregular migrant workers may raise serious problems. But there is another weakness, and this relates to the silence of international legal texts on their applicability to irregular migrants. Most of the international texts do not say whether or not this group falls under the scope *ratione personae*. This has the consequence that Contracting States have no clear and legally binding guidance concerning the treatment of irregular migrants with respect to social security. Often, the gap has been tried to be filled by the supervisory system. International monitoring bodies issued their opinions on the applicability on irregular migrants. However, these attempts to fill the gap have not been convincing. First, international monitoring bodies are mostly not empowered to give legally binding comments – let alone the question whether they are authorised to provide authoritative interpretation. Therefore, the legal value of their comments is questionable. Second, we could observe that international bodies sometimes give a conflicting opinion on the applicability of a legal text to irregular migrants. Take for instance the UN International Covenant on Economic, Social and Cultural Rights. We have two comments, one from the General Assembly explicitly saying that the right to social security, the right to social services and the right to medical care do not apply to unlawfully present aliens; and one from the Committee of Economic, Social and Cultural Rights stating that these rights do apply to non-citizens regardless of their legal status. The consequence could be that Contracting States choose: depending on their point of view and on their already existing national legislation and practice, they could highlight the one or the other interpretation when reporting on their compliance with the Covenant. And third, this research has illustrated that the quality of the opinions issued by monitoring bodies is rather low. This has to do with the fact that monitoring bodies usually do not provide explanations and reasons for their point of views. To give an example, the Committee on the Elimination of Racial Discrimination simply held that the International Convention on the Elimination of All Forms of Racial Discrimination applies to non-citizens regardless of their immigration status. Of course, would some at first tend to say, must the Convention against discrimination protect migrants, who are more likely than nationals to become victims of racial discrimination, and do so without looking at their legal status. But this is no matter of course, where any justification would be redundant. In particular not against the background of the wide meaning the Committee has attributed to the Convention in the field of social security and of the UN General Assembly Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live. The implication of a lack of justification could be that Contracting Parties are reluctant to follow such an interpretation and States interested in ratifying such treaties may be cautious to do so.

Only in very exceptional cases, and they can be counted on the fingers of one hand, international monitoring bodies have substantiated their opinion to include or exclude irregular migrants into or from the scope *ratione personae*. This, of course, is of particular interest for our research and will be highlighted in the following.

The Committee on the Rights of the Child substantiated its decision to apply the Child Rights Convention to all persons under the age of eighteen, irrespective of nationality or immigration status, with a reference to the Convention's non-discrimination provision. The non-discrimination provisions sets out that State Parties have the obligation to respect and ensure the rights under the Convention to each child within the State's jurisdiction without discrimination. This is not a very detailed explanation. The non-discrimination clause of the Convention does not expressly forbid discrimination on the basis of nationality or immigration status. More arguments would therefore have been desirable. However, it is at least some motivation.

Another international body which motivated its decision on the applicability with respect to migrants with an irregular status was the ILO Committee of Experts on the Application of Conventions and Recommendations. It substantiated its decision to exclude unlawfully residing foreigners from the concept of residents under the ILO social security standard Conventions Nos. 102 and 128 with a reference to ILO Conventions Nos. 97 and 143. The Migration for Employment Convention and the Migrant Workers (Supplementary Provisions) Convention lay down that the principle of equal treatment in social security applies only to migrant workers lawfully within the territory of the Contracting Party. The Committee of Experts referred to these equal treatment clauses and held that it therefore considers that "the term 'resident' is intended by Conventions Nos. 102 and 128 to be read as including only those non-nationals who are lawfully resident in the country of immigration". It is obvious that the ILO Committee strived for consistency in the interpretation of ILO conventions.

A special case is the interpretation of the Revised European Social Charter by the European Committee of Social Rights. The express exclusion of unlawfully residing and unlawfully working foreigners was neglected and the right to social and medical assistance declared applicable to migrants unlawfully residing in the State Party. In addition, unlawfully present children were also considered to fall within the scope *ratione personae* of the right of children and young persons to social protection and of the right to housing. The Committee motivated its decision by declaring that Revised European Social Charter must be interpreted in the light of its objective and purpose. And when determining this objective and purpose it must be taken into account that the Charter is a living human rights instrument dedicated, most notably, to human dignity and closely complementing the European Convention on Human Rights. The Committee continued that the case at hand concerned the right to life itself and thus human dignity. I commented on this decision in subchapter 3.1.1.1.

So, we have seen that some universal and European legal instruments and their provisions related to social security are applicable to irregular labour migrants. Now it is to provide an analysis on the rights actually granted and on the obligations imposed on Contracting States. Which rights could be identified in our investigation? In the following, all relevant provisions under international law where either a legal text itself or a monitoring body have pronounced on irregular labour migrants will be categorised.

- Irregular migrant workers are at least entitled to emergency medical care, provided that this sort of medical care is also available for nationals of the respective country. This obligation is set out in Article 28 ICMW and is likely to be also contained in Article 1 C143 (*text, universal*)[498]. Irrespective of the treatment of nationals, emergency medical treatment is guaranteed to a particularly vulnerable group, who may also stay and work without authorisation in a country: victims of human trafficking in need. This is laid down in Article 7 (1) EC Directive 2004/81 and in Article 12 (1) (b) in conjunction with Article 13 (2) CoE Convention on Action against Trafficking in Human Beings (CTHB) (*text, Europe*). Without further defining it and in a non-obligatory manner, the UN Protocol on Trafficking in Persons stipulates in Article 6 (3) (c) that Contracting States shall consider to provide victims medical assistance (*text, universal*). The European Court of Human Rights deduced from the prohibition of inhuman or degrading treatment (Article 3 ECHR) that illegally staying foreigners, who are terminally ill, can under very exceptional circumstances derive a right to remain in the host country in order to continue to benefit from medical assistance (*binding opinion, Europe*). The Committee of Economic, Social and Cultural Rights went further and considered the right to health (Article 12 ICESCR) as comprising an obligation to refrain from denying or limiting equal access for all persons, including illegal immigrants, to preventive, curative and palliative health services and the right to social security (Article 9 ICESCR) as containing an entitlement of all persons, irrespective of their nationality, residency or immigration status, to primary and emergency medical care (*opinion, universal*). Monitoring bodies went also further when they had to deal with children with an irregular migration status or children of parents with such irregularities in their status. The European Committee of Social Rights considered Article 17 RESC – the right of children and young persons to social protection – to entitle children to a basic health insurance covering more than just medical emergencies (*opinion, Europe*). And also the Committee on the Rights of the Child deduced from the Convention on the Rights of the Child a broader access to health services (*opinion, universal*). In particular in the context with the prohibition of discrimination (Article 2 CRC), the Committee expressed the opinion that illegal immigrant children should receive health care which goes beyond the provision of emergency health services. And finally under Article 14 European Union Directive 2008/115, unlawfully present third-country nationals should be provided, as far as possible, with emergency health care and essential treatment of illness, during periods for voluntary departure or during periods of postponed removal orders (*text, Europe*).
- The principle of equality of treatment in social security between migrant workers and family members, including irregular ones, and nationals of the country of employment is laid down in Article 27 (1) of the ICMW. The enjoyment of equal treatment, however, is subject to the fulfilment of the requirements provided for by national and international law (*text, universal*).
- International law also prescribes equal treatment between irregular migrant workers and their family members on the one hand and regular migrant workers on the other in respect of rights arising out of past employment as regards social security. This right for the irregular migrant worker and obligation for the Contracting State is set out in Article 9 (1) of ILO Convention No. 143 (*text, universal*). The ILO Committee of Experts gave a

[498] This refers to the fact whether a State obligation or a person's entitlement can be derived from a legally binding text itself (*text*) or from an analysis thereof (*opinion*) and whether the legal instrument has a universal territorial scope of application (*universal*) or a scope confined to Europe (*Europe*).

comment to this provision with regard to countries which do not link entitlement to social security benefits to a legal immigration status, but to the affiliation to the scheme and the payment of contributions. Pursuant to the Committee, in such countries Article 9 (1) C143 comprises the requirement to treat equally irregular migrant workers who do not declare their work to the social security authorities with regular migrant workers who do not do so. In other words, if regular migrant workers have the right, or their employers have the obligation, to regularise the situation by paying the contributions retroactively, so must irregular migrant workers and their employers (*opinion, universal*).

- The possibility of reimbursement of social security contributions made by irregular migrant workers shall be examined in cases where the contributions do not allow for benefits and on the basis of treatment with nationals of the country concerned – see Article 27 (2) ICMW (*text, universal*).
- There is a tendency amongst international monitoring bodies to consider particularly vulnerable groups amongst irregular migrants as having rights in the sphere of social assistance.[499] Abused irregular women migrant workers should be according to the Committee on the Elimination of Discrimination against Women entitled to social services (*opinion, universal*). This entitlement was derived from the principle of non-discrimination against women in social fields (Articles 3, 5 and 12 CEDAW). The same Committee deduced from the general principle of non-discrimination against women under the CEDAW (Article 2) that the basic needs of undocumented women migrant workers shall be satisfied in times of pregnancy or maternity (*opinion, universal*). Also children were considered to have a right to benefit from welfare services. The Committee on the Rights of the Child regarded the Convention on the Rights of the Child as comprising the obligation for State Parties to provide children, irrespective of their or their parents' immigration status, with social welfare, social services and disability care (*opinion, universal*). The European Committee of Social Rights considered Article 31 (2) RESC – the right to housing to prevent and reduce homelessness – to entitle unlawfully present children to shelter (*opinion, Europe*). No opinion, but protection afforded by the legal text itself can be observed for a very specific category of foreigners, who may also stay and work without authorisation in a country: victims of human trafficking. Under Article 7 (1) of EC Directive 2004/81 and under Article 12 (1) (a) in conjunction with Article 13 (2) CoE Convention on Action against Trafficking in Human Beings (CTHB), victims of trafficking in human beings, who do not have sufficient resources, are entitled to a standard of living capable of ensuring their subsistence. The legal status of the victim is of no importance (*text, Europe*). Without further defining it, the UN Protocol on Trafficking in Persons stipulates in Article 6 (3) (c) that Contracting States shall *consider* to provide victims material assistance (*text, universal*). This is no obligation to provide assistance, but only to consider it.
- Finally, the Committee on the Elimination of Racial Discrimination expressed the opinion that Article 5 (e) ICERD forbids racial discrimination in the field of social security, medical care and medical services also with respect to migrants with an irregular migration status (*opinion, universal*).

[499] We found one statement where the lack of access of undocumented migrants in general to social services was criticised. This was by the Committee on Economic, Social and Cultural Rights, when commenting on the Country Report of Greece. However, no recommendation to grant this access was made.

This overview illustrates that the less legally binding a statement is, the more rights are guaranteed. International monitoring bodies tend to grant irregular migrant workers more far reaching rights than the legal texts themselves. And these opinions of international monitoring bodies are, by and large, non-binding upon the Contracting States of the legal documents. It is therefore interesting to see which *explicit legally binding duties* on Contracting States with respect to irregular migrant workers had been identified. Obligations only exist

- for the provision of emergency medical care, on the basis of treatment of nationals of the State concerned (Article 28 ICMW);
- as far as possible, for the provision of emergency medical care and essential treatment of illness for unlawfully present third-country nationals during periods of voluntary departure or during periods of postponed removal orders (Article 14 EC Directive 2008/115);
- for the provision of emergency medical treatment and a standard of living capable of ensuring the subsistence of victims of human trafficking who do not have sufficient resources (Article 7 (1) EC Directive 2004/81 and Article 12 (1) (a) and (b) in conjunction with Article 13 (2) CoE CTHB);
- for equal treatment in social security with nationals of the country of employment, in so far as irregular migrant workers fulfil the national and international legal requirements (Article 27 (1) ICMW);
- for equal treatment with regular migrant workers in respect of social security rights arising out of past employment (Article 9 (1) C143); and
- for the examination of the possibility of reimbursing social security contributions, on the basis of the treatment of nationals of the State concerned (Article 27 (2) ICMW).

To this list one could maybe add the European Court of Human Rights' findings with respect to terminally ill persons. To recall, the Court, on the basis of the prohibition of inhuman or degrading treatment (Article 3 ECHR), held that under extremely exceptional circumstances, terminally ill persons have the right to remain in the host country in order to continue to benefit from medical assistance. This obligation for CoE Member States takes however a very special position, because the Court has found such an obligation only once in a whole serious of cases of terminally ill persons, where the Court held that in principle no right to remain in the territory of a Contracting State can be obtained in order to continue to benefit from medical, social or other forms of assistance.

It should be recalled that neither the ICMW, nor C143 have been ratified by Belgium, Canada or the Netherlands. So, the only legally binding duties for the countries under investigation, at least for Belgium and the Netherlands, arise out of EC Directives 2008/115 and 2004/81, out of the CoE Convention on Action against Trafficking in Human Beings and out of Article 3 of the European Convention on Human Rights. Accordingly, Belgium and the Netherlands are under the obligation to provide, first, emergency medical care and essential treatment of illness for unlawfully present third-country nationals during periods of voluntary departure or during periods of postponed removal orders; and, second, emergency medical treatment and a standard of living capable of ensuring the subsistence to victims of human trafficking who do not have sufficient resources. Moreover, under very exceptional circumstances, Belgium and the Netherlands must give terminally ill persons the right to remain in the host country in order to continue to benefit from medical assistance. Canada, by contrast, is under not explicit legal obligation to provide social security to irregular migrant workers.

Like we did for the personal scope of application, we can observe serious shortcomings also when it is about the content of social security rights for irregular labour migrants. The shortcomings relate on the one hand to the legal texts themselves and on the other hand to the comments thereto. Let us begin with the legal documents. Many of the relevant provisions are formulated in an imprecise and ambiguous manner. Let me give one of the examples which were discussed in this Part. When Article 9 (1) of the ILO Convention No. 143 talks about equality of treatment for irregular migrant workers and their family members in respect of rights arising out of past employment as regards social security, it leaves it open, first, with whom equal treatment shall be granted, second, what the phrase 'rights arising out of past employment' exactly means, and, third, what is to be understood by the concept of social security. Of course, international legal documents are a compromise of national interests. This is not only true for international organisations like the United Nations or the Council of Europe, but also for the European Union, with its greater degree of integration. As a consequence, detailed obligations are difficult to agree upon and concepts and words used are formulated rather generally to allow for a wide margin of appreciation in their application. Moreover, unintentional mistakes may occur in the drafting process of an international document. For instance, adaptations in one part, are not implemented in another part, although they would be necessarily required; or the possibility of clerical errors. All this has been demonstrated in this Part. These mistakes may also contribute to ambiguity and lack of clarity in the final text. However, whether mistakes or the difficulty to agree upon detailed obligations do justify impreciseness and ambiguity is another question.

The second area where shortcomings were observed, are the comments to legal documents issued by international monitoring bodies. Based on this research, the weaknesses can be grouped as follows:

- *Ambiguous comments*. Often comments leave many questions open or causes even more questions when using ambiguous wording. Let me refer to a few examples which were discussed in our research. The Committee on Economic, Social and Cultural Rights, when commenting on the right to health and the right to social security, used concepts, such as primary care, without defining them. The Committee on the Elimination of Discrimination against Women requires that basic needs of undocumented women migrant workers shall be satisfied in times of pregnancy or maternity, without giving the slightest hint of what these basic needs could be. The ILO Committee of Experts does not give clear guidance what 'equality in respect of rights arising out of past employment' exactly means. Is it equality after acquisition or also in the course of acquisition? The Committee's remarks are ambiguous and allow both interpretations.
- *Conflicting comments*. Sometimes it appears that even contradictory comments are issued. This might have happened when the Committee on Economic, Social and Cultural Rights used in the context of the right to health and the right to social security different concepts of medical care. One time 'preventive, curative and palliative health services' and the other time 'primary medical care'.
- *No justification*. Providing opinions without giving any motivation for it can be identified as a big problem. When monitoring bodies state that this or that right can be derived in the context of social security for irregular migrants, they mostly do so without saying why. Take for instance the Committee on the Elimination of Discrimination against Women which held that abused irregular women migrant workers should be entitled to social services. Why should they? And why should not all irregular women migrant workers be entitled to such services? Another example would be the ILO Committee of Experts in the

context of Article 9 of Convention No. 143. How come that the Committee reaches the conclusion that qualifying conditions which require legal employment or legal residence in a country would deprive Article 9, which demands equality of treatment with respect to rights arising out of past employment, of its principal effect?

The consequences of these shortcomings are serious: there is no clear guideline for Contracting States concerning the application of these provisions; Contracting States may not follow the opinions any longer – in particular if it is extensive and no justification is provided; States interested in acceding to a convention may be deterred; and so on. Sure, like for shortcomings in the legal texts themselves, one can also find causes and reasons for problems. Resources of the monitoring bodies may be too limited to give thorough comments. Or monitoring bodies may be restricted in their mandate with respect to give interpretations. This however only means that there are more factors influential and more parties responsible for 'bad' commentary. Yet, to my mind, it cannot serve as an excuse for it.

Which arguments were brought forward when irregular migrant workers were granted or denied social security rights? Unfortunately, not many.

The European Committee of Social Rights found the right of children to social protection (Article 17 ESC) as being violated because children, in the case at hand, received only emergency medical treatment or, alternatively, basic health insurance, which was however conditional upon residing (even unlawfully) a certain period of time in the host country. This was too little in the light of Article 17, which, as the Committee noted, is directly inspired by the UN Convention on the Rights of the Child. In an additional document the Committee added the reason that children are following their parents to the country of immigration and cannot be blamed for not having the required permits.

Another monitoring body, the European Court of Human Rights, regarded in one exceptional case concerning a terminally ill unlawfully present foreigner the prohibition of inhuman or degrading treatment (Article 3 ECHR) as being infringed. It awarded a right to remain in the host country in order to continue to benefit from medical assistance. The Court respected the Contracting States' "right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens". But, the Court recalled that "in exercising their right to expel such aliens Contracting States must have regard to Article 3 of the Convention, which enshrines one of the fundamental values of democratic societies". In the case at hand, the imprisoned terminally ill complainant suffered from HIV/AIDS at an advanced stadium. The Court held that there is a serious danger that the adverse social and medical conditions in his home country will "further reduce his already limited life expectancy and subject him to acute mental and physical suffering". Moreover, the Court noted that the Contracting State had already assumed responsibility for treating the claimant's condition for a few years. Because of these circumstances the Court found that the removal of the claimant would amount to inhuman treatment in violation of Article 3 ECHR. The Court made clear that it were not the conditions which would confront him in his home country that are themselves a breach of Article 3 – it was the removal, which would expose him to a real risk of dying under most distressing circumstances. In addition, the European Court of Human Rights emphasised that these were very exceptional circumstances and that in principle no entitlement to remain in a Contracting State in order to continue to benefit from medical or other forms of assistance can be derived.

The analysis of the European and international legal framework has also revealed that some clauses, which thus far have not been attributed any meaning for irregular migrant workers – neither by the drafters of international legal instruments, nor by the international monitoring bodies –, may nevertheless bear some relevance for the group under investigation. In the following, I will summarise these provisions. It is important to mention here that the possible relevance of these provisions for irregular migrant workers is nothing but speculation from our side. There has been no confirmation whatsoever that these clauses could be really interpreted like that.

The first provision I want to refer to is Article 6 of the ILO Maternity Protection Convention 2000. It requires Contracting States, amongst other countries the Netherlands, to provide for adequate benefits out of social assistance funds, subject to a possible means test, for all those women who do not meet the conditions to qualify for cash benefits during maternity leave. Irregular women migrant workers may under national law not qualify for maternity benefits, due to their irregular status of stay or work. Since Article 6 C183 applies to any female person without discrimination whatsoever, one could argue that in such cases needy irregular women migrant workers shall be entitled to adequate social assistance benefits. However, up to now there is no confirmation for such an interpretation.

Worth mentioning are also Article 13 (4) and 19 (5) of the European Social Charter and the Revised European Social Charter, which have been both ratified by Belgium and the Netherlands. Article 13 (4) (R)ESC sets out that the right to social and medical assistance shall be applied on an equal footing with own nationals to nationals of other State Parties lawfully within their territories. And Article 19 (5) (R)ESC stipulates that State Parties shall secure that workers lawfully within their territories receive treatment not less favourable than that of their own nationals with regard to, amongst other things, social security contributions. Our analysis has shown that the requirement to be lawfully within the territory relates to the lawful presence, as opposed to lawful residence or lawful work. As a consequence, foreigners who are temporary lawfully present on the territory of a Contracting State, such as tourists or students, but who are taking up employment although not allowed to do so (category B irregular migrant workers), may fall within the scope of Articles 14 (4) and 19 (5) (R)ESC.

Also Article 6 of the ILO Migrant Workers Convention No. 97 and Article 10 of the ILO Migrant Workers Convention No. 143 may bear some relevance for what we call category B irregular migrant workers. These provisions set out the principle of equal treatment between migrants lawfully within the territory of the host country and nationals of the host country in the field of social security. Since lawfulness of work is not required, migrant workers with a lawful presence, but an unlawful work status may benefit from this provision. Even so, one could argue that the ILO Committee of Experts remarked, in the context of the equal treatment clause of ILO Convention No. 118, that it does not consider the exclusion of migrants residing or working without authorisation from national social security legislation as being a matter of equal treatment based on nationality. It is rather a differentiation according to legal status and therefore not contrary to a principle which provides for equal treatment between migrant workers and nationals. For the sake of completeness it is to note that Canada has not ratified any of those migrant workers conventions and that Belgium and the Netherlands have only ratified Migrant Workers Convention No. 97.

Another treaty dealing particularly with migrant workers is the UN Migrant Workers Convention (ICMW). Its Article 25 comprises the interesting obligation for State Parties to take all appropriate measures to ensure that employers are not relieved of any legal or contractual obligations by reason of irregularity of stay or work of a migrant worker. Commentators interpreted this provision as requiring to declare work contracts with irregular migrant workers as legally binding. It is unfortunately not clear to what extent this may have consequences for third parties. To be more precise, one can ask whether the social security authorities are also bound by an employment contract which is binding for the employer and irregular migrant worker. This is a question which is of particular relevance with respect to national social security schemes which make insurance conditional upon the existence of a valid employment contract.

Let me come now to another issue our investigation has brought to light: the existence in European and international law of the rationale that the extent of social security protection enhances as the stability of the residence and work status increases. I would call this 'linkage logic'. It expresses a link between the social security status and the immigration status. The best examples of this logic can be found in the context of the protection for victims of human trafficking. Under the CoE Convention on Action against Trafficking in Human Beings and under EC Directive No. 2004/81 victims of trafficking in persons are not per se guaranteed any protection. But as soon as they are granted a reflection period in order to escape the influence of the perpetrator and/or take a decision as to whether to cooperate with the competent authorities, they shall be ensured, provided that they do not have sufficient resources, standards of living capable of ensuring their subsistence and access to emergency medical treatment. This reflection period does not create any entitlement to residence under European law, but it creates a right to not be expelled. In case the victim of human trafficking is issued a residence permit, more protection shall be provided. Victims of human trafficking without sufficient resources and with special needs shall be provided necessary medical or other assistance.

Also the migrant workers treaties of the UN, the ILO and the CoE express this linkage logic. Under the CoE European Convention on the Legal Status of Migrant Workers, only workers with a lawful status of residence and work in the country of employment belong to its personal scope of application. Accordingly, irregular migrant workers do not enjoy the social security-related rights set forth in the Convention. The UN International Convention on the Protection of All Migrant Workers and Members of Their Families clearly differentiates between migrant workers with regular and migrant workers with irregular residence and work status in the country of employment. The former, for instance, enjoys access to health services, on the basis of equality of treatment with nationals and provided that the requirements for participation in the respective schemes are met. Irregular migrant workers, by contrast, are entitled to emergency medical care only, also on the basis of equality of treatment with nationals. The ILO migrant workers conventions also link the enjoyment of social security right to a lawful status under national immigration laws. Equal treatment with nationals in matters of social security is only guaranteed to migrants lawfully within the territory of the State Party.

This brings me to the last observation I want to make here. In international legal texts, rights for irregular migrant workers are only explicitly granted if, at the same time, the prevention and elimination of irregular migration and irregular work is addressed. The CoE European Convention on the Legal Status of Migrant Workers and the ILO Convention on Migration for Employment No. 97 do not deal with the fight against this phenomenon. Here we can see that no rights with

respect to an irregular migrant worker's social security are provided for.[500] On the other hand, ILO Convention on Migrant Workers (Supplementary Provisions) No. 143 and the UN Migrant Workers Convention comprise whole Parts particularly dealing with the fight against irregular migration and irregular work. Under these legal instruments, migrant workers in an irregular situation are guaranteed a minimum protection concerning matters of social security. So the granting of rights goes hand in hand with the fight against irregular migration and work. It seems that only when measures to prevent and eliminate irregular migration and work are provided for, there is consensus to guarantee for social security rights for irregular migrant workers.

5.2. Nationals who engage in undeclared work

The second group of workers under investigation is nationals whose work is not declared to the social security authorities. Also with regard to this group one can pose two questions. First, does this group fall within the personal scope of application of international legal instruments and, second, if so, which rights are conferred on them.

The group under investigation has two characteristics: first, they are nationals of the country of employment; and second, they are undeclared workers. Due to the first characteristic, this group is excluded from the scope *ratione personae* of some international instruments. These are, in particular, international treaties dealing with migrant workers and EU law dealing with third-country nationals. In more detail, nationals who engage in undeclared work are not falling under the personal scope of application of the

- UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW);
- ILO Convention on Migration for Employment (C97);
- CoE European Convention on the Legal Status of Migrant Workers (ECMW); as well as
- Directives 2001/55, 2003/109, 2004/81, 2008/115 and 2009/52.

The second characteristic, *i.e.* engaging in undeclared work, allows for less distinctiveness. When elaborating the questions of personal scope of application and rights actually derived, it was striking to see that there is not one single legally binding international instrument which makes an explicit statement on the social security status of workers who engage in undeclared work. Of course there exist international instruments to prevent and eliminate undeclared work, such as the ILO Labour Inspection Convention No. 81[501] or the EU Guidelines for Member States Employment Policies adopted by Council Decision 2003/578. But they do not address the undeclared worker's social security. Therefore, for the rest of our analysed instruments it is not clear whether this group comes within the scope *ratione personae* and whether the group's social security status is determined.

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[500] Leaving aside the question whether under ILO C97 category B irregular migrant workers may possible enjoy equal treatment with nationals in social security.

[501] Convention concerning Labour Inspection in Industry and Commerce, 1947, 11 July 1947, Convention No. 081, available at: http://www.ilo.org/ilolex/english/convdisp1.htm. The Convention was supplemented by the Recommendation concerning Labour Inspection, 1947, 11 July 1947, Recommendation No. 081, available at: http://www.ilo.org/ilolex/english/recdisp1.htm; and the Protocol of 1995 to the Labour Inspection Convention, 1947, 22 June 1995, Protocol No. 081, available at: http://www.ilo.org/ilolex/cgi-lex/convde.pl?P081. As already written in the introduction to this Part, this Convention was sorted out in a pre-analysis because it did not reveal to have any relevance for a person's social security status.

In the following, I will, in a first step, only draw conclusion from those statements which explicitly (this relates to other sources than the texts themselves) deal with the social security of nationals who engage in undeclared work. In a second step, I will take into consideration those statements which provide indication that they bear relevance for our investigation. This approach is consistent with the one taken for irregular migrant workers. I am aware of the fact that there are legally binding texts or comments thereto which talk about the right or status of *everyone*, of *nationals*, of *workers* and so on. But this was not sufficient for our investigation. We were looking, at least, for some indication of guidance for States bound by an international instrument with respect to the social security of undeclared workers.

We already concluded before that legally binding international instruments do not expressly address the social security of undeclared workers. But it is not only the texts themselves which are silent on this issue. Also in the preparatory materials, the social security of undeclared workers does not seem to have played a role. Almost the same goes for international monitoring bodies. One rare exception is the European Committee of Social Rights, which explicitly refers to undeclared work – as understood for the purpose of this research – when dealing with social security. In more detail, in recent years the Committee has increasingly required Contracting States to the (Revised) European Social Charter to provide information on undeclared work when reporting on Article 12 (1) – the right to social security. The Committee has asked how Contracting States deal with non-payment of social security contributions by employers, how much undeclared work takes place and what Contracting States are doing to combat this phenomenon. Contracting States replied to the first question by providing information on penalties for non-payment of contributions by employers and fines for forging documents concerning the payment of contributions. Information on the treatment of the workers, with respect to whom no contributions have been paid, has thus far not been given by State Parties. This recent interest by the Committee demonstrates that it cares about the issue of undeclared work in the field of social security. It is however not clear what the reason for this is. As a human rights committee, we can assume that the Committee is concerned with the social security protection of undeclared workers. Still, the questions addressed to State Parties do not reflect this possible concern. They would rather allow for the conclusion that the Committee is concerned about the financial stability of social security funds or about compliance with national social security laws. Anyway, what are the consequences of the Committee's interest in this issue? In the best case it creates soft pressure on Contracting States for action in this field. Action, if one analyses the Committee's and the Contracting States' comments, will mean measures to prevent and diminish undeclared work.

Another explicit statement on undeclared work and social security can be found in the ILO manual on concepts and methods to survey the economically active population, employment, unemployment and underemployment. This manual is intended to supplement an ILO Resolution on this matter. The manual informs that the concept of *economically active population* under the ILO social security standard-setting treaties includes undeclared workers. Nevertheless, the ILO manual acknowledges that their measurement in practice is problematic. A similar statement for the concept of *employees* has unfortunately not been delivered. The consequence of the principal obligation to take undeclared workers into consideration when informing about the percentage of the persons protected in relation to the whole economically active population in a Contracting State would be that it is more difficult to reach the ILO standards. This, once more, might put pressure on a Contracting State to combat undeclared work in order to maintain compliance with the ILO instruments.

One can see that these two comments, which relate to the CoE (Revised) European Social Charter and the ILO social security standard-setting treaties, rather deal with the prevention and elimination of undeclared work. The protection of citizens of the country of employment, whose work and income are not declared to the social security authorities, has not been an issue. Also in other comments, it *does not seem* to have been an issue. Here I have to use vague terms, since on some occasions we encountered rather ambiguous statements.

This is first and foremost true for the concept of informal economy of the ILO. Since 2002, the ILO uses the term 'informal economy' to refer to all economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements. The problem with this definition is that it covers two completely distinctive situations: working situations which are not covered by the law; and working situations which are covered by the law, but where there is no compliance with the law. It is only the second situation which is of interest for us and which, more or less, corresponds with our concept of undeclared work. But how to know which of the two aspects of this concept is meant when it is used? Our research has illustrated many examples where confusion with respect to the use of this term arose. This relates to comments not only of the ILO itself, but also, and maybe even more, to other UN bodies using the ILO concept. These are in particular the UN Committee on Economic, Social and Cultural Rights, the UN Human Rights Committee and the UN Committee on the Elimination of Discrimination against Women. To give one example, the UN Committee on Economic, Social and Cultural Rights recommended, in its General Comment on the right to social security, to ensure that persons working in the informal economy are also covered by social security. As measures to cover these workers, the Committee suggested to remove obstacles that prevent such persons from accessing informal social security schemes, to ensure a minimum level of coverage of risks and contingencies and to respect and support social security schemes developed within the informal economy. I commented that it seems that the Committee had only the first aspect of the concept of informal economy, *i.e.* non-coverage by law, in mind when making these suggestions and that it seems that there is no relevance for our research. However, how can we be sure? Therefore, international organisations and entities thereof are strongly advised to make clear which aspect of the concept of informal economy they address. Or, maybe better, two distinctive concepts are to be developed, avoiding the now existing confusion.

Another example of ambiguity was found in the context of the legally binding EU Council Decision 2003/578. The legally non-binding EU Council Resolution on Transforming Undeclared Work into Regular Employment of 2003, which builds on Council Decision 2003/578, calls on Member States to strengthen surveillance in the fight against undeclared work, whilst ensuring appropriate protection for the victims of undeclared work. It is not clear who the victims of undeclared work are and what appropriate protection is like. We therefore do not know if this statement has any relevance for social security at all.

Let us come now to the second step. Here we are looking at provisions and comments which do *not explicitly* address the social security of undeclared workers, but where there might be some kind of relevance for undeclared workers. As for legally binding texts, two provisions have been identified: Article 9 (2) of the Employment Injury Benefits Convention (C121), ratified by Belgium and the Netherlands, and Article 6 (6) of the Maternity Protection Convention 2000 (C183), ratified by the Netherlands. Article 9 (2) C121 stipulates that eligibility for medical care and cash benefits for industrial accidents and occupational diseases may not be made subject to the

length of employment, to the duration of insurance or to the payment of contributions, provided that a period of exposure may be prescribed for occupational diseases. This can be interpreted that undeclared workers shall qualify for benefits in case of labour accidents or occupational diseases, even though no contributions have been paid. Article 6 (6) C183 sets out that where a woman does not meet the conditions to qualify for maternity leave benefits in cash under national laws and regulations, she shall be entitled to adequate benefits out of social assistance funds, subject to the means test required for such assistance. This provision may be of relevance for female citizens working in the black economy. One can think of national law which makes entitlement to maternity benefits subject to affiliation with the respective social security scheme and to payment of contributions. Such criteria cannot be fulfilled by undeclared women workers. If also a retroactive fulfilment of these criteria is not possible, *i.e.* no retroactive affiliation and no payment of arrears possible, one could argue that Article 6 (6) C183 would require Contracting States to provide for adequate benefits out of social assistance funds, provided that respective means tests are met. However, a confirmation for our assumptions does not exist.

Also international monitoring bodies, on some occasions, gave comments which, although not expressly mentioning it, may bear relevance for the social security of nationals who perform undeclared work. The UN Committee on Economic, Social and Cultural Rights, in its General Comment on the right to social security, remarked that the entitlement to employment injury benefits should not be made subject to the length of employment, to the duration of insurance or to the payment of contributions. This reminds us of Article 9 (2) of ILO Convention No. 121. Accordingly also here we can remark that this can be interpreted as prohibiting Contracting Parties from denying employment injury benefits to worker for whom no contributions have been paid.

In the same General Comment, the UN Committee on Economic, Social and Cultural Rights urges State Parties to provide non-contributory old-age benefits, social services and other assistance for all older persons who, when reaching the national pensionable age, have not completed a qualifying period of contributions. The reasons for not having completed a qualifying period of contributions have not been discussed by the Committee. Undeclared work might be one of the reasons. Therefore, State Parties to the Covenant are recommended by the Committee to provide, under Article 9 – the right to social security, cash benefits to persons reaching the retirement age, who, maybe as a consequence of undeclared work, have not accumulated sufficient periods of contributions. I criticised this undifferentiated comment by the Committee in the subchapter concerned.

What is more, the European Committee of Social Rights regularly looks at national entitlement conditions for maternity leave benefits in cash when assessing compliance with Article 8 (1) of the (Revised) European Social Charter – the right of employed women to protection [of maternity]. From this assessment it follows that the Committee basically accepts the existence of national entitlement criteria, such as being insured or having paid contributions – as long as the duration of qualifying periods is reasonable. This tells us that, according to the Committee, undeclared women workers who have not paid contributions, cannot, if national legislation requires the payment of contributions for entitlement to benefits, derive a right to maternity benefits from the (Revised) European Social Charter. So, as opposed to industrial accidents and occupational diseases, where ILO Convention No. 121 and the UN Committee on Economic, Social and Cultural Rights held that that benefit entitlement may not be made subject to the payment of contributions, for maternity benefits we have an international interpretation which allows for making entitlement subject to contribution payment.

We have seen now that legally binding international documents do not make an explicit statement on the social security of undeclared workers. Moreover, on very rare occasions international organisations have referred to this group when providing guidance for the application of international documents dealing, exclusively or in part, with social security. These references, however, did not concern the social security protection of undeclared workers. What is more, we have found some very few legally binding provisions and legally non-binding comments, where *we* interpreted a certain possible relevance for the social security of undeclared workers in certain Contracting States.

However, it would be wrong to conclude from this that there are no international obligations with respect to undeclared workers. Like we did for irregular migrant workers, our approach has been to only consider explicit duties. This entails that all statements which refer, for instance, to human beings, citizens or workers, but where undeclared workers are not expressly addressed, are not considered. As a consequence, we only can conclude that there are no explicit obligations, but not that there are no obligations.

5.3. Comparison

From the previous two subchapters it becomes apparent that there is a significant difference in the attention paid by international law to the social security of irregular migrant workers and that paid to nationals who do not declare their work to the social security authorities. Much attention was given to the rights, or should we better say human rights, of migrants with an irregular migration status. With mixed results: we observed the explicit granting of social security rights, but also to the express denial of them. However, at least there have been numerous statements in the past two decades in this issue. This cannot be said about undeclared workers. The social security protection of undeclared workers – no matter if nationals of the country of employment or not –, with some very few exceptions, has been no issue in international law. But let us have a closer look now on how the social security of these two groups compares under international law.

To begin with the scope *ratione personae* of international legal instruments, we have seen that *nationality* or *irregular immigration status* are decisive criteria. What are the reasons for that? The inclusion into the scope *ratione personae* of people with an irregular migrant status is mainly motivated by the particular vulnerability of this group and by the discouragement of irregular employment through respecting fundamental rights.[502] Concerning their exclusion, we found the argument that States are sovereign to regulate the access to and the work in the country.[503] Not having the nationality of the country of residence or employment is no reason for exclusion from the scope *ratione personae* of the instruments investigated. As we have seen, non-nationals, at least when they have a lawful immigration status, fall within the scope of social security-related provisions of human rights instruments, migrant worker treaties, social security standard instruments, documents on victims of human trafficking and the investigated EC-law. On the other hand, possessing the nationality of the country of residence or employment may well be a ground of exclusion. One can think about migrant worker treaties or EC-law on third-country nationals. The reasons for exclusion are often obvious: some of these instruments simply deal with issues

[502] See in particular the Preamble to the ICMW.
[503] See in particular the *travaux préparatoires* of the RESC.

which have no relevance for citizens of the country of residence or employment, such as EC Directive 2008/115 on returning illegally staying third-country nationals; others intend to give non-nationals in some respects a similar legal status as nationals in the country of residence or employment, such as migrant worker treaties or the EC Directive 2003/109 on long-term residents.

In contrast to nationality and irregular immigration status, *undeclared work* is under none of the investigated instruments a ground for falling within or falling out of the personal scope of application. What may be the reason for that? Maybe undeclared work is not considered as a characteristic which should receive special treatment in international law. Maybe undeclared work is not perceived at all as a characteristic. We do not know it.

Let us come now to the content of the investigated legal instruments. With respect to the social security of nationals who do not declare their work to the competent authorities, although obliged to do so, by and large no explicit obligations under international law could be identified. Different is the situation for irregular migrant workers. Contracting Parties to the UN Migrant Workers Convention, to the ILO Migrant Workers Convention No. 143, to the CoE Convention on Action against Trafficking in Human Beings and Member States of the European Union are under certain obligations with regard to migrants with an irregular migration status. Most of these rights aim at equal treatment with nationals (1):

- equal treatment in social security with nationals of the country of employment, in so far as irregular migrant workers fulfil legal requirements;
- emergency medical care, on the basis of treatment of nationals of the country concerned;
- examination of the possibility of reimbursing social security contributions, on the basis of the treatment of nationals of the country concerned.

One provision requires equal treatment with regular migrant workers (2):

- equal treatment with regular migrant workers in respect of social security rights arising out of past employment.

Finally, two provisions apply to migrants with an irregular status, whatever the treatment of other groups is like (3):

- as far as possible, emergency medical care and essential treatment of illness during periods of voluntary departure or during periods of postponed removal orders;
- emergency medical treatment and a standard of living capable of ensuring the subsistence of victims of human trafficking who do not have sufficient resources.

As to the first set of rights expressly granted to migrant workers with an irregular status of stay or work, we can pose the question with which nationals of the State concerned equal treatment shall be granted. What I want to say is: shall irregular migrant workers be granted the same treatment as nationals who work in the white or national who work in the black economy? The UN Migrant Workers Convention (ICMW) – that is the legal instrument which comprises these three equal treatment clauses – does not specify with which kind of citizens equal treatment shall be provided. Neither do the comments thereto. In most countries irregular migrant workers do not have the possibility to work in the formal economy. That is to say, they cannot declare their work to the social security authorities or they cannot do it without being detected. This means that irregular migrant workers are at the same time undeclared workers. Therefore, their situation seems to be closest to the situation of nationals of the country of employment whose work is also not declared. This could serve as an argument to compare these two groups of workers. Even with respect to the

third equal treatment clause – *i.e.* possible reimbursement of social security contributions the basis of treatment of nationals – nationals not declaring their work and not paying the required social security contributions seem to be the appropriate reference group. In case undeclared work of irregular migrants is discovered and employers pay the contributions in arrears, they are in a similar situation as nationals whose contributions are paid in arrears.

The second category of rights granted to irregular migrant workers concerns the equal treatment with regular migrant workers in respect of social security rights arising out of past employment. The ILO Migrant Workers (Supplementary Provisions) Convention C143 does not further specify with which type of regular migrant workers equal treatment shall be guaranteed. The ILO Committee of Experts made an interesting remark when commenting on this provision in the context of countries which do not link entitlement to social security benefits to a legal immigration status, but to the affiliation to the scheme and the payment of contributions. The Committee recommended that if in such countries regular migrant workers whose work is not declared to the social security authorities have the right, or their employers have the obligation, to regularise their situation by paying contributions retroactively, the same should be possible for irregular migrant workers working in the black economy. Such a comparison is in line with the logic of our comparison: irregular migrant workers mostly perform undeclared work; hence if their situation can be compared to the situation of another group, then it will be other workers who perform undeclared work too – be it regular migrant workers or nationals of the country of employment.

The third set of rights guaranteed to migrants with an irregular migration status does not take account of the treatment of others. This can be partly explained by the peculiarity of these rights. When EC Directive 2008/115 requires, as far as possible, the provision of emergency medical care and essential treatment of illness during periods of voluntary departure or during periods of postponed removal orders, there is no room for applying similar rights to the own nationals. This is because they are not in the situation of being subject to a removal order or being granted voluntary departure in a return procedure. The other rights explicitly granted to migrants with an irregular immigration status concern the provision of emergency medical treatment and a standard of living capable of ensuring the subsistence of victims of human trafficking who are in need. This is also a very particular group. Nevertheless, human trafficking is not limited to the exploitation of irregular migrants. Nationals of the country where exploitation takes place can be also subject to, amongst other things, sexual exploitation, forced labour or the removal of organs. We therefore can ask if similar protection is guaranteed to nationals of the country of exploitation, whose exploitive work is not declared to the social security authorities. Here we can see the respective EU legislation only applies to third-country nationals. Nationals of the country of exploitation are therefore *a priori* excluded. By contrast, the respective UN legislation, where the social protection is however only an optional element, also applies to nationals of the country of exploitation. However, since the offence must be transnational in nature – meaning, for instance, the involvement of organised crime that engages in activities in other countries – the field of application for nationals of the country of exploitation may be limited a little bit. Finally, the CoE legislation on victims of human trafficking applies to nationals of the country of exploitation without requiring a transnational element. Undeclared work is not referred to in these instruments. At least we can conclude that Contracting Parties of the CoE Convention on Action against Trafficking in Human Beings, amongst them Belgium, are under the obligation to provide their own nationals, who have been identified to be victims of human trafficking, emergency medical treatment and a standard of living capable of ensuring the subsistence. It can be assumed that the non-declaration of work does not relieve State Parties of the duty to provide assistance. However,

an explicit confirmation, as it is given for migrants with an irregular migration status, has not been issued.

To sum up, we have seen that no explicit statements have been made in international law as for the social security protection of nationals who do not make the required declaration of their work to the social security authorities; whereas some obligations exist with respect to the social security of irregular migrant workers. A closer look at these obligations however reveals that

- some obligations require equal treatment with nationals – where we advocated for equal treatment with nationals who do not declare their work;
- one obligation requires equal treatment with regular migrant workers – where the monitoring committee advocated in case of undeclared work of irregular migrant workers for equal treatment with regular migrant workers working on the black market;
- one obligation calls for social security protection – but in a situation which is not applicable at all to nationals; and
- one obligation requires social protection – where, although not expressly confirmed, it can be assumed that nationals who engage in undeclared work shall receive the same protection if they are in such a situation.

Our research also looked at general non-discrimination clauses in international law and their possible relevance for comparing the social security of irregular migrant workers and nationals who perform undeclared work. By general non-discrimination clauses we mean non-discrimination provisions which prohibit discrimination in general or with respect to the rights set forth in the respective instruments. The investigated legally binding general non-discrimination clauses have been:

- Article 2 (2) UN International Covenant on Economic, Social and Cultural Rights (ICESCR);
- Articles 2 (1) and 26 UN International Covenant on Civil and Political Rights (ICCPR);
- Preamble and Article E CoE (Revised) European Social Charter ((R)ESC);
- Article 14 CoE European Convention on Human Rights (ECHR) and Article 1 of the 12 AP;
- Article 21 EU Charter of Fundamental Rights (EUCFR).

Most of these clauses have proven to be relevant for social security.[504] However, not all of them are suited for a comparison between the two groups under investigation. This is in particular the case for the (R)ESC and Article 21 (2) EUCFR. Migrants with an irregular status of residence or work are excluded from the personal scope of application of the (R)ESC, including their non-discrimination clauses.[505] And Article 21 (2) EUCFR does most likely not allow for a comparison between EU-nationals and third-country nationals. The other treaties' non-discrimination clauses, by contrast, would allow for such a comparison. Nationality and immigration status, both possible characteristics for different treatment between the two groups under investigation, are no explicit prohibited grounds of discrimination in these investigated legal documents. Nevertheless, the lists of suspect grounds are usually open ones, meaning that also differentiation based on other grounds may lead to prohibited discrimination. Indeed, nationality is regularly being considered as a

[504] Concerning Article 1 of the 12 AP to the ECHR and concerning Article 21 of the EUCFR relevance for social security can be assumed due to their proximity with Article 14 ECHR and Article 18 and 19 TFEU.

[505] Despite this exclusion, the European Committee of Social Rights has in two cases declared Charter rights as being applicable upon migrants with an irregular residence status. In both cases, however, the Charter's non-discrimination clause was not investigated by the Committee.

prohibited ground by the Committee on Economic, Social and Cultural Rights, by the Human Rights Committee and by the European Court of Human Rights. Also the status under immigration laws has been regarded as a reason for discrimination, though less frequently.

We can now ask whether international monitoring bodies have already examined the social security of the two groups under investigation in the light of the general principle of non-discrimination. The answer is no. To date, according to our research, no such comparison has been conducted. Also a non-discrimination assessment under above-mentioned provisions with other reference groups has almost never been carried out. We could not find an equal treatment assessment in social security between irregular migrant workers on the one hand and regular migrant workers or nationals in general on the other hand in the European Court of Human Rights case law on the ECHR. The same goes for the EUCFR. With regard to the ICESCR and the ICCPR, such reliable conclusions are more difficult to draw since their monitoring committees are sometimes rather imprecise in their wording. For instance, the Human Rights Committee advocated for equal treatment of irregular migrant workers in the access of social services without saying with whom equal treatment shall be provided. However once the Committee to the ICESCR forwarded the legally non-binding opinion to France that persons belonging to vulnerable and disadvantaged groups, such as undocumented migrant workers and their family members, shall have access to health care on an equal basis with legal residents in France. Like I said under the relevant subchapter, this comment leaves a lot of questions open. Not least did the Committee fail to conduct an equal treatment assessment, motivating its statement and explaining why it did not see possible reasons for justification for differentiation.

This brings me to my last remark in the context of general non-discrimination provisions: may these provisions in principle allow for an equal treatment assessment in social security between irregular migrant workers and nationals who perform undeclared work? We have seen that with the exception of the (R)ESC the general non-discrimination provisions basically apply to everyone. We have also seen that nationality or immigration status are considered as prohibited grounds of differentiation. What we then need is a comparable situation between these two groups. Thus far no guidance has been issued in this respect by international monitoring bodies. To my mind irregular migrant workers and nationals working in the black economy are not *per se* in a similar situation with regard to social security. It rather would depend on the individual circumstances and on the logic of a given social security law whether a comparable situation can be assumed. Social security laws have their own logic. They may for instance aim to protect the whole resident population or the may aim to protect only the resident population which has a sufficiently strong bond with the country. On this logic, but also on the individual circumstances it would depend whether a comparable situation can be established. Relevant factors for the determination of the individual situation could be for instance

- length of residence in the country of work,
- employment and length of employment in the country of work, and
- declaration of income and work.

If one assumes an analogous situation and different treatment in social security, the next step would be to determine whether such a differentiation may be justified. As this research has illustrated, all these monitoring bodies regard different treatment based on prohibited grounds as not discriminatory if the distinction has an objective and a reasonable justification. At least in theory. In practice we have seen that in particular the monitoring bodies to the ICESCR and the ICCPR do not stick to their own rules and find prohibited discrimination even without the slightest hint of an assessment. Anyway, concerning grounds for justification one could think for instance

about the certain margin of appreciation that Contracting States usually enjoy in the design of their social security systems. One could also think about overruling national interests of preventing irregular residence and irregular work of foreigners.

This brings us to our final considerations, *i.e.* a short comparison of the prevention and elimination of irregular migration/irregular work and undeclared work. Our investigation has illustrated that both is promoted in international law. However, the international legally binding framework for the fight against irregular migration and irregular work is more elaborated. The combat against undeclared work is only marginally codified in international law. Since the late 1990s, the European Union has launched some initiatives in this regard; but they have so far not resulted in hard obligation for its Member States. Interestingly for our work, in the context of the fight against all these phenomena we also can find the requirement to respect the rights of the workers. Concerning undeclared work this is only expressed in general and vague terms in legally non-binding guidelines. In contrast to this, irregular migrant worker rights are safeguarded in an obligatory way. As regards the fight against irregular migration and work, we can find obligations such as the respect for the basic human rights (Article 1 C143), equality of treatment for social security rights arising out of past employment (Article 9 (1) C143), the guarantee that the rights vis-a-vis employers arising from employment shall not be impaired in the fight (Article 68 (2) ICMW), or the provision of emergency health care and essential treatment in the returning of illegally staying migrants (Article 14 (1) EC Directive 2008/115). So, here we come full circle, from the greater attention paid to the social security of irregular migrant workers than of undeclared workers, to the greater attention given to the fight against irregular migration and work – including the issue of safeguarding rights – than to the combat against undeclared work.

TABLE I: Ratification status and reservations

RATIFICATIONS[506]

Universal level

Number of Member States of the United Nations (UN): 192
Number of Member States of the International Labour Organization (ILO): 183

Organisation	Legal instrument	Adoption	Entry into force	Status of ratification	Comment
UN	ICESCR	16/12/1966	03/01/1976	160	BE, CA and NL ratified it.
UN	ICCPR	16/12/1966	23/03/1976	167	BE, CA and NL ratified it.
UN	ICERD	07/03/1966	04/01/1969	174	BE, CA and NL ratified it.
UN	CEDAW	18/12/1979	03/09/1981	186	BE, CA and NL ratified it.
UN	CAT	10/12/1984	26/06/1987	147	BE, CA and NL ratified it.
UN	CRC	20/11/1998	02/09/1990	193	BE, CA and NL ratified it.
UN	CRPD	13/12/2006	03/05/2008	96	BE and CA ratified it. NL and EC signed it, but *did not* ratify it.
UN	ICMW	18/12/1990	01/07/2003	44	Almost only migrant worker sending countries have ratified this Treaty. And except for Albania, Bosnia and Herzegovina and Turkey no European countries ratified it. BE, CA and NL *did not* ratify it.
UN	CTOC	15/11/2000	26/09/2003	158	BE, CA, NL and EC ratified it.
UN	CTOC-P1	15/11/2000	25/12/2003	142	BE, CA, NL and EC ratified it.
ILO	C97	01/07/1949	22/01/1952	49	BE and NL ratified it.
ILO	C143	24/06/1975	09/12/1978	23	BE, CA and NL *did not* ratify it.
ILO	C102	28/06/1952	27/04/1955	46	BE and NL ratified it.
ILO	C121	08/07/1964	28/07/1967	24	BE and NL ratified it.

[506] As throughout the whole thesis, the reference date is 1 December 2010.

ILO	C128	29/06/1967	01/11/1969	16	NL ratified it.
ILO	C130	25/06/1969	27/05/1972	15	NL ratified it.
ILO	C168	21/06/1988	17/10/1991	7	BE, CA and NL *did not* ratify it.
ILO	C183	15/06/2000	07/02/2002	18	NL ratified it.

European level

Number of Member States of the Council of Europe (CoE): 47

Organisation	Legal instrument	Adoption	Entry into force	Status of ratification	Comment
CoE	ESC	18/10/1961	26/02/1965	27	BE and NL ratified it.
CoE	ESC Revised	03/05/1996	01/07/1999	30	BE and NL ratified it.
CoE	ECHR	04/11/1950	03/09/1953	47	BE and NL ratified it.
CoE	ECMW	24/11/1977	01/05/1983	11	NL ratified it. BE signed it, but *did not* ratify it.
CoE	Code	16/04/1964	17/03/1968	21	BE and NL ratified it.
CoE	Code Revised	06/11/1990	-	1	NL ratified it.
CoE	CTHB	16/05/2005	01/02/2008	33	BE and NL ratified it.

RELEVANT RESERVATIONS[507]

Legal instrument	Country	Relevant reservations/declarations/understandings
ICESCR	Belgium	*Declaration*: "With respect to article 2, paragraph 2, the Belgian Government interprets non-discrimination as to national origin as not necessarily implying an obligation on States automatically to guarantee to foreigners the same rights as to their nationals. The term should be understood to refer to the elimination of any arbitrary behaviour but not of differences in treatment based on objective and reasonable considerations, in conformity with the principles prevailing in democratic societies."
CRC	Belgium	*Declaration*: "With regard to article 2, paragraph 1, according to the interpretation of the Belgian Government non-discrimination on grounds of national origin does not necessarily imply the obligation for States automatically to guarantee foreigners the same rights as their nationals.

[507] Reservations are relevant if they concern the social security of the two groups under investigation and when they relate to one of the three investigated countries.

		This concept should be understood as designed to rule out all arbitrary conduct but not differences in treatment based on objective and reasonable considerations, in accordance with the principles prevailing in democratic societies."
CRC	The Netherlands	*Reservation*: "Article 26: The Kingdom of the Netherlands accepts the provisions of article 26 of the Convention with the reservation that these provisions shall not imply an independent entitlement of children to social security, including social insurance."
C102	Belgium	*Obligatory declarations*: "Has accepted Parts II to X." *Additional information*: "Part VI is no longer applicable as a result of the ratification of Convention No. 121."
C102	The Netherlands	*Obligatory declarations*: "Has accepted Parts II to X." *Additional information*: "Part III is no longer applicable as a result of the ratification of Convention No. 130. Part VI is no longer applicable as a result of the ratification of Convention No. 121. As a result of the ratification of Convention No. 128 and pursuant to Article 45 of that Convention certain parts of the present Convention are no longer applicable."
C128	The Netherlands	*Obligatory declarations*: "Has accepted all Parts."
ESC	The Netherlands	*Declaration*: "As regards the Kingdom in Europe, the Kingdom of the Netherlands considers itself bound by Articles 1, 2, 3, 4 and 5; Article 6, paragraphs 1, 2 and 3; Article 6, paragraph 4 (except for government employees); Articles 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and Article 19 [...]."
ESC Revised	Belgium	*Declaration*: "In accordance with Part III, Article A, paragraph 2, of the Charter, Belgium considers itself bound by the following articles of Part II: Article 1 [to] Article 18 [...] Article 19 - The right of migrant workers and their families to protection and assistance (except paragraph 12) Article 20 [to] Article 22 [...] Article 25 [to]Article 26 - The right to dignity at work (except paragraph 2) [...] Article 29 [to] Article 30 [...]."
ESC Revised	The Netherlands	*Reservation*: "The Netherlands will not consider itself bound by Article 19, paragraph 12, of the Charter (revised)."
Code	The Netherlands	*'Provisional' denunciation*: "the Kingdom of the Netherlands denounces Part VI (Employment injury benefit) of the said Code for the Kingdom in Europe." *Communication*: "[...] it has been agreed to proceed to a "provisional" denunciation, as denunciation can only take place after the expiration of every five years from the date on which the Code entered into force."

TABLE II: Overview social security rights in international law[508]

Universal level

Legal instrument	Irregular migrant workers		Nationals who do not declare work	
	legal text	opinion	**legal text**	opinion
UDHR	**-**[509]	no rights	**-**	-
ICESCR	**-**	opinion 1: no rights opinion 2: Article 12 – right to health: obligation to refrain from denying or limiting equal access for all persons, including illegal immigrants, to preventive, curative and palliative health services Article 9 – right to social security: entitlement of all persons, irrespective of their nationality, residency or immigration status, to primary and emergency medical care	**-**	in general, too ambiguous wording to say whether undeclared workers are addressed
ICCPR	**-**	too ambiguous wording to say whether irregular migrant workers are addressed	**-**	too ambiguous wording to say whether undeclared workers are addressed
ICERD	**-**	Article 5 (e) – prohibition of racial discrimination in the field of social security, medical care and medical services: also with respect to migrants with an irregular migration status	**-**	-
CEDAW	**-**	Articles 3, 5 and 12 – non-discrimination against women in	**-**	too ambiguous wording to say whether undeclared

[508] Only *explicitly* granted or denied rights are taken into account.
[509] The hyphen stands for no (further) social security rights explicitly granted or denied.

		social fields: entitlement of abused irregular women migrant workers to social services Article 2 – non-discrimination: satisfaction of basic needs of undocumented women migrant workers in times of pregnancy or maternity		workers are addressed
CAT	**-**	-	**-**	-
CRC	**-**	Article 2 – non-discrimination: provision of health care which goes beyond emergency health services as well as social welfare, social services and disability care for children, irrespective of their or their parents' immigration status	**-**	-
CRPD	**-**	-	**-**	-
ICMW	**Article 27 (1): equality of treatment in social security between migrant workers and family members, including irregular ones, and nationals of the country of employment, in so far as they fulfil requirements provided for by national and international law** **Article 27 (2): consideration of possibility of reimbursement of social security contributions made by irregular migrant workers shall be examined in**	-	**no rights**	-

	cases where the contributions do not allow for benefits and on the basis of treatment with nationals of the country concerned **Article 28: entitlement or irregular migrant workers to emergency medical care, provided that this sort of medical care is also available for nationals of the respective country**			
CTOC-P1	**Article 7 (optional element): consideration of granting medical, psychological and material assistance to victims of human trafficking, irrespective their immigration status**	-	**-**	-
C97	**-**	-	**no rights**	-
C143	**Article 1: respect the basic human rights of all migrant workers** **Article 9: equal treatment between irregular migrant workers and their family members on the one hand and regular migrant workers on the other in respect of rights arising out of past employment as regards social security**	Ad Article 9 with regard to countries which do not link entitlement to social security benefits to a legal immigration status, but to the affiliation to the scheme and the payment of contributions: requirement to treat equally irregular migrant workers who do not declare their work to the social security authorities with regular migrant workers who do not do so	**-**	-
C102	**-**	-	**-**	-
C121	**-**	-	**-**	-
C128	**-**	-	**-**	-
C130	**-**	Article 32 – equal treatment: not applicable to irregular migrant	**-**	-

		workers		
C168	**-**	-	**-**	-
C183	**-**	-	**-**	-

European level

Legal instrument	Irregular migrant workers		Nationals who do not declare work	
	legal text	opinion	**legal text**	opinion
ESC	**no rights**	-	**-**	-
ESC Revised	**no rights**	Article 17 – right of children and young persons to social protection: entitlement of unlawfully present children to a basic health insurance covering more than just medical emergencies Article 31 (2) – the right to housing to prevent and reduce homelessness: entitlement of unlawfully present children to shelter in order to avoid homelessness	**-**	-
ECHR	**-**	**Article 3 – prohibition of inhuman or degrading treatment: unlawfully present foreigners, who are terminally ill, can under very exceptional circumstances derive a right to remain in the host country in order to continue to benefit from medical assistance (legally binding opinion)**	**-**	-
ECMW	**no rights**	-	**no rights**	-
Code	**-**	-	**-**	-
CTHB	**Articles 12 and 13: entitlement to emergency medical care and a standard**	-	**-**	-

	of living capable of ensuring their subsistence to needy victims of trafficking in human beings, irrespective of their immigration status			
EUCFR	**-**	-	**-**	-
Directive 2001/55	**-**	-	**no rights**	-
Directive 2003/109	**no rights (for unlawfully present third-country nationals)**	-	**no rights**	-
Directive 2004/81	**Article 7: entitlement to emergency medical care and a standard of living capable of ensuring their subsistence to needy victims of trafficking in human beings, irrespective of their immigration status**	-	**no rights**	-
Directive 2008/115	**Article 14: unlawfully present third-country nationals should be provided, as far as possible, with emergency health care and essential treatment of illness, during periods for voluntary departure or during periods of postponed removal orders**	-	**no rights**	-
Directive 2009/52	**-**	-	**no rights**	-
Decision 2003/578	**-**	-	**-**	vague statement requires Member States to ensure appropriate protection for the victims of undeclared work

Part II: National social security law

Introduction

Having analysed the international legal framework, we turn to the situation for irregular migrant workers and undeclared national workers in national social security law. Three countries have been selected for investigation and, later on, for law comparison: the European Union countries Belgium and the Netherlands and the non-European country Canada with its province Ontario.

There are two main reasons why these countries have been selected. First, all three countries are affected by irregular labour migration[510] and its consequences for their highly developed social security systems. Preliminary investigations revealed that these countries opted for rather different approaches towards dealing with irregular migrant workers in social security law. In addition, these countries use different techniques in social security law. This combination makes them interesting for us. It should enable us to broaden our understanding of the treatment of irregular migrant workers in national social security law in particular and the functioning of social security law in general. The second main reason for the selection of these countries is the embeddedness of this doctoral research in a broader research programme, the Dutch Cross Border Welfare State programme. It is the intention of this research programme that all comparative parts of the programme should focus on the same countries. This lockstep approach makes it possible to compare the results of the different parts and bring them together in a final synthesis report. The supervisors of the research programme, which is intended to support Dutch and European legislators in making informed choices, eventually decided to select Belgium and the Netherlands as the European countries for comparison. As a non-European country, Canada, and more particularly the province of Ontario due to its high level of immigration,[511] was selected.

The emphasis on the province of Ontario already indicates the structure of our investigation. In Canada, competences in social security are divided between the Federation on the one hand and the provinces and territories on the other hand. Such a division of competence in social security does not exist in the Netherlands. There, the right to enact laws is solely assigned to the Dutch Parliament, and not to the provinces. In Belgium, to a certain extent there is a division of competence in social security between the Federation on the one hand and the Communities and Regions on the other hand. However, those areas of statutory social security that are relevant to our research are established by federal law only. Accordingly, we will conduct an investigation of

[510] According to conservative estimates, there are 100,000 foreigners without immigration status in Belgium. This would amount to almost 1 percent of the total population. See Godfried Engbersen, Masja van Meeteren and Marion van San, *Zonder papieren: Over de positie van irreguliere migranten en de rol van het vreemdelingenbeleid in België* (Leuven: Acco, 2008), p. 10. For Canada, it is estimated that there could be up to 200,000 foreigners without immigration status. This would amount to about 0.6 percent of the total population. See Catherine Dauvergne, *Making people illegal: What globalization means for migration and law* (Cambridge: Cambridge University Press, 2008), p. 13. For the Netherlands, the most reliable estimates put the number of foreigners unlawfully present in the country at between 112,000 and 225,000. This would amount to between 0.7 and 1.4 of the total population. See Godfried Engbersen et al, *Illegale vreemdelingen in Nederland: omvang, overkomst, verblijf en uitzetting* (Rotterdam: Erasmus Universiteit Rotterdam, 2002); and Arjen Leerkes et al, *Wijken voor illegalen: over ruimtelijke spreiding, huisvesting en leefbaarheid* (The Hague: SdU, 2004).

[511] The Toronto region, to be more precise the Toronto Census Metropolitan Area, has the largest proportion of foreign-born residents (46 percent) as a share of total population of all OECD metropolitan regions. See Organisation for Economic Co-operation and Development, *OECD Territorial Reviews: Toronto, Canada* (OECD Publishing, 2010), pp. 39-40.

the laws of Belgium, the Netherlands and the Canadian Federation as well as the Canadian province of Ontario.

What is more, Belgium and the Netherlands are part of the European Union. European Union law will therefore be taken into consideration in the national investigations wherever necessary. It is important to mention that with respect to Belgium and the Netherlands, only the situation of irregular migrant workers who are third-country nationals will be investigated. This is because citizens of Member States of the European Union usually do have the right to take up employment in another European Union Member State and reside lawfully there. We will not deal with exceptional situations where there is no such right, in particular in the context of transitional periods for the free movement of workers from newly acceded Member States.

The analysis of the position of irregular migrant workers and undeclared national workers in national social security law provides the basis for a law comparison, to be conducted in Part III. Great care therefore needs to be taken with respect to the investigated legal arrangements. In order to ensure comparability, legal arrangements which fulfil a certain function will be investigated. This means legal arrangements which provide mandatory protection in event of the realisation of a recognised social risk. As recognised social risks, we have indentified in the introduction to this doctoral thesis the risks of old age, death, incapacity for work, unemployment, health care, family, and need.[512]

As a means of approaching these legal arrangements, we consider the position of an irregular migrant worker and of an undeclared national worker who is confronted with the occurrence of a social risk – to be more precise, the position of a worker who resides and works in Belgium, in Ontario and in the Netherlands. This means that the situation of a worker who works in one of these jurisdictions but resides somewhere else will not be investigated. Assuming that a given social risk occurs, we are interested in the protection the law offers. We will also investigate whether there are obligations to pay contributions associated with the relevant protection scheme.

Some legal arrangements will be excluded from our investigation, however. In the first instance, these include schemes which provide social security protection only for particular groups of workers. The best-known examples are special social security regimes for seamen, mineworkers, steelworkers, fishermen or farmers. In other words we do not investigate the social security of irregular migrant workers and undeclared national workers who are employed in these particular occupations. This allows us to focus on the general social security laws, covering the majority of workers, and not get lost in all the details of a country's social security laws. In addition, social security schemes which top up benefits under other investigated social security schemes have been shown to have little relevance for our research, since entitlement to such top-up-benefits is linked to entitlement to the basic benefit. Therefore these schemes will be excluded too. Nor are social security schemes for self-employed persons and for public-sector workers covered by this investigation, since work has been defined in the introduction to this thesis as "paid physical or mental activity for an employer", excluding work for the government.

It is also important to mention that the focus is on the social security of female or male irregular migrant workers and undeclared national workers. This does not prevent us from analysing, where

[512] For more information on these risks see Danny Pieters, *Social Security: An introduction to the basic principles*, 2. ed. (Alphen aan den Rijn: Kluwer Law International, 2006).

appropriate, the situation for the rest of the family, in particular the situation of children of irregular migrant workers and undeclared national workers. However, we do not investigate the particular situation of children who are themselves irregular migrant workers or undeclared national workers. I am talking here about persons who have not attained maturity or the age of legal majority. As a consequence, the situation of unaccompanied minors who reside unlawfully and take up employment in the destination country will not be investigated.

The research will be performed on the basis of the original legislative and accessible administrative instruments on different levels (federal and federated State level), administrative decisions and case law (again on both federal and federated State level) and legal literature mainly originating from the country described. It goes without saying that in the use of these primary sources, a balance will be maintained between the countries under comparison. The legal materials used for our research need to be up to date. Outdated legislation and regulations or overruled case law will only be taken into account if it is necessary or useful to explain the current legal situation. As set out in the Preface and Acknowledgements to this thesis, the reference date for the law will be 1 December 2010.

To facilitate the law comparison in Part III, the three country investigations in Part II will follow a uniform pattern. First we will give a concise introduction to the national social security system, discussing amongst other things the constitutional framework and the relevant social security legislation. Next, we will translate our basic concepts into the national context. To be more precise, we will examine what irregular presence, irregular work and undeclared work mean in the investigated country. Thereafter, where appropriate, we will analyse whether the two groups under investigation fall within the scope *ratione personae* of the relevant legal arrangements and whether they or their employers are under an obligation to pay contributions under the relevant legal arrangements. Such an investigation at this stage will only be conducted where social security arrangements by and large share the same personal scope of application and the same financial obligations. This will enable us to avoid unnecessary repetition. Where there is no common personal scope of obligations and where there are no common financial obligations, these issues will be examined later on in the risk-by-risk assessment. As a next step, the administration of the relevant social security legislation will be analysed. This is because preliminary investigations revealed that this area is relevant to the social security position of irregular migrant workers. Thereafter, social risk by social risk, the legal position of irregular migrant workers and undeclared national workers will be analysed. Finally, the legal position of the two groups of workers under investigation will be compared with each other.

Part IIa: Belgium

1. Social security in Belgium

This Part examines social security for irregular migrant workers and for nationals who perform undeclared work in Belgium. In doing so, we consider the situation of irregular migrant workers and undeclared Belgian workers who stay and work in Belgium and investigate their rights and duties under national social security legislation. However, since Belgium is part of the European Union, relevant supranational legislation will also be taken into consideration.

Belgium is divided into three Communities, *i.e.* the Flemish Community, the French Community and the German-speaking Community, as well as into three Regions, *i.e.* the Flemish Region, the Walloon Region and the Brussels-Capital Region.

The Constitution of Belgium is the supreme law of the country.[513] Since 1994, fundamental social rights have been part of the Constitution. These rights are expressed in Article 23 under Title II. It reads:

> "Everyone has the right to lead a life in conformity with human dignity.
>
> To this end, the laws, decrees and rulings alluded to in Article 134 guarantee, taking into account corresponding obligations, economic, social and cultural rights, and determine the conditions for exercising them.
>
> These rights include notably:
> 1. the right to employment and to the free choice of a professional activity in the framework of a general employment policy, aimed among others at ensuring a level of employment that is as stable and high as possible, the right to fair terms of employment and to fair remuneration, as well as the right to information, consultation and collective negotiation;
> 2. the right to social security, to health care and to social, medical and legal aid;
> 3. the right to have decent accommodation;
> 4. the right to enjoy the protection of a healthy environment;
> 5. the right to enjoy cultural and social fulfilment."[514]

According to the preparatory materials,[515] but also to the wording of Article 23 itself, this provision does not have direct effect. That is to say, that an individual cannot exercise these rights solely because of its proclamation in the Constitution.[516] It is up to the legislators to further specify these rights.[517] This has been confirmed by the Administrative Litigation Section of the Council of State (*Raad van State*).[518,519,520] The Constitutional Court of Belgium (*Grondwettelijk Hof*)[521] has

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[513] De gecoördineerde Grondwet van het federale België, B.S. 17 February 1994.
[514] Official English translation of the Legal Department of the Belgian House of Representatives. See http://www.fed-parl.be/constitution_uk.html.
[515] Parlementaire stukken: Senaat, B.Z. 1991-92, no. 100-2/3°, p. 4, pp. 9-11 and no. 100-2/4°, p. 6, pp. 13-14.
[516] See in particular Parlementaire stukken: Senaat, B.Z. 1991-92, no. 100-2/3°, p. 11.
[517] *Ibid*., p. 4.
[518] In the parts of this thesis dealing with individual countries, I will, wherever this benefits the precision of the country comparison, refer to documents, institutions and so on in the original, official language. In this Part on Belgium, I will primarily refer to the Dutch version of names and titles, even when there is more than one original language. French and German will be used in two situations only: first, when documents are only available in French or German and, second, when it contributes to clarity.
[519] The Council of State is both the supreme administrative court of Belgium and a legal advisor to the Belgian government.

also held that the right to social security, the right to health care and the right to social aid under Article 23 are formulated as principles, and that it is thus up to the legislators to determine their substance.[522] In doing so, the legislators have, according to the Court, a wide margin of judgment. Only if legal provisions were the result of an obviously unreasonable judgment (*'kennelijk onredelijk oordeel'*) would the Constitutional Court declare them to be in conflict with Article 23 and hence unconstitutional.[523] What is more, Article 23 of the Belgian Constitution is regarded as containing a standstill obligation. While the Article itself is silent on this issue, the preparatory materials to Article 23 expressly assume such an obligation.[524] The Constitutional Court has thus far accepted the standstill effect only with respect to the right to social aid and the right to enjoy the protection of a healthy environment.[525] Moreover, the Constitutional Court as well as the Administrative Litigation Section and the Legislation Section of the Council of State have held that the standstill obligation is not absolute, *i.e.* a change for the worse may be justified.[526]

It is worth mentioning that according to the wording of Article 23 of the Constitution, *everyone* has the right to lead a life in conformity with human dignity, including the right to social security, to health care, to social aid and to medical aid. According to the preparatory materials, the use of the word 'everyone' expresses, in principle, that these rights are inherent to human nature and are thus applicable to each and every person, irrespective of his or her nationality.[527] However, the drafters agreed that the exact scope of the term 'everyone' has to be determined by the relevant legislators or courts and by legal science.[528] Possibly, the drafters argued, the meaning of the term has to be examined for each of the rights under Article 23 individually.[529] The Constitutional Court basically applies Article 23 to everyone within Belgian territory,[530] including migrants with an irregular migration status. However, against the background of the Constitution's non-discrimination principles (Articles 10 and 11 in conjunction with Article 191) and Article 23, the

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[520] See, for instance, Raad van State, no. 54.196, *Beerts,* 03 July 1995, p. 30; no. 100.514, *Verduyn*, 31 October 2001, p. 5; or no. 186.447, *n.v. Brutel*, 23 September 2008, p. 26.

[521] The Constitutional Court is entrusted with overseeing the compliance of legislation with the Constitution. It is the only Belgian institution with this role. Between 1970 and 2007, the Constitutional Court was known as the Court of Arbitration (*Arbitragehof*).

[522] See Marc Bossuyt, "Artikel 23 van de Grondwet in de rechtspraak van het Grondwettelijk Hof" (paper presented at the studiedag Sociaal-economische grondrechten, art.23 van de Grondwet: een stand van zaken na twee decennia/ journée d'étude Droits fondamentaux socio-économiques, art.23 de la Constitution: état des lieux après deux décennies, Brussels, 19 December 2008), p. 2.

[523] For this test see, for instance, Grondwettelijk Hof, no. 66/2007, 26 April 2007, B.S. 13 June 2007 (no violation) or no. 99/2008, 03 July 2008, B.S. 10 September 2008 (no violation).

[524] Parlementaire stukken: Senaat, B.Z. 1991-92, no. 100-2/3°, p. 13 and no. 100-2/4°, pp. 85-86.

[525] See Bossuyt, "Artikel 23," p. 4.

[526] See André Alen and Koen Muylle, *Compendium van het Belgisch Staatsrecht*, Part I, 2. ed. (Mechelen: Kluwer, 2008), p. 38; Bossuyt, "Artikel 23," pp. 3-5; or Brecht Steen, "De rechtspraak van de Raad van State" (paper presented at the studiedag Sociaal-economische grondrechten, art.23 van de Grondwet: een stand van zaken na twee decennia/ journée d'étude Droits fondamentaux socio-économiques, art.23 de la Constitution: état des lieux après deux décennies, Brussels, 19 December 2008), pp. 3-6.

[527] Parlementaire stukken: Senaat, B.Z. 1991-92, no. 100-2/3°, p. 14.

[528] Parlementaire stukken: Senaat, B.Z. 1991-92, no. 100-2/4°, p. 37.

[529] *Ibid*.

[530] Gunter Maes, *De afdwingbaarheid van sociale grondrechten* (Antwerp/Groningen/Oxford: Intersentia, 2003), pp. 411-12.

Court accepts that social security for migrants unlawfully present on Belgian soil differs from social security for Belgians and other categories of foreigners.[531]

It is also interesting to mention in the context of our research that Article 23 requires the competent legislators to guarantee social rights 'taking into account corresponding obligations'. Commentators regard this as a reference to the responsibility and obligation for everyone to contribute to the realisation of social rights.[532] The Constitutional Court held in the Flemish Housing Code case that the phrase 'corresponding obligations' entitles legislators to impose obligations on individuals in order to gain access to social rights.[533] However, in order to comply with Article 23 of the Constitution, the imposition of obligations must be related to the general objective of Article 23, *i.e.* to guarantee a life in conformity with human dignity for everyone, and must not be disproportional. For us it would be interesting to know whether Article 23 also implies an obligation to provide social security if work has not been properly declared to the social security authorities and, consequently, the required statutory social security contributions have not been paid. Or, in turn, whether the phrase 'taking into account corresponding obligations' makes it possible in such cases to deny social security protection. Up to now, there have been no court decisions and no other comments on these questions.

We have already mentioned the Constitution's equal treatment (Article 10) and non-discrimination (Article 11) principles. In view of Article 191, these principles are also applicable to foreigners.[534] In contrast to Article 23, the equal treatment principle[535] has direct effect, meaning that this right can be exercised by individuals solely because of its proclamation in the Constitution. As is the case for Article 23, the Constitutional Court is empowered to judge the compatibility of legal provisions with the constitutional equal treatment clause. As we will see in this Part of our thesis, there have been a number of judgments of the Constitutional Court which have helped define the social security position of irregular migrants.

Statutory social security, by and large, falls under the competence of the federal government. In some areas, such as employment policy, vocational training, health and care policy, housing and welfare, the Constitution and laws based on the Constitution confer powers to the Communities or Regions, but statutory social security for the purposes of our research is established by federal law.

Belgian statutory social security can basically be divided into social insurance and social assistance schemes. Social insurance is organised on the basis of professional groups. There are three social insurance schemes: one for employees, one for the self-employed and one for public-

[531] See Arbitragehof, no. 131/2001, 30 October 2001, B.S. 22 December 2001; Arbitragehof, no. 14/2002, 17 January 2002, B.S. 20 March 2002; Arbitragehof, no. 16/2002, 17 January 2002, B.S. 20 March 2002; and Arbitragehof, no. 203/2004, 21 December 2004, B.S. 25 February 2005.
[532] Bossuyt, "Artikel 23," pp. 5-6; or Maes, *afdwingbaarheid van sociale grondrechten*, p. 421.
[533] In the original language the relevant sentence reads: " *[...] kunnen dus verplichtingen worden opgelegd om toegang te verkrijgen tot [sociale] rechten*." See Grondwettelijk Hof, no. 101/2008, 10 July 2008, B.S. 6 August 2008, § B.33.2.
[534] See André Alen, *Handboek van het Belgisch staatsrecht* (Deurne: Kluwer, 1995), pp. 725-26; or Didier Batselé, Tony Mortier and Martine Scarcez, *Grondwettelijk recht gevat* (Brussels: Bruylant, 2009), pp. 71, 92.
[535] In this Part, as elsewhere in this research, the notions of equal treatment and non-discrimination will be used interchangeably.

sector workers.[536] In addition, under the general scheme for employees, there is a special scheme for miners and another for seamen. We are only interested in the general social insurance scheme for employees. The other schemes will therefore not be taken into consideration.

The general social insurance scheme for employees comprises the following schemes:

- the retirement and survivor's pension scheme (Pension Act, *Pensioenwet Werknemers*);[537]
- sickness and invalidity insurance (Sickness Insurance Act, *Ziekteverzekeringswet*);[538]
- labour accident insurance (Labour Accident Act, *Arbeidsongevallenwet*);[539]
- occupational diseases insurance (Occupational Diseases Act, *Beroepsziektenwet*);[540]
- unemployment insurance (Unemployment Decree, *Werkloosheidsbesluit*);[541]
- the Family Allowance scheme (Family Allowance Act, *Kinderbijslagwet Werknemers*).[542]

As well as social insurance, there is social assistance. The federal social assistance schemes can be grouped as follows:

- Minimum Income Schemes (*Minimumvoorzieningen*):
    - Social Integration (Act on Social Integration, *Wet Maatschappelijke integratie*);[543]
    - The Guaranteed Family Allowance (Guaranteed Family Allowance Act, *Wet gewaarborgde gezinsbijslag*);[544]
    - The Minimum Income for the Elderly (Act on the Minimum Income for the Elderly, *Wet inkomensgarantie voor ouderen*);[545] and
    - The Disabled Person's Allowance (Act on the Disabled Person's Allowance, *Wet tegemoetkomingen gehandicapten*);[546]
- Social Welfare Services (Public Centres for Social Welfare Act (OCMW Act), *OCMW-Wet, Maatschappelijke dienstverlening*).[547]

Moreover, there is a special scheme for assistance to be provided to asylum-seekers (Act on the Reception of Asylum-Seekers, *Wet Opvang Asielzoekers*).[548]

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[536] For the sake of completeness we should mention that in fact there is not one scheme for public-sector workers, but that there are different schemes for different groups of public-sector workers, such as federal public-sector workers, municipal public-sector workers, members of the armed forces etc.

[537] Koninklijk besluit nr 50 van 24 oktober 1967 betreffende het rust- en overlevingspensioen voor werknemers, B.S. 27 October 1967.

[538] Wet betreffende de verplichte verzekering voor geneeskundige verzorging en uitkeringen gecoördineerd op 14 juli 1994, B.S. 27 August 1994.

[539] Arbeidsongevallenwet van 10 april 1971, B.S. 24 April 1971.

[540] Wetten betreffende de preventie van beroepsziekten en de vergoeding van de schade die uit die ziekten voortvloeit, gecoördineerd op 3 juni 1970, B.S. 27 August 1970, erratum B.S. 18 September 1970.

[541] Koninklijk besluit van 25 november 1991 houdende de werkloosheidsreglementering, B.S. 31 December 1991, erratum B.S. 13 March 1992.

[542] Samengeordende wetten betreffende de kinderbijslag voor loonarbeiders, 19 december 1939, B.S. 22 December 1939 (Koninklijk besluit van 19 december 1939 tot samenvatting van de wet van 04 augustus 1930 betreffende de kindertoeslagen voor loonarbeiders en de koninklijke besluiten krachtens een latere wetgevende delegatie genomen, B.S. 22 December 1939).

[543] Wet van 26 mei 2002 betreffende het recht op maatschappelijke integratie, B.S. 31 July 2002.

[544] Wet van 20 juli 1971 tot instelling van gewaarborgde gezinsbijslag, B.S. 7 August 1971.

[545] Wet van 22 maart 2001 tot instelling van een inkomensgarantie voor ouderen, B.S. 29 March 2001.

[546] Wet van 27 februari 1987 betreffende de tegemoetkomingen aan personen met een handicap, B.S. 1 April 1987, erratum 6 August 1987.

[547] Organieke wet van 8 juli 1976 betreffende de openbare centra voor maatschappelijk welzijn, B.S. 5 August 1976, erratum 26 November 1976.

[548] Wet van 12 januari 2007 betreffende de opvang van asielzoekers en van bepaalde andere categorieën van vreemdelingen, B.S. 7 May 2007, erratum B.S. 7 June 2007.

2. Irregular migrant workers in Belgium

2.1. Unlawful stay

2.1.1. Right to remain in Belgium

Entry into Belgium and presence and settlement in Belgium are matters of federal competence.[549] The Federation has exercised its competence through a number of laws (*wetten*), royal decrees (*koninklijke besluiten*), circular letters (*omzendbrieven*), notices (*berichten*) and the like. The basic legislation can be regarded as comprising

- the Aliens Act (*Wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen*),[550]
- the Royal Decree concerning Aliens (*Koninklijk Besluit van 08 oktober 1981 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen*).[551,552]

The right to remain in Belgium is granted to the following categories of person:

1) Belgian citizens (not explicitly regulated in Belgian national law, but can be derived from Article 3 of the Fourth Additional Protocol to the European Convention on Human Rights and Article 12 (4) of the International Covenant on Civil and Political Rights).[553]

General rules:
2) aliens who are granted a short stay (*kort verblijf, court séjour*),[554] (Title I, Chapter II Aliens Act);
3) aliens who are granted a stay of more than three months (*verblijf van meer dan drie maanden, séjour de plus de trois mois*), (Title I, Chapter III Aliens Act);
4) aliens who have the right to settlement (*vestiging, établissement*), (Title I, Chapter IV Aliens Act).

Specific rules for particular categories:
5) citizens of a European Union (EU) Member State, of a State of the European Economic Area (EEA) or of Switzerland and family members of an EU, EEA or Swiss citizen as well as family members of a Belgian citizen (Title II, Chapter I Aliens Act and Title II, Chapter I*bis* and Chapter I*ter* Royal Decree concerning Aliens);
6) refugees and individuals who qualify for subsidiary protection (Title II, Chapter II Aliens Act);

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[549] Since the field of immigration is not explicitly assigned to one of the Belgian entities, it is assumed to be a residual competence of the federal government. See Commissie van advies over persoonsgebonden aangelegenheden, Parlementaire stukken: Vlaams Parlement, 1984-85, no. 312/1, p. 21, no. 66. See also Alen, *Handboek*, p. 341; and Jan Clement and Mieke Van De Putte, "De bevoegdheidsverdeling inzake vreemdelingen en allochtonen," in *Burgerschap, inburgering, migratie*, Staatsrechtsconferentie 2006 van de Vlaamse Juristenvereniging, ed. Frank Judo and Godfried Geudens (Brussels/Ghent: Larcier, 2007), p. 34.
[550] B.S. 31 December 1980.
[551] B.S. 27 October 1981, erratum B.S. 28 October 1981.
[552] Monitoring of compliance with these laws is carried out by a number of authorities, including the police and the Immigration Service. See § 81 Aliens Act.
[553] See Alen, *Handboek*, p. 483.
[554] For the sake of clarity, I also provide the French translation here.

7) foreigners who enjoy temporary protection on the basis of EU Directive 2001/55 on the mass influx of displaced persons (Title II, Chapter II*bis* Aliens Act);
8) students (Title II, Chapter III Aliens Act);
9) victims of human trafficking and human smuggling (Title II, Chapter IV Aliens Act);
10) long-term residents in another EU Member State (Title II, Chapter V Aliens Act);
11) researchers (Title II, Chapter VI Aliens Act).

The Aliens Act clearly distinguishes between general rules and specific rules for particular categories of foreigners. The first set of rules is applicable to every foreigner, except for those who fall within the scope of the specific rules.

Regarding (1) above, Belgian citizenship is either acquired *ex lege* (grant, *toekenning*) or as the result of an explicit expression of intent by the person concerned (acquisition, *verkrijging*).[555] *Ex lege* grant of citizenship is only possible for minors under guardianship. In this respect, Belgium operates under both the *ius sanguinis* and the *ius soli* principle. That is to say, on the one hand Belgian citizenship is granted to children born to a Belgian citizen – either in Belgium or abroad;[556] on the other hand citizenship is granted to children born in Belgium if the child would otherwise be stateless,[557] or if one foreign parent was also born in Belgium and has had his/her principal residence (*hoofdverblijf*) in Belgium for a certain period of time (third-generation foreigners).[558] For the second way of becoming a Belgian citizen, *i.e.* acquisition, three procedures are possible: acquisition by declaration (*nationaliteitsverklaring*), acquisition by option (*nationaliteitskeuze*) or naturalisation.[559]

Regarding (2), a short stay in Belgium, or in any other Schengen country, may be granted for a number of reasons, such as tourism, family visit, business trip or medical treatment. Amongst the requirements are that the foreigner should have sufficient means for the stay and the journey. A short stay must in no case exceed an aggregated period of three months over a period of six consecutive months.

Regarding (3), foreigners who wish to stay for longer than just a short stay in Belgium and who neither fall into one of the specific categories of Title II Aliens Act, nor have the right to settlement under Title I, Chapter IV Aliens Act, must get an authorisation under Title I, Chapter III Aliens Act. A distinction must be made between two categories of foreigners: those whose permission to stay in Belgium for more than three months must be granted by the competent authorities and those whose right to stay arises *ex lege*. The first category relates, for instance, to foreigners who wish to come to Belgium for work, to foreigners who are already in Belgium

[555] See § 1 Code of Belgian Nationality (Wetboek van de Belgische nationaliteit van 28 juni 1984), B.S. 12 July 1984.
[556] § 8 Code of Belgian Nationality.
[557] § 10 (1) Code of Belgian Nationality. Pursuant to § 10 (2), § 10 (1) is not applicable if the child can obtain another nationality, provided that his/her parents start an administrative procedure at the diplomatic mission of the country of one of the child's parents. With this provision, introduced in December 2006, Belgium wanted to avoid alleged abuses of the possibility of obtaining citizenship through statelessness. Specifically, unlawfully present parents were opting not to contact their diplomatic representations and thus enabling their child to obtain Belgian citizenship through statelessness. These parents would then seek to obtain a legal residence status due to their child's citizenship. See *Nieuwsbrief Vreemdelingenrecht*, no. 22 (2006). Available at: http://www.vmc.be/vreemdelingenrecht/detail.aspx?id=3707
[558] § 11 Code of Belgian Nationality. For the sake of completeness it should be mentioned that adopted children may also be granted the Belgian nationality.
[559] See Chapter III (Hoofdstuk III) of the Code of Belgian Nationality.

without any legal status and who want to have their residence status regularised, as happened during the 1999[560] and 2009[561] regularisation campaigns, or to foreigners who, regardless of their legal status in Belgium, are suffering from a serious, long-term illness for which no adequate treatment is available in their country of origin (section 9*ter* Aliens Act). Aliens falling into the second category, *i.e.* an *ex lege* right to stay in Belgium, include those who fulfil the legal requirements for acquisition of Belgian citizenship by declaration or by option, those who want to be reunited with their family, and those who can derive a right to stay from international law, such as bilateral treaties. Authorisations for a stay of more than three months in Belgium may be granted for a definite or for an indefinite period of time. This is true for both of the above-mentioned categories.

Some categories of foreigners are allowed to apply for an authorisation to stay for more than three months from within the country without being lawfully present. This possibility relates, as we have seen, to foreigners who apply for regularisation (outdated subsection 9 (3) Aliens Act, Regularisation Act 1999 or current section 9*bis* Aliens Act), as well as to those who apply for a stay on medical reasons (section 9*ter* Aliens Act) – a procedure known as 'regularisation on medical grounds'. The question is, what is their residence status during the application procedure? Concerning regularisation this question will be addressed below. Regarding the application for a stay on medical reasons, two phases have to be distinguished. Before the application is initially declared to be admissible, there is no change to the applicant's residence status. Thus unlawfully present aliens continue to be unlawfully in the country. Once the application has been declared admissible, the municipality of residence registers the foreigner in the Aliens Register (*Vreemdelingenregister*) and issues a Certificate of Registration (*Attest van immatriculatie*). As soon as a positive decision on the merits of the application has been taken, the foreigner is granted a stay of more than three months in Belgium. His or her inclusion in the Aliens Register is then confirmed by the issuance of a Certificate of Entry (*Bewijs van inschrijving*).

Regarding (4), after being authorised to stay in Belgium for an indefinite time, and only then, a person may gain the right to settlement. The main difference between the right to stay for an indefinite time and the right to settlement is that the latter is a more stable right. A holder of the right to settlement can be expelled only under very exceptional conditions by Royal Decree. The authorisation to settlement is given on application to foreigners who have lived in Belgium regularly and continuously for five years, to foreigners who are the family members of foreigners with the right to settlement and, in implementation of EC Council Directive 2003/109,[562] to long-term residents.

Regarding (5), with the special provisions on EU, EEA and Swiss citizens and their family members, international law has been incorporated into Belgian legislation on aliens. In addition, with the introduction of section 40*ter* Aliens Act, family members of Belgian citizens have been granted the same status as the above-mentioned family members. Citizens of the EU Member States Bulgaria and Romania who come to Belgium for paid work, and their family members, do

[560] See Regularisation Act (Wet van 22 december 1999 betreffende de regularisatie van het verblijf van bepaalde categorieën van vreemdelingen verblijvend op het grondgebied van het Rijk), B.S. 10 January 2000.
[561] See § 9*bis* Aliens Act. See also Instruction of 19 July 2009 (Instructie van 19 juli 2009 met betrekking tot de toepassing van het oude artikel 9,3 en het artikel 9*bis* van de vreemdelingenwet).
[562] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 016, 23 January 2004, pp. 44-53.

not fall under the specific rules of Title II, Chapter I Aliens Act, but continue, at least until 1 January 2012,[563] to be subject to the general rules for staying in Belgium.[564]

Regarding (6), refugees, as defined under the Geneva Convention, are given the right to stay in Belgium for an indefinite period of time. Those who do not qualify as refugees may be granted subsidiary protection, as defined under EC legislation. Subsidiary protection is awarded to aliens in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm and where the person concerned is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country. Persons enjoying subsidiary protection have the right to stay in Belgium for a definite period of time. Their authorisation to stay will only be changed to apply for an indefinite period after five years.

Regarding (7), Title II, Chapter II*bis* Aliens Act implements EC Council Directive 2001/55. It provides for temporary protection for third-country nationals in the event of a recognised mass influx to Member States of the EU. Such displaced persons have, amongst other rights, the permission to stay in Belgium for a maximum of three years.

Regarding (8), foreigners who apply for an authorisation to stay in Belgium for more than three months for the purpose of higher education studies must be granted such an authorisation upon the fulfilment of certain conditions, including the provision of evidence of sufficient means and a letter of acceptance from an establishment of higher education.

Regarding (9), victims of human trafficking and human smuggling – as defined under section 433*quinquies* and section 77*bis* (under the circumstances of section 77*quater* 1° to 5°) of the Belgian Criminal Code – may, if necessary, receive an authorisation to stay in Belgium. To this end, it is required that the victims cooperate with the competent authorities in the judicial inquires, break ties with the perpetrators and accept the protection services of specialised centres.[565] Victims are initially given the time to come to a decision as to whether they want to cooperate with the competent authorities. For this purpose, they are issued with an order to leave the country within forty-five days. If, within these forty-five days, victims decide to cooperate, *i.e.* to make a statement or to file a charge, they are granted the right to stay in Belgium for three months. In the event of their subsequent successful cooperation, victims of human trafficking may be given authorisation to stay for more than three months – for a definite or, finally, for an indefinite period of time.[566]

Regarding (10), Title II, Chapter V Aliens Act implements EC Council Directive 2003/109. Third-country nationals who have acquired long-term residence status on the basis of EC Council

[563] See § 1 Royal Decree of 24 December 2008 amending the Royal Decree concerning Aliens (Koninklijk besluit van 24 december 2008 tot wijziging van het koninklijk besluit van 8 oktober 1981 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen), B.S. 31 December 2008.
[564] See Title II Chapter I*quater* Royal Decree concerning Aliens.
[565] See also Circular Letter of 26 September 2008 (Omzendbrief van 26 september 2008 inzake de invoering van een multidisciplinaire samenwerking met betrekking tot de slachtoffers van mensenhandel en/of van bepaalde zwaardere vormen van mensensmokkel), B.S. 31 October 2008.
[566] For unaccompanied minor victims of human trafficking, more favourable conditions apply with respect to the authorisation to stay in Belgium.

Directive 2003/109 in another EU Member State,[567] must, upon application, be granted a stay of more than three months in Belgium. However, certain conditions still have to be fulfilled for such a residence authorisation, including the possession of a stable and regular income.

Regarding (11), Title II, Chapter VI Aliens Act implements EC Council Directive 2005/71. Third-country nationals working as researchers, as defined under EC Council Directive 2005/71, and carrying out a research project on the basis of a hosting agreement signed with a research organisation, must, upon application, be granted a stay of more than three months in Belgium.

In addition, there may be situations where foreigners have no lawful residence status in Belgium, but are nevertheless not deported. This is the case, for instance, with foreigners who have applied for regularisation of their status and whose application has not yet been decided. Basically, an application for regularisation could be based on the outdated subsection 9 (3) Aliens Act, the Regularisation Act 1999, the current section 9*ter* or the current section 9*bis* Aliens Act (directly or via the 2009 regularisation campaign). Under none of these regularisation procedures does the filing of an application have a bearing on the legal status of the applicant. Thus applicants who are unlawfully present in Belgium before applying for regularisation continue to be unlawfully present until a positive decision is taken.[568] Nevertheless, it is clear that unlawfully present applicants who have applied for regularisation are, in a way, tolerated on Belgian territory.[569]

Stateless persons can be another example of tolerated foreigners. Even if they are officially recognised as such by Belgian courts, they do not necessarily have a regular immigration status. Pursuant to section 98 of the Royal Decree concerning Aliens, stateless persons and their family member are subject to the general provisions concerning their presence in Belgium. They do not form a specific category under Belgian immigration law. However, in the light of their statelessness, deportation is often not possible for legal and practical reasons.[570] Recognised stateless persons without immigration status can apply for regularisation on the ground of the impossibility of returning, based on section 9*bis* Alien Act.

A further example of an in-between status is foreigners who are temporarily unable to leave Belgium and are granted a postponement of departure (*uitstel van vertrek*). Both foreigners with a lawful residence status and foreigners unlawfully present, *i.e.* subject to an order to leave the country (*bevel om het grondgebied te verlaten*), may apply for a postponement. Such a postponement may be approved for, in principle, a maximum of three months on a number of

[567] The EU Member States Denmark, Ireland and United Kingdom are not bound by EC Directive 2003/109.

[568] Regularisation does not only refer to foreigners without legal status who are granted a lawful residence status in Belgium. Foreigners who are already lawfully resident in Belgium, such as foreigners who have been in an asylum procedure for an unreasonably long period of time, can also be regularised.

[569] For the 1999 regularisation campaign: § 14 of the Regularisation Act of 1999 prohibits deportation between the filing of the application and a negative decision due to an incomplete dossier. In addition, § IV of the Circular Letter of 6 January 2000 stipulates that foreigners who are not subject to a deportation order at the moment when they file the application for regularisation can basically only be subject to such an order from the moment that their application for regularisation is denied. For § 9*bis* and § 9*ter* Aliens Act, as well as the outdated § 9 (3) Aliens Act, see the internal note of 13 December 2007 of the Immigration Service (Dienstnota van 13 december 2007 van de Algemene Directie van de Dienst Vreemdelingenzaken, FOD Binnenlandse Zaken). For the outdated § 9 (3) Aliens Act see also Raad voor Vreemdelingenbetwistingen, no. 14.727, 31 July 2008

[570] See for instance Raad van State, no. 75.896, *xxx*, 23 September 1998. For a decision to the contrary see Hof van Cassatie, 31 May 2010, *JTT* 2010, p. 337.

grounds, such as short illness, pregnancy, marriage or, from the Easter holidays onwards, the completion of the school year.[571]

2.1.2. Routes into unlawful residence

Essentially, there are three ways of ending up residing unlawfully in Belgium: by birth, by illegal entry, and by losing a legal status.

Birthright citizenship in Belgium is granted to children born to a Belgian citizen, to children who would otherwise be stateless, or to children born to a non-Belgian parent who was also born in Belgium and has had his/her principal residence in Belgium for a certain period of time (third-generation migrants). If this is not the case, the newborn must comply with the Aliens Act in order to be lawfully present on Belgian soil.

Basically, minors who are born in Belgium enjoy the same residence status as their parents. If the parents have different residence statuses, the more favourable one is granted to the child, provided that the child is living with both parents. Otherwise the child is granted the residence status of the parent with whom he or she lives.[572] The mother, the father or both must declare the birth to the municipality where it takes place. Moreover, the management of the hospital or other institution, the physician, the midwife or any other person who is present at the birth or on whose premises the birth takes place are obliged to inform the relevant municipality.[573] The municipality where the birth took place must then inform the municipality where the family resides.[574] The latter municipality registers the child in the Population Register (*Bevolkingsregister*) or the Aliens Register (*Vreemdelingenregister*) *ex officio*. Moreover, the municipality of residence issues the appropriate identity document to the child.[575] Due to the facts that minors born in Belgium enjoy the same residence status as their parents and that the registration is done *ex officio*, it is not possible for children born in Belgium to lawfully residing parents to have an irregular residence status. By contrast, children born in Belgium to foreigners residing irregularly in principle have an irregular residence status.

The second way of being unlawfully present in Belgium is through illegal entry. Under Belgian law, illegal entry is entry in violation of Title I, Chapter II of the Aliens Act.

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[571] Circular Letter of 29 April 2003 (Omzendbrief van 29 april 2003 betreffende de verwijdering van gezinnen met schoolgaand(e) kind(eren) van minder dan 18 jaar: Optreden van politiediensten in scholen), B.S. 13 June 2003.

[572] Specifications of 17 July 2001 (Preciseringen van 17 juli 2001 aangaande de rol van het gemeentebestuur in het kader van de toepassing van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, alsmede aangaande de taken van bepaalde bureaus van de Dienst Vreemdelingenzaken), B.S. 28 August 2001, amended by Circular Letter of 16 May 2003 (Omzendbrief van 16 mei 2003 betreffende wijzigingen en collectes in het wachtregister), B.S. 10 November 2003) and Circular Letter of 21 June 2007 (Omzendbrief van 21 juni 2007 betreffende de wijzigingen in de reglementering betreffende het verblijf van vreemdelingen tengevolge van de inwerkingtreding van de wet van 15 September 2006), B.S. 4 July 2007.

[573] § 56 Civil Code (Burgerlijke Wetboek van 21 maart 1804).

[574] See Parlementaire Vraag no. 607, 25 June 2002 (Van Weert), Vragen & Antwoorden. Kamer 2002-03, no. 17.949-17.951.

[575] See Specifications of 17 July 2001 and Circular Letter of 21 June 2007 (B.S. 4 July 2007). See also Royal Decree on identity documents for children under twelve years of age (Koninklijk besluit van 10 december 1996 betreffende de verschillende identiteitsdocumenten voor kinderen onder de twaalf jaar), B. S. 20 December 1996.

The third route into unlawful residence is through the loss of legal status while still present in Belgium. There are a number of reasons under the Aliens Act why a foreigner may lose his or her legal status. Foreigners who are granted a short stay in Belgium may be without legal status in the country, for instance, after having overstayed their authorisation or after a withdrawal of their authorisation. The latter can be based on grounds such as lack of sufficient means, when the person concerned is not able to acquire such means legally, or doing work without permission to do so. Aliens who are granted a stay of more than three months or who have the right to settlement can also have their authorisation to stay in Belgium withdrawn, but the conditions under which this can happen are much tighter.

2.2. Unlawful work

Competence for regulating permission for foreigners to work in Belgium lies with the Federal government.[576] Concerning employment, the Federal government has exercised its power mainly by introducing the Aliens Employment Act (*Wet van 30 april 1999 betreffende de tewerkstelling van buitenlandse werknemers*)[577] and the Royal Decree concerning the Employment of Aliens (*Koninklijk besluit van 9 juni 1999 houdende de uitvoering van de wet van 30 april 1999 betreffende de tewerkstelling van buitenlandse werknemers*)[578,579] Self-employment of foreigners is regulated in other federal acts, which, as self-employment is not covered by this research, will not be analysed here.

The basic principle of the Aliens Employment Act is that an employer who wants to employ a foreign worker must possess an employer permit (*arbeidsvergunning*),[580] and a foreign worker who wants to be employed in Belgium must possess a work permit (*arbeidskaart*).[581] Usually, employer permit and work permit go hand in hand: an employer who wants to employ a foreign worker requests an employer permit, which is automatically treated as a request for a work permit B.[582] After a successful request, the employer permit is only valid for that particular worker and the fulfilment of a particular function, and the work permit B is only valid for that particular employer and the fulfilment of a particular function. The work permit B is the standard work permit. Foreigners who are granted a stay in Belgium of more than three months or third-country nationals who have acquired long-term residence status in another EU Member State must obtain a work permit B in order to take up work in Belgium. Such a permit is only issued for a period of up to twelve months. The period of validity of the work permit B corresponds to the period of validity of the employer permit. A loss of the residence permit (*machtiging tot verblijf*) entails the invalidity of the work permit B.[583] Extension of both permits is possible.[584]

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[576] See § 6 (1) IX 3° (1) and (2) Institutional Reforms Special Act (Bijzondere wet van 08 augustus 1980 tot hervorming der instellingen), B.S. 15 August 1980. See also Clement Van De Putte, "bevoegdheidsverdeling," p. 34.
[577] B.S. 21 May 1999.
[578] B.S. 26 June 1999.
[579] A number of Belgian authorities are responsible for monitoring compliance with the Aliens Employment Act. They include the police, the officers of the Immigration Service, the inspectorate of the RSZ, and the inspectorate of the FPS Employment, Labour and Social Dialogue.
[580] § 4 (1) Aliens Employment Act.
[581] § 5 Aliens Employment Act.
[582] § 4 (2) Royal Decree concerning the Employment of Aliens.
[583] *Ibid*.
[584] § 31 ff. Royal Decree concerning the Employment of Aliens.

There are a number of exceptions to the above-mentioned rule. First, employers do not need an employer permit for the employment of foreign workers who are holders of a work permit A or C. Second, foreigners do not need a work permit if their employer possesses a joint employer permit (*gemeenschappelijke arbeidsvergunning*).[585] Third, some categories of foreigners are exempted from the obligation to possess a work permit for employment in Belgium.

With regard to the first exception, a work permit A is a work permit which allows the holder to work in any form of employment in Belgium and which is valid for an indefinite period of time.[586] A work permit C also confers its holder the right to enter into any employment for any employer in Belgium. However, this work permit is only valid for a limited period of time, *viz* for up to twelve months.[587] However, under certain circumstances it may be renewed. A loss of the residence permit entails the invalidity of the work permit C.[588] However, in practice migrant workers who lose their permission to stay are usually allowed to keep on working in Belgium until the end of the validity of the work permit C.[589] Both work permit A and work permit C must be requested by the foreign worker him- or herself.

A work permit A is issued to foreigners who, within a period of up to ten years of lawful and continuous residence immediately preceding the day of application, have worked for four years with a work permit B.[590] In practice, the work permit A is only an intermediate step in gaining exemption from work permit requirements. This is because holders of a work permit A are usually granted the right to stay for an indefinite period of more than three months, and once they have been granted this they are exempted from the requirement to obtain a work permit for employment in the country.

The work permit C allows foreigners to work who have not come to Belgium to work and/or who have a precarious and provisional residence status in the country. Section 17 of the Royal Decree concerning the Employment of Aliens lists those categories of foreigners who may be issued a work permit C. They include victims of human trafficking during their residence procedure, foreigners who enjoy subsidiary protection, foreigners who enjoy temporary protection on the basis of EU Directive 2001/55 on the mass influx of displaced persons, students (under certain circumstances), and asylum-seekers whose case has not been decided within six months.[591]

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[585] In such cases the employer must provide the employees with a copy of the joint employer permit. A similar exemption applies to employers who possess a provisional employer permit (*voorlopige arbeidsvergunning*). This concerns foreigners who are still awaiting a decision on an application for regularisation made during the 1999 regularisation campaign. This is discussed in more detail later.

[586] § 3 (1) Royal Decree concerning the Employment of Aliens.

[587] § 3 (3) Royal Decree concerning the Employment of Aliens.

[588] § 4 (3) Royal Decree concerning the Employment of Aliens.

[589] See Vlaams Minderhedencentrum, "De arbeidskaart C." Available at: http://www.vmc.be/vreemdelingenrecht/wegwijs.aspx?id=638.

[590] § 16 Royal Decree concerning the Employment of Aliens. Under certain circumstances, a period of two or three years of work with a work permit B is sufficient. However, not all working years under a work permit B are counted for the purpose of § 16. For instance, work as an au pair or as a researcher or visiting professor is not counted. However, foreigners who have worked in these occupations with a work permit B for four years are in practice granted the right to stay for an indefinite time, which exempts them from being required to possess a work permit.

[591] For asylum-seekers see Royal Decree of 22 December 2009 (Koninklijk besluit van 22 december 2009 tot wijziging van artikel 17 van het koninklijk besluit van 9 juni 1999 houdende uitvoering van de wet van 30 april 1999 betreffende de tewerkstelling van buitenlandse werknemers), B.S. 12 January 2010. See also Circular Letter of 14 June 2010 (Omzendbrief van 14 juni 2010, verduidelijking inzake artikel 17,1° van het KB van 9 juni 1999 houdende

The second exception from the general rule relates to employers who possess a joint employer permit. If this is the case, then the foreign workers do not need a work permit.[592] A joint employer permit authorises an employer to employ more than one foreign worker. It is intended to facilitate the employment of a number of workers for a short period of time, such as an orchestra. Accordingly, a joint employer permit is only valid for three months.

The third exception concerns certain categories of foreigners who are exempted from the obligation to possess a work permit in order to perform work in Belgium. These foreigners are exempted due to their residence status or due to their profession. In the former of these two categories, subsection 2 (1) of the Royal Decree concerning the Employment of Aliens exempts:

- citizens of the Member States of the European Union/European Economic Area – except for Bulgarian and Romanian citizens[593] – and Switzerland, as well as their family members who settle with them in Belgium;
- spouses or registered partners of Belgian citizens and, if they settle with them, other family members;
- foreigners who have the right to settlement;
- foreigners who are granted the right to stay for an indefinite period of more than three months;
- refugees; and
- diplomatic personnel – but only for the fulfilment of their diplomatic role.

The same provision of the Royal Decree concerning the Employment of Aliens lists a large number of professions the exercise of which also exempt a foreigner from obtaining a work permit. They include actors, sportsmen and journalists who are granted a short stay in Belgium, researchers under Title II, Chapter VI Aliens Act, and students (under certain circumstances). What is more, based on subsection 2 (1) 20°, people who are employed based on international agreements are exempted from the requirement to possess a work permit too. According to subsection 2 (2) Royal Decree concerning the Employment of Aliens, the exemptions from possessing a work permit only apply if the foreigner concerned is lawfully present in Belgium.[594]

Foreigners who are granted a short stay in Belgium under Title I, Chapter II Aliens Act are basically not allowed to work in the country. However, there are some exceptions. As mentioned before, foreigners who come to Belgium for a short period of time in order to work in a certain occupation, such as actors, sportsmen or journalists, are exempted from the obligation to be in possession of a work permit. Moreover, under very exceptional circumstance foreigners who are granted a short stay in Belgium may receive a work permit B and consequently change their residence status.

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de uitvoering van de wet van 30 april 1999 betreffende de tewerkstelling van buitenlandse werknemers), B.S. 14 July 2010.

[592] § 6 (1) Aliens Employment Act.

[593] See Royal Decree of 18 December 2008 (Koninklijk besluit van 18 december 2008 tot wijziging van het koninklijk besluit van 9 juni 1999 houdende uitvoering van de wet van 30 april 1999 betreffende de tewerkstelling van buitenlandse werknemers, naar aanleiding van de verlenging van de overgangsbepalingen die werden ingevoerd bij de toetreding van Bulgarije en Roemenië tot de Europese Unie), B.S. 30 December 2008.

[594] However, there are two exceptions to this rule: students who are on an obligatory internship as well as apprentices up to the age of eighteen can be exempted from the work permit requirement, even if they are staying in Belgium unlawfully. However, these two exceptions will be not taken into consideration in our research.

For foreigners who are granted a postponement of departure, no particular regulation for employment exists. From this and the general principles of the Aliens Employment Act it follows that they are not allowed to work in Belgium.

Lawful work during unlawful residence in Belgium is basically not possible. However, as mentioned earlier, applicants for regularisation during the 1999 regularisation campaign whose case has not been decided yet, are, in a way, tolerated on Belgian territory, in that they are not deported despite their unlawful presence. In addition, a Circular Letter has granted this group of applicants the limited right to work in Belgium.[595] To be more precise, employers have the possibility to ask for a provisional employer permit (*voorlopige arbeidsvergunning*) in relation to such regularisation applicants. Such a provisional employer permit is valid for three months, but may be renewed. Thus far, similar initiatives, *i.e.* possibilities to work for regularisation applicants, have not been taken in the context of other regularisation procedures – *i.e.* the outdated subsection 9 (3) Aliens Act for applications between 10 January 2000 and 1 June 2007 and the current section 9*bis* Aliens Act (directly or via the 2009 regularisation campaign).

2.3. Categories of irregular migrant workers

Category A: unlawfully resident and working unlawfully

Aliens who are present in Belgium in contravention of Belgian immigration law are unlawfully present. This refers to all foreigners who do not have one of the following immigration statuses:
- a short stay under Title I, Chapter II Aliens Act;
- a stay of more than three months under Title I, Chapter III Aliens Act;
- the right to settlement under Title I, Chapter IV Aliens Act; or
- a specific right to stay under Title II Chapter I to Chapter VI Aliens Act and Title II Chapter I*bis* and I*ter* Royal Decree concerning Aliens.

Such unlawfully present foreigners may have come to the attention of the immigration authorities, or their presence may be clandestine. Such aliens do not have the right to work in Belgium. If they nevertheless take up work in the country, they are regarded as working unlawfully.

Category B: lawfully resident and working unlawfully

Lawfully resident aliens who do *not* belong to one of the following categories:
- citizens of the Member States of the European Economic Area[596] (except for the countries Bulgaria and Rumania) and Swiss citizens, as well as their family members who settle with them;

[595] Circular Letter of 6 April 2000 (Omzendbrief van 6 april 2000 betreffende de voorlopige arbeidsvergunningen voor de buitenlandse onderdanen die een aanvraag tot regularisatie van het verblijf hebben ingediend), B.S. 15 April 2000; and Circular Lettter of 6 February 2001 (Omzendbrief van 6 februari 2001 tot wijziging van de omzendbrief van 6 april 2000 betreffende de voorlopige arbeidsvergunningen voor de buitenlandse onderdanen die een aanvraag tot regularisatie van het verblijf hebben ingediend), B.S. 24 February 2001. In general, the provisional employer permit was replaced by work permit C in 2003. However, this replacement had no effect on applicants for regularisation under the 1999 Regularisation Act. See Circular Letter of April 2003 (Omzendbrief betreffende de opheffing, ten gevolge van de invoering van de arbeidskaart C, van bestaande omzendbrieven waarbij in een voorlopige arbeidsvergunning werd voorzien), B.S. 14 May 2003.
[596] This includes all EU citizens.

- spouses or registered partners of Belgian citizens and, if they settle with them, other family members;
- aliens with the right to settlement;
- aliens with the right to stay for an indefinite period of more than three months;
- refugees;
- certain professional groups; or
- foreigners whose employment is based on international agreements

are either not allowed to participate in the Belgian labour market at all or would need a work permit to do so. If such foreigners nonetheless take up work in Belgium, they fall into our category of immigrants who are lawfully resident, but working unlawfully.

Apart from these two categories there is a third one: aliens whose immigration status is neither regular, nor completely irregular. This relates, for instance, to foreigners in an application procedure who are, in a way, tolerated in Belgium, such as applicants for regularisation on medical reasons (section 9*ter* Aliens Act), applicants for regularisation on other grounds, or victims of human trafficking in the course of a residence application procedure. Other examples would be foreigners who are granted a postponement of departure or recognised stateless persons who cannot be deported. In line with the other country investigations, these foreigners who are in an in-between situation will be considered as lawfully present for the purpose of our research. Usually they have no right to take up employment in Belgium. If they nevertheless do so, they fall into category B. However, whenever there are differences from other category B workers, these will be explicitly reported

Concerning applicants for regularisation, we have limited the scope of investigation. Only applicants for regularisation based on section 9*bis* Aliens Act (directly or via the 2009 regularisation campaign) are included in this research. Pending applications under the 1999 Regularisation Act or the outdated subsection 9 (3) Aliens Act will be disregarded. This is because applications for regularisation based on the latter two provisions ceased to be possible a number of years ago.

3. Belgian nationals engaging in undeclared work

3.1. Nationals

For the concept of Belgian citizenship or nationality – terms which are used interchangeably throughout our research – see subchapter 2.1.1. above.

3.2. Undeclared work

This subchapter investigates the obligations of employees and employers regarding the declaration of work to the Belgian social security authorities. Work carried out without these obligations being met is defined as undeclared work in the Belgian context.

Employers who hire an employee are obliged to inform the social security authorities immediately. 'Immediately' means at the latest on the day on which the employee starts work. The declaration has to take place electronically through the so-called DIMONA[597] system.[598] The employer must transfer, amongst other things, the following data: the employee's Social Security Number (*Identificatienummer van de Belgische sociale zekerheid, INSZ*) , the employee's Social Security Card (*Sociale identiteitskaart, SIS-kaart*) number and the date of commencement of employment. Alternatively, if there is no Social Security Number, the employer must declare the name, first name, place and date of birth and principal residence (*hoofdverblijfplaats*) of the new employee.[599] The data are collected, via the DIMONA system, by the National Social Security Office (*Rijksdienst voor Sociale Zekerheid, RSZ*). This office is entrusted in particular with the collection and allocation of employer and employee contributions for Belgian social security.[600] After the RSZ has received the declaration, the employer is immediately given a so-called DIMONA number,[601] which can be used to identify the declaration later on.[602] Additionally, at the latest within ten working days after the receipt of the DIMONA declaration, the RSZ sends a confirmation to the employer.[603] If the employer does not object to this confirmation within five working days, the declaration becomes final and is regarded as evidence of the declaration.[604] Employers who fail to make the DIMONA declaration are subject to criminal law sanctions.[605]

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[597] DIMONA stands for **D**éclaration **im**médiate/**on**middellijke **a**angifte.

[598] See Royal Decree on immediate declaration of employment (Koninklijk besluit van 05 november 2002 tot invoering van een onmiddellijke aangifte van tewerkstelling, met toepassing van artikel 38 van de wet van 26 juli 1996 tot modernisering van de sociale zekerheid en tot vrijwaring van de leefbaarheid van de wettelijke pensioenstelsels), B.S. 20 November 2002. Another system of declaration of employment is the so-called LIMOSA system. However, since this system, in principle, addresses employees who are not subject to Belgian social security legislation, such as posted workers, it is of no particular relevance for our research.

[599] § 4 2°-4° Royal Decree on immediate declaration of employment.

[600] See § 5 RSZ Act (Wet van 27 juni 1969 tot herziening van de besluitwet van 28 december 1944 betreffende de maatschappelijke zekerheid der arbeiders), B.S. 25 July 1969.

[601] § 10 Royal Decree on immediate declaration of employment.

[602] See Enrico Leenknecht and Vanessa Verdeyen, "Socialezekerheidsbijdragen," in *Praktijkboek sociale zekerheid: Voor de onderneming en de sociale adviseur*, ed. Johan Put and Vanessa Verdeyen (Mechelen: Kluwer, 2010), p. 133.

[603] § 11 (1) Royal Decree on immediate declaration of employment.

[604] § 11 (2) Royal Decree on immediate declaration of employment.

[605] § 181 Social Criminal Code (Sociaal Strafwetboek van 6 juni 2010), B.S. 1 July 2010. The Social Criminal Code will enter into force at the latest on 1 July 2011.

In addition, employers are obliged to submit information to the RSZ every three months about the wages and the working hours of their employees.[606] This is done electronically through the so-called Multifunctional Declaration (*Multifunctionele aangifte,* DmfA).[607] The declaration is called multifunctional because, via the Crossroads Bank for Social Security (*Kruispuntbank van de Sociale Zekerheid, KSZ*), different social security authorities make use of the data collected by the RSZ. The data is grouped by employee. Each employee is identified by his or her INSZ number. The data – notably on wages and working hours – are used, amongst other purposes, for calculating and collecting social security contributions. The calculation of the contributions is done automatically during the declaration procedure. The employer is thus immediately informed about the due social security contributions. Similarly to the DIMONA declaration, after every successful DmfA the employer immediately receives a ticket number, so that the declaration can be identified afterwards. In addition, the RSZ sends an electronic confirmation of the declaration. The DmfA has to be made quarterly – at the latest on the last day of the month following the month for which the declaration has to be made, *i.e.* on 30 April, 31 July, 31 October and 31 January. If employers fail to comply with DmfA obligations, the RSZ can determine the amount of contributions *ex officio*, based on all the information available. If there is no useful information available, the RSZ can base its calculations on the minimum wages for the economic sector concerned. However, the RSZ also has the option of giving social inspectors, as defined by the Labour Inspection Act, the task of making the declaration, at the employer's expense.[608]

Based on the quarterly DmfA, the employer is obliged to remit the employee and employer social security contributions in due time to the RSZ. The contributions must be credited to the RSZ's account at the latest on the last day of the month following the month for which the contributions have to be paid.[609] However, most employers are required to make monthly advance payments. These payments must be credited to the RSZ's account at the latest on the fifth day of the following month. When remitting the contributions, the employer must make clear the purpose for which the money is being transferred. To this end, he or she may use payment forms which are attached to the DmfA. If it is not clear what the money relates to, the payment is used to settle the oldest debts. Employers who do not remit contributions on time may be subject to additional charges of 10 percent of the amount due and late-payment interest of 7 percent per year.[610] What is more, employers who fail to comply with obligations under the RSZ Act, such as the making of a DmfA declaration or the payment of contributions, may be subject to criminal penalties too.[611]

Of utmost importance for our research is the declaration procedure in case of detection of undeclared work by social inspectors. If social inspectors encounter a worker for whom no DIMONA declaration has been made, they regularise the situation by making the necessary declaration *ex officio*. This declaration, in principle, only takes effect from the day on which the undeclared work has been detected. However, if the RSZ can establish that undeclared work has taken place not only on the day of the inspection, but for a period of time before the day of inspection, a retroactive declaration of work can be made and hence a retroactive obligation to pay

[606] See § 21 RSZ Act.
[607] DmfA stands for **D**éclaration **m**ulti**f**onctionelle/multifunctionele **A**angifte
[608] See § 22 (3) RSZ Act.
[609] See § 35 and § 35*bis* RSZ Royal Decree (Koninklijk besluit van 28 november 1969 tot uitvoering van de wet van 27 juni 1969 tot herziening van de besluitwet van 28 december 1944 betreffende de maatschappelijke zekerheid der arbeiders), B.S. 5 December 1969.
[610] § 28 ff. RSZ Act.
[611] See in particular § 218 and § 223 Social Criminal Code.

contributions can arise. In practice, this turned out to be a difficult task for which the RSZ needed the cooperation of the employer, the employee concerned or other employees.[612] At the end of 2008, the legislators provided for an alternative to this costly and tricky investigation.[613] Since 1 January 2009, the RSZ has been able to levy a so-called solidarity contribution (*solidariteitsbijdrage*) when social inspectors encounter an employee for whom no DIMONA declaration has been made. The solidarity contribution is a fine which is based on the assumption that the employee was engaging in undeclared work even before the day he/she was encountered. The fine amounts to three times the basic contribution on the average minimum monthly income for a twenty-one year old worker. In other words, it is assumed that the employee was employed for three months or one quarter. The minimum rate is EUR 2,500 plus an index-based adjustment. This can only be reduced if the employer can prove that it was in fact not possible (*materiële onmogelijkheid*) for the employee to perform full-time work – for instance, if the employee was a student who attended classes during the week. In addition, the RSZ must reduce the amount of the solidarity contribution to the extent that social security contributions are owed for work actually declared.[614] In other words, if it is established by the RSZ that undeclared work was done before the day of discovery and contributions are levied for this period, then the fine has to be reduced accordingly, all the way down to zero where applicable. This emphasises once more the substitutional nature of the fine. To my mind, the possibility cannot be excluded that the introduction of the solidarity contribution may result in the RSZ making less of an effort to discover the real length of the period of undeclared work. The solidarity contribution allows for *de facto* income for the RSZ, even without a previous criminal sentence and without the establishment of the real period of undeclared work. In practice, therefore, the burden of proof has, in a sense, been shifted. Nevertheless, if an employee is interested in the payment of social security contributions – for which, as we will see later, there may be good reasons – and cooperates with the RSZ, there is of course still a chance of determining the actual period of undeclared work.

Besides the declaration of a new employee, the quarterly declaration of the wages and the remittance of social security contributions – all of which relate to the RSZ, employers are under two more relevant obligations. First, they are obliged to affiliate with a labour accident insurance company and, second, they must affiliate with a Family Allowance fund.

Regarding the first of these obligations, all employers falling under the personal scope of application of the Labour Accident Act must arrange labour accident insurance with a private insurance company or mutual insurance fund for the benefit of their employees.[615] Employers who do not comply with this obligation are affiliated *ex officio* with the Labour Accident Fund (*Fonds voor Arbeidsongevallen, FAO*). However, the FAO does not become the employer's insurer, and can reclaim the cost of benefits provided from the uninsured employer.[616] The FAO usually gets to know about a lack of insurance through the private insurance funds, which are obliged to inform the FAO about the employers with which they have contracted insurance.[617] Another source of

[612] Parlementaire stukken: Kamer, 2008-09, no. 1607/001, pp. 51-53.
[613] Act of 22 December 2008 (Programmawet van 22 december 2008), B.S. 29 December 2008, § 70 ff.
[614] § 22*quater* RSZ Act.
[615] § 49 (1) Labour Accident Act .
[616] Jacques Petit, *Arbeidsongevallen* (Mechelen: E-Story-Scientia, 2005), p. 418. Petit refers to the Hof van Cassatie, 14 December 1987, *Arr. Cass*. 1987-88, p. 486.
[617] Vanessa Verdeyen, "Arbeidsongevallen," in *Praktijkboek sociale zekerheid: Voor de onderneming en de sociale adviseur*, ed. Johan Put and Vanessa Verdeyen (Mechelen: Kluwer, 2010), p. 394.

information is the social inspectors. Employers must pay premiums for labour accident insurance directly to the insurance company and, as part of the employer's share of the general social security contributions, to the RSZ. Employers who are affiliated *ex officio* with the FAO must pay contributions to it too. However, despite the name, these contributions are considered as a fine and a source of income for the FAO. They are definitely not social security contributions.[618] Employers who fail to affiliate with an insurer and fail to pay the required premiums may also be subject to criminal penalties.[619]

Concerning Family Allowance funds, employers falling within the scope of the Family Allowance Act are obliged to register with a Family Allowance fund from the moment of employment of the first employee.[620] Family Allowance funds are established as non-profit associations. However, some categories of employers must affiliate with the National Office for Family Allowances for Employees (*Rijksdienst voor Kinderbijslag voor Werknemers, RKW*). Moreover, all employers who omit to affiliate with a Family Allowance fund despite being obliged to do so, are registered *ex officio* with the RKW.[621] Usually, there are no contributions to be paid directly to the Family Allowance funds.[622] Instead contributions for Family Allowances are part of the employer's share of the general social security contributions and are thus remitted to the RSZ. Whenever a new employee joins the company, the Family Allowance funds receive the necessary data about him or her from the Crossroads Bank for Social Security. In order to inform the Family Allowance funds about employees who are under the personal scope of application of the Family Allowance Act, but who are not part of the scope *ratione personae* of the RSZ Act, employers must provide quarterly information about their personnel.[623] If employers fail to provide this quarterly information, administrative fines may apply.[624]

The obligation to declare work and pay contributions lies solely with employers.[625] Employees are supposed to be informed regularly, *i.e.* at each salary payment, by their employers about the payment of their social security contributions.[626] However, they are under no obligation to contact the social security authorities if they do not receive such a statement.

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[618] Petit, *Arbeidsongevallen*, p. 418. Petit refers to case law. The 'contributions' to the FAO are based on the length of the period during which there was no insurance, on the number of employees and on the Maximum Wage Threshold ('*maximum basisjaarloon'*). For the amount of the Maximum Wage Threshold see § 39 Labour Accident Act.

[619] § 184 and § 219 Social Criminal Code.

[620] § 34 (1) Family Allowance Act.

[621] § 34 (2) Family Allowance Act.

[622] Exceptions may apply, for instance, if the fund's financial reserves are no longer sufficient to cover administrative costs. See § 94 (8) Family Allowance Act.

[623] This has to be done by filing form 'Model F".

[624] See § 223 Social Criminal Code.

[625] In the construction industry particular measures have been taken to fight undeclared work. Under the so-called 'section 30*bis* system', clients, contractors and subcontractors have a joint liability for the payment of social security contributions. See § 30*bis* RSZ Act.

[626] § 15 Act on the Protection of Wages (Wet van 12 april 1965 betreffende de bescherming van het loon der werknemers), B.S. 30 April 1965, in conjunction with Royal Decree of 27 September 1966 (Koninklijk besluit van 27 september 1966 tot vaststelling, wat de particuliere sector betreft, van de gegevens die de afrekening moet bevatten welke bij elke definitieve betaling van het loon aan de werknemer overhandigd wordt), B.S. 11 October 1966. However, no obligation for the employee to take action arises out of the obligation for the employer to inform the employee.

4. The personal scope of application of social security arrangements

4.1. General remarks

It has already been remarked that Belgian statutory social security can be divided into two categories: social insurance, organised along professional lines, and social assistance. The general social insurance schemes for employees, which are the subject of our research, basically insure employees who have an employment contract with their employers. In this chapter we will analyse whether irregular migrant workers and Belgians who engage in undeclared work will come within the personal scope of application of these social insurance schemes.

Under Belgian social assistance schemes, residence as well as Belgian nationality and a certain immigration status are by and large the crucial criteria for being covered. Only the Social Welfare Services scheme, as public assistance of last resort, protect, in principle, every person. As there are differences of scope *ratione personae* between these social assistance schemes, their scope will be discussed in the chapter on the social risk of financial need.

4.2. Legislation limiting personal scope with respect to aliens or undeclared workers

There exists no overall legislation in Belgium, which generally excludes aliens from statutory social security, whether their immigration status is regular or irregular. That is to say, there is no overall legislation that excludes them from being entitled to benefits or from the disbursement of benefits. Exclusions from particular social security schemes do exist, as we will see, but there is no general exclusion from statutory social security in Belgium. The same goes for undeclared workers. There is no general rule stipulating that the non-declaration of work to the social security authorities leads to disentitlement from Belgian social security benefits based on employment.

4.3. Personal scope with respect to aliens or undeclared workers under social insurance for employees

As a general rule, social insurance schemes for employees cover employees (*werknemers*) who have a contract of employment with their employers. This rule is set out in subsection 1 (1) of the RSZ Act.[627] But it is not the RSZ Act itself which deals with the scope of persons insured against the occurrence of a social risk; the RSZ Act only establishes the rules for the payment of employee social insurance contributions. It is the individual social insurance laws for employees that define the scope of persons eligible for benefits. However, in defining the personal scope of application, most employee social insurance laws refer to subsection 1 (1) RSZ Act.[628] Only the legislation on

[627] One can also find this principle back in § 1, § 2 and § 3 of the Act on the General Principles of Social Security (Wet van 29 juni 1981 houdende de algemene beginselen van de sociale zekerheid voor werknemers), B.S. 2 July 1981. However, this Act, with the exception of a few sections, has never entered into force.

[628] See § 1 Labour Accident Act; § 2 Occupational Diseases Act; and § 32 1° and § 86 1° (a) Sickness Insurance Act. The Family Allowance Act makes not an explicit, but an implicit reference to the RSZ Act. According to § 2 1° of this Act in conjunction with § 51 (1) 1°, a person is entitled to Family Allowance if he or she is employed by an employer who is subject to the rules on social security for employees. In the original language § 2 1° reads: "*Voor de toepassing van artikel 1 dient te worden verstaan als persoon die personeel tewerkstelt krachtens een arbeidsovereenkomst: de*

retirement and survivor's pension insurance makes no reference to it. Pursuant to section 1 of the Pension Act, the Act is intended to set out the rules, first, for retirement pensions in favour of employees who were employed in Belgium under a contract of employment and, second, for survivor's pensions in favour of widows of employees who were employed in Belgium under a contract of employment. So, even without reference to the RSZ Act, the personal scope of this Act is congruent with that of the RSZ Act – leaving aside any extensions and limitations for now.

An employment contract is considered to be an agreement which bears the following characteristics:

- the employee undertakes to perform work;
- the employee receives wages for the work performed;
- there must be a relationship of subordination between employee and employer.[629]

It is by these criteria that the existence of an employment contract is assessed. How the parties describe their relationship themselves may serve as a guideline, but is not decisive.

Notwithstanding the general rule set out above, the scope *ratione personae* has been extended to certain individuals who do not work under a contract of employment. For example, these include apprentices or artists. On the other hand, certain persons working under a contract of service are not regarded as insured employees for the purposes of the social insurance schemes for employees. This applies for instance to domestic workers who work less than eight hours per week. What is more, some professional groups are included in or excluded from some but not all of the social insurance schemes for employees. For example, trainee doctors are not covered by the retirement and survivor's insurance or the unemployment insurance. From this it follows that it is always necessary to look at the individual insurance schemes to determine exactly which employees fall within the personal scope of application and which do not. However, the general rule applies to all social insurance schemes.

Finally, it should be mentioned that, also as a general rule, the scope *ratione loci* is confined to Belgium, *i.e.* the employment must take place in Belgium and the employer must be based in Belgium.

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werkgever die onderworpen is aan de regeling van de sociale zekerheid voor werknemers." § 51 (1) 1° reads: "*Is rechthebbende op kinderbijslag [...]: de persoon die tewerkgesteld is in België door een werkgever bedoeld in de artikelen 1 tot 4.*" It is the RSZ Act which sets out which employers are subject to the rules on social security for employees. Therefore the Family Allowance Act refers for its personal scope of application implicitly to the RSZ Act. The Unemployment Decree similarly makes an implicit, not explicit, reference to the RSZ Act, when it refers to the work carried out subject to the unemployment component of the social security system. See § 37 (1) Unemployment Decree.

[629] § 328 5° (a) Act of 27 December 2006 (Programmawet (I) van 27 december 2006), B.S. 28 December 2006 (3rd ed.), erratum B.S. 24 January 2007, erratum B.S. 13 February 2007, erratum B.S. 23 February 2007 (2nd ed.) and § 2 ff. of the Act on Employment Contracts (Wet van 3 juli 1978 betreffende de arbeidsovereenkomsten), B.S. 22 August 1978. See also Herman Lenaerts, *Inleiding tot het sociaal recht* (Ghent: Story, 1977), pp. 141-43 cited in Jef Van Langendonck and Johan Put, *Handboek socialezekerheidsrecht*, 7. rev. ed. (Antwerp/Oxford: Intersentia, 2006), p. 195. See also Danny Pieters and Paul Schoukens, *Triptiek sociale zekerheid: De beginselen van socialezekerheidsrecht en hun toepassing in België en Nederland* (Leuven/Voorburg: Acco, 2006), p. 62. Additionally see, for instance, Hof van Cassatie, 22 May 2006, *Soc. Kron.* 2007, p. 164.

4.3.1. Irregular migrant workers

Social insurance for employees, in principle, insures employees irrespective of their nationality or their immigration status. The relevant laws simply require one to be an employee in order to fall within their personal scope of application. The only exception is the unemployment scheme, where compliance with immigration laws is a precondition for insurance. We will analyse this particular situation separately in the chapter on the social risk of unemployment. This subchapter investigates the question of insurance for irregular migrant workers under the other employee insurance schemes.

As we have seen, the law links insurance to employment. Employment exists when employer and employee conclude a contract – verbal or written, implicit or explicit[630] – under which the employee undertakes to work for wages under the authority of an employer. The nationality of the parties is irrelevant: foreigners can conclude valid employment contracts. However, the question is whether foreigners with an irregular migration status are able to conclude a valid contract of employment. Under Belgian civil law, the obligations entered into under a contract must have a lawful cause (*geoorloofde oorzaak*), *i.e.* they must not be against public order and against 'good morals'.[631] Otherwise the contract would be absolutely invalid (*absolute nietigheid*). Belgian case law basically regards the Aliens Employment Act as a piece of public order legislation; a contractual obligation to perform work in violation of this Act is therefore regarded as having an unlawful cause.[632] It follows that an employment contract concluded with a foreigner who is not allowed to work in Belgium is absolutely invalid. Invalidity means that the contract is considered not to exist and not to bear any legal consequence.[633] The absoluteness of invalidity entails that the invalidity can be invoked by any of the parties to the contract and by any third party. Judges are in fact required to invoke it *ex officio*.[634]

However, labour law and social security law are intended to protect employees. Declaring an employment contract as without legal consequences in these areas would negatively impact those who are supposed to be protected and thereby thwart the objectives of social security law and labour law. To avoid such negative consequences, the legislators have provided for exceptions to this general rule of invalidity. What are these exceptions with respect to the insurance against the realisation of social risks for migrants with an irregular migration status?

An express exception can be found in the Belgian Labour Accident Act. Subsection 6 (1) of the Labour Accident Act states that the invalidity of an employment contract cannot be invoked with respect to the application of the Act. This means that irregular migrant workers, who are working under an employment contract within the meaning of the RSZ Act,[635] but whose employment

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[630] See for instance Frans D'Hertefelt, Ludo Laurysens, Bernard De Klerck and Dirk Verhaeghe, *Praktisch sociaal recht* (Antwerp: De Boeck, 2010), p. 55.
[631] § 1108 and § 1133 Civil Code.
[632] Arbeidshof Antwerpen, 21 September 1988, *Limburgs Rechtsleven* 1988, p. 220 and *JTT* 1990, p. 14.
[633] See also Willy Van Eeckhoutte, *Sociaal compendium: Arbeidsrecht 2010-2011 met fiscale noties*. Vol. 2 (Mechelen: Kluwer, 2010), p. 1903.
[634] See Willy Van Eeckhoutte, *Sociaal compendium: Arbeidsrecht 2010-2011 met fiscale noties*. Vol. 1 (Mechelen: Kluwer, 2010), p. 213.
[635] § 1 1° of the Labour Accident Act refers for the personal scope of application of the act to the RSZ Act ('*Deze wet vindt toepassing op alle personen die als werkgever, werknemer [...] geheel of gedeeltelijk vallen onder de wet van 27 juni 1969*').

contract is invalid due to an infringement of the Aliens Employment Act, are nonetheless to be insured against labour accidents.[636]

The other employee social insurance laws do not have a provision similar to subsection 6 (1) of the Labour Accident Act. Strikingly, however, there is a similar provision in the RSZ Act. Section 4 of the RSZ Act stipulates that employers cannot invoke the invalidity of an employment contract in order to prevent the application of the Act. We have already seen that the RSZ Act mainly sets out the rules for the payment of employee social insurance contributions. Section 4 is therefore to be read as setting out an obligation to comply with social insurance contribution liabilities, despite the fact that the employment contract is invalid. However, as also outlined above, the RSZ Act also has another function which is of relevance for this Part of our research: its scope *ratione personae* for the payment of contributions provides the point of reference for the scope *ratione personae* of insurance under the employee social insurance laws. One can ask now whether this point of reference is sufficient to assume that section 4 RSZ Act is also applicable to employee social insurance. In other words, does it mean that employers should not be able to invoke the invalidity of an employment contract for the purpose of insurance and entitlement to benefits? Legal doctrine does not provide clear answers. Herman Lenaerts, for instance, notes that section 4 RSZ Act and subsection 6 (1) Labour Accidents Act ensure that the employees concerned can enjoy the advantages of these laws.[637] He is discussing these laws rather than advantages deriving from other laws, such as the Sickness Insurance Act. What he means by advantages for employees from the RSZ Act is not so clear, however. The Labour Court of First Instance (*Arbeidsrechtbank*) of Ghent decided in a case concerning an employment contract with a prostitute, which was declared absolutely invalid due to its violation of good morals, that section 4 RSZ Act precludes the invoking of contractual invalidity for the purpose of denying social security rights.[638] This case related to holiday pay, which for the purposes of our research we do not consider as part of social security, but which comes within the scope *ratione materiae* of the RSZ Act for blue-collar workers. Anyway, the Labour Court of First Instance interpreted section 4 RSZ Act as having a direct effect on the right to holiday pay, as regulated in the Royal Decree on holiday pay. An explanation for this assumption was unfortunately not given.

To my mind, section 4 RSZ Act cannot be interpreted that broadly – at least not when we are discussing employee social insurance and not holiday pay. The provision states clearly that employers cannot invoke the invalidity of the employment contract for the purpose of preventing the application of this RSZ Act.[639] It is *this* Act whose application should not be prevented, and not any other act that refers to the personal scope of application of this Act. A literal interpretation does not allow for any other conclusion. In addition, if we also consider the purpose of section 4 RSZ Act, we can see that it is the employer who is precluded from invoking the invalidity of the employment contract. This is rather obvious, since the employer is obliged under the RSZ Act to retain the employee's share of the social security contributions and to remit it together with the

[636] See implicitly Arbeidshof Antwerpen, 14 March 2005, *Soc. Kron.* 2005, p. 384.
[637] Herman Lenaerts, *Inleiding tot het sociaal recht* (Diegem: Kluwer, 1995), p. 254.
[638] Arbeidsrechtbank Gent, 9 November 1990, *Tijdschrift voor Gentse Rechtspraak* 1990, p. 147. In the original language the relevant paragraph reads: "*Uit deze wetsbepaling* [author's note: section 4 RSZ Act] *volgt dat de nietigheid [...] geen toepassing vindt inzake sociale zekerheid. [...] De eisende partij kan derhalve blijven aanspraak maken op de erin vervatte rechten, inzonderheid het hier gevorderd vakantiegeld bij uitdiensttreding, verschuldigd op grond van artikel 46 van het K.B. dd. 30 maart 1967 tot bepaling van de algemene uitvoeringsmodaliteiten van de wetten betreffende de jaarlijkse vakantie der loonarbeiders.*"
[639] In the original language the relevant provision reads: "*De werkgevers mogen zich niet op de nietigheid van de met de werknemer gesloten overeenkomst beroepen ten einde de toepassing van deze wet uit te sluiten.*"

employer's share to the RSZ.[640] If section 4 RSZ Act applied to the employee social insurance laws, it would mean that employers cannot invoke the invalidity of the contract for insurance and entitlement to benefits. This would not make much sense – leaving aside the issue of holiday pay. Rather, it will be other parties, such as the public authorities responsible for aliens, which have an interest in referring to the invalidity of the contract. But they would have no possibility of doing so if section 4 RSZ Act is interpreted broadly. To conclude, section 4 RSZ Act, which prohibits employers to invoke the invalidity of the employment contract, seems not to make sense when applied in the context of accessing employee social insurance benefits, and seems unsuited for such a purpose.

Nevertheless, in Belgian labour law, specifically in the Act on Employment Contracts and the Labour Act, we find the provision that invalidity of an employment contract/ of employment cannot be invoked (with respect to the rights of employees), when the invalidity of the contract is the result of an infringement of provisions which regulate labour relations.[641] Case law regards the Aliens Employment Act as regulating labour relations. Consequently, the invalidity of the employment contract cannot be invoked against employees when the contract is invalid due to a violation of the Aliens Employment Act.[642] The law rules in general terms that invalidity cannot be invoked, but does not specify who is not allowed to invoke it. According to case law and jurisprudence, it must be interpreted as prohibiting the employer, the judge and also third parties from invoking invalidity.[643]

What is the impact of this rule in labour law for social security? Section 14 of the Act on Employment Contracts stipulates that invalidity cannot be invoked 'with respects to the rights of employees which result from the application of this Act' ('*ten aanzien van de rechten van de werknemer die voortvloeien uit de toepassing van deze wet*'), when the invalidity of the contract is the result of an infringement of provisions which regulate labour relations. By contrast, section 5 of the Labour Act simply states that invalidity cannot be invoked when the invalidity of employment (*dienstbetrekking*) is the result of an infringement of provisions which regulate labour relations. Concerning the former of these two provisions, once again I am inclined to regard its impact as limited to the particular law itself, *i.e.* the Act on Employment Contracts. This opinion is supported by jurisprudence, which also comes to the conclusion that, based on a literal interpretation, section 14 does not prevent the invoking of invalidity with respect to rights deriving from other laws.[644] The wording of the Labour Act, however, is different and more general. Section 5 does not refer to a particular law. Instead it states that under certain conditions, the invalidity of the employment relationship cannot be invoked. Wilfried Rauws shows, referring to the advice of the Council of State when drafting the Labour Act, that this open formulation was a

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[640] § 23 RSZ Act.

[641] § 14 1° Act on Employment Contracts. See also § 5 2° (a) of the Labour Act (Arbeidswet van 16 maart 1971), B.S. 30 March 1971.

[642] Arbeidshof Antwerpen, 21 September 1988, Limburgs rechtsleven 1988, p. 220 and *JTT* 1990, p. 14. See also Wilfried Rauws, *Civielrechtelijke beëindigingswijzen van de arbeidsovereenkomst: Nietigheid, ontbinding en overmacht* (Antwerp: Kluwer, 1987), pp. 326-27, 396, 790-91.

[643] See Rauws, *Civielrechtelijke beëindigingswijzen*, pp. 386-87. For the judges see also the advice of the Council of State,
Parlementaire stukken: Senaat, B.Z. 1964-65, no. 115, p. 139.

[644] See Danny Duysens, *Algemene wijze van beëindiging van de arbeidsovereenkomst: Ontbinding, onderlinge toestemming, nietigverklaring, schuldvernieuwing* (Bruges: Die Keure, no date), pp. 56-57; and Rauws, *Civielrechtelijke beëindigingswijzen*, p. 387.

deliberate decision.[645] In other words, the legislators were well aware of the broad impact these words may have. According to Rauws, section 5 Labour Act therefore establishes a general protection of workers' rights, which is not confined to the protection given by the Labour Act itself.[646] Danny Duysens is of the same opinion, and puts forward the argument that any other interpretation would lead to absurd situations in which some of the employee's labour and social rights are protected, whilst others are not guaranteed if the employment relationship or employment contract is invalid.[647] To my mind, the wording of section 5 Labour Act is clear and the arguments of legal doctrine are convincing, so that this provision must be considered as also protecting the rights under the employee social insurance laws. For the purposes of our research, this means that even if an employment contract is in principle absolutely invalid, due to an infringement of the Aliens Employment Act, its invalidity may not be invoked, on the basis of section 5 Labour Act, in order to exclude irregular migrant workers from the scope *ratione personae* of employee social insurance laws. In other words, from a legal point of view, irregular migrant workers are insured. Therefore, other legal concepts which have been resorted to in order to avoid negative consequences for employees due to invalid employment contracts, such as the *bona fides* argument or the *ex nunc* effect, are superfluous.[648]

Our investigation has so far looked at the legal status of irregular migrant workers who are employees, *i.e.* who have a contract of employment with their employer. As we have already seen, employee social insurance also treats certain persons, who are working under the authority of another person,[649] on a par with employees, and thus insures them, even though they are not working under an employment contract. For instance, such persons include artists or apprentices. For the sake of completeness it should be mentioned that section 5 of the Labour Act, which prohibits the invoking of contractual invalidity, relates not just to employment contracts, but to employment relationships in general.[650] This means that the employment of irregular migrants, who perform work under the authority of another person, but without having an employment contract, may not be claimed to be invalid for the purpose of employee social insurance schemes. In other words, irregular migrants in such a position are, from a legal point of view, also insured.

The few authors who have dealt specifically with the legal position of irregular migrants in Belgian social insurance for employees have reached the same conclusion: from a legal point of view, irregular migrants are insured. Yves Jorens, the most-cited author, argues briefly that Belgian social insurance schemes, except for unemployment insurance, do not require lawful employment for a person to be insured. According to Belgian law, people are insured because they work in Belgium. They are not insured because they have a valid employment contract. The illegality of a foreigner's employment therefore does not prevent him or her from being insured under Belgian laws and from being entitled to benefits.[651]

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[645] See Rauws, *Civielrechtelijke beëindigingswijzen*, p. 388. See also the advice of the Council of State, in Raad van State, Parlementaire stukken: Kamer, B.Z. 1969-70, no. 556/1, pp. 18, 46.
[646] Rauws, *Civielrechtelijke beëindigingswijzen*, p. 389.
[647] Duysens, *beëindiging arbeidsovereenkomst*, pp. 57-58.
[648] For the *bona fides* argument see Rauws, *Civielrechtelijke beëindigingswijzen*, pp. 794-96. See also Herwig Verschueren, *Internationale arbeidsmigratie: De toegang tot de arbeidsmarkt voor vreemdelingen naar Belgisch, internationaal en Europees gemeenschapsrecht* (Bruges: Die Keure, 1990), p. 125.
[649] See also Lenaerts, *Inleiding sociaal recht* (1995), p. 236.
[650] See also Rauws, *Civielrechtelijke beëindigingswijzen*, p. 388.
[651] In the original language it reads: "*Daar de Belgische sociale-zekerheidswetgeving op geen enkel ander ogenblik* [author's note: this refers to the unemployment insurance] *de vereiste stelt dat de betrokkene wettig moet tewerkgesteld zijn, leidt dit tot de conclusie dat de illegaliteit van tewerkstelling niet kan leiden tot de niet-verzekering*

4.3.2. Nationals who engage in undeclared work

Nationals who perform undeclared work are by definition persons whose work is supposed to be declared to social security authorities and for whom social security contributions are supposed to be remitted. They are thus by definition persons who fall within the scope of subsection 1 (1) of the RSZ Act. We have seen that Belgian employee social insurance laws insure, by and large, those persons who come within the scope of this subsection. It follows that undeclared workers are in principle insured against the realisation of social risks.

However, one can ask whether the fact that work is not declared to the social security authorities and no social security contributions are paid[652] – and thus legal obligations are violated – has any consequences for the validity of the employment contract. Here, two situations have to be distinguished: first, the situation where employee and employer conclude an employment contract and the employer subsequently fails to declare the work and pay contributions; second, the situation where employee and employer conclude a contract in which they agree not to declare the work in order to avoid the payment of contributions. Employees are in fact not in a position to omit to declare work and pay contributions. The duties in question are incumbent on the employer alone.[653] As already mentioned, employees are supposed to be informed regularly by their employers about the payment of their social security contributions. Moreover, employees are under an obligation to declare their income tax correctly. However, employees are never in a position to avoid declaring work or paying social security contributions.

In the first situation mentioned above, *i.e.* employee and employer conclude an employment contract and the employer subsequently omits to declare the work and pay contributions, no issues

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van betrokkene. Volgend de Belgische wetgeving is verzekerd, al wie werkzaamheden in België heeft uitgeoefend. Wie heeft gewerkt, is dus verzekerd. Het is omdat men werkt dat men verzekerd is en niet omdat men een geldig arbeidscontract heeft. De illegaliteit van tewerkstelling verhindert dus niet dat men verzekerd is onder de Belgische wetgeving en dat men dan ook recht heeft op uitkeringen." See Yves Jorens, *De rechtspositie van niet-EU-onderdanen in het Europese socialezekerheidsrecht* (Bruges: Die Keure, 1997), p. 270. See also Yves Jorens, "Illegalen en de rechten van de mens: het recht op sociale zekerheid," in *Mensenrechten: jaarboek van het Interuniversitair Centrum Mensenrechten* (Antwerp/Apeldoorn: Maklu, 1997), p. 187; and Yves Jorens, "Illegalen en sociale zekerheid: Over de koppeling tussen het vreemdelingenrecht en het recht op socialezekerheidsuitkering," in *Migrantenonderzoek voor de toekomst: Huldeboek Ruud F. Peeters*, ed. Marie-Claire Foblets, Bernard Hubeau and Aimé De Muynck (Leuven: Acco, 1997), p. 194. Steven Bouckaert, when discussing the impact of fundamental rights on the protection of irregular migrants under Belgian social insurance, refers to the opinion of Yves Jorens. See Steven Bouckaert, *Documentloze vreemdelingen: Grondrechtsbescherming doorheen de Belgische en internationale rechtspraak vanaf 1985* (Antwerp/Apeldoorn: Maklu, 2007), p. 478. See also the reference to Yves Jorens in the work of Lotte Van Leuffel: "Illegalen en sociale zekerheid: Illegale vreemdelingen en hun recht op sociale zekerheid in België." Unpublished.

[652] The discussion is confined here to the situation where work and wages are completely hidden from the social security authorities. Other situations of black-economy work and social fraud which may also impact the validity of the employment contract are not taken into consideration, since they fall outside the scope of this research. These include, for instance, the situation where the work is basically declared to the social security authorities, but part of the wages are hidden and so lower contributions are paid; or the situation where the employment relationship is accidentally incorrectly categorised and the employee is therefore not registered with the authorities for employee social insurance (but with other social security authorities, such as the one for self-employed); or the situation where work and wages are basically declared, but through legal means are intentionally disguised so that no or fewer contributions have to be paid – for instance bogus self-employment, declaration of wages as professional expenses etc.

[653] See § 23 (1) and § 26 RSZ Act. See also § 4 Royal Decree on immediate declaration of employment.

of contractual invalidity arise. The employment contract itself does not contain any clauses providing for misdemeanours. Rather, the employer simply fails to comply with legal obligations which result from closing the employment contract.

In the second situation, employee and employer agree to conceal their work from the social security authorities. According to Belgian civil law, the cause and the object of the contract must be lawful (*geoorloofde oorzaak en geoorloofde voorwerp*). This means that the cause and the subject matter of the contractual obligations must not be against public order, against good morals or against imperative law. Otherwise the contract is absolutely or relatively invalid.[654] Marc De Vos, who addresses the consequences under civil and labour law of contracts set up to evade the payment of social security contributions, argues that there is little doubt that the agreement to maintain secrecy, *i.e.* to elude the application of the RSZ Act, is against public order and thus absolutely invalid.[655] In other words, employee and employer are not bound by their agreement to secrecy. However, the question is: how does this affect the validity of the employment contract as a whole? Here De Vos takes the position that if there is no further arrangement to perpetrate fraud, the *object* of the contract is lawful.[656] In other words, the agreement to secrecy does not make the rest of the contract invalid. On the other hand, if the main obligations of the employment contract give rise to fraud, the object must be regarded as unlawful, for instance, if employee and employer agree that the employer will pay the employee's share of the social security contributions directly to the employee instead of remitting it to the social security authorities as is legally required. However, in practice the parties will usually just agree to keep their work hidden from the authorities. Additional arrangements, such as the 'gross wage deal' just described, are the exception. De Vos also investigates the lawfulness of the *cause* of the obligations. Here too, he reaches the conclusion that the cause will usually be lawful. This is because the decisive reason for concluding the employment contract will hardly be to elude social security contributions. Rather, the decisive motive is employment, while eluding contributions will be the means to construct the employment relationship in a more favourable way for the parties.[657]

Case law scarcely exists in this area. De Vos draws his conclusions on the basis of legal doctrine on invalidity of contracts and by analogy with case law in fiscal law, trade law and consumer law. His arguments are convincing and lead to the conclusion that employment contracts in which the parties agree not to declare the work to social security authorities are usually valid. Only exceptionally, when the agreement to engage in black-economy work is an integral part of the contractual obligations, such as through a 'gross wage deal', would the whole employment contract be rendered invalid.[658] Such invalidity would basically also affect third parties, such as the

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[654] § 6, § 1108 and § 1133 Civil Code. See also Walter Van Gerven, *Verbintenissenrecht*, 2. rev. ed. (Leuven/Voorburg: Acco, 2006), p. 78 ff., p. 135 and p. 142 ff.

[655] Marc De Vos, "Zwart loon door overeengekomen ontduiken van socialezekerheidsbijdragen: Algemene civielrechtelijke en arbeidsrechtelijke aspecten," in *Actuele problemen van het arbeidsrecht 5*, ed. Marc Rigaux and Willy Van Eeckhoutte (Ghent: Mys & Breesch, 1997), p. 151 ff.

[656] Marc De Vos talks in this context about the validity of the real agreement (tegenbrief) and the validity of the bogus employment contract, since he is focusing here on disguised and not hidden wages. As for completely hidden wages, the topic of our research, the reverse applies: the employment contract expresses the real will of the parties, whereas the agreement to secrecy can be regarded as the bogus deal. See De Vos, "Zwart loon," p. 137.

[657] *Ibid*., p. 154 ff.

[658] Such absolute invalidity can be invoked by anyone. § 5 of the Labour Act – which stipulates that invalidity cannot be invoked, if it is the result of an infringement of provisions which regulate labour relations – is not applicable in such situations. This is because the relevant provisions of the RSZ Act, which are violated by the agreement to hide

social security authorities.[659] However, as we seen in the context of employment contracts concluded with irregular migrant workers, the invalidity of an employment contract cannot be invoked on the basis of section 5 Labour Act when workers' rights are at stake.[660] For the sake of completeness, it should also be mentioned that invalidity is only effective *ex nunc*, and not *ab initio*.[661] For reasons of fairness and equity, as well as for practical reasons, Belgian case law and legal doctrine assume that the invalidity of employment contracts only takes effect for the future, and not for the past.[662] This means that parties and third parties can invoke rights and obligations deriving from the contract with respect to the past. From this it follows that the non-declaration of work, based on an agreement between employers and employees, does not preclude insurance under the social insurance schemes for employees.

Besides the question of validity, one can also ask whether the non-payment of contributions has an influence on insurance from a legal point of view. As we will see later on, the relevance of contribution payment varies from insurance to insurance. With sickness and invalidity insurance, for instance, eligibility for benefits depends on having paid sufficient social security contributions in a reference period, whereas under the terms of labour accidents and occupational diseases insurance, contributions payment is of no relevance. Despite these differences, the RSZ Act contains a provision which applies to all Belgian social insurance schemes for employees: section 26 RSZ Act. It reads: "(1) The employer must not recover the employee's share of the social insurance contributions which the employer failed to deduct on time. (2) The employer is obliged to compensate the disadvantage which the employee sustained due to the failure or delay in the payment of contributions."[663] Subsection 26 (1) relates to the point made earlier, in subchapter 3.2: the obligation to declare work and pay social security contributions lies solely with employers. If the employer fails to comply with these legal obligations, he or she alone is held responsible. The employer, as subsection 26 (1) RSZ Act ensures, cannot recover the employee's share of the contributions, which the employer, and no one else, omitted to pay.[664] Subsection 26 (2) RSZ Act provides the employee with the possibility of holding the employer liable *ex delicto* for the non-payment or late payment of contributions on the employee's account to the RSZ, if the employee has suffered loss as a result. Although basically applicable to all employee social insurance schemes, this provision, in the first instance, is only relevant to social insurance schemes in which the right to benefits is linked to contributions payment.[665] These are the retirement and survivor's insurance and the sickness and invalidity insurance. Accordingly, subsection 26 (2) RSZ Act will be discussed below in the relevant subchapter.

One final point that should be made with regard to all general social insurance schemes for employees is that exercising the right to benefits results in the declaration of the previously

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the work from social security authorities, are not essentially regulating labour relations. Rather, they are regulating the relations between the employee and the social security authorities.

[659] De Vos, "Zwart loon," p. 181.

[660] Invalidity also cannot be invoked for the application of the Labour Accident Act. See § 6 (1) Labour Accident Act.

[661] *Ibid*., p. 168.

[662] See Rauws, *Civielrechtelijke beëindigingswijzen*, p. 66 ff.

[663] In the original language § 26 RSZ Act reads: "*(1) De werkgever mag op de werknemer niet de werknemersbijdrage verhalen, waarvan hij de inhoudingen te gepasten tijde zou nagelaten hebben te verrichten. (2) De werkgever is verplicht het nadeel te herstellen dat de werknemer heeft geleden ingevolge de nalatigheid of de vertraging bij de overdracht van de bijdragen.*"

[664] For case law on § 26 (1) RSZ Act see Willy Van Eeckhoutte, *Sociaal compendium: Sociale-zekerheidsrecht 2010-2011 met fiscale noties*. Vol. 1 (Mechelen: Kluwer, 2010), p. 245.

[665] *Ibid*., p. 232.

undeclared work. This is because of the exchange of data between the National Social Security Office (RSZ) and the respective social insurance authorities. To be more precise, the RSZ collects both the DIMONA and the quarterly DmfA declaration and provides the information on employment and contribution payment via the Crossroads Bank for Social Security (KSZ) to the Belgian social security institutions. Social insurance institutions which receive an application for benefits need to determine whether it relates to an employee within the meaning of the RSZ Act or to another insured person. Since this information is not available in the KSZ network if the work has not been declared, they have to turn to the RSZ to find out whether the applicant for benefits is an employee falling within the scope of the RSZ Act.[666] The RSZ, on its part, will investigate the reason why the applicant does not appear in the KSZ registers and will eventually determine his/her status. Consequently, the right to benefits can only be exercised at the price of retroactively declaring the work. However, as we have seen, that price is paid by the employer, not the employee.

[666] For this task of the RSZ see § 5 RSZ Act.

5. The financing of social security arrangements

5.1. General remarks

Belgian federal social insurance is primarily financed from contributions by employers and/or employees. Further sources of income are governmental subsidies and alternative funding, such as earmarked taxes. Employers are liable for the payment of both the employee's and the employer's element of the social insurance contributions.[667] Both employees and employers have a share in the funding of the retirement and survivor's pension scheme, the sickness and invalidity insurance and unemployment insurance. Concerning the other social insurance schemes, *i.e.* labour accident insurance, occupational diseases insurance and the Family Allowance scheme,[668] only employers contribute to the funding. The employee social insurance contributions are collected together for all schemes by the RSZ and are subsequently distributed to the individual schemes according to their needs.

The social assistance schemes Minimum Income for the Elderly and Disabled Person's Allowance are funded from federal general revenue. Social Integration is financed partly from the federal budget and partly from the budget of the municipal Public Centres for Social Welfare (*Openbare Centra voor Maatschappelijk Welzijn, OCMW*). The Social Welfare Services of the OCMW are basically paid for by these centres themselves. The centres are in turn financed from the federal, regional and municipal budgets. Moreover, the OCMWs generate their own income through services. Costs incurred by the centres are only directly reimbursed by the federal government for particular beneficiaries, such as urgent medical assistance for unlawfully present aliens or Social Welfare Services for migrants who are not enrolled on the Population Register.[669] Individuals may indirectly contribute to the financing of these social assistance schemes by paying taxes, but in principle there is no direct obligation to contribute[670] to be investigated here.

5.2. Financial duties with respect to aliens or undeclared workers under social insurance for employees

Social insurance contributions are supposed to be paid by the employer for every employee falling within the scope of the RSZ Act, *i.e.* for every person who works under an employment contract or who is placed on the same footing.[671] The contributions for all employee social insurance schemes

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[667] § 23 (1) RSZ Act.

[668] The Guaranteed Family Allowance, *i.e.* the family allowance of last resort for needy parents, is funded from employers' contributions via the National Employees' Family Allowance Office.

[669] For the latter see § 1 Ministerial Decree of 18 October 2002 (Ministerieel besluit van 18 oktober 2002 tot wijziging van het ministerieel besluit van 30 januari 1995 tot regeling van de terugbetaling door de Staat van de kosten van de dienstverlening door de openbare centra voor maatschappelijk welzijn toegekend aan een behoeftige die de Belgische nationaliteit niet bezit en die niet in het bevolkingsregister is ingeschreven), B.S. 31 October 2002.

[670] Except for co-payments for certain types of Social Welfare Services of the OCMW, such as housing or hospitalisation. The amount of the contributions is determined according to the beneficiaries' means. Under exceptional circumstances the OCMWs may waive the requirement to make a contribution.

[671] For this duty, for all insurance schemes, except for the labour accident and occupational diseases insurance, see the RSZ Act itself. For labour accident insurance and occupational diseases insurance, see § 59 1° (a) Labour Accident Act and § 56 1° Occupational Diseases Act in conjunction with § 21 (2) 4°, 5° and § 22 (1), (2) (a) Act on the General Principles of Social Security.

are paid together to the RSZ. For sickness and invalidity insurance, labour accident insurance and the Family Allowance scheme, where employers or employees are required to affiliate with mutual insurance funds, non-profit associations or private insurance companies, the contributions are likewise part of the general employee social insurance contributions paid to the RSZ. However, additional payments to such insurers may be required. It should be mentioned that employers who have a disproportionate safety risk are obliged to pay an additional premium at a fixed sum to the respective private insurance fund.[672]

5.2.1. Irregular migrant workers

Irregular migrant workers fall within the scope of the RSZ Act if they perform work under a contract of employment or, if they are not working under an employment contract, are treated as employees by this Act. We have already seen that an employment contract concluded with a foreigner who is not allowed to work in Belgium is absolutely invalid. However, pursuant to section 4 of the RSZ Act, employers cannot invoke the invalidity of a contract with an employee in order to prevent the application of the Act. In other words, employers cannot use the invalidity of the contract as an excuse for not complying with contribution payment obligations.[673] Section 4 talks about a contract with employees and not about an employment contract. According to the preparatory materials, section 4 was intentionally not limited to employment contracts only, but was intended to apply to all contracts between employers and employee for the application of the RSZ Act.[674] As a result, employers are also unable to invoke the invalidity of the employment relationship in the case of those who do not have a contract of employment but are treated on a par with employees. From this it follows that employers are, from a legal point of view, obliged to pay social insurance contributions for unlawfully employed foreign workers.

One may ask whether employers are *able* to declare the work of irregular migrant workers and pay contributions for them. This seems a rather theoretical question, since irregular work and undeclared work usually go hand in hand. Irregular migrant workers normally want to avoid contact with the public authorities due to their violation of laws governing the residence and employment of aliens. Employers likewise have no great desire to declare the work of employees whom they are not allowed to employ. However, the possibility cannot be excluded that the work of irregular migrants might voluntarily be declared, for instance because the parties involved are not aware of the irregular status of the foreign worker. The question then is whether it is possible to register them for social security.

According to the National Social Security Office (RSZ), it is basically possible for irregular migrant workers to be affiliated with the RSZ. Neither is the status of a foreigner under the Aliens Act or the Aliens Employment Act systematically checked for affiliation or continuation of

[672] Employers with higher-risk working environments are charged the so-called prevention contribution. See § 49*bis* ff. Labour Accident Act. This higher risk is assessed according to the number of accidents in the company in relation to the labour accident risk in the respective industry. The risk is determined by FAO and communicated to the competent insurance company/fund, which is entrusted with the collection of the prevention contribution.
[673] For the obligation to pay contributions despite the invalidity of the working contract, see Hof van Cassatie, 3 February 1975, *Arr. Cass.* 1975, p. 626 or Cour du Travail de Liège, 10 February 1995, *Soc. Kron.* 1996, p. 303.
[674] Parlementaire stukken: Senaat, B.Z. 1966-67, no. 390, p. 6.

affiliation with the RSZ.[675] However, there is one requirement for contact with the social security authorities which will often make the RSZ aware of the irregular status of a foreign worker. This is the requirement to use one's Social Security Number.

We have already seen that the declaration of a new employee takes place electronically via the DIMONA system and that the quarterly declaration of wages for the calculation of contributions must be done electronically via the DmfA system.[676] For the DIMONA declaration, employers are legally required to submit, in particular, the new employee's Social Security Number or, as a temporary measure if the number is not available, the employee's name, place and date of birth and principal residence.[677] However, the law requires a natural person to be identified in the social security system solely by means of his or her Social Security Number.[678] Therefore, for further contact with the social security authorities, the employer needs to produce the employee's Social Security Number. This is true in particular for the quarterly declaration of wages via DmfA to the RSZ.[679] We will demonstrate below, in subchapter 6.2.2.1., that irregular migrant workers without authorisation to be in Belgium (category A) usually cannot possess a Social Security Number, whereas category B workers can, in particular if they are included in the Aliens Register.

The RSZ needs a Social Security Number for data processing purposes. If there is no such number, then the RSZ can create it.[680] That is not the problem. The issue is rather that if there is no such number and such a number cannot be provided upon request, this is an indication of irregular residence or (less conclusively) of irregular work by a foreigner. Since the inspectorates of the RSZ are also entrusted with monitoring compliance with the Aliens Employment Act[681] and since the RSZ and its employees are obliged to report violations of the Aliens Act,[682] any attempt to affiliate an irregular migrant worker with the RSZ without a Social Security Number may well prove unsuccessful. However, the situation is different for irregular migrant workers who possess a Social Security Number. Their irregular status is not so likely to be disclosed, and the successful declaration of work and payment of social security contributions are therefore possible.

Whether this declaration of work and payment of contributions create an entitlement to benefits is the subject of our investigation in the chapters on the individual social risks. For the present purpose it is sufficient to point out that there is no legal basis for reimbursing contributions already paid, if work falling within the scope of the RSZ Act turns out to have been performed by an irregular migrant worker and does not – as is the case with unemployment insurance – confer a

[675] These findings are unfortunately not based on publicly available sources. I obtained this information from an e-mail from Bruno De Pauw, Attaché at the Department for International Relations at the RSZ, 24 February 2010.
[676] See subchapter 3.2.
[677] § 4 2° Royal Decree on immediate declaration of employment.
[678] § 8 Crossroads Bank Act (Wet van 15 januari 1990 houdende oprichting en organisatie van een Kruispuntbank van de sociale zekerheid), B.S. 22 February 1990. See also below, subchapter 6.2.2.
[679] See also the administrative manual from the RSZ *Glossarium DMFA: volledige versie 2010/3*, publication date: 26 August 2010. Available at: https://www.socialsecurity.be/portail/glossaires/dmfa.nsf/970bf0d7adb7e9c6c1256869004c440a/9fd7912624573ae9c12577370029e333/$FILE/VersComplDMFA103_N.pdf.
[680] To be more precise, a Crossroads Bank Number will be created which serves as a Social Security Number.
[681] § 11 Aliens Employment Act in conjunction with the Labour Inspection Act (Wet van 16 november 1972 betreffende de arbeidsinspectie), B.S. 8 December 1972. See also Alde Domen, *Praktijkgids: Tewerkstelling buitenlandse werknemers* (Antwerp: Standaard, 2004), p. 140.
[682] See below, subchapter 6.2.3.

right to benefits. The RSZ has confirmed that contributions are never reimbursed on these grounds.[683]

5.2.2. Nationals who engage in undeclared work

Nationals who engage in undeclared work are defined as workers for whom the required social security contributions are not paid. This group of workers thus falls by definition within the scope of the RSZ Act, but is in a situation of non-compliance. Agreements to hide work and income from the social security authorities do not exempt employers from the requirement to pay contributions. As we have already seen, the employment contract will still be valid or, although this is only relevant in exceptional cases, its invalidity will *not* take effect *ex tunc*.

[683] These findings are unfortunately not based on publicly available sources. I obtained this information from an e-mail from Bruno De Pauw, Attaché at the Department for International Relations at the RSZ, 24 February 2010.

6. The administration of social security arrangements

6.1. General remarks

When discussing the administration of social security in Belgium, we must distinguish between political responsibility and administrative supervision on the one hand, and implementation on the other. The first is carried out by the Belgian government. More specifically, the Federal Public Service[684] (FPS) Social Security (*Federale Overheidsdienst (FOD) Sociale Zekerheid*), under the authority of a number of ministers, is responsible for all general social insurance schemes for employees, except for unemployment insurance. Unemployment insurance falls within the competence of the FPS Employment, Labour and Social Dialogue (*FOD Werkgelegenheid, Arbeid en Sociaal Overleg*). The Minimum Income Schemes, except for Social Integration, are also subject to the FPS Social Security. Social Integration, by contrast, falls within the competence of the FPS Social Integration, anti-Poverty Policy, Social Economy and Federal Urban Policy (*Programmatorische Federale Overheidsdienst (POD) Maatschappelijke Integratie, Armoedebestrijding, Sociale Economie en Grootstedenbeleid*).

The actual administration is carried out by public institutions and private actors, such as private insurance companies, mutual insurance funds and non-profit associations. We have already seen that employee social insurance contributions are collected and distributed by the National Social Security Office (*Rijksdienst voor Sociale Zekerheid, RSZ*). Concerning benefits, the administration of the retirement and survivor's pension scheme is assigned to the National Office for Pensions (*Rijksdienst voor Pensioenen, RVP*), that of the sickness and invalidity insurance to the National Sickness and Invalidity Insurance Institute (*Rijksinstituut voor ziekte- en invaliditeitsverzekering, RIZIV*), that of labour accident insurance to a certain extent to the Labour Accident Fund (*Fonds voor Arbeidsongevallen, FAO*), that of occupational diseases insurance to the Occupational Diseases Fund (*Fonds voor de Beroepsziekten, FBZ*), in the unemployment insurance to the National Employment Office (*Rijksdienst voor Arbeidsvoorziening, RVA*) and that of the Family Allowance scheme[685] to the National Office for Family Allowances for Employees (*Rijksdienst voor Kinderbijslag voor werknemers, RKW*). All these institutions are public institutions established by law. Under most social insurance schemes, the work of the public institutions is supported by private actors. In the case of sickness and invalidity insurance it is the insurance funds with which the insured must affiliate and which pay out the benefits. Unemployment benefits are generally disbursed by union-affiliated institutions. With respect to labour accident insurance and the Family Allowance scheme, administration is for the most part left to private insurance companies, mutual insurance funds and non-profit associations. Employers must affiliate with these private institutions and eligible employees receive their benefits directly from them.

Without exception, social assistance schemes are administered by public institutions. The RVP manages the Minimum Income for the Elderly. The Disabled Person's Allowance is managed by a Directorate-General of the FPS Social Security. The municipal Public Centres for Social Welfare (*Openbare Centra voor Maatschappelijk Welzijn, OCMW*) administer the Social Integration and the Social Welfare Services. The OCMWs are autonomous public institutions, and are found in every Belgian municipality.

[684] 'Federal Public Service' has been the new name for a federal ministry since the year 2000.
[685] This also includes the management of the Guaranteed Family Allowance.

Finally, the Crossroads Bank for Social Security (*Kruispuntbank van de Sociale Zekerheid, KSZ*), which is a public institution, organises the data exchange between the various actors in social security. In principle, the Crossroads Bank does not retain data itself; it merely organises, *i.e.* joins up, the data flow. To this end, the KSZ keeps an electronic list of natural persons, which indicates where each type of information about them can be found.

6.2. Administration with respect to the rights of aliens or undeclared workers

As we will see later, under certain social security schemes inclusion in municipal registers is crucial for entitlement to benefits. Moreover, for data processing in the social security system, individuals are identified by their Social Security Number. This chapter will therefore deal with the access of irregular migrant workers and Belgians not declaring their work to municipal registers and to a Belgian Social Security Number.

6.2.1 The Belgian National Register and municipal registers

The Belgian National Register (*Rijksregister*) is a database within the FPS Home Affairs (*FOD Binnenlandse Zaken*), containing information on the identification of natural persons.[686] It aims, most notably, at rationalising the administration of the municipal registers and facilitating data exchange between public authorities. The National Register includes everyone who is already enrolled in the Population Register (*Bevolkingsregister*), the Aliens Register (*Vreemdelingenregister*) or the Waiting Register (*Wachtregister*), all administered by the municipalities. Municipalities are *ex officio* required to submit the necessary information to the National Register. This information originating from the municipal registers includes name, nationality, principal residence, residence and employment status of foreigners, profession, family situation and information about the type of municipal register in which the person concerned is enrolled.[687]

The municipal registers are administered by the local executives (*Colleges van Burgemeester en Schepenen*).[688] Anyone who takes up his or her principal residence (*hoofdverblijfplaats, résidence principale*) in a Belgian municipality must inform the municipal authorities about it.[689] Principal

[686] See § 1 (1) National Register Act (Wet van 8 augustus 1983 tot regeling van een Rijksregister van de natuurlijke personen), B.S. 21 April 1984.
[687] See § 3 and § 4 National Register Act and § 1 Royal Decree on the type of information in the National Register (Koninklijk besluit van 8 januari 2006 tot bepaling van de informatietypes, verbonden met de informatiegegevens bedoeld in artikel 3, eerste lid, van de wet van 8 augustus 1983 tot regeling van een Rijksregister van de natuurlijke personen), B.S. 25 January 2006. For the Population Register and the Aliens Register see also § 1 and § 2 Royal Decree on the information in the Population Register and the Aliens Register (Koninklijk besluit van 16 juli 1992 tot vaststelling van de informatie die opgenomen wordt in de bevolkingsregisters en in het vreemdelingenregister), B.S. 15 August 1992. For the Waiting Register see also § 4 Royal Decree on the information in the Waiting Register (Koninklijk besluit van 1 February 1995 tot vaststelling van de in het wachtregister vermelde informatiegegevens en tot aanwijzing van de overheden die bevoegd zijn om die gegevens in het wachtregister in te voeren), B.S. 16 February 1995.
[688] See § 3 Royal Decree concerning the Population Register and the Aliens Register (Koninklijk besluit van 16 juli 1992 betreffende de bevolkingsregisters en het vreemdelingenregister), B.S. 15 August 1992.
[689] § 7 (1) Royal Decree concerning the Population Register and the Aliens Register.

residence is considered as the place where a person usually lives (*gewoonlijk leven, vivent habituellement*).[690] It is the factual situation which is decisive for determining where this is. Different indicators are considered in order to determine where a person usually lives and hence his or her principal residence. The relevant Royal Decree mentions the place where the person goes to after working hours, the workplace, the place where the children attend school, the place of energy use and telephone costs, and the place where the spouse or other members of the household usually stay.[691] The authorities determine and check on this and, in the case of foreigners, check the residence documents.[692] If all requirements are fulfilled,[693] the person will be enrolled in either the Population Register or the Aliens Register.[694] With regard to asylum-seekers, it is the competent Minister who is responsible for informing the municipal authorities as soon as an asylum-seeker arrives in Belgium or the actual presence of an asylum-seeker on Belgium soil is established.[695] Asylum-seekers are, unlike other foreigners, enrolled in the Waiting Register.

Who exactly is enrolled in which municipal register? Belgian citizens who have their principal residence in a municipality are enlisted in the municipality's Population Register. Persons without Belgium nationality are enrolled in the Population Register, the Aliens Register or the Waiting Register, depending on their residence status under Belgian immigration laws. Aliens who have the right to settlement, including third-country nationals who are long-term residents, are subject to the Population Register.[696] In addition, EU citizens and their family members who have, as a rule, three years of continuous residence in Belgium may apply for a permanent residence status (*duurzaam verblijfsrecht*). If they are granted this status, they are enrolled in the Population Register too.[697] By contrast, aliens who are granted a stay of more than three months are enrolled in the Aliens Register.[698] Moreover, some foreigners who are still in the application procedure are nevertheless enlisted in the Aliens Register. This applies to family members of non-EU nationals who apply for family reunification; to non-EU nationals who apply for family reunification with an EU national or a Belgian national; to non-EU nationals who apply for student status; to foreigners who apply for a stay on medical grounds under section 9*ter* Aliens Act; to victims of human trafficking after their reflection period; and to foreigners who have filed an appeal with a suspensive effect to the Aliens' Appeal Council (*Raad voor Vreemdelingenbetwistingen*). Asylum-seekers, *i.e.* foreigners still in the application procedure for refugee status, and their family members are, as mentioned before, enrolled in the Waiting Register. Foreigners who are only

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[690] § 3 Municipal Registers Act (Wet van 19 juli 1991 betreffende de bevolkingsregisters, de identiteitskaarten, de vreemdelingenkaarten en de verblijfsdocumenten en tot wijziging van de wet van 8 augustus 1983 tot regeling van een Rijksregister van de natuurlijke personen), B.S. 3 September 1991.

[691] § 16 (1) Royal Decree concerning the Population Register and the Aliens Register. See also the relevant case law of the Council of State – such as Raad van State, no. 28.317, *Lambrechts*, 30 June 1987 or Raad van State, no. 82.258, *Van den Bogaert*, 14 September 1999 – as summarised in the General Briefing of 1 July 2010 (Algemene Onderrichtingen van 1 juli 2010 betreffende het houden van de bevolkingsregisters, FOD Binnenlandse Zaken), p. 20. Available at: http://www.ibz.rrn.fgov.be.

[692] See Specifications of 17 July 2001.

[693] See here also § 11 Royal Decree concerning the Population Register and the Aliens Register.

[694] For the registration of newborns in Belgium see above subchapter 2.1.2. It should also be mentioned that certain categories of foreigners are neither enrolled in the Population, nor in the Aliens Register. This relates, for instance, to diplomatic personnel.

[695] § 1*bis* Municipal Registers Act. To avoid confusion, it should be pointed out that the Municipal Registers Act is the only law which does not differentiate between the Population Register and the Aliens Register. It refers to both of them as population registers. See § 12 (1) Aliens Act.

[696] § 17 (1) Aliens Act.

[697] § 42*quinquies* Aliens Act.

[698] § 12 Aliens Act.

granted a short stay are not registered in the municipal registers at all. They simply receive a declaration of arrival (*aankomstverklaring*).

6.2.1.1. Irregular migrant workers

Category A workers, who do not have a lawful residence status in Belgium, are not enrolled in municipal registers and thus not in the National Register either. This is because pursuant to subsection 1 (1) 1° and 2° Municipal Registers Act in conjunction with the Aliens Act, only certain categories of foreign nationals with a lawful residence status, as outlined above, are required to be registered. This raises the question whether foreigners who are already enrolled in the municipal registers continue to be listed even after losing their lawful immigration status. Concerning the Population and the Aliens Register, the answer is no. The loss of their lawful residence status leads to the deletion of their entry.[699] With regard to the Waiting Register the situation is different. Asylum-seekers who have exhausted all legal procedures (*uitgeprocedeerd*) and who are unlawfully present[700] on Belgian soil are not deleted from the register. Their entry is only supposed to be deleted when they actually leave the country.[701] However, being enrolled in the Waiting Register does not change the fact that a rejected asylum-seeker is unlawfully present in Belgium.[702]

Category B workers are lawfully present, but working in violation of the Aliens Employment Act. Given that foreigners are only enrolled in the Population Register if they have the right to take up employment in Belgium – which means foreigners with the right to settlement and Union citizens and their family members who have a permanent residence status – category B workers cannot be enlisted in the Population Register. However – leaving aside asylum-seekers enrolled in the Waiting Register, who are not part of this investigation – category B workers may be enrolled in the Aliens Register, depending on their residence status. For instance, a foreign student who has an authorisation for a stay of more than three months in Belgium for the purpose of higher education studies and who has his or her principal residence in a Belgian municipality is supposed to be enrolled in the Aliens Register. If he or she takes up work without being in possession of a work permit C, he or she is then working unlawfully and thus falls into our category B. The same is true for a foreigner without authorisation to be in Belgium who has applied for regularisation of his or her immigration status on medical grounds (section 9*ter* Aliens Act). As soon as the application is declared admissible by the Immigration Service (*Dienst Vreemdelingenzaken*) within the FPS Home Affairs – this is the case when the application including all required documents is received by registered post – and the residence and identity check has been conducted, the applicant is enrolled in the Aliens Register. If the regularisation applicant then starts to work in Belgium, he or she is then working unlawfully and falls into our category B. On the other hand, a tourist who is

[699] See § 12 5° Royal Decree concerning the Population Register and the Aliens Register.
[700] These foreigners are subject to an enforceable order to leave the country (*uitvoerbaar bevel om het grondgebied te verlaten*).
[701] See § 1*bis* (2) 2° Municipal Registers Act. See also Hof van Cassatie, no. S.07.0078.N, 19 May 2008, *JTT* 2008, p. 416 ff. However, in practice there may be situations in which rejected asylum-seekers are deleted from the register *ex officio*. In such a case they can request the cancellation of the deletion at the competent municipality. If such foreigners can provide evidence that they have not left the country, the municipality will continue to enlist them in the Waiting Register. See Circular Letter of 16 May 2003 (Omzendbrief van 16 mei 2003 betreffende wijzigingen en collectes in het wachtregister), B.S. 10 November 2003.
[702] Hof van Cassatie, 19 May 2008, *JTT* 2008, p. 416.

authorised to stay for three months in Belgium and who takes up work, although not allowed to do so, is also a category B worker, but, in contrast to the two above-mentioned examples, will not be enrolled in the Aliens Register.

6.2.1.2. Nationals who engage in undeclared work

Belgian citizens who take up their principal residence in a Belgian municipality are enrolled in the municipal registers. The performance of work in general and the declaration of the performed work in particular do not have an influence on an individual's enrolment in a municipal database.

6.2.2. The Social Security Number

The Social Security Number (*Identificatienummer van de Belgische sociale zekerheid, INSZ-nummer*) is either the person's National Register Number (*Rijksregisternummer*) or, if a person is not enrolled in the National Register,[703] the Crossroads Bank Number (*Kruispuntbanknummer, bisnummer*).[704] Social security administrations are legally obliged to retrieve the data which are available at the Crossroads Bank exclusively from the Crossroads Bank.[705] The only means of identification of a natural person in this context is the Social Security Number.[706]

The National Register Number is issued upon first enrolment in the National Register.[707] It is a unique eleven-digit number. The number itself does not expire.

The Crossroads Bank Number, which is also a unique eleven-digit number, is issued upon enrolment in the 'bis-registers' of the Crossroads Bank Registers (*Kruispuntbankregisters*) to persons who do not possess a National Register Number.[708] The bis-registers of the Crossroads Bank Registers are subsidiary registers in which the Crossroads Bank enrols all natural persons whose identification is necessary for social security and who are not included in the National Register.[709] This applies, for instance, to frontier workers or posted workers, as well as to certain foreigners who are in a regularisation procedure after an unlawful stay and who are given a limited right to work in Belgium, for which their identification is necessary for social security. The bis-registers of the Crossroads Bank Registers include, like the municipal registers, information such as name, nationality, profession and family situation. Instead of a principal residence, however, only an address of stay or address of payment is recorded. The residence and employment status of foreigners is not documented. Besides the bis-registers, the Crossroads Bank Registers include a

[703] Persons who are not enrolled in the National Register anymore, but who because of previous enrolment have a National Register Number, are enrolled in the Crossroads Bank Registers, while keeping their National Register Number for social security purposes.
[704] See § 1 4° Royal Decree of 18 December 1996 (Koninklijk besluit van 18 december 1996 houdende maatregelen met het oog op de invoering van een sociale identiteitskaart ten behoeve van alle sociaal verzekerden, met toepassing van de artikelen 38, 40, 41 en 49 van de wet van 26 juli 1996 tot modernisering van de sociale zekerheid en tot vrijwaring van de leefbaarheid van de wettelijke pensioenstelsels), B.S. 7 February 1997.
[705] § 11 (1) Crossroads Bank Act.
[706] § 8 (1) Crossroads Bank Act.
[707] § 2 (2) National Register Act. For information on enrolment in the National Register see above, subchapter 6.2.1.
[708] § 4 (2) Crossroads Bank Act.
[709] *Ibid*. Exceptionally persons who are enrolled in the National Register, but whose data are not systematically kept up to date, are also included in the Crossroads Bank Registers.

register for all persons who were once enrolled in the National Register, but whose data is no longer kept up to date (*register der geschrapten*). Since these already have a social security number, they have no particular relevance for our research. Hence, when we refer to the Crossroads Bank Register, we are referring to the bis-registers alone.

6.2.2.1. Irregular migrant workers

We have already seen that irregular migrant workers without a lawful residence status in Belgium, *i.e.* category A workers, are not enrolled in municipal registers and hence not in the National Register either.[710] Category A workers therefore cannot be assigned a National Register Number. However, those who once had a lawful residence status in Belgium, due to which they were enrolled in the National Register and assigned a National Register Number, keep their number even after losing their residence status. This is because the number does not expire.

Some category B workers, depending on their residence status, may be enrolled in the Aliens Register and thus in the National Register. Upon enrolment they receive a National Register Number. Moreover, all category B workers who once had another residence status which allowed them to be included in the National Register are also in possession of a National Register Number.

The assignment of a Crossroads Bank Number, by contrast, is not linked to a foreigner's immigration status.[711] Anyone who has no National Register Number and comes into contact with Belgian social security is given the number. However, for foreigners not included in a municipal register who take up employment in Belgium, the Belgian government has set up a specific procedure to provide them with a Crossroads Bank Number. Under this procedure, foreign workers are only issued a Crossroads Bank Number if they can produce a work permit or evidence of exemption from the obligation to possess a work permit. Specifically, since 2006 municipalities have performed the task of submitting the request for a Crossroads Bank Number for temporary foreign workers[712] who are not enrolled in the National Register.[713] Such a request may only be submitted if the temporary foreign worker produces his or her work permit or evidence of exemption from the requirement for a work permit.[714] The municipalities thus fulfil a kind of gatekeeper function. However, taking up employment is not the only way in which foreigners can come into contact with the Belgium social security system. Take the Belgian Family Allowance scheme, for instance. There, as we will see in subchapter 12.1.1., it is possible for a person who is

[710] Except for asylum-seekers who have exhausted all legal procedures and who, on application, may continue to be enrolled in the Waiting Register. However, as they were previously lawfully resident, they are covered by the situation described in the following sentence.

[711] These findings are unfortunately not based on publicly available sources. I obtained this information from an e-mail message from Mark Demol, Crossroads Bank, 15 January 2010.

[712] This relates only to temporary foreign workers from non-EEA countries, except for Bulgarian and Romanian citizens.

[713] Municipalities are obliged to perform this task for every temporary foreign worker not enrolled in the National Register. Even for frontier workers or workers who reside in a hotel and who are usually not required to directly contact the municipality. In such cases, the employer must tell the worker to contact the municipality in which the workplace is located in order to request a Crossroads Bank Number. See Circular Letter of 2 December 2005 (Omzendbrief van 2 december 2005 betreffende de procedure tot toekenning van een identificatienummer door de Kruispuntbank van de Sociale Zekerheid, het zogenaamde 'bisnummer', aan vreemdelingen die tijdelijk naar België komen als gelegenheidswerknemers), B.S. 12 December 2005.

[714] Circular Letter of 2 December 2005, § 2.

unlawfully present in Belgium to be designated by law as the person to whom the Family Allowance is paid. A migrant staying unlawfully in Belgium usually cannot be entitled to such benefits, but may be designated as the person to receive them. However, these legal provisions create problems in practice, since unlawful residents are usually unable to open a bank account in Belgium. In order to overcome these problems, the legislators have provided for the possibility in such cases of the entitled person also being the one who actually receives them. Nonetheless, for such a situation to be detected and communicated, there has to be contact between the social security authorities and the unlawful resident. As a result of this contact, the Family Allowance funds are asked to enrol the person in the Crossroads Bank Registers and assign a Crossroads Bank Number.[715] This example demonstrates that a foreigner who is unlawfully present in Belgium is able to be assigned a Crossroads Bank Number. If he or she were then to take up employment in the country, he or she would fall into our category A and would be in possession of a Crossroads Bank Number.

What is more, like the National Register Number, the Crossroads Bank Number does not expire, which means that irregular migrant workers who had permission to work in Belgium at some time in the past will still be in possession of such a number.

From this it follows that irregular migrant workers are, by and large, *not assigned* a Social Security Number. However, there are *exceptions*. They include those who come into contact with the social security system somehow and are issued a Crossroads Bank Number, as well as a group of category B irregular migrant workers who may be enrolled in the National Register and therefore get a Social Security Number/National Register Number. Furthermore, irregular migrant workers, regardless of their category, are in *possession* of a Social Security Number if they have ever been included in the National Register or the Crossroads Bank Registers.

6.2.2.2. Nationals who engage in undeclared work

Belgian citizens who do not declare their work to the social security authorities when they are obliged to do so are usually in possession of a Social Security Number. This is because Belgian citizens are assigned a National Register Number, if they have ever had their principal residence in a Belgian municipality. Even in the rather theoretical case of a Belgian citizen who takes up his or her principal residence in Belgium for the first time while also performing black-economy work in the country, he or she would receive a National Register Number, which could be used as a Social Security Number for social security purposes. The non-declaration of work is no obstacle to obtaining this number.

6.2.3. Duty to report

Staying unlawfully in Belgium territory is a criminal offence (*misdrijf*) according to section 75 Aliens Act. It is classified as a '*wanbedrijf*'. An employer who employs a foreigner who lacks authorisation to work in the country commits a criminal or an administrative offence under section

[715] Circular Letter of the National Office for Family Allowances for Employees of 8 September 2008 (Omzendbrief van de Rijksdienst voor Kinderbijslag voor werknemers van 8 september 2008 omtrent wet houdende diverse bepalingen (I) van 24 juli 2008), § 3.

175 Social Criminal Code. If the employee has no residence authorisation, the employer's criminal offence is also classified as a '*wanbedrijf*'. If the foreign employee only lacks a work authorisation, but possesses a residence authorisation, the employer's criminal offence is classified as an '*overtreding*' – provided that no aggravating circumstances apply.[716] There are three kinds of criminal offence in Belgian law: *overtreding*, *wanbedrijf* and *misdaad*. A *misdaad* is a serious crime, punishable by five years or more in prison. An *overtreding* is a minor offence, punishable by up to seven days in prison or a fine. A *wanbedrijf* is the category in between, punishable by eight days to five years in prison or a fine.

Pursuant to section 29 of the Criminal Procedure Code,[717] criminal offences which are classified as *misdaad* or *wanbedrijf* must be reported by any public institution, officer or government employee, including the public social security institutions.[718,719] The reporting obligation under the Criminal Procedure Code is usually considered to be more of a moral obligation, since penal sanctions are not entailed.[720,721] However, the lack of penal consequences does not change the fact that the social security authorities are under an obligation to report foreigners who are staying or working unlawfully. The information is supposed to be passed on to the Public Prosecutor (*Procureur des Konings van het Openbaar Ministerie*), the Immigration Service (*Dienst Vreemdelingenzaken*) within the FPS Home Affairs or any other relevant authority.[722]

[716] See § 175 in conjunction with 101 Social Criminal Code. See also Antoine Lievens, "Het Sociaal Strafwetboek – Een nieuwe stap in de strijd tegen de sociale fraude en illegale arbeid," *Rechtskundig Weekblad*, no. 13 (2010-11), p. 535.

[717] Wetboek van Strafvordering van 17 november 1808, B.S. 27 November 1808. See also § 81 Aliens Act.

[718] In the original language § 29 Criminal Procedure Code reads: "*Iedere gestelde overheid, ieder openbaar officier of ambtenaar die in de uitoefening van zijn ambt kennis krijgt van een misdaad of van een wanbedrijf, is verplicht daarvan dadelijk bericht te geven aan de procureur des Konings bij de rechtbank binnen wier rechtsgebied die misdaad of dat wanbedrijf is gepleegd of de verdachte zou kunnen worden gevonden, en aan die magistraat alldesbetreffende inlichtingen, processen-verbaal en akten te doen toekomen.*" For the reporting duty for public social security institutions see also Frank Robben, "De Kruispuntbank van de sociale zekerheid" (PowerPoint presentation given in Brussels on 30 November 2007), p. 22. Available at: http://www.law.kuleuven.be/icri/frobben/presentations/20071130nl.ppt.

[719] Moreover, anyone who knowingly helps a foreigner to remain unlawfully in Belgium commits a criminal offence and is subject to a custodial sentence, a fine or both. See § 77 (1) Aliens Act. This provision is not applicable in case of support for humanitarian reasons. See § 77 (2) Aliens Act.

[720] However, there may be disciplinary sanctions. See Isabelle Van der Straete and Johan Put, *Beroepsgeheim en hulpverlening* (Bruges: Die Keure, 2005), p. 143, § 282.

[721] According to the Belgian Minister of Justice, the criminal offence of unlawful presence is in practice likewise usually not subject to criminal prosecution, because the foreigner must by definition leave the country, which makes prosecution in Belgium impossible. See in this respect Parlementaire Vraag no. 881, 5 October 2006 (Tastenhoye), Vragen & Antwoorden Kamer 2005-06, no. 27.058-27.062. In the original language it reads: *"[...] het 'misdrijf' van illegaal verblijf in de praktijk zelden tot nooit als dusdanig vervolgd wordt (temeer dat de betrokkenen per definitie het grondgebied dienen te verlaten en mogelijk gerepatrieerd worden, zodat iedere strafrechtelijke vervolging in België onmogelijk word).*"

[722] For possible secrecy and confidentiality obligations for health care providers and the social assistance authorities see the respective chapters below.

7. The social risk of old age

The risk of getting old and no longer being able to work for a living is addressed on a multiple-pillar basis in Belgium. There are statutory retirement pension schemes, there are employer pension funds and supplementary pensions for the self-employed, and there are personal pension arrangements. This chapter will only address the statutory scheme for employees, *i.e.* the retirement and survivor's pension insurance based on the Pension Act (*Pensioenwet Werknemers*). There is also a specific social assistance scheme for older people who have no retirement pension or whose retirement pension is below a certain threshold. This scheme will be discussed in the chapter on the social risk of financial need.

7.1. The retirement pension scheme based on the Pension Act

7.1.1. Irregular migrant workers

The statutory retirement pension for employees provides a pension income to all those who have worked as an employee and contributed to Belgian social security at some point in their life.[723] The Pension Act does not specifically address the legal position of irregular migrant workers. It therefore remains to be seen whether irregular migrant workers are able to fulfil the entitlement criteria for a retirement pension.

Migrants who have worked in violation of the Aliens Employment Act and possibly also stayed in Belgium in contravention of the Aliens Act are able from a legal point of view to fulfil the requirement of having worked under an employment contract. This is because the employment contract, though basically invalid due to an unlawful cause, still bears legal consequences, since this invalidity cannot be invoked.[724]

The second condition, namely to have contributed to Belgian social security, can also be met *de iure* by irregular migrant workers. There is no legal provision excluding the affiliation of irregular migrant workers with the RSZ or the payment of contributions on their behalf. On contrary, the payment of contributions is a legal requirement for irregular migrant workers, just as it is for every worker coming within the scope of the RSZ Act. In practice neither irregular migrant workers nor their employers will wish to declare the work to the social security authorities. However, if an employer does wish to do so, he or she will face the obstacle that these workers, especially if they are unlawfully present in Belgium, lack a Social Security Number. Not possessing a Social Security Number is not a problem *per se*, since the RSZ can assign a Crossroads Bank Number to the irregular migrant worker, which then serves as a Social Security Number. But if a Social Security Number cannot be produced, it is very likely that the RSZ will detect the irregular work and take the necessary steps to end it. Only in cases where irregular migrant workers possess a

[723] § 1, § 2 and § 3 Pension Act. The contribution requirement is established by § 32 (1) (b) Pension Decree (Koninklijk besluit van 21 december 1967 tot vaststelling van het algemeen reglement betreffende het rust- en overlevingspensioen voor werknemers), B.S. 16 January 1968. This states that evidence of employment which opens the right to a retirement pension is adduced by any document which proves that pension contributions have been withheld or which relates to periods of inactivity that are equated with periods of activity.

[724] See subchapter 4.3.1.

Social Security Number, which mostly relates to category B workers, is the possibility of declared work and thus contribution payment realistic.[725]

We have already noted that most irregular migrant workers will perform their work without informing the authorities about it. The same rules apply here as for Belgian citizens who work in the black economy, and this situation is therefore covered in the next subchapter, on nationals who engage in undeclared work.

When it comes to the disbursement of pension payments, the laws do not require lawful residence in Belgium. What they do require from foreigners is actual residence in Belgium (*werkelijk verblijven*, *résider effectivement*). There are exemptions from this pension export restriction for refugees, stateless persons, citizens of the EEA, citizens of countries with which Belgium has entered into bilateral agreements and foreigners residing lawfully in another EU Member State (except for Denmark) or in Australia, Japan, Uruguay or India.[726] Actual residence in Belgium is defined as having one's principal residence in Belgium and usually being present (*gewoonlijk verblijven, séjourner habituellement*)[727] in Belgian territory.[728] Principal residence is based on the actual situation of the person concerned.[729] What is considered is whether the person was *de facto* resident in a Belgian municipality for most of the year. This determination is based on various circumstances, such as place of work, usual place of stay of the person's partner or other members of the household, the place of education of his or her children, energy consumption or telephone costs.[730] Thus the place of principal residence is assessed according to the place of actual residence, not the legal status under immigration law. This means that from a legal point of view, foreigners unlawfully residing in Belgium are able to have their principal residence in the country and therefore, provided they are not improperly absent, to collect any pension payments to which they are entitled.

It should be mentioned that pension law obliges the National Office for Pensions (RVP) to obtain the relevant information for deciding on a pension application, including information about the principal residence, from the National Register.[731] The RVP may only turn to other sources if the

[725] See subchapter 6.2.2.1.
[726] See § 27 Pension Act and § 65 Pension Decree.
[727] Here it becomes obvious that the Dutch version and French version of laws are not consistent in their use of the words 'stay' or 'reside'. Throughout our research we have found that the Dutch texts only use the word 'verblijven', which literally translated would rather correspond to the English terms 'stay' or 'be present'. Yet legislation and case law have often attributed a meaning to the term 'verblijven' which requires a certain connection to Belgium and which therefore corresponds more closely to the English term 'reside'. The French texts, by contrast, make a distinction between 'séjourner' and 'résider'. In order to provide a more accurate translation, I will take the French text as my basis.
[728] § 65 (2) Pension Decree. 'Usually living' means, by and large, that foreigners, other than those in the privileged situations mentioned earlier, must not be absent from Belgium for more than one month at a time or for more than three months per year. For this rule and the exceptions to it see § 65 Pension Decree.
[729] Principal residence under the pension laws must be interpreted in the same way as principal residence under the National Register Act. See § 1 (1) 6° in conjunction with § 32 Royal Decree of 4 December 1990 (Koninklijk besluit van 4 december 1990 tot uitvoering van de wet van 20 juli 1990 tot instelling van een flexibele pensioenleeftijd voor werknemers en tot aanpassing van de werknemerspensioenen aan de evolutie van het algemeen welzijn, en tot wijziging van sommige bepalingen inzake werknemerspensioenen), B.S. 20 December 1990. For principal residence under the National Register Act see § 3 (1) 5° National Register Act and § 16 (1) Royal Decree concerning the Population Register and the Aliens Register. For the actual situation see also Raad van State, no. 56.024, *Van der Plas and De Meuter*, 25 October 1995, § 2.1.2.2.
[730] See § 16 (1) Royal Decree concerning the Population Register and the Aliens Register.
[731] § 19 Pension Decree.

National Register does not provide the relevant information.[732] We have seen that foreigners unlawfully residing are not enrolled in the municipal registers and hence not in the National Register – except for asylum-seekers who have exhausted all legal procedures (*uitgeprocedeerd*) and who continue to be enrolled in the Waiting Register.[733] In their case, the RVP would hence be obliged to carry out further investigations in order to determine the principal residence. If the investigations bring to light that the person is not allowed to be present on Belgian soil – which is very likely since this is the reason why the person is not enrolled in the National Register despite his/her principal residence actually being in Belgium – the officer in charge of the RVP is required to report this to the Public Prosecutor, the Immigration Service or any other relevant authority. This is because, as we indicated earlier,[734] staying unlawfully on Belgium territory is a criminal offence which must be reported by the social security administrations. If the RVP complies with its obligation, the Immigration Service will be aware that the applicant for a retirement pension is present unlawfully. This in turn means that there is a chance that the applicant may receive an order to leave the country. Nevertheless, we have seen above[735] that there are possibilities for unlawfully present foreigners to regularise their stay or to be tolerated on Belgian territory even without regularisation. In any case, even if such a foreigner receives an order to leave the country, there is no guarantee that he or she will comply.

However, as long as an unlawfully present foreigner who fulfils all legal requirements for a retirement pension is actually staying in Belgium, he or she is entitled to a retirement pension. This might be the case, for example, in the exceptional circumstances in which the work has been declared and contributions have been paid correctly, or when former periods of undeclared work have been established and contributions have been paid retroactively. Once outside the country, the foreigner can only receive his or her retirement pension if the pension is exported.

7.1.2. Nationals who engage in undeclared work

Under the general retirement pension scheme for employees, eligibility for a retirement pension is triggered once a person has worked under an employment contract and proves that social security contributions for the pension component have been withheld for this employment.[736] Only periods of work for which contributions have been withheld are taken into consideration for the calculation of the retirement pension rate. Undeclared work by Belgian would be regarded as employment under an employment contract, as non-declaration basically does not affect the validity of the contract.[737] However, the fact that no contributions are paid with respect to this work excludes undeclared work by Belgian citizens from being taken into account under the Pension Act.

If past undeclared work is detected – for instance after social inspection or a pension application by an undeclared worker – entitlement to a retirement pension would depend on the proof that

[732] *Ibid*.
[733] See subchapter 6.2.1.1.
[734] See subchapter 6.2.3.
[735] See subchapter 2.1.1.
[736] The Court of Cassation confirmed that the social security contributions must be for the pension component. Contributions for other components of social security do not serve as evidence for employment under the Pension Act. See Hof van Cassatie, 9 November 2009, *JTT* 2010, p. 60.
[737] Even if exceptionally the employment contract was considered to be invalid, the invalidity would not have effect *ex tunc*. See subchapter 4.3.2.

there was employment within the meaning of the RSZ Act and, subsequently, on the payment of contributions. If the competent authorities, *i.e.* the National Social Security Office (RSZ) and the National Office for Pensions (RVP), succeed in collecting contributions, periods of previously undeclared work would be taken into consideration for the retirement pension insurance. The (former) employee does not face any penalty under social security law.[738] The employer alone is liable to pay the employee's and the employer's share of the social security contributions and all additional charges and fines. It should also be recalled that the employer is not entitled to recover the employee's share of the social insurance contributions from the employee, having failed to make the appropriate deductions at the proper time.[739]

The RSZ alone can recover due social security contributions.[740] It may do so for social security contribution debts within a period of three years,[741] or if an *ex officio* declaration takes place after the discovery of fraudulent actions or intentionally incomplete declarations, within a period of seven years,[742] counting from the day on which any given contribution should have been paid. Three or seven years does not seem a very long period with regard to social insurance schemes such as the retirement pension where rights are built up gradually over the whole career. In view of this, beyond this period covered by the statute of limitations, employer or employee has the possibility to regularise periods of undeclared work under the Pension Act by paying social security contributions to the National Office for Pensions RVP. These contributions will equal the employer's and employee's share of the social security contributions with respect to pensions, and are calculated on the basis of average minimum monthly income. Additionally, late-payment interest is charged.[743] If the (former) employer cooperates and pays the regularisation contributions, periods of insurance under the Pension Act will be established. If not, then the (former) employee has the possibility to pay the regularisation contributions. In such a case, the (former) employee may recover these costs from the (former) employer. The basis for such a claim would be either subsection 26 (2) RSZ Act,[744] which stipulates that the employer is obliged to compensate for the disadvantage which the employee has sustained due to the non-payment or late payment of contributions, or section 1382 Civil Code (claim for damages *ex delicto*).

[738] However, the (former) employee may be confronted with back duty under income tax laws.
[739] § 26 (1) RSZ Act. See subchapter 4.3.2. However, § 26 (1) RSZ Act does not prevent that employees, who absolutely voluntarily pay their share of the contributions to the employer who failed to remit them on time, cannot recover these contributions due to payment without reason (betaling zonder oorzaak). See Arbeidshof Antwerpen, 12 December 1991, *JTT* 1992, p. 285.
[740] See, for instance, Arbeidshof Gent, 11 January 1987, *Soc. Kron.* 1985, p. 235.
[741] See § 42 RSZ Act. From 1 January 2009 on the prescription period was reduced from five to three years. See § 74 ff. Act of 22 December 2008.
[742] § 42 RSZ Act.
[743] § 32*bis* Pension Decree.
[744] See subchapter 4.3.2.

8. The social risk of death

On a statutory basis, the risk of losing one's source of income due to the death of another person is in the first instance covered by social insurance, which is organised along professional lines. There are different schemes for employees, the self-employed and public-sector workers, which provide for survivor's benefits in case the insured person deceases. What is more, survivors of employees may also be entitled to specific benefits in the event of the work-related death of the insured person. This chapter will address the legal position of irregular labour migrants and nationals who work in the black economy under the employee schemes: the retirement and survivor's pension scheme based on the Pension Act (*Pensioenwet Werknemers*), labour accident insurance (Labour Accident Act, *Arbeidsongevallenwet*) and occupational diseases insurance (Occupational Diseases Act, *Beroepsziektenwet*).

8.1. The survivor's pension scheme based on the Pension Act

8.1.1. Irregular migrant workers

The survivor's pension component of retirement and survivor's insurance provides a pension for surviving spouses of deceased insured workers who have little or no income from work or from replacement income benefits. One of the preconditions for entitlement is that the deceased worker must have worked under an employment contract within the meaning of the RSZ Act and that social security contributions must have been withheld from wages.[745] For the surviving spouse of an irregular migrant worker this means that whenever contributions are paid with respect to that worker – be it due to declared work or due to retroactive regularisation of periods of undeclared work – the spouse qualifies for a survivor's pension.[746]

One can also ask whether the entitled surviving spouse can be an irregular migrant worker. In principle, this is possible, since the surviving spouse must only satisfy three conditions: he or she must have reached the qualifying age, must have been married to the deceased and must not be earning any relevant income. With regard to this last condition, the irregular migrant worker, who has by definition income from employment, must not earn more than the threshold set. However, there is the risk that the lack of immigration status of an unlawfully present survivor will be revealed during the application procedure.[747] This does not necessarily affect the enjoyment of benefits. The survivor will only be unable to collect benefits – unless they are exported – if his or

[745] § 1, § 2 and § 3 Pension Act and § 32 (1) (b) Pension Decree.

[746] Here we can refer to our analysis of the retirement pension component of retirement and survivor's insurance. See above, subchapter 7.1.1.

[747] The lack of authorisation to be in Belgium is likely to be revealed in the context of the assessment of the survivor's marriage status and – which is crucial for the enjoyment of benefits – the actual residence in Belgium. Information on both must be retrieved from the National Register. See § 19 (1) Pension Decree. Other sources of information are only allowed if the civil status cannot be determined from the National Register. See § 19 (2) Pension Decree. Since unlawfully resident survivors, except for former asylum-seekers still enrolled in the Waiting Register, are not registered with the National Register, additional investigations have to take place. These investigations will very probably bring to light the lack of immigration status, as this is the reason why the person is not enrolled in the National Register when he or she has actually his/her principal residence in Belgium.

her lack of status has been reported to the immigration authorities and, as a consequence, he or she has had to leave the country.[748]

8.1.2. Nationals who engage in undeclared work

Survivors of Belgian citizens who worked without their work being declared to the RSZ and hence without contributions being paid in respect of it are not eligible for a survivor's pension under the Pension Act. This is because the Pension Act only protects survivors of insured employees. Insurance requires the performance of work under an employment contract and the proof that social security contributions for the pension component have been withheld with respect to this employment.

However, as is the case in the retirement pension component of retirement and survivor's insurance, periods of insurance can be established in retrospect by the competent social security authorities. In other words, once the RSZ suspects that there has been undeclared work, it tries to prove it and to collect social security contributions for it. Regularised periods of former undeclared work are then taken into consideration for opening a right to a survivor's pension under the Pension Act and for the calculation of the pension rate. Again, survivors have the possibility to regularise periods of undeclared work of the deceased by themselves. This must relate to periods which are subject to the statute of limitations, *i.e.* for which the RSZ can no longer exercise its power to claim contributions. For regularisation, the survivor, and theoretically the former employer of the deceased too, have to pay regularisation contributions to the RVP.[749] This raises the question whether survivors who have paid regularisation contributions can reclaim them from employers who failed to pay them on time. Section 1382 of the Belgian Civil Code on compensation for damages *ex delicto* would provide a legal basis for this. Section 26 RSZ Act seems less suitable, since it allows for compensation for the employee only, and not the survivor of the employee.[750]

Belgian survivors who are themselves working without informing the social security authorities are eligible for survivor's pensions as long as their income does not exceed the relevant income threshold.[751] In practice, since the RVP is not aware of income from undeclared work, such survivors will probably also be able to collect a survivor's pension to which they are not entitled, because they earn more than the allowed income.

8.2. Labour accident insurance and occupational diseases insurance

Labour accident insurance and occupational diseases insurance will be mainly discussed in chapter 9 on social security protection in case of incapacity for work. Since both insurance schemes also provide for benefits for survivors of a fatal work accident or a fatal occupational disease, in this subchapter we will briefly analyse two questions: first, whether, irregular migrant workers and

[748] For the export of survivor's benefits, basically the same rules apply as for the export of retirement pensions under retirement and survivor's insurance. In addition, export is possible for survivors of deceased EEA citizens or deceased citizens of countries with which Belgium has concluded a bilateral agreement.
[749] For details about the regularisation contributions procedure, see above, subchapter 7.1.1.
[750] For all this, see our findings for the retirement pension component of retirement and survivor's insurance in subchapter 7.1.1.
[751] § 64 (2) Pension Decree.

nationals who do not declare their work to the social security authorities may qualify for survivor benefits and, second, whether the deceased worker could have been an irregular migrant worker or a national working in the black economy.

The legal conditions for survivor's benefits are to a large extent the same under both labour accident insurance and occupational diseases insurance. This is because the Occupational Diseases Act refers with respect to survivor' benefits to Part II, Chapter 1 of the Labour Accident Act.[752]

8.2.1. Irregular migrant workers

Neither the Labour Accident Act nor the Occupational Diseases Act links eligibility for survivor's benefits to a correct immigration status – either of the surviving applicant, or of the deceased worker. Actual payment of social insurance contributions and, in the case of labour accident insurance, premiums to the insurer by the employer of the deceased is not a condition for benefit eligibility. We will see later, in chapter 9, that irregular migrant workers are therefore able to qualify for incapacity for work benefits under the Labour Accident Act and the Occupational Diseases Act. The same can be said for survivors *of* irregular migrant workers[753] and for survivors *who are* irregular migrant workers.

Regarding survivors who are irregular migrant workers, the question arises whether the irregular residence status of category A workers constitutes an obstacle to being regarded as a survivor or to the actual disbursement of benefits.

Eligible survivors are spouses and partners living together under law (*wettelijk samenwonen*); divorced spouses who received subsistence payments from the deceased; (adopted) children of the diseased, the spouse, or the partner who lived together with the deceased under law; in the absence of children, relatives in the ascending line who were economically dependent on the deceased; under certain circumstances, grandchildren who were economically dependent on the deceased; or, in the absence of any other survivors, brothers and sisters who were economically dependent on the deceased.[754] There is an irrefutable presumption of economic dependence[755] if people were living under the same roof.[756] Whether or not a survivor lived with the deceased worker under the same roof is a question of fact for which the survivors must adduce evidence. The Court of Cassation held that this evidence must be more than having the same address in the municipal registers.[757] Unlawfully present foreigners who provide proof of having regularly lived under the same roof as the deceased should therefore be considered as economically dependent survivors.

As we will see below in subchapter 9.3.1., there is no legal requirement for principal residence or inclusion in the National Register for the applicant for benefits. What is more, benefits can be paid by cheque, money order or bank transfer to a foreign bank, so that it is also possible for irregular

[752] § 33 Occupational Diseases Act.
[753] The situation when the deceased was an irregular migrant worker can be compared to the situation when the irregular migrant worker becomes incapacitated for work. We therefore refer for the legal basis of our statements to our findings in chapter 9.
[754] § 12 ff. Labour Accident Act
[755] 'Economically dependent' is my translation of the phrase in the original text '*rechtstreeks voordeel uit het loon halen*'. See § 20 Labour Accident Act.
[756] See Hof van Cassatie, 1 June 1977, *Rechtskundig Weekblad* 1977-78, p. 1367.
[757] *Ibid*.

migrants who have difficulties opening a Belgian bank account to receive benefits.[758] The contact with the social security authorities requires the use of a Social Security Number, which unlawfully present foreigners usually do not have. This might lead to the detection of their unlawful presence by the social security authorities. If so, there is a chance that the Immigration Service will be informed about it, since public social security institutions have an obligation to report the criminal offence of unlawful presence in Belgium. This in turn might have consequences for the person's continued presence in the country.[759] In any case, periodical survivor's benefits under the Labour Accident and Occupational Diseases Act can be exported. Besides, under labour accident insurance, surviving spouses and surviving partners may apply to have part of the periodical survivor's pension converted into a lump-sum payment.[760] Under occupational diseases insurance this is not possible.

To sum up, there are no obstacles for irregular migrant workers to qualify for and actually receive survivor's pensions under the labour accident and occupational diseases insurance schemes. For irregular migrant workers with an unlawful immigration status in Belgium, however, there is a chance that an application will lead to the detection of their irregular immigration status, with possible consequences for their further stay in Belgium.

8.2.2. Nationals who engage in undeclared work

We have already seen that the payment of social insurance contributions and, in the case of labour accident insurance, contributions to the insurer by the employer of the deceased is not a condition for benefit eligibility under the Labour Accident Act and the Occupational Diseases Act. We will see later, in chapter 9, that nationals who perform undeclared work are therefore able to qualify for incapacity for work benefits under the Labour Accident Act and the Occupational Diseases Act. The same is true for survivors *of* nationals working in the black economy[761] and for survivors *who are* nationals working in the black economy. Concerning the latter, there is nothing which would prevent them from qualifying for benefits: there is no link to work or to the income of the survivor.

[758] § 8 and § 9 Royal Decree of 24 December 1987 (Koninklijk besluit van 24 december 1987 tot uitvoering van artikel 42, tweede lid, van de arbeidsongevallenwet van 10 april 1971, betreffende de uitbetaling van de jaarlijkse vergoedingen, van de renten en van de bijslagen), B.S. 6 January 1988. Cash payment is not possible.
[759] On this subject, refer to the findings in subchapter 6.2.3..
[760] § 45 ff. Labour Accident Act and § 6 and § 7*bis* Royal Decree of 24 December 1987.
[761] The situation where the deceased was a Belgian citizen working in the black economy can be compared to the situation where the undeclared Belgian worker becomes incapacitated for work. We therefore refer for the legal basis of our statements to our findings in chapter 9.

9. The social risk of incapacity for work

In Belgian statutory social security law, sickness and invalidity insurance, based on the Sickness Insurance Act (*Ziekteverzekeringswet*), covers the risk of losing one's source of income by becoming incapacitated for work. As the name indicates, the insurance covers short-term sickness as well as long-term invalidity. In addition, it provides for income replacement benefits during periods of incapacity for work due to maternity, paternity or adoption. In addition to sickness and invalidity insurance, labour accident insurance, based on the Labour Accident Act (*Arbeidsongevallenwet*), and occupational diseases insurance, which has its legal basis in the Occupational Diseases Act (*Beroepsziektenwet*), allow for income replacement payments in case of industrial injury or occupational disease. These three schemes will be under investigation in this chapter. The Disabled Person's Allowance is not considered here. Due to its social assistance character, it will be discussed below under the social risk of financial need.

9.1. Incapacity for work benefits based on the Sickness Insurance Act

9.1.1. Irregular migrant workers

The incapacity for work component of Belgium's sickness and invalidity insurance provides an income replacement benefit for a worker who has had to stop work completely due to injury or sickness and whose degree of earning capacity is 66 percent or less of that of a reference person.

The Sickness Insurance Act does not link eligibility for and disbursement of incapacity for work benefits to lawful presence or lawful work in Belgium. However, there are two qualifying conditions which will make it difficult for irregular migrant workers to qualify for benefits: first, the requirement to affiliate with a sickness and disability insurance fund or with the Relief Fund for Sickness and Invalidity Insurance (*Hulpkas voor ziekte- en invaliditeitsverzekering*);[762] and, second, the need to have paid sufficient RSZ contributions for the incapacity for work component.[763] Usually, neither of these conditions is met by irregular migrant workers, since their work is not declared to the social security authorities. Only in two situations is it possible for irregular migrant workers to enjoy protection under the Sickness Insurance Act in case of incapacity for work due to sickness or invalidity: first, in case of formal work and, second, in case of retroactive regularisation of previous informal work.

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[762] § 118 (1) Sickness Insurance Act.

[763] As a rule, incapacitated employees must have worked a sufficient time and paid sufficient social security contributions during a waiting period. The waiting period is the last six months before obtaining the status as employee within the meaning of the sickness and invalidity insurance. See § 128 Sickness Insurance Act. For the exceptions to the waiting period requirement, see § 205 Sickness Insurance Decree (Koninklijk besluit van 3 juli 1996 tot uitvoering van de wet betreffende de verplichte verzekering voor geneeskundige verzorging en uitkeringen, gecoördineerd op 14 juli 1994), B.S. 31 July 1996. Moreover, all claimants, *i.e.* employees subject to a waiting period and employees exempted from this requirement, must prove that they have worked and contributed to social insurance sufficiently during the second and the third calendar quarter before they become incapacitated. For instance, if a person becomes incapacitated on 5 November 2011, he or she must have worked and contributed sufficiently in the first and second calendar quarter of 2011. See § 130 Sickness Insurance Act. This period is called the 'reference period'. With regard to the requirement to have worked a sufficient number of days, the law does not explicitly require that work to be in compliance with the Alien Employment Act. See in particular § 207*bis* Sickness Insurance Decree and § 24 RSZ Royal Decree.

Concerning the first situation, we have already seen that this only happens exceptionally.[764] Neither employer nor irregular migrant worker is usually inclined to declare the work. What is more, even if they tried to declare their work properly, there would be a chance, in particular with respect to category A workers, that the RSZ would discover the worker's irregular status under the Aliens Act and the Aliens Employment Act and prevent him or her from starting work. That said, in the exceptional situation where such work was successfully declared, the irregular migrant worker would face no obstacles under the Sickness Insurance Act in qualifying for incapacity for work benefits. Affiliation with a sickness and invalidity insurance fund is both legally and practically possible. This is because the insurance fund receives the insurance data via the KSZ from the RSZ[765] and there are no requirements with regard to immigration status when it comes to affiliation.[766] The second relevant condition, *i.e.* payment of sufficient social security contributions, is also fulfilled in case of formal work. Problems will only arise if the affiliation with an insurance fund results in the discovery of irregular residence status[767] and if this discovery in turn leads to the worker leaving Belgium. He or she would no longer be able to receive incapacity for work benefits, since they are basically not exported. However, it should be mentioned that even if the immigration authorities are informed about an unlawfully resident foreigner, the latter, if sick or disabled, may be able to get an order to leave the country postponed or to get his or her immigration status regularised.[768]

Concerning the second situation, *i.e.* regularisation of undeclared work, the legal position of irregular migrant workers is the same as the position of nationals whose work is not declared. This means that when it can be established that employment within the meaning of the RSZ Act took place and the employer retroactively pays the social insurance contributions, the irregular migrant worker is retroactively insured. It should also be mentioned here that the regularisation procedure will reveal the migrant's lack of residence status and/or employment authorisation. Enjoyment of incapacity for work benefits is hence only possible as long as the person does not leave Belgium.

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[764] See subchapter 5.2.1.

[765] People coming within the personal scope of application of the Sickness Insurance Act basically have the choice with which institution they want to register. There is no *ex officio* affiliation with an insurance fund or the Relief Fund. The insurance fund has to decide within the legal framework on whether to accept an applicant or not. However, as we will describe in the next subchapter on Belgian nationals who engage in undeclared work, an acceptance only takes effect if the insurance fund receives a certificate of contribution payment with respect to the affiliation of an employee. See § 252 (5) Sickness Insurance Decree.

[766] Belgian law requires neither lawful residence nor the possession of permission to work in Belgium for affiliation with a fund. The policies of the funds also do not seem to require proof of these things. See for instance Christophe Vanroelen, Tom Smeets and Fred Louckx, *Nieuwe kwetsbare groepen in de Belgische gezondheidszorg* (Ghent: Academia Press, 2004), pp. 49-50.

[767] When requesting affiliation with an insurance fund, the applicant must, amongst other information, provide his or her address (§ 252 (1) Sickness Insurance Decree in conjunction with Annex I to the Sickness Insurance Decree). The insurance fund is then legally required to check this information (§ 252 (1) Sickness Insurance Decree). To this end, the fund must consult the National Register (§ 7 (1) Sickness Insurance Act). If the irregular migrant worker is enrolled in the National Register, which may in particular be the case for category B workers, the living address can be confirmed. If not, then the sickness fund has to turn to other sources to determine the applicant's living address (§ 7 (2) Sickness Insurance Act). Such investigations may reveal the person's lack of residence status under immigration laws.

[768] See subchapter 2.1.1.

9.1.2. Nationals who engage in undeclared work

There are two qualifying conditions for incapacity for work benefits under the Sickness Insurance Act which can be considered as a requirement to declare the work: first, the condition that the employee affiliates with an insurance fund and, second, the condition that the employer has paid sufficient RSZ contributions for the incapacity for work component.[769] Concerning the first condition, affiliation with a fund only becomes effective if the fund receives either a certificate of contribution payment from the RSZ or, for a first registration, a declaration by the employer that the applicant is an employee who is subject to the incapacity for work component or the health care component or both of sickness and invalidity insurance, and that contributions will therefore be paid in respect of him or her.[770] Since undeclared work is defined for the purposes of our research as work engaged in without informing the social security authorities where there is an obligation to do so, and without paying the required social security contributions, it follows that Belgians who engage in undeclared work do not qualify for sickness and invalidity benefits under the Sickness Insurance Act.

However, if the social security authorities become aware of undeclared work – for instance through social inspections or because the employee applies for benefits – they try to establish the circumstances of the work. If the authorities do not succeed in proving undeclared employment for periods before the day on which the undeclared work became known, then the employer is subject to fines, including the solidarity contribution. Retroactive contribution payment, though, does not take place. This in turn means that no entitlement to incapacity for work benefits can be established. If, on the other hand, the authorities succeed in determining a previous period of undeclared work, then a contribution obligation arises. A subsequent payment of contributions paves the way for incapacity for work benefit payments for a previously undeclared worker.

9.2. Maternity, paternity and adoption benefits based on the Sickness Insurance Act

The personal scope of application of maternity insurance is completely identical to that for sickness and invalidity insurance under the Sickness Insurance Act. Almost the same can be said about the entitlement criteria. Most notably, there is also a waiting period[771] and a reference period, during which a minimum number of working days and a minimum amount of contribution payment must be proven. As is the case under sickness and disability insurance, the employee must stop working – though this must be due not to injury or sickness, but due to maternity, paternity or adoption.

Concerning foreign employees who work in contravention of the Aliens Employment Act in Belgium and Belgian employees whose work is not declared to the social security authorities, we

[769] We referred earlier to the requirement to have paid sufficient social security contributions during the waiting period and the reference period. Concerning the waiting period, § 128 Sickness Insurance Act reads in the original language: "*[...] het bewijs leveren dat [...] de bijdragen voor de sector uitkeringen werkelijk betaald werden.*" Regarding the reference period, § 130 Sickness Insurance Act reads in the orginial language: "*[...] het bewijs leveren dat [...] de bijdragen voor de sector uitkeringen [...] werden betaald.*"

[770] § 252 (5) and § 276 (2) Sickness Insurance Decree.

[771] With the difference that under § 205 (4) Sickness Insurance Decree there is a special rule for the reduction of the waiting period for maternity benefits.

can refer to our findings on sickness and invalidity insurance in subchapter 9.1. The only thing to be added here is that there is no requirement whatsoever as to the child.[772]

9.3. Labour accident insurance

9.3.1. Irregular migrant workers

Belgium's labour accident insurance provides employees who have had a work-related accident with an income replacement and the coverage of health care costs. Employers who have to finance this insurance in turn largely enjoy immunity from civil law suits.[773] The insurance basically covers employers and their employees who fall within the scope of the RSZ Act. Irregular migrant workers are, despite their invalid employment contract, employees within the meaning of the RSZ Act, because contractual invalidity cannot be invoked for the application of the RSZ Act.[774] The same is true of the application of the Labour Accident Act.[775] Hence they are protected under the Labour Accident Act. Compliance with the Aliens Act or the Aliens Employment Act is not required for benefit entitlement or disbursement. Payment of contributions by the employer is not a criterion either. From this it follows that irregular migrant workers are entitled to incapacity for work and health care benefits under the Labour Accident Act if they have had a work-related accident, provided, of course, that they meet all the eligibility requirements, such as not having deliberately caused the accident.

This conclusion has been confirmed by case law. The Labour Court of Appeal of Antwerp held that the fact that a person is employed illegally is irrelevant for the application of the Labour Accident Act. The fulfilment of the legal eligibility requirements is the only decisive factor.[776]

There are no other conditions that might form a particular obstacle for migrants residing unlawfully in Belgium under the Labour Accident Act and related laws. Specifically, there are no conditions relating to having one's principal residence in Belgium,[777] being included in the

[772] See § 112 ff. Sickness Insurance Act.
[773] § 46 (1) Labour Accident Act.
[774] See subchapter 4.3.1.
[775] § 6 (1) Labour Accident Act.
[776] In the original language it reads: "*De discussie of deze tewerkstelling illegaal was en of het slachtoffer was ingeschreven op een loonlijst, is hierbij irrelevant. De illegale tewerkstelling is, voor wat betreft de toepassing van de Arbeidsongevallenwet, zonder enige invloed voor de aanvaarding van het ongeval, voorzover aan de in deze wet gestelde voorwaarden is voldaan.*" The Court did not elaborate further on the issue of illegality. Instead it dealt with the question whether an accident during an attempt to escape from the police, because of unlawful employment, amounts to a labour accident. This was eventually decided in the affirmative. Arbeidshof Antwerpen, 14 March 2005, *Soc. Kron.* 2005, p. 384.
[777] For some communications between insurers/FAO and the applicant/beneficiary, the law states that the applicant/beneficiary must be contacted at his/her principal residence. However, the applicant/beneficiary can apply to use another contact address. For instance, for the submission of the contribution certificate see § 34 Labour Accident Decree (Koninklijk besluit van 21 december 1971 houdende uitvoering van sommige bepalingen van de arbeidsongevallenwet van 10 april 1971), B.S. 28 December 1971. Moreover, when a labour accident is declared, the principal residence and, if necessary, a contact address have to be provided. For the model form see Aanschrijving no. 2007/4, 9 July 2007 of the FAO. Insurers and FAO can check the information on the principal residence in the National Register. See Royal Decree of 16 December 1987 (Koninklijk besluit van 16 december 1987 houdende organisatie en werking van een centrale gegevensbank bij het Fonds voor arbeidsongevallen), B.S. 25 December 1987. However, there is no legal or practical consequence if information on the principal residence is not provided.

National Register, or having a Belgian bank account to which the benefits can be transferred.[778] Thus migrants with an irregular immigration status can receive benefit payments in Belgium, and former irregular migrant workers can receive their income replacement benefits abroad.

Nevertheless, since irregular migrant workers usually engage in undeclared work there may be some difficulties in proving that they have been in employment and establishing the wages on which the calculation of the benefit rate will be based.[779] Moreover, contact with the social security authorities, and possibly with the labour inspectorate and the police too, may lead to the injured worker's irregular migration status being discovered.[780] This in turn may put an end to the worker's stay in Belgium. However, it should be noted that it is possible for an order to leave the country to be postponed for medical reasons or for an immigration status to be regularised for longer for medical reasons. What is more, income replacement benefits under the labour accident scheme can be exported or transformed into a lump sum payment.[781]

It is worth mentioning that in case of temporary partial incapacity for work, the Labour Accident Fund (*Fonds voor Arbeidsongevallen, FAO*), the employer and the competent doctor may investigate the possibilities of reemployment.[782] The benefit rate for temporary partical incapacity for work is basically 90 percent of the previous average wage. If the incapacitated worker accepts reemployment, he or she is entitled to the difference between the wage before and the wage after the accident. If the incapacitated worker refuses an offer of reemployment without valid reason, the benefit is reduced to an amount which equals the worker's degree of incapacity. The concrete loss of wages is then not relevant anymore. To my knowledge, the question whether a lack of a work authorisation is a valid reason to refuse an offer of reemployment has not been addressed by the competent authorities or case law so far.

9.3.2. Nationals who engage in undeclared work

Belgian citizens whose work is not declared to the social security authorities and their employers fall by definition within the scope of the RSZ Act and thus of the Labour Accident Act. The fact that Belgian laws are violated by the non-declaration of the work does not usually affect the validity of the employment contract. It has been demonstrated that only in exceptional situations where the agreement to engage in black-economy work is an integral part of the contractual

[778] For instance, benefits can be paid by money order, cheque payment or by bank transfer to a foreign bank. See § 8 and § 9 Royal Decree of 24 December 1987.

[779] Employers are basically obliged to report a labour accident within eight days to the insurer or the FAO, and, under certain circumstances, the labour inspectorate for workplace safety or even the police. See § 2 Royal Decree of 12 March 2003 (Koninklijk besluit van 12 maart 2003 tot vaststelling van de wijze en van de termijn van aangifte van een arbeidsongeval), B.S. 2 April 2003. If the employer fails to report the accident, then the employee can do so within a prescribed period of time.

[780] In case of an industrial accident, there may be a number of institutions involved: the Labour Accident Fund; if applicable, the labour accident insurer; and, if applicable, the labour inspectorate for workplace safety and the police. Some of these authorities, *i.e.* the labour inspectorate for workplace safety and the various police forces, are explicitly required by law to monitor compliance with the Aliens Employment Act (See § 11 Aliens Employment Act in conjunction with the Labour Inspection Act. See also Domen, *Praktijkgids*, p. 140). In addition, public institutions, including the public social security institutions, are required to report a criminal offence such as unlawful presence in Belgium. See subchapter 6.2.3.

[781] Transformation is only possible for persons whose permanent incapacity for work has been assessed as being more than 19 percent, and it is only possible to transform one-third of the projected future benefits. See § 45 ff. Labour Accident Act and § 6 and § 7*bis* Royal Decree of 24 December 1987.

[782] § 23 Labour Accident Act.

obligations – such as when employee and employer agree that the employer will pay the employee's share of the social security contributions directly to the employee instead of to the social security authorities – can one argue that the contract would be invalid, due to its unlawful cause and unlawful subject matter. However, both the RSZ Act and the Labour Accident Act expressly stipulate that invalidity of the contract cannot be invoked to prevent the application of these acts.[783]

What is more, benefit entitlement does not depend on the payment of contributions. In the case of labour accident insurance, it is only the employer who has an obligation to contribute to its funding. If the employer fails to comply with this obligation, there are no consequences for the protection provided to the injured employee.[784]

For the sake of completeness one should mention that undeclared work can occur in two forms in the context of labour accident insurance. First, when the employer is not known as an employer at all to the social security authorities. In other words, when the employer fails to take out insurance with a labour accident insurance company/fund and to declare its employees to the RSZ.[785] Second, when the employer is affiliated with an insurer, but does not declare the work of all of its employees to the RSZ. In the first situation, the employer will be registered *ex officio* with the Labour Accident Fund (FAO), as soon as the authorities become aware of the employer – for instance because of the declaration of an industrial accident or because of social inspections. The FAO is then also legally required to provide benefits to the injured black-economy worker.[786] However, since the FAO is not an insurance fund, the FAO is entitled to claim back the cost of these benefits from the uninsured employer, by virtue of 'subrogation' rights).[787] In the second situation, it is the private insurance company or fund which is under a legal obligation to provide benefits to the undeclared worker.[788]

[783] See subchapter 4.3.2. In more detail, see § 6 (1) Labour Accident Act.
[784] See for instance the above-cited case of the irregular migrant worker who engages in undeclared work. Arbeidshof Antwerpen, 14 March 2005, *Soc. Kron.* 2005, p. 384. See also Fonds voor arbeidsongevallen, *Uw rechten inzake arbeidsongevallen in de prive-sector* (information brochure) (Brussels: Fonds voor arbeidsongevallen, March 2007), p. 3.
[785] For the employer's obligation to affiliate with a labour accident insurance company or fund see § 49 (1) Labour Accident Act. See also subchapter 3.2.
[786] § 58 (1) 3° Labour Accident Act.
[787] Hof van Cassatie, 14 December 1987, *Arr. Cass.* 1987-88, p. 486. In addition, see § 60 Labour Accident Act. In particular, for the possibilities for refraining from claiming back costs see Royal Decree of 30 December 1976 (Koninklijk besluit van 30 december 1976 tot uitvoering van de artikelen 45*quinquies*, 60 en 60*bis* van de arbeidsongevallenwet van 10 april 1971), B.S. 15 January 1977 and Royal Decree of 8 December 1977 (Reglement van 8 december 1977 vastgesteld in toepassing van de artikelen 1 en 3 van het koninklijk besluit van 30 december 1976 tot uitvoering van de artikelen 60 en 60*bis* van de arbeidsongevallenwet van 10 april 1971), B.S. 7 March 1978. For the requirement to reclaim costs see § 59 Bestuursovereenkomst tussen de Belgische Staat en het Fonds voor arbeidsongevallen, Attachment to the Royal Decree of 8 April 2002 (Koninklijk besluit van 8 april 2002 tot goedkeuring van de eerste bestuursovereenkomst van het Fonds voor Arbeidsongevallen en betreffende de vaststelling van de maatregelen tot rangschikking van bedoeld Fonds bij de openbare instellingen van sociale zekerheid), B.S. 4 June 2002.
[788] For a confirmation see Arbeidshof Antwerpen, 14 March 2005, *Soc. Kron.* 2005, p. 384.

9.4. Occupational diseases insurance

Occupational Diseases Insurance is in many respects similar to Labour Accident Insurance and hence will only be discussed briefly.

9.4.1. Irregular migrant workers

Occupational Diseases Insurance provides incapacity for work, health care and survivor's benefits to (former) employees who suffer from a work-related disease. In return for receiving these benefits, employees largely abandon their rights to sue the employer.

Irregular migrant workers fall within the scope of the RSZ Act. Accordingly, they are also protected under the Occupational Diseases Act.[789] Neither the irregular migration status of the employee nor the non-payment of RSZ contributions by the employer affects eligibility for benefits. In practice, proof of the work which caused the disease might be difficult to provide for undeclared workers – whether irregular migrant workers or Belgians. Essentially, if the disease is a recognised occupational disease and is thus included on an officially recognised list of occupational diseases, the (former) employee has to prove that he/she worked in a certain occupation or industrial sector. If this is not the case, it will be even more difficult for an undeclared worker to provide evidence for an occupational disease. Then the worker must adduce evidence that, amongst other things, the exposure to hazardous substances or circumstances was inherent to his/her job and that the exposure was considerably greater than the exposure of the population in general. Here the factor of time, *i.e.* the period of employment, plays a greater role than it does for labour accident insurance, where the primary requirement is for employment at the time of the industrial accident to be established. For workers whose work has not been declared to the social security authorities it will not be easy to succeed in proving that work was done over a period of time and consequently that the disease is occupational.

Concerning irregular migrant workers without authorisation to stay in Belgium, there are no conditions which would prevent them from qualifying for or collecting benefits – the latter in Belgium or abroad. In particular, there is no requirement to have one's principal residence in Belgium or to be included in the National Register.[790] Nor is there a requirement to have a Belgian bank account for benefit transfer.[791] However, for contact with the social security authorities in general and the Occupational Diseases Fund (*Fonds voor de Beroepsziekten, FBZ*) in particular, a Social Security Number is required.[792] Since most foreigners without authorisation to be in Belgium do not possess a Social Security Number and the reason for this is the lack of a regular

[789] § 2 (1) 1° Occupational Diseases Act.

[790] For all communications between the FBZ and the applicant/beneficiary, the law prescribes that the applicant/beneficiary must be contacted at his/her principal residence. However, the applicant/beneficiary can apply to use another contact address. See § 13 (3) Royal Decree of 26 September 1996 (Koninklijk besluit van 26 september 1996 tot vaststelling van de wijze waarop de aanvragen om schadeloosstelling en om herziening van reeds toegekende vergoedingen bij het Fonds voor de beroepsziekten worden ingediend en onderzocht), B.S. 9 October 1996.

[791] On the contrary, bank transfer is only possible by request. See § 3 Royal Decree of 10 December 1987 (Koninklijk besluit van 10 december 1987 tot vaststelling van de wijze van betaling van de vergoedingen die verschuldigd zijn krachtens de op 3 juni 1970 gecoördineerde wetten betreffende de schadeloosstelling voor beroepsziekten), B.S. 29 December 1987.

[792] § 8 Crossroads Bank Act.

migration status, the FBZ or the RSZ may discover their status. For the consequences, see the previous subchapter on labour accident insurance.

With respect to occupational diseases, there may be a long period of time between the exposure to harmful working conditions and the emergence of a disease or the appearance of symptoms of a disease. We have already seen that income replacement benefits are also exported once a person moves or is forced to move abroad. But what if a person, in particular a former irregular migrant worker, is already abroad when a disease becomes apparent? If there is a bilateral agreement with the country or it is a European Union Member State, applications may be filed with authorised foreign social security authorities, which then submit the application to the Belgian Occupational Diseases Fund.[793] Outside the scope of bilateral and European Union legislation, applications can be filed directly with the Belgian Occupational Diseases Fund. It is then up to the Fund, if applicable in cooperation with the foreign social security authorities and doctors, to establish the existence of an occupational disease related to the employment in Belgium. For irregular migrant workers, who have usually worked in the black economy in Belgium, the establishment of Belgian employment may be more difficult than it is for other social risks. This is because a long time may have passed since the employment took place, and the employment was not known to the public authorities. If the worker was not lawfully resident, the Belgian authorities may not even have known about the existence of the foreigner. Thus, while a former irregular migrant worker may qualify for incapacity for work benefits when outside Belgium, there may be difficulties in establishing employment and employment circumstances in Belgium.

9.4.2. Nationals who engage in undeclared work

Belgian citizens whose work is not declared to the social security authorities are in the same legal position as irregular migrant workers (regardless of whether these latter have worked in the black economy or, exceptionally, declared their work to the RSZ). More specifically, undeclared Belgian workers come within the scope of the RSZ Act. Accordingly, they are also protected under the Occupational Diseases Act.[794] The non-payment of RSZ contributions by the employer does not affect eligibility for benefits. The only potential problem, as mentioned before in the context of undeclared irregular migrant workers, is that providing proof of the work which caused the disease might be difficult for undeclared workers. This is especially true if the disease is not a recognised occupational disease which is included in the above-mentioned list.

[793] See § 3 Royal Decree of 26 September 1996.
[794] § 2 (1) 1° Occupational Diseases Act.

10. The social risk of unemployment

The risk for employees of becoming unemployed and losing their source of income is only covered on a statutory basis by the unemployment insurance based on the Unemployment Decree (*Werkloosheidsbesluit*).

10.1. Unemployment insurance

10.1.1. Irregular migrant workers

Unemployment insurance provides a replacement income for employees who have become involuntarily unemployed and who have done enough work in a reference period. However, irregular migrant workers are largely excluded from the possibility to build up rights in the unemployment insurance scheme and to become entitled to benefits even if they have contributed to social security. This exclusion is expressly stipulated in both the Unemployment Decree and its legal basis, section 7 of the Act of 28 December 1944. More specifically, work performed by a foreigner in violation of the Aliens Employment Act is not taken into consideration for the fulfilment of the waiting period requirement,[795] *i.e.* the performance of sufficient work in the reference period,[796] and hence cannot lead to the building up of rights in the unemployment insurance scheme.[797] What is more, aliens who do not meet the conditions set out in the Aliens Act and the Aliens Employment Act are not entitled to unemployment benefits.[798] This exclusion

[795] § 42 Unemployment Decree provides for an exemption from the waiting period if unemployment benefits are reapplied for within three years. However, § 43 (2) Unemployment Decree and § 7 (14) (6) Act of 28 December 1944 restrict this exemption from the waiting period to exclude migrants who lose their work permit or employer permit. If they do not regain their work authorisation within sixty days after its loss, they cannot be exempted from the waiting period, according to § 42. This restriction does not apply to foreigners who have the right to settlement in Belgium, to refugees and to foreigners to whom the employer permit must not be denied. See § 43 (2) (2) Unemployment Decree and § 7 (15) (7) Act of 28 December 1944.

[796] § 27 7° and § 30 Unemployment Decree.

[797] § 43 (1) (1) and (2) Unemployment Decree and § 7 (15) Act of 28 December 1944 (Besluitwet van 28 december 1944 betreffende de maatschappelijke zekerheid der arbeiders), B.S. 30 December 1944, erratum B.S. 25 January 1945. Case law has been confronted with a number of legal questions concerning the interpretation of § 43 Unemployment Decree and its compliance with international law with respect to asylum-seekers who have worked under a provisional employer permit in Belgium.[797] Since asylum-seekers are not covered by this research, since their work in Belgium is legally compliant and since many of the legal questions were resolved with the introduction of the Aliens Employment Act in 1999, these legal problems will not be addressed here. Legal questions with regard to foreigners who have no authorisation at all to be or to work in Belgium have not been discussed by the judiciary. For the provisional employer permit see subchapter 2.2. For a discussion of the case law see Bouckaert, *Documentloze vreemdelingen*, pp. 462-77.

[798] § 69 (1) Unemployment Decree. In the original language it reads: "*Om uitkeringen te genieten moet de vreemde of staatloze werkloze voldoen aan de wetgeving die betrekking heeft op de vreemdelingen en deze die betrekking heeft op de tewerkstelling van vreemde arbeidskrachten.*" Unemployment insurance is legally based on a Royal Decree, which has never been discussed in Belgian parliament. Therefore we do not know the reason for the exclusion of irregular migrant workers. The incorporation of this exclusion into formal law, *i.e.* in § 7 (15) of the Act of 28 December 1944, did not shed any more light on this issue. In 2002, the Belgian legislators reiterated § 69 Unemployment Decree in § 7 (15) of the Act of 28 December 1944 in response to the courts. The courts, against the background of Article 191 Belgian Constitution, had required this special treatment of foreigners to be based on a parliamentary Act, rather than a Royal Decree. However, this adaptation was merely explained in Belgian parliament as being required for technical reasons, without further discussion. For the case law on this point see most notably Hof van Cassatie, 25 March 2002, *JTT* 2002, p. 440. For the motivation of the adaptation in Belgian parliament see Parlementaire stukken: Kamer, 2001-

relates both to the moment of application and to the whole period of receipt. Any change of immigration status for the worse – in other words, any loss of authorisation to stay in the country – immediately entails the loss of entitlement to benefits. With respect to a loss of authorisation to work in Belgium, the situation is somewhat different. Foreign beneficiaries whose work permit is withdrawn or whose employer loses the employer permit remain entitled to benefits for sixty more days. Foreigners in respect of whom the employer permit may not be denied according to the Aliens Employment Act have the right to receive benefits even beyond the period of sixty days.[799]

Since beneficiaries must have their principal residence in Belgium and must actually reside (*effectief verblijven, résider effectivement*) in this country, it is not possible for foreigners who have built up rights during periods of lawful work to receive benefits abroad once they cease to be lawfully resident or lose their work authorisation and leave the country.[800]

We saw in subchapter 5.2.1. that, basically, the possibility cannot be excluded that foreigners who have no authorisation to work in the country are registered with the RSZ and social security contributions are paid for their work. However, this fact is irrelevant to unemployment insurance. Subsection 43 § 1 (1) and (2) Unemployment Decree makes it impossible for rights to arise from employment in violation of the Aliens Employment Act. The situation has actually occurred in which irregular migrant workers for whom social security contributions have been paid, but who due to their irregular status are not entitled to unemployment benefits, have contacted the RSZ and requested the reimbursement of their contributions. The RSZ has always dismissed such requests, for which there is indeed no legal basis. The RSZ could only reimburse contributions if it turned out that there had not been employment within the meaning of the RSZ Act. This however is not the case with regard to irregular migrant workers.[801]

We have seen that foreigners must comply with the Belgian Aliens Act and the Aliens Employment Act in order to be entitled to unemployment benefits. This is not required of Belgian citizens, who basically have the right to stay and work in the country. However, case law and some authors have considered this additional requirement as a possible form of discrimination based on nationality, since compliance with other Belgian laws is not demanded. For instance, periods of work in violation of the laws which regulate night-work, child labour or maternity protection are accepted for building up rights to unemployment insurance scheme.[802]

10.1.2. Nationals who engage in undeclared work

Eligibility for unemployment benefits is, amongst other things, made conditional upon having worked for long enough during a reference period and upon being available for the Belgian labour

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02, no. 1823/014, pp. 38-39. For the adaptation itself see § 114 Act of 2 August 2002 (Programmawet van 2 augustus 2002), B.S. 29 August 2002.

[799] § 69 (2) Unemployment Decree. § 7 (15) Act of 28 December 1944.

[800] § 66 (1) Unemployment Decree.

[801] These findings are unfortunately not based on publicly available sources. I obtained this information from an e-mail message from Bruno De Pauw, Attaché at the Department for International Relations at the RSZ, 24 February 2010.

[802] See Jef Van Langendonck, "De behandeling van vreemdelingen in de Belgische sociale zekerheid," in *Vreemdelingen en sociale zekerheid*, ed. Instituut voor Sociaal Recht K.U. Leuven (Ghent: Mys & Breesch, 1996), p. 13; or Van Langendonck and Put, *Handboek socialezekerheidsrecht*, p. 575. See also Arbeidsrechtbank Antwerpen, 13 February 2003, *Tijdschrift Vreemdelingenrecht* 3 (2003), pp. 228-29; or Arbeidsrechtbank Brugge, 29 June 1998, *Soc. Kron.* 1999, pp. 519-98. However, these legal cases were not about irregular migrant workers as defined for the purposes of our research, but about asylum-seekers who performed work under a preliminary employer permit only.

market.[803] Pursuant to the Unemployment Decree, only work for which deductions for social security, including for its unemployment component, have been made by the employer are taken into consideration for the determination of the fulfilment of the waiting period requirement.[804] The Ministerial Decree pursuant to the Unemployment Decree differentiates between making deductions and remitting contributions. The latter is not a precondition for benefit entitlement.[805] In the case of completely undeclared work, which is the subject of our research, employers fail to do both: deductions and remittances. Hence this distinction is not relevant for our research.

Nevertheless, unemployment insurance facilitates access to unemployment benefits for undeclared workers, as defined by our research, who contribute to the discovery of black-economy work. More specifically, if the employee reports the employer's failure to social inspectors or if the competent union has urged the employer to comply with the employer's obligations, it is assumed that a deduction for social security has been made and that the entitlement criterion has been fulfilled.[806]

Employees who do not cooperate in the above ways are in effect deemed to have cooperated in black-economy work and are therefore only eligible for benefits after the regularisation of previous periods of undeclared work. To be more precise, the Ministerial Decree pursuant to the Unemployment Decree requires the employee to provide evidence that the employer has in the meantime actually paid the outstanding contributions to the RSZ for employment that falls within the scope of the RSZ Act. [807] These provisions are unique. Similar provisions cannot be found in other Belgian social insurance laws.

[803] § 27 7° and § 30 Unemployment Decree and § 56 Unemployment Decree.
[804] § 37 (1) (1) Unemployment Decree.
[805] § 16 (1) Ministerial Decree of 26 November 1991 (Ministerieel besluit van 26 november 1991 houdende de toepassingsregelen van de werkloosheidsreglementering), B.S. 25 January 1992, erratum B.S. 8 April 1992, erratum 11 June 1992. In the original language it reads: "*De werknemer op wiens loon de voorgeschreven inhoudingen voor de sociale zekerheid, met inbegrip van de sector werkloosheid, verricht werden, voldoet aan de bepalingen van artikel 37, § 1, eerste lid, 2°, van het koninklijk besluit, zelfs als de werkgever niet de vereiste stortingen bij de bevoegde instelling gedaan heeft.*"
[806] § 16 (2) Ministerial Decree of 26 November 1991. In the original language it reads: "*De werknemer op wiens loon de voorgeschreven inhoudingen voor de sociale zekerheid niet, of slechts ten dele werden verricht, wordt geacht te voldoen aan de bepalingen van artikel 37, § 1, eerste lid, 2°, van het koninklijk besluit indien gelijktijdig voldaan is aan de volgende voorwaarden: [...] 2° de werknemer heeft zich bij de bevoegde inspectiedienst over het verzuim van zijn werkgever beklaagd of zijn vakorganisatie heeft de werknemer, bij ter post aangetekend schrijven, verzocht zijn verplichtingen na te leven.*"
[807] § 17 Ministerial Decree of 26 November 1991. In the original language it reads: "*Wanneer niet voldaan werd aan de voorwaarden van artikel 16, tweede lid, 2°, worden de arbeidsdagen waarvoor een loon werd betaald waarop de voorgeschreven inhoudingen voor de sociale zekerheid, niet of slechts ten dele werden verricht, niettemin in aanmerking genomen, met uitwerking op de datum van de uitkeringsaanvraag, indien gelijktijdig voldaan is aan de volgende voorwaarden: [...] 2° de werknemer levert het bewijs dat de werkgever werkelijk de ontbrekende inhoudingen aan de bevoegde instelling heeft gestort.*"

11. The social risk of health care

We will divide this chapter on the social risk of health care into two parts. First, we will investigate access to health care. In other words, we will explore whether there is an obligation for health care providers to give care, irrespective of whether the treatment is paid for (directly or through insurance). And if so, to what extent must medical treatment be provided? The answers to these questions are relevant given the fact that the two groups of workers under investigation may not be socially insured.

The second part, like all the other chapters on the different social risks, deals with the question whether irregular migrant workers and nationals who do not declare their work to the social security authorities are covered by statutory health care arrangements. The following health care arrangements can be identified as relevant for our research: sickness and invalidity insurance for employees, labour accident insurance and occupational diseases insurance for employees, the Social Welfare Service scheme, and the Emergency Medical Assistance scheme.

In this chapter we will deal with sickness and invalidity insurance for employees and the Emergency Medical Assistance scheme. With regard to the Social Welfare Service scheme, we confine our discussion to the urgent medical assistance provided to unlawfully present foreigners. Other medical benefits under the Social Welfare Service scheme will be discussed under the social risk financial need – see subchapter 13.5. Health care benefits provided under labour accident insurance and occupational diseases insurance have already been discussed in our examination of incapacity for work benefits – see subchapters 9.3 and 9.4.

11.1. Access to health care

Health care providers are under a legal obligation to provide medical treatment to people whose physical or psychological integrity is in great danger. This obligation is laid down in section 422*bis* of the Belgian Criminal Code, and basically stipulates that anyone who notices a situation of great danger is required to provide or organise help. However, case law seems to expect and require more from physicians with regard to this obligation to provide support.[808] Great danger is said to pertain when there is an immediate and serious threat to a person's physical or psychological integrity. Danger to life is not required.[809]

In addition to the Criminal Code, the Act on Emergency Medical Assistance requires physicians who have been notified by the emergency call system to provide the necessary care on the spot.[810] This requirement relates to persons whose state of health requires urgent assistance, due to an

[808] See Marjan Rom and Eveline Ankaert, *Over risico's en beperkingen: Juridisch onderzoek naar de positie van de consulenten van de sociale diensten van de Bijzondere Jeugdbijstand, met focus op 'aansprakelijkheid' en 'schuldig verzuim'* (Leuven, Instituut voor Sociaal Recht K.U. Leuven, 2006), p. 90; Jean Du Jardin, "Schuldig verzuim," in *Strafrecht en strafvordering: Commentaar met overzicht van rechtspraak en rechtsleer*, ed. Armand Vandeplas, Patrick Arnou, Steven Van Overbeke and Steven Vandromme (Mechelen: Kluwer, loose-leaf, 2007), p. 108; and Van der Straete and Put, *Beroepsgeheim en hulpverlening*, p. 150, § 302.

[809] See Jean Du Jardin, who refers to case law. Du Jardin, "Schuldig verzuim," p. 102.

[810] § 4 and § 4*bis* Act on Emergency Medical Assistance (Wet van 8 juli 1964 betreffende de dringende geneeskundige hulpverlening), B.S., 25 July 1964.

accident or a sudden disorder or medical complication.[811] What is more, ambulance drivers are obliged to bring the patient to hospital and the hospital, in turn, is required to receive the patient and provide all the care that the person's state of health requires.[812]

The Criminal Code and the Act on Emergency Medical Assistance establish the legal framework within which health care providers are obliged to provide medical assistance. In addition to this legal framework, the Code of Medical Practice of the National Council of the Order of Physicians provides guidelines on the conduct of physicians.[813] The Order of Physicians is an association governed by public law, which has disciplinary jurisdiction over physicians in Belgium.[814] In exercising its disciplinary jurisdiction, disciplinary judges also refer to the Code of Medical Practice.[815] Section 6 of the Code sets out the obligation of each physician to provide instant help to a sick person who faces immediate danger. What is more, section 28 rules that physicians are in principle free to refuse to treat a sick person, except in cases of emergency or when they would fail in their human duties ('*wanneer hij in zijn menslievende plichten tekort zou schieten*'). Sections 113 and 114 stipulate that ensuring the continuity of medical care is a professional duty and that hence every physician has the obligation to take the necessary measures in order to guarantee this continuity of medical care.

To summarise, according to criminal law, medical law and disciplinary law, physicians, and sometimes other health personnel too, are under an obligation to provide treatment in medical cases which have at least an element of urgency.

We can ask whether there is a duty of professional secrecy or a duty to report any discovery of an irregular residence status in connection with the provision of medical care. A duty of professional secrecy for physicians and certain other medical personnel is stipulated in section 458 Criminal Code. These persons are subject to imprisonment or fines if they disclose confidential information concerning a patient which they learn in the course of their professional practice, unless the law provides otherwise. Disciplinary law also imposes a duty of professional secrecy. In Chapter V of the Code of Medical Practice, the duty of professional secrecy is declared to be a matter of public order.[816] Again, physicians must not disclose any confidential information, except as provided for by law, which they learn in the course of their professional practice.[817] There is no legal obligation to break professional secrecy by disclosing a foreigner's irregular residence status. Nevertheless, under section 29 of the Criminal Procedure Code there is a legal obligation to report criminal offences.[818] We saw in subchapter 6.2.3. that according to this provision government employees

[811] § 1 Act on Emergency Medical Assistance.
[812] § 5 and § 6 Act on Emergency Medical Assistance.
[813] See Nationale Raad van de Orde van Geneesheren, *Code van geneeskundige plichtenleer*, last adaptation March 2009. Available at: http://www.ordomedic.be/nl/code/inhoud.
[814] Physicians who want to practise medicine in Belgium are legally required to affiliate with the Order of Physicians. See § 7 2° Royal Decree of 10 November 1967 (Koninklijk besluit nr 78 van 10 november 1967 betreffende de uitoefening van de gezondheidszorgberoepen), B.S. 14 November 1967, erratum B.S. 12 June 1968.
[815] For the possibility to refer to the Code of Medical Practice see Hof van Cassatie, 19 May 1988, *Arr. Cass.* 1988, p. 1235. See also Thierry Vansweevelt, *De civielrechtelijke aansprakelijkheid van de geneesheer en het ziekenhuis* (Antwerp/Apeldoorn/Brussels: Maklu and Bruylant, 1997), p. 68; and Herman Nys, *Geneeskunde: Recht en medisch handelen* (Mechelen: Wolters Kluwer, 2005), p. 81.
[816] § 55 Code of Medical Practice.
[817] § 55, § 56 and § 57 Code of Medical Practice. In disciplinary proceedings doctors may not invoke the duty of professional secrecy. See § 69 (1) Code of Medical Practice.
[818] § 30 Criminal Procedure Code and § 458*bis* Criminal Code do not apply with respect to the criminal offence of unlawful presence, as laid down in § 75 Aliens Act.

must report any criminal offence which they discover in the course of their work. Since unlawful presence in Belgium is a criminal offence under section 75 Aliens Act and some doctors, such as those employed by public hospitals in Belgium, are government employees, they may be under this obligation to report criminal offences. Yet at the same time they may be under an obligation to maintain professional secrecy. The government and legal doctrine have admitted that such doctors may be subject to two conflicting obligations. The Minister of Justice has taken the position that for physicians the duty of professional secrecy prevails.[819] Most legal commentators are of the same opinion.[820] This view is mainly based on a Court of Cassation judgment, which, although it does not explicitly address this issue, seems to prioritise the duty of professional secrecy.[821]

11.2. Health cost coverage

11.2.1. Health care benefits based on the Sickness Insurance Act

11.2.1.1. Irregular migrant workers

Irregular migrant workers are not explicitly addressed in the Sickness Insurance Act. In other words, neither unlawful residence nor unlawful work is a reason for exclusion from insurance. The health care component of sickness and invalidity insurance in the first instance insures employees falling within the scope of the RSZ Act and people treated on a par with them. Beyond that, the insurance also covers non-active persons – such as old age pensioners, students, residents or dependants.[822]

Irregular migrant workers working under an employment contract are employees within the meaning of the RSZ Act. We have seen that an employment contract concluded in violation of the Aliens Employment Act is invalid, due to its unlawful cause. However, the contract still has legal consequences, since employee protection considerations mean that its invalidity cannot be invoked.[823] From this it follows that irregular migrant workers fall within the scope of mandatory health care insurance.

In order to make insurance effective, the insured person must affiliate with a sickness and disability insurance fund. In principle, irregular migrant workers are able to affiliate with such a fund in their capacity as employee. Neither the sickness insurance laws nor the policies of the sickness insurance funds exclude them from doing so. Nevertheless, irregular migrant workers usually work in the black economy, meaning that no social security contributions are paid. As a result, affiliation cannot become effective, since an effective affiliation is linked to a certificate of contribution payment.[824] Only in exceptional situations is it conceivable that irregular migrant workers could successfully affiliate with a sickness and invalidity insurance fund. Such situations relate to declared work, retroactive regularisation and fraudulent affiliation in another capacity.

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[819] See See Parlementaire Vraag no. 881, 5 October 2006 (Tastenhoye), Vragen & Antwoorden Kamer 2005-06, no. 27.058-27.062.
[820] Van der Straete and Put, *Beroepsgeheim en hulpverlening*, p. 145, § 290.
[821] Hof van Cassatie, 29 May 1986, *Rechtskundig Weekblad* 1986-87, p. 1027.
[822] § 32 (1) Sickness Insurance Act
[823] See subchapter 4.3.1.
[824] On this whole area see our analysis of the incapacity for work component of sickness and invalidity insurance in subchapter 9.1.1.

A further obstacle for irregular migrant workers is the requirement to have paid sufficient social security contributions for the health care component in a reference period in order to get health care costs reimbursed. Here too, the non-declaration of work makes it impossible to meet this entitlement criterion. However, this entitlement criterion could be met by irregular migrant workers in the following situations: first, if an irregular migrant worker has, exceptionally, engaged in declared work; second, if an irregular migrant worker's undeclared work is discovered and affiliation takes place retroactively; third, if an irregular migrant worker benefits from the retention of his or her insured status in the health care component of the sickness and invalidity insurance; and, fourth, if an irregular migrant worker has fraudulently affiliated in a capacity other than employee.

Concerning the first situation, we have seen that this only happens exceptionally. Neither the employer nor the irregular migrant worker is usually inclined to declare the work. What is more, even if they tried to declare their work properly, there would be a chance, in particular with respect to category A workers, that the RSZ would discover the worker's irregular status under the Aliens Act and the Aliens Employment Act and prevent him or her from starting work. That said, in the exceptional situation where such work was successfully declared, the irregular migrant worker would face no obstacles under the Sickness Insurance Act in qualifying for health care benefits.

Regarding the second situation, *i.e.* regularisation of undeclared work, the legal position of irregular migrant workers is the same as the position of nationals whose work is not declared. This means that when it can be established that employment within the meaning of the RSZ Act took place and the employer retroactively pays the social insurance contributions, the irregular migrant worker is retroactively insured.

Third, in contrast to the incapacity for work component of the Sickness Insurance Act, the health care component allows for a long retention of insured status. To be more precise, the insured person and his or her dependants are initially eligible for health care cost compensation until the end of the year following the year in which the right was established.[825] Thereafter, this period may even be longer. This may enable migrant workers who lose their status under the Aliens Act or the Aliens Employment Act during or after employment to continue to be entitled to health care benefits.

Fourth, the health care component of the Sickness Insurance Act treats a number of other groups of the population on a par with economically active persons and includes them in its scope *ratione personae*. These include persons entitled to social insurance benefits, such as beneficiaries of a retirement pension or an unemployment benefit, students, dependants and, as the group of last resort, residents. Since people sometimes belong to more than one of these groups, there are some rules of precedence. What is relevant here is that insurance in the capacity of resident or dependant is not possible if the person falls within the scope of the Sickness Insurance Act as an employee. Irregular migrant workers may therefore register with an insurance fund in another capacity, such as student[826] or resident[827], by fraudulently concealing their employment. If they then correctly pay

[825] § 129 Sickness Insurance Decree.

[826] According to § 32 (1) 14° Sickness Insurance Act, students in higher education fall within the scope of the health care component of sickness and invalidity insurance. For registration with an insurance fund, students must produce a certificate of enrolment by a recognised higher education institution. For eligibility for benefits they must have paid their personal insurance contribution. But there are no further requirements as to immigration status. The literature

their personal contributions, they may qualify for health care benefits. These are rights which are obtained as students or residents – and only because the work is not declared. This possibility is mentioned here as it may in practice mean that an irregular migrant worker can be covered by statutory health care insurance.

Children may basically choose whether they are insured in the capacity of resident or of dependent person.[828] Children possessing Belgian citizenship, one of whose parents works as an irregular migrant worker in the informal economy, may be insured due to their residence. However they may also be insured due to their dependence on the working parent who is an irregular migrant worker and is somehow insured or on the other parent. Unlawfully present children of irregular migrant workers cannot be insured as residents. This is because the sickness insurance laws explicitly exclude foreigners who are not granted a stay of more than three months in Belgium or who have no right to settle in the country from being considered as residents.[829] In their capacity as dependants, by contrast, they may qualify for insurance. Immigration status is of no relevance for being considered as a dependent person under the Sickness Insurance Act. Also, the requirement to be part of the family, and hence to provide proof of the same principal residence in the National

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reports that this is a possible means by which foreigners who are unlawfully resident in Belgium can be insured against health care costs.[826] See for instance Nele Verbruggen, *Health care for undocumented migrants: Germany, Belgium, The Netherlands, United Kingdom* (Antwerp: De Wrikker, 2001), p. 23; or Medimmigrant, "De ziekteverzekering voor mensen zonder wettig verblijf," (Brussels: Medimmigrant). Available at: http://www.medischezorg.be/ziekteverzekering_nederlands.pdf. If a student who is either without a lawful resident status or is lawfully resident but lacks work permit C for work during the academic year, took up employment, he or she would be an irregular migrant worker as defined by our research and at the same time would be insured under the health care component of the Sickness Insurance Act.

[827] Insurance in the capacity of resident is more difficult for irregular migrant workers, but cannot be completely excluded. Pursuant to § 32 (1) 15° Sickness Insurance Act, persons who are enrolled in the National Register fall within the scope of mandatory health care insurance, provided they are not excluded. The first excluded category consists of persons who have a right or may have a right to health care benefits according to another Belgium or foreign rule in relation to health care insurance. This means that irregular migrant worker who work under a contract of employment and who are supposed to be insured under § 32 (1) 1° Sickness Insurance Act will not be insured as residents under § 32 (1) 15°. The fact that their insurance is not effective because other entitlement criteria are not fulfilled, such as the payment of contributions, is irrelevant. See Van Eeckhoutte, *Sociaal compendium: Sociale-zekerheidsrecht*, p. 879. Nevertheless, in practice it may be possible to successfully and fraudulently conceal the work. However, § 32 (1) 15° Sickness Insurance Act excludes as a second category foreigners who are not granted a stay of more than three months in Belgium or who have no right to settle in the country. In other words, persons without permission to stay, with a tolerated status (such as applicants for regularisation), or with authorisation for a short stay (such as tourists) do not fall within the scope of § 32 (1) 15° Sickness Insurance Act. § 128*quinquies* (1) Sickness Insurance Decree qualifies this exclusion by declaring § 32 (1) 15° Sickness Insurance Act to be applicable to asylum-seekers and to foreigners in possession of a provisional certificate of stay (*voorlopig verblijfsattest*) – see Annex 15 of the Royal Decree concerning Aliens. From this it follows that an unlawfully present foreigner, like a category A worker, does not fall within the scope of § 32 (1) 15° and thus cannot affiliate with a sickness insurance fund. See also Arbeidshof Bergen, 3 September 2009, *Tijdschrift voor Vreemdelingenrecht* 2010, p. 350. By contrast, persons with temporary permission to stay in Belgium, as is the case for certain category B workers, may be able to affiliate. This relates for instance to a foreigner whose immigration status has been regularised on the basis of § 9*bis* or § 9*ter* of the Aliens Act. They may be insured under § 32 (1) 15° Sickness Insurance Act and, if personal contributions are paid, qualify for benefits. However, we have to recall that this is only possible because the work is kept hidden from the social security authorities.

[828] § 124 (1) 2° Sickness Insurance Decree. I am excluding here children who are themselves economically active or are students in higher education.

[829] See § 32 (1) 15° Sickness Insurance Act. § 128*quinquies* (1) Sickness Insurance Decree qualifies this exclusion by declaring § 32 (1) 15° Sickness Insurance Act to be applicable to asylum-seekers and to foreigners in possession of a provisional certificate of stay (*voorlopig verblijfsattest*) – for the latter see Annex 15 of the Royal Decree concerning Aliens. However, foreigners without authorisation to stay in Belgium are excluded.

Register, is lifted for children under the age of twenty-five. This means that they can be insured on account of their parent, who is an insured irregular migrant worker in Belgium. It is also conceivable that the child could be insured as a dependant of the other parent, who is not an irregular migrant worker.

As long as foreigners without immigration status are actually residing in Belgium, they may enjoy health care cost compensation to which they are entitled. However, in the course of affiliation with an insurance fund or the regularisation procedure for previously undeclared work, their irregular status may be revealed. There is a chance that this lack of status will then be communicated to the immigration authorities and that they will take action. Foreigners with medical problems may get an order to leave the country postponed or may get their immigration status regularised, but if and when they actually leave Belgium, health care benefits, which are basically not exported, can no longer be received.

11.2.1.2. Nationals who engage in undeclared work

Belgians working under an employment contract are employees within the meaning of the RSZ Act. The non-declaration of work, basically, does not affect the validity of the contract. Hence Belgians who perform undeclared work fall within the scope of the health care component of statutory sickness and invalidity insurance. However, non-declaration makes it impossible to make insurance effective and to qualify for health care benefits. To be more precise, two conditions under the Sickness Insurance Act can be considered as a requirement to declare the work: first, the condition that the employee must affiliate with an insurance fund and, second, the condition that the employer must have paid sufficient RSZ contributions for the health care component. Concerning the first condition, affiliation with a fund only becomes effective if the fund receives either a certificate of contribution payment from the RSZ or, for a first registration, a declaration by the employer that the applicant is an employee who is subject to sickness and invalidity insurance, and that contributions will therefore be paid in respect of him or her. Since undeclared work is defined for the purposes of our research as work engaged in without informing the social security authorities where there is an obligation to do so, and without paying the required social security contributions, it follows that undeclared Belgian workers do not qualify for health care cost compensation under the Sickness Insurance Act.

Nevertheless, as it is the case for irregular migrant workers, there may be situations where undeclared workers enjoy protection under the Sickness Insurance Act. This relates most notably to the regularisation of previously undeclared work or to the fraudulent arrangement of insurance in another capacity.

Regularisation of undeclared work may take place when the social security authorities become aware of undeclared work – for instance through social inspections or because the employee applies for benefits. In such situation, the competent authorities try to establish the circumstances of the employment. If the authorities succeed in determining that there was a previous period of undeclared work, a contribution obligation arises. Subsequent payment of the contributions paves the way for retroactive coverage of health care costs of a previously undeclared worker.[830]

[830] This has been confirmed by Christel Heymans, RIZIV attaché, letter to the author, 17 February 2010.

Belgians who work in the black economy may also affiliate with a sickness and invalidity insurance fund in another capacity, for instance as a resident. The correct payment of personal contributions may then allow them to qualify for (partial) reimbursement of their health care costs.[831] However, as mentioned before, this is not a right of an undeclared worker. It is a right of a resident, exercised by an undeclared worker.

Children of Belgian citizens who do not declare their work to the social security authorities may be insured under statutory health care insurance in their capacity as residents. Insurance as a dependent person is only possible if the undeclared working parent is also insured, such as when the parent conceals his or her employment and affiliates as a resident.

11.2.2. Social Welfare Services

The Social Welfare Service scheme, established under the OCMW Act, is the Belgian social assistance of last resort. It will therefore be discussed more generally in subchapter 13.5. under the social risk of financial need. Concerning health care, this social assistance scheme is relevant in two respects: first, it provides for health care benefits in kind;[832] and, second, it provides for urgent medical assistance for foreigners unlawfully present in Belgium. The first aspect will be addressed below in subchapter 13.5., whereas the second aspect, *i.e.* urgent medical assistance, will be considered here.

11.2.2.1. Irregular migrant workers

Social Welfare Services are intended to enable everyone to live in human dignity.[833] This is a value which is also enshrined in the Belgian Constitution – see chapter 1. However, foreigners without authorisation to be in Belgium are, as a rule, exempted from the personal scope of application of the Social Welfare Service scheme. Only with regard to one type of benefits is an exception made: urgent medical assistance (*dringende medische hulp*) – see subsection 57 § 2 OCMW Act. This means that unlawfully present foreigners have the right to have the cost of urgent medical assistance paid for,[834] if the foreigner concerned would not otherwise be able to lead a life in human dignity. So, three conditions must be fulfilled: unlawful presence (*illegaal verblijf, séjour illégalement*), neediness and medical assistance that is urgent.

As we will see below in subchapter 13.5., unlawful presence is considered as presence on Belgian soil without authorisation.

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[831] It should be mentioned that indigent persons – *i.e.* persons who enjoy benefits under the Act on Social Integration, cash benefits under the Social Welfare Services, or benefits under the Act on the Minimum Income for the Elderly – are exempted from the obligation to pay personal contributions. What is more, residents with an income that is not higher than the annual Integration Income for the category 'persons living together' are also considered to be indigent and hence do not have to pay personal contributions either. See § 134 Sickness Insurance Decree.

[832] See § 57 (1) 3 OCMW Act. Health care benefits are provided either by the OCMW Centre or by physicians or hospitals with which the OCMW Centre has concluded an agreement. Regarding cost coverage, OCMW Centres either pay affiliation costs and contributions for statutory health insurance or, if there is no statutory health insurance, simply pay the medical costs.

[833] § 1 (1) OCMW Act.

[834] The fact that this is a right can be derived from the parliamentary preparatory materials. See Parlementaire stukken: Kamer, 1995-96, no. 364/1, p. 59. In the same tenor, see Grondwettelijk Hof, no. 50/2009, 11 March 2009, B.S. 30 April 2009.

Concerning human dignity, there has been some discussion in recent years as to whether neediness should be subject to examination with respect to urgent medical care for unlawfully present foreigners, as it is for anyone else. In 2009, the Constitutional Court put an end to this discussion by ruling that unlawfully present foreigners must also undergo a means test.[835] Our research deals with foreigners who work in violation of the Aliens Employment Act. By definition, this group has income. If this income together with the person's other means is sufficient to live a life in human dignity, medical costs are from a legal point of view non-recoverable.[836]

The question when medical assistance is urgent has caused somewhat discussion too. In 1984, for the first time, the legislators limited Social Welfare Services for unlawfully present foreigners to benefits in kind and medical assistance which are necessary for subsistence.[837] It is worth mentioning that the limitation of Social Welfare Services was introduced as just one of a number of measures to integrate foreigners more harmoniously into Belgian society and hence to provide for a more peaceful co-existence.[838] Others included implementing a moratorium on immigration, fighting racism and xenophobia, and facilitating naturalisation.[839] The limitations under the OCMW Act were in particular motivated by the wish not to provide an incentive for irregular migration and other abuses.[840] But let us come back to the notion of 'urgent medical assistance'. The 1984 restriction, *i.e.* limitation to material and medical assistance necessary for subsistence, created some confusion with regard to its interpretation. In view of the confusion and the rather extensive interpretation of the concept by case law, the legislators introduced the concept of urgent medical assistance in 1992 and confirmed it in 1996.[841] Since the introduction of the new concept failed to stop what the government regarded as extensive interpretation, in 1996 it issued a Royal Decree on the scope of the concept of 'urgent medical assistance'.[842] According to the 1996 Decree, urgent medical assistance is assistance of a medical nature only and cannot take the form of financial assistance, housing or other Social Welfare Services in kind. Urgent medical

[835] The Court simply ruled that the preliminary question comes from a wrong interpretation of the OCMW Act and that human dignity serves as a reference for the assessment of entitlement for every applicant. See Grondwettelijk Hof, no. 50/2009, 11 March 2009, B.S. 30 April 2009. For the means-testing of unlawfully present foreigners see Circular letter of 25 March 2010 (Omzendbrief van 25 maart 2010 betreffende het sociaal onderzoek vereist voor de terugbetaling van de medische kosten in het kader van de wet van 2 april 1965 en het ministerieel besluit van 30 januari 1995), B.S. 6 May 2010.

[836] For the problem that in practice income from unlawful work may not be declared to the OCMWs see subchapter 13.1.

[837] § 11 Act of 28 June 1984 (Wet van 28 juni 1984 betreffende sommige aspecten van de toestand van de vreemdelingen en houdende invoering van het Wetboek van de Belgische nationaliteit), B.S. 12 July 1984.

[838] Parlementaire stukken: Kamer, 1983-84, no. 756/1, p. 2.

[839] *Ibid*., pp. 3-4.

[840] In the original language it reads: "*Anderzijds schijnt de gulheid van onze O.C.M.W.'s vergeleken bij die van de openbare welzijnscentra in de verschillende Europese landen, een aansporing te zijn voor de onregelmatige immigratie en voor andere misbruiken. Derhalve dient de bemiddeling van de O.C.M.W.'s te worden beperkt in bepaalde gevallen*." See Parlementaire stukken: Kamer, 1983-84, no. 756/1, p. 3. For other comments in the parliamentary discussion see Parlementaire stukken: Kamer, 1983-84, no. 756/1, pp. 10-11 and pp. 62-63; Parlementaire stukken: Kamer, 1983-84, no. 756/5, p. 2; and Parlementaire stukken: Kamer, 1983-84, no. 756/6, pp. 7-8.

[841] Act on social and various provisions of 30 December 1992 (Wet van 30 december 1992 houdende sociale en diverse bepalingen), B.S. 9 January 1993; and Act of 15 July 1996 (Wet van 15 juli 1996 tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen en van de organieke wet van 8 juli 1976 betreffende de openbare centra voor maatschappelijk welzijn), B.S. 5 October 1996.

[842] See Bouckaert, *Documentloze vreemdelingen*, pp. 584-85, 601, 603.

assistance can be both preventive and curative medical care.[843] By a Royal Decree in 2003, the scope of urgent medical assistance has been extended to aftercare that is necessary for public health in connection with recognised infectious diseases which require prophylactic treatment.[844] Paul Schoukens deduced *a contrario* from this provision that urgent medical care basically does not include aftercare, apart from the exception mentioned in the Royal Decree.[845] But he qualifies his statement by pointing out that aftercare can also be urgent, if it prevents a patient from relapsing to a situation where urgent medical assistance is required. All these rules provide the framework within which urgent medical care must be provided. There is no list of medical services which fall under the heading of urgent medical care.

Concerning the element of urgency, section 1 of the Royal Decree of 1996 stipulates that the urgency of assistance must be demonstrated by a medical certificate. In other words, it is the doctor who is consulted that must determine whether a given form of medical assistance is urgent or not.[846] However, there is no guidance for doctors about what 'urgent' really means. Some authors report that in practice 'urgent' is interpreted as 'necessary', *i.e.* more broadly.[847] Others give an account of case law which interprets 'urgent' as being 'immediately necessary' and therefore excluding 'necessary' assistance, such as planned medical operations.[848]

The doctor consulted for urgent medical care, who can determine the urgency of the treatment, can be any medical doctor affiliated with the National Sickness and Invalidity Insurance Institute (RIZIV).[849] For example, this includes general practitioners, medical specialists, dentists, or medical doctors in a hospital or a psychiatric institution.

The costs of urgent medical care are covered by the Public Centres for Social Welfare (OCMWs). They, in turn, can apply for reimbursement to the FPS Social Integration. But let us take a closer look at the procedure. Unlawfully present foreigners who need urgent medical care are usually required to contact a health care provider who certifies the need for such treatment. With this certificate the foreigner concerned should turn to the competent OCMW, which then has to determine his or her neediness and check his or her immigration status. Concerning the latter, OCMW can turn to the Waiting Register or the municipality, or can contact the Immigration Service (*Dienst Vreemdelingenzaken*) within the FPS Home Affairs directly. However, residence

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[843] § 1 Royal Decree concerning urgent medical assistance (Koninklijk besluit van 12 december 1996 betreffende de dringende medische hulp die door de openbare centra voor maatschappelijk welzijn wordt verstrekt aan de vreemdelingen die onwettig in het Rijk verblijven), B.S. 31 December 1996.

[844] Royal Decree of 13 January 2003 (Koninklijk besluit van 13 januari 2003 tot wijziging van het koninklijk besluit van 12 december 1996 betreffende de dringende medische hulp die door de openbare centra voor maatschappelijk welzijn wordt verstrekt aan vreemdelingen die onwettig in het Rijk verblijven), B.S. 17 January 2003.

[845] Paul Schoukens, "De illegale migrant en het recht op dringende gezondheidszorg: Zoektocht naar een evenwichtige maatschappelijke dienstverlening," *Tijdschrift voor Gezondheidsrecht*, vol. 11, no. 3 (2005-06), p. 192.

[846] See also the statement of the Minister of Social Integration: "Wanneer een geneesheer meent dat hulp dringend is, is ze dat, punt. Niemand anders moet dat beoordelen." Commissie voor de Volksgezondheid, het Leefmilieu en de Maatschappelijke Integratie, 29 January 2003, CRIV 50 COM 967, p. 2.

[847] See Vincent Corluy and Ive Marx, "Dringend medische hulp voor mensen zonder wettig verblijf," in *Grenzeloze solidariteit?: Over migratie en menschen zonder papieren*, ed. Christiane Timmerman, Ina Lodewyckx and Yves Bocklandt (Leuven/Voorburg: Acco, 2008), p. 162.

[848] Steven Bouckaert, "Het recht op dringende medische hulp voor vreemdelingen zonder wettig verblijf: Materieelrechtelijke en procedurele aspecten, de lege lata en de lege ferenda," *Tijdschrift Vreemdelingenrecht*, no. 1 (2008), p. 17.

[849] Circular Letter of 27 January 1997 (Omzendbrief van 27 januari 1997 betreffende de opvang van asielzoekers), § 1.5, not officially published, but reprinted in *Tijdschrift Vreemdelingenrecht*, no. 4 (1996), p. 414.

status can only determined as unlawful by the Immigration Service.[850] Thus the following allocation of competence can be derived: the doctor is the only one authorised to determine the urgency of the medical treatment, the OCMW is competent for assessing the recipient's neediness, and the Immigration Service has the power to decide on his or her immigration status. Once all these three entitlement criteria are established and fulfilled, the unlawfully present foreigner is issued by the OCMW with an attestation, a medical card, a medical pass or the like that certifies that the cost of a certain treatment on a certain day or for a certain period will be covered. Unfortunately there is no uniform system. Each OCMW operates its own procedure policy.[851] With such an attestation or medical card the foreigner can then contact the health care provider to receive the urgent medical treatment. If an unlawfully present foreigner has no opportunity to contact the OCMW in advance and he/she immediately seeks the urgent medical treatment, the health care provider must certify the urgency of the case, perform a brief check of his/her neediness and contact the competent OCMW. The OCMW should then conduct the means test.[852]

In a second step, OCMWs turn to the FPS Social Integration to get the costs incurred for urgent medical treatment reimbursed. The FPS is only obliged to pay the costs when there is a medical certificate which makes it clear that the treatment was urgent.[853] Reimbursement only takes place for services covered by sickness and invalidity insurance and on the basis of its tariffs.[854]

Concerning the procedure for the coverage of the costs of urgent medical care, section 4 of the Royal Decree of 1996 stipulates that information which appears on medical certificates or can be deduced from them must be treated confidentially and must not be used for any purpose other than the reimbursement of costs. Here too, there is a tension between the duty of confidentiality and the duty to report a crime under section 29 of the Criminal Procedure Code. On this, see above, subchapter 11.1. It should be noted that no abuses of confidentiality have been reported so far.

The current procedure for cost coverage of urgent medical assistance for unlawfully present aliens has caused some problems in practice. In the following, the most relevant problems as analysed by other authors will be reported. The assessment of the indigence of clandestine migrants is a big challenge for OCMWs. It is difficult to assess their financial resources, any income from undeclared work and assistance provided by NGOs. OCMWs also complain that the procedure gives rise to considerable expenses, such as personnel costs, which they do not get reimbursed.

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[850] Circular Letter of 27 January 1997, § 1.2. The Immigration Service must not use these data for immigration prosecution purposes. See § 4 Royal Decree concerning urgent medical assistance.

[851] This has led to criticism. Paul Schoukens, for instance, warned about unequal treatment and the fact that 'efficient' OCMWs may become the centre of attraction for unlawfully present foreigners. See Schoukens, "Illegale migrant en dringende gezondheidszorg," p. 193. The FPS Social Integration strongly advocates the use of a medical card for urgent medical care. However, this does not prevent the existence of a heterogeneous system of medical cards. See Circular Letter of 14 July 2005 (Omzendbrief van 14 juli 2005 betreffende dringende medische hulpverlening aan vreemdelingen die illegaal in het land verblijven).

[852] The Court of Cassation held that the obligation to provide medically necessary care and to cover the costs thereof exists even if the unlawfully present foreigner does not make this application. In the case before the Court of Cassation the patient had been admitted to the reanimation unit and was not able to file any application. See Hof van Cassatie, 22 February 2010, *JTT* 2010, p. 185, *Rev.dr.étr.* 2010, p. 120.

[853] § 2 Royal Decree concerning urgent medical assistance. Since 1 March 2005, OCMWs have no longer been obliged to send the medical certificate to the FPS Social Integration. They merely have to keep the medical certificate for the purpose of evidence. See Circular Letter of 14 July 2005, § 4.

[854] See § 3 Royal Decree concerning urgent medical assistance referring to § 11 (1) Act of 2 April 1965 (Wet van 2 april 1965 betreffende het ten laste nemen van de steun verleend door Openbare Centra voor Maatschappelijk Welzijn), B.S. 6 May 1965, erratum B.S. 25 May 1965. See also Circular Letter of 27 January 1997, § 1.5.

Both OCMWs and health care providers complain that, since the check by the FPS Social Integration takes place retroactively, they run the risk that some of their costs will not be covered. Health care providers also struggle with the non-uniform attestation for urgent medical care issued by the OCMWs.[855] Last but not least, the lack of guidance on how 'urgent' should be interpreted in the context of health care has led to an inconsistent application of subsection 57 § 2 OCMW Act.[856]

Unlawfully present children of irregular migrant workers may enjoy more comprehensive medical treatment than just urgent medical treatment. This will be discussed below in subchapter 13.5.

11.2.2.2. Nationals who engage in undeclared work

The above-described procedure for the reimbursement of costs for urgent medical care under the OCMW Act is not applicable to Belgian citizens. By contrast, Belgian citizens may be eligible under the OCMW Act for full Social Welfare Services, including health care benefits and a contribution to the payment of sickness insurance contributions.

11.2.3. Act on Emergency Medical Assistance

When discussing access to health care, under subchapter 11.1., we mentioned emergency medical assistance, which is provided under the Act of the same name. Emergency medical assistance is the immediate provision of adequate assistance to persons whose state of health, due to an accident or a sudden disorder or medical complication, requires urgent help, when the provision takes place in the context of the emergency call system.[857] In order to avoid confusion with urgent medical assistance under subsection 57 § 2 OCMW Act, I am translating '*dringende geneeskundige hulpverlening*' as emergency medical assistance. This reflects the fact that the medical assistance covered by the Act on Emergency Medical Assistance is narrower. Filip Dewallens paraphrased it as assistance with the aim of limiting mortality, invalidity and morbidity by reducing the waiting time between an incident with a pathology that urgently threatens the victim's life, organs or extremities and the beginning of provision of health care.[858]

The Act on Emergency Medical Assistance provides for the establishment of a fund, by which the expenses for emergency medical assistance will be covered. This fund is financed by insurance funds, dealing with the risks of sickness, labour accidents, road use and so on, and the federal government. It covers the costs for the assistance provided by the doctor on the spot and the transportation to the hospital.

The Act does not establish any conditions to be fulfilled by the victim of an accident or ill person, except that his or her state of health requires urgent help. Other criteria, such as status of insurance or status under immigration laws, are therefore irrelevant. Accordingly, both irregular migrant

[855] Corluy and Marx, "Dringend medische hulp," pp. 171-74.
[856] Bouckaert, "dringende medische hulp," p. 24.
[857] § 1 Act on Emergency Medical Assistance.
[858] See Filip Dewallens, "Gelet op de dringende noodzakelijkheid...: Analyse en voorstellen tot wijziging van de reglementering inzake de kwalificatie en regulatie van de oproep in de dringende geneeskundige hulpverlening," in *De wetgeving inzake dringende geneeskundige hulpverlening*, ed. X (Ghent: Mys & Breesch, 1995), p. 57.

workers and nationals who do not declare their work to social security enjoy emergency medical protection in Belgium.

12. The social risk of family

The financial burden of having and raising children is addressed in two ways: through the provision of income replacement benefits during absence from work due to pregnancy or childbirth and through (partial) compensation of the costs of having and raising children. The first of these takes the form of maternity, paternity and adoption benefits based on the Sickness Insurance Act and has already been analysed above in subchapter 9.2. As for the second, there are two forms of provision: at the federal level there are social insurance schemes, organised along professional lines, and there is also a social security scheme providing child benefits to indigent parents who do not qualify for a Family Allowance under the professional social insurance schemes. In this chapter we will discuss the general Family Allowance scheme for employees (Family Allowance Act, *Kinderbijslagwet Werknemers*). The Guaranteed Family Allowance (Guaranteed Family Allowance Act, *Wet gewaarborgde gezinsbijslag*) will be analysed below in the chapter on the social risk of financial need.

12.1. Family Allowance

12.1.1. Irregular migrant workers

The Family Allowance scheme under the Family Allowance Act defines three parties:[859] the person entitled to benefits (usually the employee),[860] the child in respect of whom benefits are granted, and the person who receives benefit payments (usually the mother). Irregular migrant workers are *de iure* able to qualify for Family Allowance. Their work under an employment contract in Belgium, the invalidity of which cannot be invoked,[861] puts them in a position to be considered as employees under the Family Allowance Act who are eligible for benefits. There is no legal provision excluding from eligibility aliens who violate the Aliens Employment Act or the Aliens Act. Nor is contribution payment an explicit precondition for entitlement under the Family Allowance scheme. However, in practice the RKW and Family Allowance funds do not pay out benefits until the situation of a former undeclared worker has been regularised. 'Regularised' means that employment under the RSZ Act is established and that due contributions, including additional charges and late-payment interest, are paid in arrears.[862] Thus irregular migrant workers whose work is not declared to the RSZ, which is usually the case, do not receive benefit payments until their previous undeclared work has been regularised. It should be mentioned that in the course of a regularisation procedure it is highly likely that their violation of the Aliens Act or the Aliens Employment Act will be discovered. However, this does not necessarily jeopardise the receipt of Family Allowance – even if the irregular migrant worker has to leave Belgium – since the entitled person and the person who receives the benefit are often not the same.

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[859] We omit here the employer, who is under an obligation to affiliate with a Family Allowance fund and to pay contributions with respect to the Family Allowance insurance.

[860] According to § 2 1° in conjunction with § 51 (1) 1° Family Allowance Act, a person is entitled to Family Allowance if he or she is employed by an employer who is subject to the rules on social security for employees. It is the RSZ Act that sets out which employers are subject to the rules on social security for employees. The Family Allowance Act therefore refers implicitly to the RSZ Act for its personal scope of application.

[861] See subchapter 4.3.1.

[862] These findings are unfortunately not based on publicly available sources. I obtained this information from an e-mail message from Johan Verstraeten, General Manager of the National Office for Family Allowance for Employees, 18 March 2010.

The situation is different in which irregular migrant workers possess a Social Security Number and work, exceptionally, in the legal economy. They are then able to qualify for Family Allowance, without needing to fear that their lack of work authorisation or permission to stay in the country will be discovered.

In principle, irregular migrant workers may also be eligible for Family Allowance in a capacity other than that of employee. A preliminary analysis revealed that the capacity of student would be a possibility. The capacity of student takes precedence over the capacity of employee.[863] There are no requirements as to the current residence situation of the student. And though there is the requirement to have actually resided (*werkelijk verblijven, résider effectivement*) in Belgium for at least five years when the application is filed, this residence is not linked to a correct immigration status.[864] A category A worker could therefore qualify *de iure*. In practice, there may be some obstacles, such as providing evidence of a five-year residence in the country or the discovery of an unlawful residence status.[865] Category B workers would face no difficulties with qualifying as a student, since their work does not affect their eligibility.

Concerning the person who receives payment of the Family Allowance, *i.e.* usually the mother,[866] there are no particular requirements established. This makes it possible from a legal point of view for irregular migrant workers to enjoy the benefits. In practice, it has turned out that foreigners without authorisation to be in Belgium face major obstacles in collecting benefits.[867] This is because the Family Allowance Act only provides for payment via bank transfer or cheque. Unlawfully present foreigners usually cannot open a bank account in Belgium and also have difficulties in cashing cheques. The legislators have therefore adapted the rules so that if the

[863] § 56*sexies* (1) last sentence Family Allowance Act.

[864] § 56*sexies* (1) Family Allowance Act. Exempted from this requirement are persons who fall under the application of EC Regulation 1408/71 on the coordination of social security themselves or whose children do so,[864] who are citizens of a country which has ratified the European Social Charter, who are stateless persons or who are refugees. These are the same exceptions, at least as regards the parent, as those found in the Guaranteed Family Allowance Act.

[865] For the obligation to consult the National Register see § 173*quater* Family Allowance Act.

[866] § 69 Family Allowance Act.

[867] See Arbeidsrechtbank Antwerpen, no. 382.017, 28 April 2006. In this case before the Labour Court of First Instance of Antwerp, the entitled person was the father of a Belgian daughter and the husband of an unlawfully present woman. They were all living together, so the mother was the person to whom the Family Allowance benefits were to be paid out. But this was not possible. § 68 (3) Family Allowance Act only provides for payment via bank transfer and cheque payment. However, the mother and wife was not able to open a bank account in Belgium due to her unlawful residence status. The competent social security administration were therefore unable to remit the allowance via bank transfer. Payment by cheque was not considered by the authority because it would not be possible for the women concerned to cash the cheque. In 2008, the legislators provided for a solution: § 68 (2) Family Allowance Act was adapted so that if the person that is legally designated to receive the Family Allowance benefits is unable to do so for practical reasons because the person cannot identify him- or herself, the benefits are remitted to the entitled person. To this end, both the person who is designated to receive the benefits and the entitled person must file a request to the competent Family Allowance fund. The Family Allowance funds, for their part, are asked to seek to identify those who effectively cannot receive their payments – on the basis of indications in the Family Allowance application, non-enrolment in the National Register and the return of cheques. For the legal adaptation see § 92 Act on various provisions of 24 July 2008 (Wet houdende diverse bepalingen (I) van 24 juli 2008), B.S. 7 August 2008. For practical guidance for the Family Allowance funds for the implementation of this new provision see Circular Letter of the National Office for Family Allowances for Employees of 8 September 2008, §§ 2, 3. It has already been mentioned in subchapter 6.2.2.1., that in the context of this contact with the Family Allowance funds, a Crossroads Bank Number, and thus a Social Security Number must be created for an unlawfully present foreigner who does not yet possess a Social Security Number.

person that is legally designated to receive the Family Allowance is unable to do so for practical reasons because the person cannot identify him- or herself, the benefits are remitted to the entitled person.

For the sake of completeness it should be mentioned that the child for whom Family Allowance is received must in principle be brought up in Belgium or must basically follow their education in the country.[868] The law does not define the notion 'brought up' (*opgevoed worden*). Case law has often sought guidance on the concept of maintenance obligation in the Belgium Civil Code.[869] It is crucial that the child receives accommodation, means of subsistence, supervision and education in Belgium.[870] There seems to be no reason why a child who is unlawfully present in Belgium should not be considered as a child in respect of whom the right to Family Allowance arises.[871] However, case law has not addressed this issue so far.

12.1.2. Nationals who engage in undeclared work

The Family Allowance Act, in principle, covers persons who are employed by an employer who is subject to the rules on social security for employees. Payment of social security contributions or achievement of a minimum working period are not requirements for benefit eligibility.[872] Undeclared workers are by definition not known to the social security authorities. Hence a right to Family Allowance cannot be established. However, if the work becomes known to the social security authorities, for instance through the social inspectors or through the worker him- or herself, the RKW and Family Allowance funds recognise a right to benefits, if the previously undeclared work has been regularised. 'Regularised' means that employment within the meaning

[868] § 52 Family Allowance Act. Exceptions exist under EC social security coordination rules and under bilateral agreements.

[869] See for instance the Labour Court of Antwerp, confirmed by the Court of Cassation in Hof van Cassatie, 4 May 1998, *JTT* 1998, p. 366.

[870] For regular study periods abroad see Hof van Cassatie, 4 May 1998, *JTT* 1998, p. 366.

[871] In the same sense see Ruth Stokx, "De sociale zekerheid en de illegaal," in *Vreemdelingen en sociale zekerheid*, ed. Instituut voor Sociaal Recht K.U. Leuven (Ghent: Mys & Breesch, 1996), p. 52.

[872] Some authors interpret § 72 Family Allowance Act as not requiring the payment of social security contributions by the employer for the employee to be entitled to benefits. See, *inter alia*, Van Eeckhoutte, *Sociaal compendium: Sociale-zekerheidsrecht*, pp. 246, 753; and Daniël Cuypers, "De gevolgen van herkwalificatie," in *Rechts(on)zekerheid omtrent (schijn)zelfstandigheid: De gespannen verhouding tussen artikel 1134 BW en de sociaalrechtelijke finaliteit*, ed. Marc Rigaux and Anne Van Regenmortel (Antwerp/Oxford: Intersentia, 2008), p. 226. § 72 stipulates that the payment of Family Allowance to a person employed by an employer who is affiliated with a Family Allowance fund or the RKW should in no case depend on compliance by the employer with the employer's obligations under the Family Allowance Act. To my mind, a more nuanced interpretation is called for. The Family Allowance Act does not stipulate the obligation to pay social security contributions. It is the RSZ Act which does so. Accordingly, § 72 Family Allowance Act would not be the legal basis to consider a right to benefits as being independent from the payment of social security contributions. However, § 72 can serve as the legal grounds for entitlement to benefits not being linked to Family Allowance contributions, paid directly to the RKW. These contributions are due for employees who, exceptionally, do not fall within the scope of the RSZ Act, but fall within the scope of the Family Allowance Act, such as persons in occasional employment. See § 77 Family Allowance Act. The obligation for this particular contribution payment is laid down in the Family Allowance Act. For all other employees falling within the scope of the RSZ Act, I do not see § 72 Family Allowance Act as explicitly confirming the lack of connection between social security contribution payment and entitlement to Family Allowance.

of the RSZ Act is established and that social security contributions, including additional charges and late-payment interest, are paid in arrears.[873]

It should be mentioned that undeclared work in the context of Family Allowance insurance can take place in two forms. First, the employer is not affiliated at all with a Family Allowance fund or the RKW and, second, the employer is affiliated, but does not declare the work of a specific employee. However, differences with respect to possible rights to benefits do not arise out of these two forms of undeclared work. In the first case, the employer will simply be registered with the RKW *ex officio* and with retroactive effect, as soon as undeclared work is discovered.[874]

Like irregular migrant workers, Belgian citizens whose work is not known to the social security authorities may qualify in another capacity for benefits under the Family Allowance Act. For instance, undeclared workers would be able to qualify in the capacity of student. Their undeclared work does not affect entitlement either *de iure* or *de facto*.

[873] This analysis has been confirmed by Johan Verstraeten, the General Manager of the National Office for Family Allowance for Employees, in an e-mail to the author on 18 March 2010.
[874] See subchapter 3.2.

13. The social risk of financial need

People without the means to live a decent life are supported on a federal level by two social assistance schemes: first, the Social Integration scheme, legally based on the Act on Social Integration (*Wet Maatschappelijke integratie*) and, second, Social Welfare Services (*Maatschappelijke dienstverlening*), on the basis of the OCMW Act (*OCMW-Wet*). The personal scope of application of the latter scheme is broader and its benefits can be regarded as the support of last resort.

What is more, for three specific groups in need there are special schemes of social assistance in place. These are the Guaranteed Family Allowance (Guaranteed Family Allowance Act, *Wet gewaarborgde gezinsbijslag*), the Minimum Income for the Elderly (Act on the Minimum Income for the Elderly, *Wet inkomensgarantie voor ouderen*) and the Disabled Person's Allowance (Act on the Disabled Person's Allowance, *Wet tegemoetkomingen gehandicapten*).

Asylum-seekers receive assistance in centres of the Federal Agency for the Reception of Asylum-Seekers (*Federaal Agentschap voor de opvang van asielzoekers*, FEDASIL). This assistance is provided within the legal framework of the Act on the Reception of Asylum-Seekers (*Wet Opvang Asielzoekers*).

13.1. Social Integration

13.1.1. Irregular migrant workers

The Act on Social Integration establishes a social assistance scheme which aims to socially integrate people who lack sufficient means and who are unable to acquire sufficient means, by offering them work or an Integration Income or both. Assistance under this scheme is only available for non-Belgians to a very limited extent. Only EU citizens or family members of EU citizens who have the right to stay in Belgium for more than three months, persons falling within the scope *ratione personae* of EC Regulation 1612/68, refugees, stateless persons, and foreigners enrolled in the Population Register are eligible for benefits.[875] The first categories are included due to international obligations. The inclusion of the last category, *i.e.* foreigners enrolled in the Population Register, follows the equal treatment logic under national law.[876] Foreigners enrolled in

[875] § 3 3° of the Act on Social Integration.

[876] According to the explanatory memorandum of 2002 to the Act on Social Integration, the Act was intended to provide for equal treatment between Belgian citizens and aliens registered with the Population Register. This was because the latter group comprises, in the main, foreigners who were hired in the 1960s to come to work in Belgium and who have settled in the country since then. According to the drafter of the Act, these foreigners are in the same situation as Belgian citizens with respect to the right to social integration. See Parlementaire stukken: Kamer, 2001-02, no. 1603/001, p. 9. Meanwhile, the Constitutional Court has confirmed that it is legitimate to distinguish between, on the one hand, aliens who are entitled to settle in Belgium, and who are thus enrolled in the Population Register, and, on the other, aliens who are authorised to stay in Belgium for a limited or an unlimited period of time. The Court considered the residence situation of foreigners with the right to settle as to a great extent identical with the situation of Belgian citizens who actually reside in the country. This is not the case for other foreigners. However, if other foreigners, who are lawfully resident in the country, are in need, they can, according to the Court, fall back on Social Welfare Services under the OCMW Act. See Arbitragehof, no. 5/2004, 14 January 2004, B.S. 27 February 2004, §§ B.6.1.-B.6.4, *Rechtskundig Weekblad* 2004-05, pp. 1092-93.

the Population Register are foreigners with the right to settle and Union citizens and their family members with a permanent residence status. Except for stateless persons, all foreigners eligible for benefits under the Act on Social Integration have the right to reside and to work in Belgium. The question whether irregular migrant workers may qualify for benefits under this scheme therefore only relates to stateless persons, who, since recognised statelessness is not an immigration status *per se*,[877] may have various immigration statuses in Belgium, even an irregular one.

However, regarding category A workers the Royal Decree on Social Integration[878] precludes aliens without residence authorisation from qualifying for benefits. To be more precise, the Decree states that the condition that one must have one's actual place of residence (*werkelijke verblijfplaats, résidence effective*) in Belgium, *i.e.* one must be usually and permanently living in the country (*gewoonlijk en bestendig verblijven, séjourner habituellement et en permanence*),[879] can only be established if the person concerned is legally entitled to stay in Belgium.[880] This means that category A workers are not eligible for benefits under the Act on Social Integration.

Concerning category B workers, the only group able to fulfil the 'immigration status' and 'actual residence' requirements are recognised stateless persons who are lawfully resident, but do not have permission to take up work in Belgium. This relates for instance to stateless persons who have applied for asylum or to stateless persons who have already been regularised under section 9*bis* Aliens Act, but are not in possession of a work permit C. However the question is whether such stateless category B workers may meet the other qualifying criteria under the Act on Social Integration. In particular one can ask whether a foreigner without authorisation to work in Belgium can satisfy the legal requirement of being willing to work.[881] Case law and policy have not provided an answer to this question so far.[882] The same goes for possible requirements to participate in measures aimed at labour market and social (re)integration.[883] The reason why these questions have not been addressed up to now may be that this is not an issue in practice. All eligible foreigners apart from stateless persons have authorisation to work in Belgium; and eligible stateless persons are also in a position to be in possession of a work authorisation.

Another obstacle faced by stateless category B workers would be compliance with the means test.[884] Only if they have income from work below the relevant threshold or performed the irregular work before the relevant period of investigation of the income can they qualify for benefits. If income is not declared and social security authorities are misled about the real need of the applicant, the same rules apply as for Belgian citizens who work in the black economy.

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[877] See above, subchapter 2.1.1.

[878] Koninklijk besluit van 11 juli 2002 houdende het algemeen reglement betreffende het recht op maatschappelijke integratie, B.S. 31 July 2002.

[879] See § 3 1° of the Act on Social Integration in conjunction with § 2 of the Royal Decree on Social Integration.

[880] § 2 of the Royal Decree on Social Integration.

[881] § 3 5° Act on Social Integration.

[882] Willingness to work under the Act on Social Integration must be interpreted differently from the corresponding criterion in unemployment insurance. In particular, the requirement to be available for the labour market under the Unemployment Decree is not part of the assessment under the Act on Social Integration. See Arbeidshof Antwerpen, 27 September 1989, *Soc. Kron.* 1990, p. 366. Willingness to work rather refers to the person's attitude towards work; for example, he or she must make an effort to find a job.

[883] The imposition of such measures is left, to a large extent, to the discretion of the competent authorities. See § 11 and § 13 (2) Act on Social Integration. The sanction in case of non-compliance is also left to the discretion of the authorities. Benefits can be partially or completely suspended for one or, in case of recurrence, three months. See § 30 (2) Act on Social Integration.

[884] § 3 4° Act on Social Integration.

The Integration Income is paid at the highest possible rate, the so-called 'family rate', whenever an applicant[885] – whether a single person or a couple – lives together with and takes care of a minor, unmarried child.[886] There are no requirements regarding the immigration status of the child. Living together (*samenwoning*) means living under the same roof.[887] The preparatory materials on the Act on Social Integration emphasises that it is the actual situation which is to be assessed, not the administrative one (for example enrolment in the municipal registers).[888] This is in fact what OCMWs do, including when they deal with applicants who are living together with an unlawfully present foreigner.[889]

13.1.2. Nationals who engage in undeclared work

Belgian citizens who perform undeclared work are eligible for benefits under the Act on Social Integration if they actually reside in Belgium. Belgian citizenship, a further requirement, is by definition fulfilled by Belgians who engage in undeclared work. However, Belgian citizens who perform undeclared work have both work and income from work. The Act on Social Integration, by contrast, aims to socially integrate people who lack sufficient means by offering work and/or a financial benefit. People with both an income and work at the time of application – whether undeclared Belgian workers or irregular migrant workers – are not the target group of this social assistance scheme. Undeclared workers who are residents of Belgium could meet crucial qualifying requirements, such as being willing to work or lacking sufficient means, if their work and income is marginal. In all other cases, workers are not entitled to social assistance under the Act on Social Integration.

However, if work is not declared for social security contribution purposes, it is likely that it will also not be declared to other public authorities, such as the OCMWs.[890] As a consequence, by misleading the OCMWs undeclared workers may be paid benefits to which they are legally not

[885] For the sake of completeness it should be noted that benefits under the Act on Social Integration are not only provided upon application, but also *ex officio*.
[886] § 14 (1) Act on Social Integration
[887] § 14 (1) 1° Act on Social Integration.
[888] Parlementaire stukken: Kamer, 2001-02, no. 1603/004, p. 55.
[889] See Steven Bouckaert, comment to Arbeidsrechtbank Brussel, no. 11.660/05, 13 October 2005, *Tijdschrift voor Vreemdelingenrecht*, no. 2 (2006), p. 192. This case and the comment relate to unlawfully present partners who are living together with applicants for benefits under the Act on Social Integration. Concerning unlawfully present partners there has been some discussion whether the concept of living together also comprises an economical and financial dimension. This would mean that foreigners who are unlawfully present in Belgium are not to be taken into account as persons living together with the applicant, since they have no means with which they could possibly contribute to the joint household. Hence, a person living together with an unlawfully present foreigner would need to be regarded as a single person and would need to be attributed the higher Integration Income rate. Case law decided in both directions. For the economic and financial meaning see Arbeidsrechtbank Brugge, 24 September 2003, *Rechtskundig Weekblad* 2003-04, p. 1191; Arbeidsrechtbank Brussel, 30 August 2004, *Soc. Kron.* 2005, p. 270. For the literal meaning of 'living under the same roof' see Arbeidsrechtbank Brussel, 30 October 2007, cited in Grondwettelijk Hof, no. 132/2008, 1 September 2008, B.S. 8 October 2008. Concerning children, there are no reasons to deviate from the literal meaning and assign an economic or financial meaning. In contrast to partners and other adults with whom the applicant lives together, children are not supposed to contribute economically to the joint household. Accordingly, the OCMW's practice appears to be in line with the relevant laws.
[890] For the means test, applicants are required to declare their and their family's income and assets. On the basis of this declaration, the competent OCMW assesses the person's indigence. See § 14 Act on Social Integration. If necessary, the OCMW can contact other authorities, such as social security administrations, to verify the applicant's statements. See § 6 § 3 Royal Decree on Social Integration.

entitled. Here it should be mentioned that Integration Income that has been paid out will be reclaimed if the payment was based on inaccurate declarations by the applicant.[891] If the inaccurate declarations were made fraudulently, the reclaimed amount will include interest[892] and the person who made the claim may be subject to criminal penalties.[893]

13.2. Guaranteed Family Allowance

13.2.1. Irregular migrant workers

The Guaranteed Family Allowance scheme provides for child benefits of last resort to needy parents who do not qualify for a Family Allowance under the professional social insurance schemes for employees, for the self-employed or for public-sector workers. In order to enjoy child benefits, both applicant and child must actually reside (*werkelijk verblijven, résider effectivement*) in Belgium.[894] The Guaranteed Family Allowance Act explicitly requires that this residence must be in accordance with Belgian immigration laws.[895] This requirement was introduced in the early 1980s when the nationality clause was dropped and the benefit was also made available to a large extent to foreigners.[896] It is worth mentioning that the Constitutional Court held in 2006 that the lawful residence requirements do not violate constitutional non-discrimination principles when the right to Guaranteed Family Allowance is not granted for a Belgian child who is being cared for by a foreigner who is not authorised to stay in the country.[897] The decision was based on the reasonableness and adequacy of requiring, by means of the condition of lawful residence, the establishment of a sufficient link (*voldoende band*) with Belgium, in particular because it is a non-contributory scheme. In addition, the measure was considered to be proportional with regard to the means employed and the objectives aimed at, since an unlawfully present person has at least a right to Social Welfare Services for his or her child.

Besides current residence in Belgium, applicant and child must also have previously resided in Belgium. To be more precise, they must have resided in the country for an uninterrupted period of five years preceding the day the application is filed, provided that no exception applies.[898] As

[891] § 24 § 1 1° in conjunction with § 22 § 1 4° Act on Social Integration.
[892] § 24 § 4 Act on Social Integration.
[893] § 233 Social Criminal Code.
[894] § 1 (1) Guaranteed Family Allowance Act for the parent and § 2 (1) 1° for the child.
[895] § 1 (8) Guaranteed Family Allowance Act for the parent and § 2 (1) 1° for the child. In more detail, the law specifies that if the child and the parent are not Belgian citizens, they must be authorised to stay or to settle in Belgium according to the Aliens Act.
[896] See Royal Decree of 31 December 1983 (Koninklijk besluit nr 242 van 31 december 1983 tot wijziging van de wet van 20 juli 1971 tot instelling van gewaarborgde gezinsbijslag), B.S. 13 January 1984.
[897] Arbitragehof, no. 110/2006, 28 June 2006, B.S. 15 September 2006.
[898] For the residence history requirement and the exceptions thereto see § 1 and § 2 Guaranteed Family Allowance Act. Concerning the child, the residence history requirement does not apply if the child is related by blood to the applicant or is the child of the applicant's wife or actual partner. The applicant, in turn, is exempted from the five-year residence requirement if he or she falls within the personal scope of application of EC Regulation 1408/71 on the coordination of social security, is a citizen of a country which has ratified the European Social Charter, is a stateless person or is a refugee. Besides, the competent minister is allowed to deviate from this five-year requirement in individual cases or for specific categories worthy of consideration. The minister has done so, for instance, for foreigners who have been regularised on the basis of the 1999 regularisation campaign. See Circular Letter of 16 July 2007 (Omzendbrief van 16 juli 2007 omtrent algemene afwijkingen en de samengeordende wetten betreffende de kinderbijslag voor loonarbeiders en in de wet van 20 juli 1971). Recently the Constitutional Court ruled that the failure

opposed to the current residence requirement, it is not clear whether the residence during the five years before application must also have been in compliance with Belgian immigration laws. As for the applicant, subsection 1 (1) Guaranteed Family Allowance Act stipulates that this must be a natural person who is residing in Belgium. Subsection 1 (7) of this Act lays down that the natural person of subsection 1 (1) must have resided actually and uninterruptedly for a period of five years in Belgium. Finally, subsection 1 (8) stipulates that if the natural person of subsection 1 (1) is a foreigner, the foreigner must be authorised to stay or settle in Belgium in accordance with the Aliens Act. The situation for the child is similar. The only difference is that these three conditions are not written in different subsections, but are all summed up in one subsection, *i.e.* subsection 2 (1) Guaranteed Family Allowance Act. The connection between the lawful residence requirement and the requirement to be actually resident in Belgium – at the time of application and during the receipt of the benefit – is quite clear. With respect to the text we can see that, first, subsection 1 (8) explicitly refers to subsection 1 (1) (applicant) and, second, the lawful residence requirement is written in the present tense (applicant and child). What is more, all courts, including the high courts, apply the lawful residence requirement to the current situation of both applicant and child.[899] By contrast, the link between the lawful residence requirement and the requirement to have resided in Belgium during a period of five years before applying for Guaranteed Family Allowance is not obvious. From a textual point of view these requirements seem to stand next to each other, instead of being interlinked with each other, and the language of the lawful residence requirement does not indicate that it should be applied for periods in the past. Thus far, Belgian case law has not dealt with this question.[900] We only know that the Constitutional Court has considered the five-year residence requirement, like the lawful residence requirement and the actual residence requirement, to be an expression of the demand to have a sufficient link *(voldoende band*) with Belgium.[901] However, knowing the purpose of this requirement does not shed light on the issue.[902]

What is more, the Guaranteed Family Allowance Scheme also defines a third party, as well as the applicant/entitled person and the child: the person who actually receives the benefit. From a legal point of view, this person can be a foreigner with an irregular immigration status in Belgium.[903] However, we have already seen in the context of the Family Allowance scheme for employees that in such cases foreigners usually face practical obstacles to accessing the financial benefit. The

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to exempt from this requirement foreigners lawfully present in Belgium, who are looking after a child who has Belgium citizenship or European Union citizenship and is actually present in Belgium, violates constitutional non-discrimination principles and EU law. See Grondwettelijk Hof, no. 62/2009, 25 March 2009, B.S. 29 May 2009 and no. 48/2010, 29 April 2010, B.S. 10 June 2010.

[899] See all the case law of this subchapter cited above and below.

[900] This issue has likewise not been addressed in legal cases that concern the Guaranteed Family Allowance and foreigners in general,. See for instance Arbitragehof, no. 106/2003, 22 July 2003, B.S. 4 November 2003, § B.7.3; Arbitragehof, no. 110/2006, 28 June 2006, B.S. 15 September 2006; or Grondwettelijk Hof, no. 62/2009, 25 March 2009, B.S. 29 May 2009.

[901] See in particular Arbitragehof, no. 83/95, 14 December 1995, B.S. 19 January 1996, §§ B.6.3., B.7.

[902] In practice, the social security authorities assess the fulfilment of the five-year residence requirement by consulting the National Register. However, case law has made it clear that periods during which a person was not registered with the National Register must also be taken into consideration, if there is sufficient evidence that the person was actually residing in Belgium. For the case of a homeless person who was not enrolled in the National Register see Arbeidsrechtbank Brussel, 11 October 2005, *Soc. Kron.* 2006, p. 611. Non-registration in the National Register would therefore not be an argument for excluding periods of unlawful presence when determining the five-year period.

[903] Here we can refer to our finding in subchapter 12.1.1. This is because pursuant to § 6 Guaranteed Family Allowance Act, the same rules apply in this regard as under the Family Allowance scheme for employees.

legislators have therefore provided for a mechanism that allows the benefit to be paid out to the entitled person and not to the person who is assigned to collect the benefit, but cannot do so.

13.2.2. Nationals who engage in undeclared work

The Guaranteed Family Allowance scheme supports indigent parents who, faced with the costs of raising children, cannot fall back on the other schemes for Family Allowance. Belgians who engage in undeclared work have income from work by definition – like irregular migrant workers. Therefore they can only qualify for the Guaranteed Family Allowance if their income is not sufficient, *i.e.* if they pass the means test. Other qualifying conditions can in principle be fulfilled by Belgian citizens, such as the condition that they must currently reside in Belgium. The condition that one must have been continuously residing in Belgium for the five years prior to the application does not apply to Belgian citizens. In 1995 the Constitutional Court ruled that Belgians already demonstrate a sufficient link with the country by having Belgian nationality. [904]

13.3. Minimum Income for the Elderly

13.3.1. Irregular migrant workers

The Minimum Income for the Elderly scheme, which serves as a kind of backup for elderly people who have little or no retirement pension, does not explicitly require lawful residence in Belgium in order to qualify for benefits. However, due to the requirement that foreigners should have a certain status in Belgium, the possibilities for unlawfully present foreigners to qualify for benefits are restricted. The personal scope of application is limited to Belgian citizens, persons falling under the scope *ratione personae* of EC Regulation 1408/71 on social security coordination, citizens of countries with which Belgium has contracted an agreement on a reciprocal basis, recognised refugees, recognised stateless persons and persons of undetermined nationality,[905] foreigners who are entitled to a retirement or survivor's pensions based on Belgian laws,[906] and – in future –[907]

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[904] Arbitragehof, no. 83/95, 14 December 1995, B.S. 19 January 1996.

[905] A person is stateless if the person is not recognised by any country as a citizen. A person is of undetermined nationality if the citizenship has not yet been determined.

[906] The fact that foreigners, who do not qualify otherwise, must be entitled to a Belgian retirement or survivor's pension in order to qualify for Minimum Income for the Elderly, whereas Belgian citizens are not required to do so, does not infringe the equal treatment principle as laid down in Article 11 and Article 12 of the Belgian Constitution and Article 14 European Convention on Human Rights in conjunction with Article 1 of the First Protocol to the Convention. Due to the non-contributory character of this scheme, the legislators are entitled to require foreigners to have a sufficiently strong bond to Belgium. See Grondwettelijk Hof, no. 69/2010, 10 June 2010, B.S. 20 August 2010.

[907] This extension has not yet entered into force. It will enter into force upon a proclamation by Royal Decree, when the budgetary costs of this extension can be estimated. From the parliamentary debate it is clear that the government extended the scope due to its interpretation of its obligations under Article 13 European Social Charter. This provision lays down the right to social and medical assistance and stipulates that State Parties undertake "[...] to apply [this obligation] on an equal footing with their nationals to nationals of other Parties lawfully within their territories [...]." The new legal text of § 4 Act on the Minimum Income for the Elderly simply requires recipients to be a citizen of a State Party and does not require a lawful residence status. A literal interpretation would therefore also allow the eligibility of citizens of State Parties unlawfully present in Belgium. A teleological interpretation, on the other hand, might lead to the conclusion that it was the intention of the legislators to comply with their obligations under Article 13 European Social Charter – an obligation which does not require social and medical assistance to be guaranteed to persons unlawfully present in a State Party. For the introduction of this category see § 110 and § 111 of the Act on various provisions of 6 May 2009 (Wet houdende diverse bepalingen van 6 mei 2009), B.S. 19 May 2009. For the

citizens of a State Party to the European Social Charter.[908] This restriction, however, does not completely exclude the possibility that an unlawfully present foreigner may be eligible for benefits. For instance, we have already heard that the recognition of statelessness does not entail the right to be present on Belgian soil. In other words, a stateless person who does not comply with the general procedures for lawful presence under the Aliens Act is not authorised to be in Belgium, but would be eligible for benefits under the Minimum Income for the Elderly scheme. Also, foreigners who are entitled to a retirement or survivor's pension based on Belgian laws, a further eligible category, could basically be present without authorisation in Belgium.[909]

Besides Belgian citizenship or a privileged foreigner status, the law requires principal residence as well as permanent and actual presence (*bestendig en daadwerkelijk verblijven, séjourner en permanence et effectivement*) in Belgium.[910] Principal residence has the same meaning as under the Municipal Registers Act. This means that the usual place of living has to be determined, according to the factual situation – see already subchapter 6.2.1. With regard to permanent and actual presence in Belgium, the relevant Royal Decree stipulates that, in principle, a stay abroad for less than thirty days is still counted as permanent and actual presence in Belgium.[911] In practice, an application from an unlawfully present foreigner may lead to the discovery of his or her irregular immigration status.[912] If he or she therefore leaves Belgium, there would be no further entitlement to benefits, since the person would no longer be able to meet the principal residence and permanent and actual presence requirement.

Lack of permission to work in Belgium has no influence on the right to benefits. However, many category B workers simply do not qualify for benefits under the Minimum Income for the Elderly scheme because of their residence status. That is to say, only a few category B workers have a

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entry into force and the parliamentary debate see Parlementaire stukken: Kamer, 2008-09, no. 1786/018, p. 15 and Parlementaire stukken: Kamer, 2008-09, no. 1786/001, p. 60.

[908] § 4 Act on the Minimum Income for the Elderly. The extension of the personal scope of application to these categories of foreigners has happened gradually over the years and has been mainly due to Belgium's international and bilateral obligations. However, persons of undetermined nationality have been included in the scope *ratione personae* due to national equal treatment logics; more specifically, for reasons of equal treatment between persons of undetermined nationality and stateless persons. See Parlementaire stukken: Senaat, BZ 1979, no. 55-1.

[909] The Constitutional Court, when dealing with the Guaranteed Family Allowance, remarked that § 4 of the Act on the Minimum Income for the Elderly, *i.e.* the privileged foreigner condition and the principal residence condition, prevents a person unlawfully in Belgium from being eligible for benefits. See Arbitragehof, no. 110/2006, 28 June 2006, B.S. 15 September 2006, § B.5.2. Unfortunately the Constitutional Court did not give any further explanation. Our analysis above shows that there may be situations, where such a foreigner may pass the requirements under § 4.

[910] See § 2 and § 4 Act on the Minimum Income for the Elderly as well as § 3 Municipal Registers Act and § 1 5° Royal Decree on the Minimum Income for the Elderly (Koninklijk besluit van 23 mei 2001 tot instelling van een algemeen reglement betreffende de inkomensgarantie voor ouderen), B.S. 31 May 2001.

[911] § 42 Royal Decree on the Minimum Income for the Elderly.

[912] The National Office for Pensions (*Rijksdienst voor Pensioenen, RVP*), when determining eligibility for the Minimum Income for the Elderly, is legally obliged to consult the National Register to retrieve information on the applicant's principal residence. See § 9 (1) Royal Decree on the Minimum Income for the Elderly. We have already seen that unlawfully present foreigners are not enrolled in the National Register – except for asylum-seekers who have exhausted all legal procedures and who continue to be enlisted in the Waiting Register. When a person is not part of the National Register – as is the case for most unlawfully present foreigners – then, and only then, can the RVP turn to other sources to determine the principal residence. See § 9 (1) Royal Decree on the Minimum Income for the Elderly. In such a case the RVP would be obliged to carry out further investigations – which will very likely bring to light the fact that the person is unlawfully present in Belgium, since this is the reason for his or her non-enrolment in the National Register.

residence status which qualifies them as privileged foreigners under the Act on the Minimum Income for the Elderly.

13.3.2. Nationals who engage in undeclared work

The Minimum Income for the Elderly is intended to provide financial support to the indigent elderly. Undeclared Belgian workers may qualify for benefits due to their Belgian citizenship, provided they have their principal residence and are permanently and actually living in the country. Concerning indigence, it should be noted that beneficiaries are not precluded from having some income from work. However, all income above a certain threshold is deducted from the benefit. Belgians of pensionable age who have income from work that is not declared to the RSZ are eligible for benefits, like anyone else, as long as their income does not exceed the relevant threshold. However, nationals who do not declare their work to the RSZ are also unlikely to provide accurate information about their income to the RVP, especially as applicants are required to attach their tax declaration to the income declaration for the Minimum Income for the Elderly.[913] As a consequence, by misleading the RVP, undeclared workers may receive benefits to which they are legally not entitled.

13.4. Disabled Person's Allowance

13.4.1. Irregular migrant workers

The Disabled Person's Allowance scheme financially assists people who are unable to make a living due to their disability or who are not able to cover additional costs which accrue due to their inability to live independently. The personal scope of application of this social assistance scheme is limited to Belgian citizens and privileged foreigners.[914] Lawful residence in Belgium is not required. The group of privileged foreigners comprises EU citizens and family members; EEA, Swiss, Moroccan, Algerian or Tunisian citizens and family members who comply with the conditions under EC Regulation 1408/71;[915] recognised stateless people and family members; recognised refugees and family members; foreigners enrolled in the Population Register;[916] and

[913] § 15 (1) Royal Decree on the Minimum Income for the Elderly.

[914] The categories of privileged foreigners and hence the scope *ratione personae* of the Act on the Disabled Person's Allowance have been extended over the years. This extension was due to international obligations, due to adjustment with other Minimum Income schemes and due to the wish to prevent disabled people who received a higher Child Allowance in their childhood from losing governmental support. See for instance Arbitragehof, no. 92/2004, 19 May 2004, B.S. 20 September 2004 or Grondwettelijk Hof, no. 153/2007, 12 December 2007, B.S. 11 February 2008 and *Rechtskundig Weekblad* 36 (2007-08): p. 1.

[915] § 4 (1) Act on the Disabled Person's Allowance and § 1 of the Royal Decree of 17 July 2006 still talk about EU Coordination Regulation 1408/71. However, it is to note that since 1 May 2010 the new EU Coordination Regulation 883/2004 has been implemented.

[916] This category was introduced in 2009 after a judgment of the Constitutional Court, which held that treating foreigners who are enrolled in the Population Register, because of an authorisation to settle in Belgium, differently from the other privileged foreigners under the Act on the Disabled Person's Allowance amounts to discrimination in violation of Article 10 and Article 11 of the Belgian Constitution and Article 14 European Convention on Human Rights in conjunction with Article 1 of the First Protocol to the Convention. See Grondwettelijk Hof, no. 153/2007, 12 December 2007, B.S. 11 February 2008 and *Rechtskundig Weekblad* 36 (2007-08): p. 1. For the amendment of the rules see § 1 Royal Decree of 9 February 2009 (Koninklijk besluit van 9 februari 2009 houdende wijziging van het koninklijk besluit van 17 juli 2006 tot uitvoering van artikel 4, § 2, van de wet van 27 februari 1987 betreffende de tegemoetkomingen aan personen met een handicap), B.S. 6 March 2009, which adapted § 1 Royal Decree of 17 July

those who used to receive the increased Child Allowance for disabled children under the Family Allowance scheme for employees or the self-employed.[917] This limitation makes it difficult for foreigners who are unlawfully present in Belgium to qualify for disability benefits.[918] However, we can identify three eligible categories of people who do not necessarily have a regular immigration status. These are stateless persons and their family members, family members of refugees, and persons who received the increased Child Allowance until the age of twenty-one.

In addition to the status requirement, applicants for benefits must also comply with the requirement that their actual place of residence is in Belgium (*werkelijke verblijfplaats, résidence réelle*).[919] This means that the principal residence is in Belgium and that the applicant permanently and actually lives there (*bestendig en daadwerkelijk verblijven, séjourner en permanence et effectivement*).[920] Unlawfully present foreigners are in principle able to fulfil these criteria, since immigration status does not play a role here. For the concept of principal residence and permanent and actual presence see above, subchapter 13.3.1. In practice, problems may arise, since investigation of the principal residence may bring to light the lack of authorisation to stay in Belgium.[921] This does not necessarily have consequences for entitlement to and receipt of benefits under the Disabled Person's Allowance scheme. Only when the discovery means that the foreigner leaves Belgium will he or she cease to satisfy the residence and presence requirements and cease to be entitled to benefits.

Category B workers will also usually be unable to qualify for benefits under the Disabled Person's Allowance scheme. This is not because of their unlawful work – working unlawfully or lacking

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2006 (Koninklijk besluit van 17 juli 2006 tot uitvoering van artikel 4, § 2, van de wet van 27 februari 1987 betreffende de tegemoetkomingen aan personen met een handicap), B.S. 28 August 2006. It is worth mentioning that in this judgment the Constitutional Court also found that being authorised for a short stay or for a stay of more than three months does not demonstrate a sufficient link with Belgium, as opposed to the authorisation to settle in the country. It is therefore inconceivable that persons who lack authorisation to remain in Belgium and who do not fall into one of above-mentioned categories could be considered by the Constitutional Court to be entitled to benefits under the Act on the Disabled Person's Allowance. For another point of view see Hof van Cassatie, 8 December 2008, *Nieuw Juridisch Weekblad* 2009, p. 173. There the Court of Cassation expressed the opinion that the exclusion of foreigners authorised for a stay of more than three months and enrolled in the Aliens Register may amount to discrimination.

[917] § 4 (1) Act on the Disabled Person's Allowance and § 1 of the Royal Decree of 17 July 2006.

[918] The following categories are regarded as lawfully present in Belgium: foreigners enrolled in the Population Register, citizens of the EU and the EEA and their family members (compliance with EC Directive 2004/38 provided), and Swiss citizens and their family members (subject to compliance with the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other part, on the free movement of persons OJ L 114/6, 30 April 2002). The same is true for Moroccan, Algerian or Tunisian citizens and their family members, who in order to comply with EC Regulation 1408/71 need a legal residence status in the Member State (see § 1 Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality, OJ L 124/1, 20 May 2003); see also § 1 of Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality, OJ L 344/1, 29 December 2010).

[919] § 4 Act on the Disabled Person's Allowance.

[920] § 3 of the Royal Decree on the Disabled Person's Allowance (Koninklijk besluit van 6 juli 1987 betreffende de inkomensvervangende tegemoetkoming en de integratietegemoetkoming), B.S. 8 July 1987.

[921] Principal residence is defined in accordance with the Municipal Registers Act. The competent authorities have to turn to the National Register for information on a person's principal residence. See § 1 5° Royal Decree on the Disabled Person's Allowance and § 9 (1) Royal Decree of 22 May 2003 (Koninklijk besluit van 22 mei 2003 betreffende de procedure voor de behandeling van de dossiers inzake tegemoetkomingen aan personen met een handicap), B.S. 27 June 2003.

permission to work in general is not a factor in establishing eligibility. The reason is related to their residence status. The eligible categories of privileged foreigners generally have authorisation to work in Belgium. Only stateless persons and their family members, family members of refugees, and persons who received the increased Child Allowance may fall within the scope of the group of category B workers.

If, exceptionally, irregular migrant workers satisfy all these qualifying conditions, there still might be the obstacle that, by definition, they have income from work. The Disabled Person's Allowance scheme does not *per se* prohibit income from work, but it cannot be more than the amount of the benefit, when the income exemptions have been taken into consideration.

13.4.2. Nationals who engage in undeclared work

Belgian citizens who perform undeclared work fall within the scope *ratione personae* of the Disabled Person's Allowance scheme due to their Belgian citizenship, provided that they have their principal residence in Belgium and are permanently and actually present there. The only obstacle this group might face for eligibility to benefits is the requirement that they should not have sufficient means of their own. Like irregular migrant workers, nationals who work in the black economy by definition have income from work. In order for them to pass the means test, their income from work, together with any other income, has to be below the relevant threshold. However, if their income is above the threshold, the FPS Social Security will probably not know, since it retrieves income and work information from other public authorities, such as the tax authorities or the RSZ.[922] In such cases, undeclared workers may be able to enjoy benefits to which they are not entitled.

13.5. Social Welfare Services

13.5.1. Irregular migrant workers

The OCMW Act provides for Social Welfare Services in cash and in kind, including health services, to everyone who needs assistance to live a life in human dignity.[923] The Act does not distinguish between Belgian citizens and foreigners. *Everyone* falls within the scope *ratione personae* of the Act. However, this principle is in fact restricted by the rules on the allocation of competences. The question of which Social Welfare Centre is competent for the provision of welfare benefits depends on a person's actual presence in a Belgian municipality.[924] Case law has gone further and looks not at the municipality in which the person is simply physically present, but at the municipality in which his or her actual and permanent place of residence is located.[925] To determine this, objective factors such as continuity of residence, as well as the person's intentions,

[922] § 10 (3) Royal Decree of 22 May 2003.
[923] The right to lead a life in conformity with human dignity, as we have seen in chapter 1, is also enshrined in the Belgian Constitution – see Article 23 Constitution.
[924] § 1 1° Act of 2 April 1965 reads in Dutch "het openbaar centrum voor maatschappelijk welzijn van de gemeente op wier grondgebied zich een persoon bevindt" and in French "'le centre public d'aide sociale' de la commune sur le territoire de laquelle se trouve une personne".
[925] Raad van State, no. 38.097, 13 November 1991, cited in Dries Simoens, *Handboek OCMW-dienstverlening* (Bruges: Die Keure, loose-leaf, 2010), p. 602.

are relevant.[926] Only with respect to urgent medical care does the criterion appear to be simple presence and not residence in a municipality.[927]

For foreigners who are present in Belgium without being authorised to do so[928] a further restriction applies: they are, according to the Act, only eligible for urgent medical assistance[929] and *not* for financial assistance, for housing or for other Social Welfare Services in kind.[930]

However, the legislators have specified two exceptions to this restriction. First, aliens who are receiving Social Welfare Benefits at the moment when an order to leave the country is served keep on receiving these (full) social benefits until they actually leave or the granted period to leave expires.[931] Second, unlawfully present foreigners who undertake to leave Belgium voluntarily are entitled to full Social Welfare Services for the period that is necessary to depart.[932]

Belgium's Constitutional Court considered the above-mentioned restriction of urgent medical assistance, *in general*, to be in compliance with the Belgian Constitution and international law to which Belgium is a signatory.[933] In more detail, the Court found that the exclusion from Social Welfare Services beyond urgent medical assistance is adequate and proportional[934] for the achievement of an immigration policy aim, namely to encourage the foreigner to comply with an order to leave the country. The exclusion therefore does not violate the constitutional non-discrimination principles. It is also worth mentioning that the Court held that the exclusion does not infringe the right to an adequate standard of living, as laid down in Article 11 ICESCR, since this right is not be granted to everyone, but only to persons for whom the State acts as a guarantor.[935] This, according to the Constitutional Court, is not the case for aliens who are subject to an order to leave the country.

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[926] Arbeidshof Luik, 21 May 1990, *Journal du droit des jeunes* 1990, p. 50.

[927] For an analysis and overview of case law see Simoens, *Handboek OCMW-dienstverlening*, p. 604-05.

[928] The OCMW Act itself defines unlawful presence only with respect to asylum-seekers whose application has been rejected. § 57 (2) 4 OCMW Act stipulates that asylum-seekers are unlawfully present in Belgium when their request for asylum is denied and their order to leave the country is served. This definition was considered to be necessary given the peculiarities of the asylum procedure.[928] However, in the preparatory materials it was made clear that aliens outside an asylum procedure do not need an order to leave the country to be considered as unlawfully present – they are unlawfully present whenever they lack the authorisation to be in Belgium. See Simoens, *Handboek OCMW-dienstverlening*, p. 666; see Circular Letter of 27 January 1997, § 1.2; and see Parlementaire stukken: Kamer, 1995-96, no. 364/1, p. 61. It must be noted that whereas the legislators and the government do not consider the order to leave Belgium to be decisive for the determination of unlawful presence for foreigners other than asylum-seekers, they do regard it as decisive with respect to asylum-seekers. In a circular letter the Minister of Social Integration made it clear that asylum-seekers who have exhausted all legal procedures but, for whatever reason, have not been sent an order to leave the country, are still eligible for full Social Welfare Services. This interpretation is in line with § 57 (2) (4) OCMW Act, but clearly puts former asylum-seekers in a stronger position than all other unlawfully present foreigners. See Circular Letter of 26 April 2005 (Omzendbrief van 26 april 2005 betreffende het recht op maatschappelijke dienstverlening voor sommige categorieën vreemdelingen).

[929] § 57 (2) (1) 1° OCMW Act.

[930] See already subchapter 11.2.2.

[931] § 57 (2) (5) OCMW Act.

[932] § 57 (2) (6) OCMW Act. Basically, this period may not exceed one month. However, if voluntary departure is not practically possible, the Minister of Home Affairs may postpone the order to leave and the foreigner concerned will continue to be entitled to Social Welfare Services. See Circular Letter of 27 January 1997, § 1.4.

[933] Arbitragehof, no. 51/94, 29 June 1994, B.S. 14 July 1994.

[934] The means employed were regarded as being proportional since the person concerned is guaranteed to receive the benefits in kind which are sufficient to enable him or her to leave the country within one month and is always guaranteed urgent medical assistance.

[935] In the orginal language it reads: "Het kan voor elke Staat slechts gaan om de personen voor wie hij instaat".

Although section 57 OCMW Act was found to be generally constitutional, the Constitutional Court also partly extended the right to Social Welfare Services for irregular migrants beyond urgent medical assistance. One set of its decisions, which related to the position of foreign children staying unlawfully with their parents in Belgium, found its way into the OCMW Act, *i.e.* subsections 57 § 2 (1) 2° and (2).[936] In 2003, the Constitutional Court held that the non-provision of Social Welfare Services in kind to children who are unlawfully present in Belgium together with their parents violates the principle of non-discrimination,[937] as well as the right to health,[938] the right to social security[939] and the right to an adequate standard of living.[940,941] The Constitutional Court, referring to the above-mentioned judgment, recalled that in principle it cannot be acceptable to provide foreigners who are subject to an order to leave the country with an incentive for not complying with this order by guaranteeing them Social Welfare Services. However, the Court was not willing to accept that the objective of the Social Welfare Service scheme would be thwarted by denying benefits to children staying unlawfully under all circumstances. Against the background of Belgium's obligations under the UN Child Rights Convention in particular, the Court eventually held that, subject to the fulfilment of certain conditions, Social Welfare Services in kind must be provided to children staying unlawfully .[942] The legislators, when incorporating this judgment into the OCMW Act, adjusted the eligibility criteria established by the Constitutional Court. Now, according to subsections 57 § 2 (1) 2° and (2) OCMW Act, about it is necessary to determine that the person in question is a foreigner who is below eighteen years of age, who is unlawfully present in Belgium together with his/her parents and whose parents are not complying or are unable to comply with their maintenance obligation. To avoid abuse, entitlement to benefits is restricted to benefits in kind which are indispensible for the development of the child and which are provided in a centre of the Federal Agency for the Reception of Asylum-Seekers (FEDASIL).[943] Since a further judgment of the Constitutional Court in July 2005,[944] the presence of the parents in these Federal Agency centres has been guaranteed.[945] It is only the child who is entitled to benefits in kind. The parents are solely guaranteed to be present in the Federal Agency centres, but this does not entitle them to Social Welfare Services beyond urgent medical assistance. Benefits granted to the child usually comprise

[936] See § 483 Act of 22 December 2003 (Programmawet van 22 december 2003), B.S. 31 December 2003.
[937] As laid down in Article 10 and Article 11 of the Belgian Constitution and Article 2 of the UN Convention on the Rights of the Child.
[938] Article 24 CRC.
[939] Article 26 CRC.
[940] Article 27 CRC.
[941] Arbitragehof, no. 106/2003, 22 July 2003, B.S. 4 November 2003.
[942] See also Arbitragehof, no. 189/2004, 24 November 2004, B.S. 11 January 2005.
[943] In cases where FEDASIL centres have no further capacity to take care of families staying unlawfully, the competent OCMW must provide financial assistance to the unlawfully present child. The OCMW can recover the expenses from FEDASIL. See Arbeidsrechtbank Brussel, 1 July 2010. Available at: http://www.vmc.be/uploadedFiles/Vreemdelingenrecht/Rechtsspraak/Rechtspraak/Arbrb.%20Bxl%201-07-10.pdf; or Arbeidsrechtbank Brugge, 20 July 2010. Available at: http://www.vmc.be/uploadedFiles/Vreemdelingenrecht/Rechtsspraak/Rechtspraak/Arbrb.%20Brugge%2020-07-10.pdf. For the capacity problem in general see Arbeidshof Luik, 7 January 2010, *Rev.dr.étr.* 2010, p. 120, Soc. Kron. 2010, p. 94, *Tijdschrift voor Vreemdelingenrecht* 2010, p. 153.
[944] Arbitragehof, no. 131/2005, 19 July 2005, B.S. 8 August 2005.
[945] See § 22 Act on various provisions of 27 December 2005 (Wet houdende diverse bepalingen van 27 december 2005), B.S. 30 December 2005.

housing, food, social and medical accompaniment and education.[946] Moreover, children and their parents are supposed to be supported in either finding legal ways to remain in Belgium, or voluntarily leaving the country.[947]

It is worth mentioning that the Constitutional Court has been confronted a few times with the question whether subsections 57 § 2 (1) 2° and (2) OCMW Act violate the principle of non-discrimination and other rights guaranteed by the Child Rights Convention, in that *parents staying unlawfully* on Belgian soil with a *child who has Belgian citizenship* are not protected by this provision.[948] The Constitutional Court has replied that children with Belgian nationality enjoy full protection under the OCMW Act, as there is no minimum age for the receipt of Social Welfare Services. Thus the rights in question can be exercised either by the child or by the parent on behalf of the child.[949]

What is more, the restriction to urgent medical assistance only is not applied when unlawfully present foreigners are not able to comply with an order to leave the country for reasons wholly beyond their control. Concerning medical reasons, the Constitutional Court ruled that unlawfully present foreigners not able to leave Belgium due to health problems are in a different situation from unlawfully present foreigners without medical problems.[950] Treating them equally under the OCMW Act was therefore regarded as a violation of the constitutional principle of non-discrimination. As a result, such foreigners are to be granted full Social Welfare Services, irrespective of whether or not they also try to regularise their residence status because of their medical problems.[951] With regard to the inability to leave Belgium due to other reasons beyond a

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[946] See also Circular Letter of 21 November 2006 (Omzendbrief van 21 november 2006 ter vervanging van de omzendbrief van 16 augustus 2004 betreffende het koninklijk besluit van 24 juni 2004 tot bepaling van de voorwaarden en de modaliteiten voor het verlenen van materiële hulp aan een minderjarige vreemdeling die met zijn ouders illegaal in het Rijk verblijft).

[947] *Ibid.*

[948] See Arbitragehof, no. 32/2006, 1 March 2006, B.S. 29 May 2006 and *Tijdschrift voor Bestuurswetenschappen & Publiekrecht* 4 (2007), pp. 223-24; Arbitragehof, no. 35/2006, 1 March 2006, B.S. 29 May 2006; or Arbitragehof, no. 66/2006, 3 May 2006, B.S. 25 July 2006. It should be noted that the Constitutional Court was also asked about the constitutionality of not granting Social Welfare Services to unlawfully present parents of children with a serious disability who cannot leave the country. The Court found that such a practice violates the principle of non-discrimination and a number of rights under the Child Rights Convention. See Arbitragehof, no. 194/2005, 21 December 2005, B.S. 10 February 2006.

[949] The Court hence found that the Child Rights Convention was not being violated, since the child's protection is legally guaranteed. However, the Constitutional Court held that when both parents are unlawfully present in Belgium, the OCMWs, when providing Social Welfare Services to the Belgian child, have to take into consideration the specific situation of these parents, *i.e.* the fact that their right to Social Welfare Services is limited to urgent medical assistance. See Arbitragehof, no. 35/2006, 1 March 2006, B.S. 29 May 2006. It is interesting to observe that the lower courts have not always complied with these findings of the Constitutional Court. Some courts have not considered unlawfully present parents of Belgian citizens as being unlawfully present within the meaning of § 57 (2) OCMW Act, arguing that their deportation is unlikely, and hence granting them the right to full Social Welfare Services for themselves. See Arbeidsrechtbank Brussel, no. 6170/2006, 26 June 2006, *Tijdschrift voor Vreemdelingenrecht* 2006, p. 422; Arbeidsrechtbank Brussel, no. 4856/06, 14 June 2006; and Arbeidsrechtbank Brussel, no. 22786/05, 14 June 2006.

[950] Arbitragehof, no. 80/99, 30 June 1999, B.S. 24 November 1999.

[951] Thus, instead of first adjusting such people's residence status, the Constitutional Court opted to grant them Social Welfare Services regardless of any immigration procedures. As a result of this judgment, the social assistance authorities have had to assess a foreigner's inability to leave the country. In practice, it has been found that foreigners who have turned to the labour courts for the non-application of § 57 (2) OCMW Act due to medical reasons have almost always also tried to get their residence status (temporary) regularised due to medical reasons. See Bouckaert, *Documentloze vreemdelingen*, pp. 622, 674, 675. This means that two entities of the State, *i.e.* the social assistance authorities and the immigration authorities, have been engaged with a rather similar question. However, the Minister

person's control, the courts, above all the Court of Cassation, have also taken the view that the restriction of subsection 57 § 2 OCMW Act should not be applied and full Social Services should be granted.[952] These other reasons were of a technical and administrative nature, such as the refusal of the country of origin to let the person concerned enter the country, or related to the (political) situation in the country of origin, such as war.[953]

Foreigners who are lawfully present in Belgium, which is the case for category B workers, are, in general, eligible for Social Welfare Services without restriction. Limitations only exist for asylum-seekers,[954] who are not covered by this research, and for applicants for regularisation under section 9*bis* Aliens Act. The latter group has been defined for the purposes of our research as being lawfully present in Belgium and thus may fall within the scope of our category B. However, until a positive decision has been taken on the merits of their application, this group is not eligible for Social Welfare Services beyond urgent medical assistance.

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for Social Integration recently specified eligibility for Social Welfare Services for applicants for medical regularisation. In more detail, in February 2008 the Minister made it clear that as soon as an application for regularisation on medical grounds, based on § 9*ter* Aliens Act, has been declared admissible, the applicant is entitled to full Social Welfare Services. See Circular Letter of 20 February 2008 (Omzendbrief van 20 februari 2008 betreffende de verblijfsregularisatie om medische redenen en de invloed daarvan op het recht op maatschappelijke dienstverlening), B.S. 14 March 2008, § 3.3. An application is declared admissible as soon as it is received by registered post and all documents have been submitted. In other words, eligibility for Social Welfare Services is already possible at a moment when the foreigner is strictly speaking still present in Belgium in violation of the Aliens Act. This circular letter does not implement the Constitutional Court's findings of 1999, but can be seen as an attempt to overcome parallel processes. In practice it will relieve the OCMWs in that they no longer have to assess the impossibility of leaving the country due to medical reasons, if the foreigner has already correctly submitted his or her application for medical regularisation to the Immigration Service (*Dienst Vreemdelingenzaken*) within the FPS Home Affairs.

[952] Hof van Cassatie, 18 December 2000, *Arr. Cass*. 2000, p. 2009. The Court of Cassation ruled that it follows from the objective of the OCMW Act that § 57 (2) OCMW Act only applies to unlawfully present aliens who refuse to leave the country but not to unlawfully present aliens who, for reasons beyond their control, are not able to leave the country.

[953] Labour courts have often based such decisions on an analogous application of the Constitutional Court's 1999 judgment on the impossibility of leaving the country due to medical reasons. For an overview of the case law see Steven Bouckaert, "Artikel 57 § 2 van de OCMW-wet en vreemdelingen in een situatie van medische overmacht: Een overzicht van de rechtspraak (i.h.b. tussen 1999 en 2004)," *Tijdschrift voor Vreemdelingenrecht*, no. 2 (2005), pp. 80-81; and Simoens, *Handboek OCMW-dienstverlening*, pp. 681-83. Concerning the impossibility of leaving the country due to medical reasons, we have seen that the declaration of admissibility of regularisation applications on medical grounds (§ 9*ter* Aliens Act) in itself leads to eligibility for Social Welfare Services. The same cannot be said about applications for regularisation in other extraordinary circumstances which make a return impossible or extremely difficult (§ 9*bis* Aliens Act). Throughout the application procedure, unlawfully present foreigners have no right to Social Welfare Services beyond urgent medical assistance. Only from the moment on a positive decision on the merits of the case has been taken and the application has been approved may they be eligible for benefits. See Circular Letter of 20 February 2008, § 2.3.

[954] Asylum-seekers are by and large subject throughout the asylum procedure to the Act on the Reception of Asylum-Seekers, which provides for benefits in kind and a *per diem* allowance in the FEDASIL centres; this is discussed in more detail below in subchapter 13.6. What is more, the Constitutional Court has made it clear that, as a rule, rejected asylum-seekers who have received an order to leave the country are entitled to Social Welfare Services as long as their appeal before the Council of State concerning their application for asylum has not been decided. See See Arbitragehof, no. 43/98, 22 April 1998, B.S. 29 April 1998 and Arbitragehof, no. 108/98, 21 October 1998, B.S. 29 January 1999. See also Circular Letter of 26 April 2005. Nevertheless, this rule is not applicable to appeals against a second rejection of an asylum application, where the asylum-seeker has not brought forward new evidence. See for instance Arbitragehof, no. 50/2002, 13 March 2002, B.S. 28 May 2002.

Category B workers by definition lack permission to work in Belgium. To what extent willingness to work and participation in labour market and social (re)integration projects is required of recipients of Social Welfare Services depends on the competent OCMW.[955] In addition, by definition such workers have income from work. If their income and other means enable them to live in human dignity, no right to Social Welfare Services will arise. As we have seen many times now, irregular work usually goes hand in hand with undeclared work. In such a case, the problem will rather be that the worker's income will not be declared to the OCMWs and the authorities will be misled about the real state of need.

For the sake of completeness, it should be added that the personnel of the OCMWs are under a duty to maintain professional secrecy. Such a duty exists under the OCMW Act and related laws for the members of the council of the OCMWs,[956] as well as for the rest of the OCMW personnel.[957] Moreover, section 458 Criminal Code sets out a duty of professional secrecy which by and large also applies to personnel of the OCMWs.[958] In all these cases, the duty of professional secrecy is subject to the condition that there is no legal obligation to disclose a professional secret.[959] There is no such obligation here. However, under section 29 of the Criminal Procedure Code government employees are required to report a criminal offence, such as unlawful presence in the country. This obligation also applies to the personnel of the OCMWs.[960] The OCMW staff are therefore subject to two conflicting obligations. See above, subchapter 11.1, on the discussion about which obligation prevails.

13.5.2. Nationals who engage in undeclared work

Social Welfare Services are available for everyone. Restrictions in the scope of the provided services only exist for foreigners who are unlawfully present in the country. Belgian citizens who perform undeclared work are therefore fully eligible for benefits under the OCMW Act. Like all social assistance schemes, Social Welfare Services are provided to those who are in need. In the words of the OCMW Act these are those who need support to lead a life in human dignity. As is the case under all social assistance schemes, the problem with workers who do not declare their work to the social insurance authorities is that by definition they have income – an income which

[955] § 60 (3) OCMW Act stipulates that the provision of cash benefits, at the discretion of the OCMW, may be made subject to the condition that the recipient is willing to work and to fulfill (re)integration obligations, as laid down in § 3 5°, § 11 and § 13 (2) Act on Social Integration. Otherwise the cash benefit may be stopped, suspended or reduced for the period of one month, or in case of recurrence, three months, at the OCMW's discretion. Concerning a general obligation to be willing to work in order to receive Social Welfare Services, there is no consensus in either case law or jurisprudence. However, this discussion will not be addressed here. For an overview, see Simoens, *Handboek OCMW-dienstverlening*, p. 292 ff.

[956] § 36 OCMW Act and § 40 (4) Flemish Decree of 19 December 2008 (Decreet van 19 december 2008 betreffende de organisatie van de openbare centra voor maatschappelijk welzijn), B.S. 24 December 2008.

[957] See § 50 OCMW Act for the French Community. For the Flemish Community see § 109 (3) of the Flemish Decree of 19 December 2008.

[958] See for instance Hof van beroep, Brussel, 17 May 1989, *Journal des tribunaux* 1989, p. 583; Hof van beroep, Antwerpen, 25 November 1993, *Rechtskundig Weekblad* 1994-95, p. 25; or Van der Straete and Put, *Beroepsgeheim en hulpverlening*, p. 49 ff.

[959] See § 458 Criminal Code and Parlementaire Vraag no. 210, 22 April 1991 (Van Wambeke), Vragen & Antwoorden Kamer 1990-91, no. 13.711-13.712

[960] See Parlementaire Vraag no. 881, 5 October 2006 (Tastenhoye), Vragen & Antwoorden Kamer 2005-06, no. 27.058-27.062.

they will not be inclined to declare to the social assistance authorities. As a consequence they may obtain by fraud benefits to which they are legally not entitled.[961]

13.6. Act on the Reception of Asylum-Seekers

Asylum-seekers are not covered by this investigation. However, for the sake of completeness it should be mentioned that, in some situations, benefits under the Act on the Reception of Asylum-Seekers can or must continue to be provided to asylum-seekers who have exhausted all legal remedies, including before the Council of State, and who are subject to an order to leave the country. Pursuant to section 7 Act on the Reception of Asylum-Seekers, benefits *can* continue to be granted to foreigners who

- have applied for a postponement of departure in order to finish a school year (from the Easter holidays onwards) – until the application for postponement of departure is rejected or the postponement of departure expires;
- have applied for a postponement of departure due to the impossibility of leaving Belgium for reasons beyond their control – until the application for postponement of departure is rejected or the postponement of departure expires;
- are at least seven months pregnant – until two months after childbirth;
- are parents of a Belgian child and have applied for regularisation on the basis of section 9*bis* Aliens Act – until a decision on the regularisation is made;
- have undertaken to leave the country voluntarily – until they actually leave, unless the departure is delayed due to their fault;
- who for medical reasons are unable to leave the reception centre and have applied for medical regularisation on the basis of section 9*ter* Aliens Act.[962]

Moreover, benefits *must* continue to be granted to foreigners who have a family member who fall within the scope *ratione personae* of the Act on the Reception of Asylum-Seekers.[963] Finally, subsection 7 § 3 of the Act allows the reception centres to deviate from the previous subsections in particular circumstances which relate to respect for human dignity. According to the preparatory materials on this provision, this is only possible if the humanitarian reasons relate to one of the situations enumerated in subsections 7 § 1 and § 2.[964]

Pursuant to section 3 of the Act, every asylum-seeker in need has the right to a reception which enables him or her to lead a life in human dignity. To this end, the FEDASIL centres grant benefits in kind, including necessary medical care[965] and a *per diem* allowance, which are funded by the federal government.

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[961] For the sanctions see in particular § 233 Social Criminal Code.
[962] § 7 (2) Act on the Reception of Asylum-Seekers. See also Instruction of 6 April 2010 (Instructie van 6 april 2010 betreffende het einde van de materiële hulp, de verlenging van de materiële hulp, en de overgang van de materiële hulp naar de financiële steun). For applicants under § 9*ter* Aliens Act see in particular Instruction of 9 November 2010 (Instructie van 9 november 2010 betreffende de begunstigden van de opvang wiens aanvraag tot machtiging van verblijf op basis van artikel 9*ter* van de wet van 15 december 1980 ontvankelijk werd verklaard en die tegelijkertijd nog een lopende asielprocedure hebben).
[963] § 7 (1) Act on the Reception of Asylum-Seekers.
[964] Parlementaire stukken: Kamer, 2009-10, no. 2299/001, p. 96.
[965] See § 23 ff. Act on the Reception of Asylum-Seekers.

14. Comparison

Under Belgian social insurance law, irregular migrant workers are to a large extent in the same legal position as Belgian workers. If the work of irregular migrant workers is not declared to the social security authorities, their legal position is the same as that of Belgians who engage in undeclared work. If it is declared, then their legal position is the same as that of Belgian workers whose work is declared. This is due to the fact that the general social insurance schemes for employees, by and large, do not differentiate between Belgian and foreign workers. In general, Belgian social insurance laws insure individuals working under an employment contract for a Belgian employer – irrespective of the individual's status under the Aliens Act or the Aliens Employment Act.

Employment contracts concluded with foreigners who lack authorisation to work in Belgium have an unlawful cause and are therefore absolutely invalid. Employment contracts where employer and employee agree to hide their work from the social security authorities may also raise questions of contractual legality. However, even absolutely invalid employment contracts bear consequences for social insurance, since, first, the invalidity is only effective *ex nunc*, and, second, the invalidity cannot be invoked. The latter is due to the fact that the invalidity of the employment is the result of an infringement of provisions which regulate labour relations, *i.e*. provisions under the Aliens Employment Act.[966] Therefore, employment contracts concluded with foreigners who lack the required work permission and employment contracts concluded with the aim of defrauding the social security system bear legal consequences for social insurance. Irregular migrant workers and undeclared Belgian workers are therefore insured under most Belgian social insurance laws.

Entitlement to benefit depends under most social insurance laws on the deduction of social insurance contributions. As a result, irregular migrant workers whose work is not declared are in the same position as Belgian citizens whose work is not declared. Moreover, irregular migrant workers whose work is declared have the same status under social insurance laws as Belgians whose work is declared. In practice, however, irregular work by a foreigner is usually undeclared. Both parties, *i.e.* employer and employee, have a lot to lose if irregular work is discovered and will hence not be inclined to declare the work. And even if they intend to affiliate with social insurance correctly, there is a chance that the competent administration will bring the irregular work to an end, or prevent it before it has even begun.

This brings us to the differences between irregular migrant workers and Belgian workers under Belgium's general social insurance schemes for employees. There is one social insurance law which differentiates between foreign workers and Belgian workers: that on unemployment insurance. Work performed in violation of the Aliens Employment Act is not taken into consideration when determining whether there has been sufficient work in the reference period. In addition, as long as foreigners lack a residence or a work authorisation they are ineligible for unemployment benefits.

Other differences between irregular migrant workers and Belgian workers are of a practical nature. They relate to the possibility of affiliating with social insurance and the possibility of actually

[966] For labour accident insurance, the prohibition to invoke invalidity is also explicitly set out under § 6 Labour Accident Act.

receiving benefits. We have seen that if an employer wants to make a correct declaration of the work of a foreigner who lacks the authorisation to work and may also lack residence permission, the work may be stopped or prevented. It is not that the irregular migrant worker cannot be affiliated: rather, the grounds for affiliation, i.e. employment, will cease to exist. Belgians do not face this obstacle. If the employer wants to affiliate the employee with social security, the employer can do so. The employee is not prevented from taking up work. The second difference relates to the possibility of receiving social insurance benefits. Unlawfully present foreigners who apply for benefits run the risk that their unlawful presence may be revealed and that they may have to leave the country. I am not saying that discovery necessarily leads to deportation or voluntary departure: my point is simply that if it does so, *i.e.* if the foreigner leaves the country, benefits can only be received if there is a provision for the export of acquired rights.

In contrast to employment-based social insurance schemes, residence-based social assistance schemes distinguish between citizens and foreigners, and, subsequently, between different categories of foreigners. Citizens and privileged foreigners are usually in a stronger position than other foreigners. Under the Social Integration, Minimum Income for the Elderly and Disabled Person's Allowance schemes only citizens and privileged foreigners – such as those falling within the scope of specific EU legislation, refugees or stateless persons – are eligible for assistance. This makes it difficult or even impossible for irregular migrant workers to come within the scope *ratione personae*. Under the Guaranteed Family Allowance scheme, citizens and privileged foreigners are exempted from the requirement to have been residing in Belgium for an uninterrupted period of five years before applying for benefits. Moreover, foreigners with no immigration status are expressly excluded from benefit entitlement. Finally, under the Social Welfare Services schemes, assistance to unlawfully present foreigners is limited to urgent medical assistance, whereas other foreigners and Belgian citizens residing in the country are eligible for full social assistance. To sum up, Belgians who engage in undeclared work and who are actually in need are eligible for social assistance in Belgium, based on their residence in the country and, usually, based on their citizenship. Needy lawfully present irregular migrant workers fall into three categories as regards eligibility: they may be eligible for assistance without restrictions (Social Welfare Services); they may be eligible as privileged foreigners (Social Integration, Minimum Income for the Elderly and Disabled Person's Allowance); or they may be eligible if they have resided for long enough in Belgium (Guaranteed Family Allowance). By contrast, unlawfully present foreigners may only qualify for urgent medical assistance, or in certain rare cases they may fall within a group of privileged foreigners under the Minimum Income for the Elderly scheme and Disabled Person's Allowance scheme.

Part IIb: Canada

1. Social security in Canada

This Part examines the social security of irregular migrant workers and the social security of nationals who perform undeclared work in the Canadian province of Ontario. In doing so, we consider in particular the situation of irregular migrant workers and undeclared Canadian workers who stay and work in Ontario and investigate their rights and duties under both federal and provincial social security legislation.

Ontario is one of ten provinces in Canada, along with Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, Quebec and Saskatchewan. There are also three territories: Northwest Territories, Nunavut and Yukon Territory. The major difference between provinces and territories is that provinces receive powers directly from the Constitution Act, 1867, while territories obtain powers from the federal government. As a result, the provinces have wider powers.

The Constitution of Canada is the supreme law of Canada. It consists of all acts and orders referred to in the Constitution Act of 1982 and any amendments to these documents, in particular statutes, orders-in-council, judicial decisions, constitutional conventions and informal traditions and customs.[967] The major written component of the Constitution of Canada is the Constitution Act of 1982, which incorporates, amongst other previous acts, the Constitution Act of 1867 (formerly the British North America Act, 1867).

The Constitution of Canada, in particular the Canadian Charter of Rights and Freedoms as Part I of the Constitution Act, 1982, does not contain any social rights. Some have argued that the Charter's non-discrimination provision or its right to life, liberty and security of the person could be regarded as including social rights.[968] However, Canada's Supreme Court has so far failed to uphold the notion that governments are under any positive obligation to include disadvantaged groups in social security programmes.[969]

The Constitution Act, 1867 divides the legislative powers between the Parliament of Canada and the provincial parliaments in sections 91-95. The Act assigns unemployment insurance exclusively to the legislature of the Parliament of Canada in subsection 91 (2A)[970], while according to subsection 92 (7) the "establishment, maintenance, and management of hospitals, asylums, charities and eleemosynary in and for the province" is exclusively allocated to provincial parliaments. In addition, section 94A[971] states that "the Parliament of Canada may make laws in relation to old age pensions and supplementary benefits, including survivors, and disability benefits irrespective of age, but no such law shall affect the operation of any law present or future of a provincial legislature in relation to any such matters". Beside these clear allocations of legislative powers, section 91 of the Constitution Act, 1867 indicates in a blanket clause that all

[967] § 52 Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.
[968] For a literature review of this possibility see Martha Jackman and Bruce Porter, "Canada: Socio-economic rights under the Canadian Charter," in *Social rights jurisprudence: Emerging trends in international and comparative law*, ed. Malcolm Langford (Cambridge/New York: Cambridge University Press, 2008), pp. 211-13.
[969] *Ibid*.
[970] Added by the Constitution Act, 1940, 3-4 George VI, c. 36 (U.K.).
[971] Added by the Constitution Act, 1964, 12-13 Elizabeth II, c. 73 (U.K.).

matters not mentioned as belonging to the provincial legislatures come under the federal parliament.

Accordingly, the federal Parliament of Canada has exclusively established an employment insurance system. In addition, pursuant to its constitutional competence it has set up a public old age pension system consisting of two components: Old Age Security (OAS) and the Canada Pension Plan (CPP). The provinces would be constitutionally entitled to establish their own pension systems. However, the province of Quebec is the only federated State to have done so, creating the Quebec Pension Plan for its residents. With regard to the social risks of death or incapacity for work, both federal and provincial/territorial parliaments provide benefits. Health care and care as well as social assistance for people in need are covered by provincial or territorial programmes. However, the Parliament of Canada has established national standards in this regard, which have to be met in order to receive federal funding. Social security systems to mitigate the burden of having children have been established under federal and provincial/territorial legislation. In this context it is worth mentioning that Quebec launched its own parental care system in 2006, while all other Canadian regions are covered by a federal parental care system as a part of the federal unemployment insurance. In 2005 the Canadian Supreme Court judged that both the Federation and the federated States are constitutionally entitled to legislate regarding income replacement benefits during maternity leave and parental leave.[972]

Private social insurance arrangements are not considered in this research. This concerns in particular the Canadian registered pension plans, registered retirement savings plans, supplemental unemployment benefit plans and private health insurance plans. Also excluded are special social protection schemes for particular occupations, such as farm work, work in mines, and work in the steel industry. Social security benefits which are provided through the Canadian income tax system, such as the Canada Child Tax Benefit, are part of this research, whereas income tax benefits, such as the Child Care Expenses Deduction, are left out.

[972] See Supreme Court of Canada, *Quebec (Attorney General) v. Canada (Attorney General)* (2005), 2005 SCC 56, 2005 C.L.L.C. 240-015, (sub nom. Reference re: EI Act (Can.), ss. 22, 23) 258 D.L.R. (4th) 243, 45 C.C.E.L. (3d) 159, [2005] 2 S.C.R. 669, 2005 CarswellQue 9127.

2. Irregular migrant workers in Canada

2.1. Unlawful stay

2.1.1. Right to remain in Canada

The federal Canadian Immigration and Refugee Protection Act[973] (IRPA) together with the Immigration and Refugee Protection Regulations[974] (IRPR) establish the criteria for entering and remaining in Canada.[975] The right to enter and remain in Canada is granted to

1) Canadian citizens under the Citizenship Act[976] (subsection 19 (1) IRPA);
2) registered Indians under the Indian Act[977] (subsection 19 (1) IRPA);
3) permanent residents (subsection 27 (1) IRPA);
4) temporary residents (subsection 29 (1) IRPA).

Regarding (1) above, essentially, Canadian citizenship is acquired by birth in Canada (other than as a child of foreign diplomatic personnel), or by birth abroad when at least one parent is a Canadian citizen, or can be granted to a permanent resident.[978] Canada, therefore, operates under both the *ius soli* and the *ius sanguinis* principle. The rule that anyone born on Canadian soil gets Canadian citizenship, with exceptions for children of foreign diplomatic personnel, has been subject to some discussion in the past decade. In order to avoid abuse,[979] some, such as the Ministry of Citizenship and Immigration Canada or the Parliamentary Standing Committee on Citizenship and Immigration, have proposed to make the provision of Canadian citizenship to children born on Canadian territory dependent on the legal status of the parents.[980] It was suggested that the parents should have to be Canadian citizens, permanent residents, Convention refugees or refugee claimants whose claims have been accepted. However, thus far nothing has changed and the Citizenship Act still guarantees citizenship for children born in Canada. Consequently, children who are born in Canada to parents residing there unlawfully become Canadian citizens.

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[973] Immigration and Refugee Protection Act, S.C. 2001, c. 27.
[974] Immigration and Refugee Protection Regulations, SOR/2002-227.
[975] These immigration laws are enforced by immigration officers. See § 138 (1) IRPA. See also Claudette Deschênes, "Letter of Designation of the Vice-President of the Enforcement Branch of Canada Border Services Agency on the Authorisation to have the Authority and Powers of a Peace Officer by the Vice-President of the Enforcement Branch." Available at: http://www.cbsa-asfc.gc.ca/agency-agence/delegation/desig/po-ag-eng.html. Peace officers, such as police officers, are not tasked to enforce the IRPA. However, the police support immigration officers in their task. To be more precise, once an immigration warrant or written order for arrest, detention or removal from Canada of a foreign national is issued, police officers are asked to execute it when so directed by an immigration officer. See § 142 IRPA.
[976] An Act respecting Citizenship, R.S.C. 1985, c. C-29.
[977] An Act respecting Indians, R.S.C. 1985, c. I-5.
[978] § 3 Citizenship Act.
[979] The Standing Committee on Citizenship and Immigration referred in a report to an abuse of the citizenship system in which it was reported that women come to Canada expressly for the purpose of giving birth to a child and thereby assuring him or her Canadian citizenship. See House of Commons, *Canadian Citizenship: A Sense of Belonging*, Report of the Standing Committee on Citizenship and Immigration, June 1994. The then Minister of Citizenship and Immigration pointed to the problem that arises when parents who are in a removal procedure give birth to a child. See Allan Thompson, "Birth may not mean automatic citizenship: Minister reviews status of refugee claimants' babies," *Toronto Star*, 23 May 1996, p. A3.
[980] House of Commons, *Canadian Citizenship*, p.17.

Regarding (2), the term 'Registered Indians' (=Status Indians) refers to people who are registered in the Indian Register of the federal government as Indians (=Native Canadians or Aboriginal people), according to the terms of the Indian Act.

Regarding (3), permanent residents may be selected, according to section 12 IRPA, as members of

- the family class (including spouses, common-law partners, conjugal partners and dependent children),
- the economic class (including skilled workers, business immigrants, provincial nominees, live-in caregivers and their immediate family),
- or the refugee category.

In addition, for the purpose of flexibility to approve deserving cases not anticipated in the legislation, permanent residence status may be granted by the Minister of Citizenship and Immigration on humanitarian and compassionate considerations to persons who are inadmissible under the IRPA.[981] Such an application for consideration to remain in Canada on humanitarian and compassionate grounds is processed in a two-step assessment. First, it is assessed whether the foreign national should be exempted from the selection criteria relating to becoming a permanent resident. Second, it is determined whether the foreign national is granted permanent residence in Canada.[982]

Regarding (4), temporary residents are either visitors (for a temporary purpose such as visiting, studying or working) or holders of a temporary resident permit. They have the right to enter and remain in Canada on a temporary basis.[983] A temporary resident permit is issued to persons who are inadmissible or do not meet the requirements for temporary or permanent residence status under the IRPA or the IRPR, but where the circumstances justify granting the right to enter and temporarily stay in Canada.[984] A special category of people who are issued a temporary resident permit are victims of human trafficking, who may have entered Canada lawfully or unlawfully.[985] Temporary residents may or may not require a visa for their stay.[986] It is also worth mentioning that a person may be authorised to enter Canada for the purpose of further examination or an admissibility hearing under Part I of the IRPA.[987]

Moreover, Canadian immigration law recognises the status of protected person. A protected person is, according to subsections 21 (2) and 95 (2) IRPA, a person whose application for protection has been finally determined by the Immigration and Refugee Board to be a Convention refugee or a person in need of protection. In addition, persons who are subject to deportation and who face a risk of harm if returned to their country of origin can apply for a Pre-Removal Risk Assessment.[988] If their application is upheld by the Minister of Citizenship and Immigration, they too fall under

[981] See § 25 IRPA. See also Citizenship and Immigration Canada, *Immigrant Applications in Canada made on Humanitarian and Compassionate Grounds*, Program Manual Inland Processing 5 (Ottawa: Citizenship and Immigration, loose-leaf, 2009), p. 7.
[982] See § 66 IRPR. See also Citizenship and Immigration Canada, *Immigrant Applications on Humanitarian and Compassionate Grounds*, p. 12.
[983] § 29 (1) IRPA.
[984] See § 24 (1) IRPA.
[985] See Citizenship and Immigration Canada, *Temporary Residence Permits*, Program Manual Inland Processing 1 (Ottawa: Citizenship and Immigration, loose-leaf, 2007), Appendix G.
[986] See in particular § 179 ff. IRPR.
[987] § 23 IRPA.
[988] § 112 IRPA.

the category of protected persons. Persons who have been determined to be a member of the Convention Refugee Abroad Class or the Humanitarian Protected Person Abroad Class are also protected persons. However, the status of protected person is not itself an authorisation to enter or remain in Canada. Therefore, protected persons stay in Canada either as permanent or as temporary residents. Sometimes they have a rather precarious immigration status and are subject to a conditional or unenforceable removal order.[989]

Foreigners may also find themselves in a position where they are considered neither as regularly residing, nor as irregularly residing in Canada. For instance, current law does not explicitly grant refugee claimants a legal status to remain in Canada. Therefore, as soon as persons actually staying in Canada apply for refugee protection, they receive a removal order. But this removal order is conditional. The conditional removal order comes into force when the claim is determined to be ineligible, rejected, declared withdrawn or abandoned, or the proceedings are terminated.[990] If the claimant appeals a decision to reject his claim for refugee protection, his removal order will be stayed.[991]

A similar situation arises when a removal order is not enforceable. This does not entitle the person to a regular status of residence.[992] A removal order is not enforceable when it has not come into force or when it is stayed. A removal order has not come into force if there is a right to appeal it or if the appeal is not finally determined.[993] And a removal order is stayed if, amongst other possibilities, the Minister of Citizenship and Immigration finds that the circumstances in a country or a place pose a generalised risk to the entire civilian population,[994] a refugee claimant appeals the decision to reject his claim,[995] a person has made an application for protection to the Minister of Citizenship and Immigration under section 112 IRPA,[996] or a person has made an application for permanent residence status based on humanitarian and compassionate considerations to the Minister under subsection 25 (1) IRPA,[997] such as for instance if the person cannot leave the country due to medical reasons.

Strictly speaking, only non-citizens with a permanent or temporary resident status can be said to be staying lawfully in Canada. However, for the sake of this report persons under a conditional or unenforceable removal order will also be considered as lawfully resident.[998] All other non-citizens will be referred to in this investigation as 'unlawfully resident' or 'residing unlawfully'.

2.1.2. Routes into unlawful residence

Individuals can end up residing unlawfully in Canada in two ways: first, by entering Canada unlawfully or, second, by entering Canada lawfully, but losing their legal status later on. Unlawful

[989] The status of protected person guarantees more rights than normally granted to foreigners in Canada. See Martin Jones and Sasha Baglay, *Refugee Law* (Toronto: Irwin Law, 2007), p. 73.
[990] § 49 (2) IRPA.
[991] § 50 IRPA and § 231 IRPR.
[992] See § 25 IRPR, as well as § 202 IRPR in conjunction with § 206 (b) IRPR.
[993] § 49 (1) IRPA.
[994] § 230 (1) IRPR.
[995] § 231 (1) IRPR.
[996] § 232 IRPR.
[997] § 233 IRPR.
[998] For an explanation see subchapter 2.3.

residence due to birth, which is possible in countries whose citizenship law is based on the *ius sanguinis* principle, is not possible in Canada. Regarding the first of these two ways of becoming unlawfully resident, a person's entry into the country is unlawful, basically, when it contravenes the provisions of the IRPA and the regulations arising therefrom. The requirements of lawful entry have been outlined earlier.

Concerning the second way, temporary resident status is usually lost at the end of the period for which the person is authorised to remain in Canada.[999] The period authorised for the stay of a temporary resident is six months or any other period that is fixed by the immigration authorities.[1000] It ends, amongst other possibilities, on the earliest day on which a work permit issued to the temporary resident expires.[1001] However, the period authorised for stay can be extended. Other reasons for loss of a temporary resident status are cancellation of a temporary resident permit or, as determined by an immigration officer, failure to comply with any of the requirements of Canadian immigration law.[1002] Here it is interesting to note that temporary residents with work permits for a specific employer only may lose status when switching employers. This is not the case for open work permits, which allow the holder to work for any employer.

Permanent resident status in Canada can be lost if the individual fails to comply with the residency obligations. These require the person's physical presence in Canada or some other affiliation with Canada if he stays abroad for a total of two years or more in a five-year period. In addition, permanent resident status can be revoked if the immigration authorities conclude that the individual is inadmissible and a removal order enters into force. Finally, it can be lost if the decision to allow an individual's claim for refugee protection or protection is vacated because the individual has misrepresented or withheld relevant facts.[1003]

Under certain circumstances, even Canadian citizenship can be lost. According to Part II of the Citizenship Act, such loss can be based on the renunciation of citizenship by the citizen him- or herself, non-registration and non-application to retain his or her citizenship in the case of certain foreign-born Canadian citizens, and in cases of fraud.[1004]

It is also worth mentioning that a precarious legal status under immigration law can of course be lost, in which case the foreigner in question will end up staying in the country completely unlawfully. In the previous subchapter we mentioned the situation of foreigners who are subject to a conditional or unenforceable removal order. Once a conditional removal order becomes activated or an unenforceable removal order becomes enforceable, the person's presence in the country is completely unlawful. This relates for instance to failed refugee claimants who have exhausted all appeals and whose conditional removal order, as a consequence, becomes activated.

2.2. Unlawful work

[999] § 47 IRPA.
[1000] § 183 (2) IRPR.
[1001] § 183 (4) (b) IRPR.
[1002] § 47 IRPA.
[1003] § 46 IRPA.
[1004] See § 9 to 10 Citizenship Act.

'Work' is defined for Canadian immigration purposes as "activity for which wages are paid or commission is earned, or that is in direct competition with the activities of Canadian citizens or permanent residents in the Canadian labour market".[1005] Citizens and permanent residents are entitled to work in Canada.[1006] All others, who for IRPA and IRPR purposes are called 'foreign nationals', may not work in Canada unless authorised to do so.[1007] The Immigration and Refugee Protection Regulations regulate which foreign nationals are allowed to work in Canada. They differentiate between foreign nationals who are authorised to work in Canada without a work permit and foreign nationals who do need this permit.[1008]

Section 186 IRPR lists all foreign nationals who may work in Canada without a work permit. Amongst them are foreign representatives and their family members, full-time students who hold a study permit for working on the campus, certain kinds of artists and sportsmen and business visitors.[1009]

All other foreign nationals not listed in section 186 IRPR must obtain an employment authorisation before they engage in the Canadian labour market. In general, foreign nationals must apply for a work permit before entering Canada.[1010] In exceptional cases they are allowed to apply on or after entry.[1011] Application after entry is, *inter alia*, allowed for foreign nationals who already hold a work or study permit, who hold a temporary resident permit that is valid for at least six months (*e.g.* victims of human trafficking), or who are in a situation described in section 206 or section 207 IRPR.[1012]

Application for a work permit in accordance with these provisions is one of the requirements for being issued a work permit. The other requirements are, primarily, that the foreign national falls within a category described under sections 203 to 208 IRPR, and that he or she meets the medical examination requirement under section 30 IRPR.[1013] Incidentally, with effect from 1 April 2011 work permits will basically be denied to temporary residents who have already held work permits for a cumulative total of four years, until a further period of four years has elapsed.[1014]

Sections 203 to 205 IRPR provide that a work permit may be issued based on a job offer that is genuine and is likely to have a neutral or positive effect on the labour market in Canada,[1015] based on work pursuant to an international agreement,[1016] or based on work that in particular serves Canadian interests.[1017]

Section 206 IRPR provides that a work permit may be issued to a foreign national who cannot support himself without working, if the foreign national

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[1005] § 2 IRPR.
[1006] Implicitly § 2 (1) in conjunction with § 30 (1) IRPA.
[1007] § 2 (1) in conjunction with § 30 (1) IRPA, and § 196 IRPR.
[1008] § 8 IRPR.
[1009] Business visitor as defined by § 187 IRPR.
[1010] § 197 IRPR.
[1011] § 198 and § 199 IRPR.
[1012] § 199 IRPR.
[1013] § 200 IRPR.
[1014] § 200 (3) IRPR.
[1015] § 203 IRPR.
[1016] § 204 IRPR.
[1017] § 205 IRPR.

(a) has made a claim for refugee protection that has been referred to the Refugee Protection Division [of the Immigration and Refugee Board] but has not been determined; or
(b) is subject to an unenforceable removal order.
Once the removal order becomes enforceable, the work permit becomes invalid.[1018]

Section 207 provides for the issuance of a work permit to a foreign national who
(a) is a member of the live-in caregiver class and meets the requirements of section 113 IRPR;
(b) is a member of the spouse or common-law partner in Canada class;
(c) is a protected person within the meaning of subsection 95 (2) IRPA;
(d) has applied to become a permanent resident and has been granted an exemption by the Minister under section 25 IRPA (humanitarian or compassionate considerations); or
(e) is a family member of a person described in any of paragraphs (a) to (d).

Section 208 states that a work permit may be issued to a foreign national who cannot support himself without working, if the foreign national
(a) holds a study permit and has become temporarily destitute through circumstances beyond his or her control and beyond the control of any person on whom that person is dependent for financial support to complete his or her term of study; or
(b) holds a temporary resident permit[1019] that is valid for at least six months.

Section 202 IRPR stipulates that a foreign national who is issued a work permit under section 206 or subsection 207(c) or (d) does not, merely by reason of being issued a work permit, become a temporary resident.

A work permit becomes invalid when it expires or when a removal order that is made against the permit holder becomes enforceable.[1020]

To summarise, citizens, permanent residents and foreign nationals authorised to work under section 186 IRPR cannot be considered to be working unlawfully in Canada, *i.e.* in contravention of immigration law. On the other hand, anyone who is not allowed to work in the country at all or who would need a work permit but is working without one, is considered to be working unlawfully. Thus this latter possibility could apply to foreigners who do not apply for a work permit, whose application has been denied, or whose work permit has become invalid; and they may be residing in Canada lawfully or unlawfully.

There are two groups of aliens whose immigration status in Canada is not entirely regular, but who may be issued a work permit:

- aliens who are subject to a conditional removal order. These are aliens who have made a claim for refugee protection that has been referred to the Refugee Protection Division of the Immigration and Refugee Board, but has not been determined, and who cannot support themselves without working; and
- aliens who are subject to an unenforceable removal order and who cannot support themselves without working.

[1018] § 209 IRPR.
[1019] Issued under § 24 (1) IRPA.
[1020] § 209 IRPR.

2.3. Categories of irregular migrant workers

Category A: unlawfully resident and working unlawfully

Aliens who are present in Canada in contravention of Canadian law on permission to stay are unlawfully present. In other words, non-citizens who do not have status either as a permanent or as a temporary resident are residing unlawfully in Canada. They may have come to the attention of the immigration authorities or they may have gone undetected, but such aliens do not have the right to work in Canada.

Category B: lawfully resident and working unlawfully

Permanent residents and the particular types of temporary resident who are listed in section 186 IRPR are authorised to work in Canada without a work permit. All other non-citizens must be in the possession of a work permit, when they engage in remunerative activity or activity which is in direct competition with Canadian citizens or permanent residents in the Canadian labour market. If they do participate in the labour market without having the required work permit, they are working unlawfully. These aliens may be temporary residents whose application for a work permit is rejected (such as visitors under Part X IRPR or holders of a temporary resident permit who can support themselves), who would be eligible for a work permit but do not apply for one, or whose work permit has become invalid (because it has expired or a removal order has become enforceable)[1021].

Apart from these two categories there is a third one: aliens whose residence status is neither regular nor irregular, because they are in Canada under a conditional or unenforceable removal order. Such aliens can usually get a work permit. If they are working in Canada without a work permit, they are working unlawfully. As they are more similar to category B workers, they will be considered as lawfully resident for the purpose of this report and investigated under category B. However, whenever there are differences from other category B workers, these will be explicitly reported.

3. Canadian nationals engaging in undeclared work

3.1. Nationals

For the concept of Canadian citizenship or nationality – terms which are used interchangeably throughout our research – see subchapter 2.1.1. above.

[1021] Since we exclude situations in which an alien who possesses a work permit for a particular (type of) work only and is engaging in another activity for which he or she does not have permission to work, this reason for the invalidity of a work permit will not be considered.

3.3. Undeclared work

This subchapter investigates the obligations of employers and employees regarding the declaration of work to the Canadian social security authorities. Work carried out without these obligations being met is defined as undeclared work in the Canadian context.

3.3.1. The Canada Pension Plan (CPP) and Employment Insurance (EI)

Anyone who is employed in insurable employment and has not previously been registered with the Canada Employment Insurance Commission[1022] must apply to this commission for registration within three days of commencing employment.[1023] Insurable employment is, in general, employment in Canada under an employment contract.[1024] Upon a correct application for registration, the EI Commission assigns a Social Insurance Number (SIN) and issues a SIN card.[1025] The data of an insured person are stored in two registers, maintained by the EI Commission. Similar, the Canada Pension Plan Act prescribes that anyone who becomes employed in pensionable employment, which also relates to employment under a contract of service, and has not earlier been assigned a SIN number, must apply for such a number within thirty days.[1026]

Whenever an employer hires an employee, the employer has a duty to request the employee to produce his or her SIN card within three days of commencing insurable employment and within thirty days of commencing pensionable employment. However, employees are themselves obliged to present their SIN card within these periods of time.[1027] If the employee becomes employed in insurable employment before he or she has received his SIN card, he or she must produce the card within three days of receiving it.[1028] Where an employee fails to produce the SIN card and the employer is consequently unable to ascertain the SIN, the employer is obliged to report the matter to the competent authorities.[1029] What is more, if the employee's SIN begins with the digit 9, which indicates that the person is neither a Canadian citizen, nor a permanent resident, the employer must verify whether the SIN is still valid.[1030]

Moreover, employers are entrusted with responsibility for calculating premiums for the Canada Pension Plan and the Canadian Employment Insurance, deducting them from the wages, holding them in trust, and remitting them in due time to the relevant federal government department, the Canada Revenue Agency.[1031] This department is mandated to collect CPP and EI contributions. Employers are not obliged to inform the Canada Revenue Agency when they hire a new employee.

[1022] The Canada Employment Insurance Commission is an entity within the department of Human Resources and Skills Development.
[1023] See § 138 (1) Employment Insurance Act (EI Act), S.C. 1996, c. 23, in conjunction with § 89 (2) Employment Insurance Regulations (EI Regulations), SOR/96-332.
[1024] § 5 EI Act.
[1025] § 138 (3), (4) EI Act.
[1026] § 98 (2) Canada Pension Plan (CPP), R.S.C. 1985, c. C-8.
[1027] § 89 (15), (16) EI Regulations and § 98 (5), (6) CPP.
[1028] § 89 (2) in conjunction with § 89 (17) EI Regulations.
[1029] § 89 (18) EI Regulations and § 6 (1) Canada Pension Plan (Social Insurance Numbers) Regulations, C.R.C., c. 386.
[1030] More on SINs beginning with the digit 9 in subchapter 6.2.1.
[1031] See § 21 (1) CPP.

However, they do have the obligation to remit the employee's share as well as the employer's share of CPP and EI premiums on the due date to the Canada Revenue Agency. Depending on the total of CPP and EI premiums as well as income tax deducted by the employer two calendar years ago, the due date varies between a few days and three months after the payment of the salary. The remittance of these deductions is accompanied by a completed Remittance Voucher, *i.e.* a statement of account for current source deductions.[1032] This voucher includes, amongst other things, information on the total amount of CPP and EI contributions and income tax as well as the number of employees for whom these deductions are being paid. Information on the individual employee is provided to the Canada Revenue Agency on another form: the T4 slip. This has to be submitted by the employer once a year, by the last day of February following the calendar year to which the statement applies. A separate T4 slip has to be filed for each employee. A T4 slip contains, *inter alia*, the employee's name, address and Social Insurance Number (SIN), and the amount of CPP contributions and EI premiums which have been deducted by the employer.

Employers who fail to remit CPP contributions or EI premiums in due time are liable to fines or imprisonment, or both.[1033]

3.3.2. Ontario's Workers' Compensation

Ontario's Workplace Safety and Insurance Act requires most employers in Ontario to register with the Workplace Safety and Insurance Board[1034] – a public sector organisation which administers Ontario's Workers' Compensation programme. Only a few industries are exempted from this obligation, such as banks, insurance companies, travel agencies, photographers, barbers and hair salons. Employers must inform the Ontario Workplace Safety and Insurance Board about their business operations within ten calendar days of hiring the first worker and must complete the registration at the latest by the final day of the month following the month in which the first worker began employment.[1035] On affiliating with the Ontario Workplace Safety and Insurance Board, the employer has to provide, amongst other things, information on the number of workers and the total estimated wages for the current year.

Ontario's Workers' Compensation programme divides employers into two categories: Schedule 1 and Schedule 2 employers. The first category is employers of industries listed in Schedule 1 of Ontario Regulation 175/98 under the Workplace Safety and Insurance Act.[1036] These employers must contribute to the fund and are, as a consequence, protected by a system of collective liability.[1037] The second category of employers belongs to industries listed in Schedule 2 of the above-mentioned regulation. These employers are individually liable for the payment of benefits. The Workplace Safety and Insurance Board, however, charges administration costs and, in some circumstances, may require the payment of a deposit for the payment of benefits on behalf of the employer.[1038]

[1032] These are the forms PD7A, PD7A(TM), PD7A-RB and the electronic form E-PD7A.
[1033] § 21 (7) (a) (iii) and (b) CPP and § 106 (1) EI Act.
[1034] § 75 (1) Workplace Safety and Insurance Act (WSI Act), S.O. 1997, c. 16, Sched. A.
[1035] § 75 (1) WSI Act. See also Ontario Workplace Safety and Insurance Board, *Operational Policy Manual: Registration*, doc. no. 14-02-02 (Toronto: Workplace Safety and Insurance Board, loose-leaf, 2007).
[1036] Ontario Regulation 175/98, Enabling Statute: Workplace Safety and Insurance Act, S.O. 1997, c. 16, Sched. A.
[1037] § 88 WSI Act.
[1038] § 85 and § 92 WSI Act.

Schedule 1 employers have to report and remit premiums monthly, quarterly or annually to the Board – depending on the amount of their total wages, *i.e.* their payroll. This has to be done via the Premium Remittance form or, if the employer reports and pays online, via the Calculate & Report Premium Payment form. Unless an employer has to report special issues, such as the employment of municipal volunteer forces or workers who earn more than the maximum wages ceiling, no information about individual employees is provided.

Once a year, Schedule 1 employers must submit a statement about the total wages of the preceding year to the Board.[1039] Schedule 2 employers have to pay their share of the Board's administrative costs and, if necessary, the deposit, once a year.[1040]

To sum up, an employee is engaging in undeclared work if his or her employer does not fulfil any of the following obligations: registration with the Ontario Workplace Safety and Insurance Board; as a Schedule 1 employer, inclusion of the employee's wages in the total wages reported and submitted to the Board; as a Schedule 2 employer, payment of administrative costs and, if obliged, a deposit.

Employers who fail to register with the Ontario Workplace Safety and Insurance Board, who fail to keep an accurate record of all wages, or who fail to file the annual statement setting out the total wages, have committed an offence and are liable to either a fine or imprisonment.[1041] In addition, employers who do not pay premiums when they become due are required to pay interest on the outstanding premiums.[1042]

[1039] § 78 (1) WSI Act.
[1040] § 87 (2) and (3) WSI Act.
[1041] § 151 (1) and § 152 (1) in conjunction with 158 (1) WSI Act.
[1042] § 89 (1) WSI Act.

4. The personal scope of application of social security arrangements

4.1. General remarks

Canadian statutory social security programmes operate either on a professional basis or on the basis of residence. Insurance on a professional basis targets the whole or parts of the working population. For the most part, the working population is considered to consist of wage earners and government employees. In some cases, self-employed persons are also included. Universal insurance and social assistance schemes cover individuals residing in Canada or residing in a particular Canadian province or territory.

4.2. Legislation limiting personal scope with respect to aliens or undeclared workers

There exists no overall legislation in Canada or the province of Ontario, which generally excludes foreigners from statutory social security – whether foreigners in general, unlawfully resident foreigners, or foreigners who are working unlawfully. That is to say, there is no overall legislation that excludes them from insurance, from being entitled to benefits or from the disbursement of benefits. Exclusions from particular social security schemes do exist, as we will see, but there is no general exclusion from statutory social security in Canada. The same goes for undeclared workers. There is no general rule stipulating that the non-declaration of work to the social security authorities leads to disentitlement from Canadian social security benefits based on employment.

4.3. Personal scope with respect to aliens or undeclared workers

The scope *ratione personae* of Canadian social security schemes varies from one scheme to another. As a consequence, the personal scope of application with respect to these two groups will be investigated as part of the discussion of the different social security schemes in chapters 7 to 13.

5. The financing of social security arrangements

5.1. General remarks

In general, Canadian social security programmes are financed either from contributions or from general revenue. Profits from investment have become another, increasingly important, source of funding.

Canada's federal insurance schemes based on employment are mainly contribution-financed. There are no subsidies from federal or provincial governments. Under the Canada Pension Plan, employer and employee each pay half of the contributions, whereas under the Employment Insurance employers contribute 1.4 times more than their employees.

Ontario's employment-based Workers' Compensation programme is also for the most part funded from contributions. In contrast to the above-mentioned federal insurance schemes, only employers are obliged to pay premiums. It is prohibited for employers to require or permit workers to contribute to the Workers' Compensation insurance.[1043] The premium rate depends on the health and safety risk of the employer's type of business, the size of the employer's payroll and the employer's health and safety record.

Canada's and Ontario's residence-based social security programmes against the social risks relating to old age, health care and family are financed out of either the federal general revenue or the provincial general revenue or both. In more detail, the Old Age Security programme[1044], the Interim Federal Health Program, the Universal Child Care Benefit, and the Canada Child Tax Benefit are financed from the federal budget – more precisely, the Consolidated Revenue Fund, which is the general pool for all income of the federal government. The Ontario Child Benefit and the Ontario Child Care Supplement for Working Families are paid for from the provincial budget.

The Ontario Health Insurance Plan is funded out of both federal and provincial general revenue.[1045] In addition, the government of Ontario has introduced two taxes which are claimed to be dedicated to the health care system: the Ontario Health Premium and the Employer Health Tax. Despite its name, the first of these is classified as a tax. The Ontario Income Tax Act requires every resident in Ontario to pay the Ontario Health Premium.[1046] The tax is deducted from taxable income above a certain threshold and collected through the income tax system. The Employer Health Tax Act obliges every employer who has a permanent establishment in Ontario to remit the Employer Health Tax.[1047] The tax is based on the total payroll of the employer. Strictly speaking, however, neither tax is earmarked for health care purposes in Ontario.[1048]

[1043] § 95.1 WSI Act.
[1044] An earmarked Old Age Security tax, as it existed at the beginning of the programme, does not exist anymore.
[1045] For the sake of completeness it should be mentioned that co-payments are levied on certain insured services. See § 12 (1) Health Insurance Act, R.S.O. 1990, c. H.6.
[1046] See § 2.2 (1) Ontario Income Tax Act, R.S.O. 1990, c. I.2.
[1047] § 2 (1) Employer Health Tax Act, R.S.O. 1990, c. E.11.
[1048] See for instance Jack M. Mintz and Andrey Tarasov, "Efficient and Fair Financing of the Public Share of Canadian Health Care Insurance with Greater Reliance on the User-Pay Approach" (paper presented at the conference on 'Social Insurance for Health Care: Economic, Legal and Political Considerations', School of Public Policy & Governance, University of Toronto, 9 and 10 November 2006).

Ontario's social assistance programmes are financed from general revenue. Ontario Works and the Ontario Disability Support Program are funded partly from the federal budget and partly from the provincial one. The Canadian government provides a fixed amount of money in an annual, single, block payment for the funding of regional social assistance and social services. This transfer system, which consists of cash payments and tax contributions, is called Canada Social Transfer. By contrast, Ontario's Guaranteed Annual Income System, which offers social assistance for seniors in need, is financed out of Ontario's general revenue.

5.2. Financial duties with respect to aliens or undeclared workers

By and large, financial duties only arise in respect of social insurance based on employment, *i.e.* the CPP, the EI and the Workers' Compensation scheme. Only under these three programmes is there a direct obligation to contribute to the programme's funding. For the sake of clarity, financial duties with respect to irregular migrant workers and undeclared workers will be analysed together with any rights in the relevant subchapter on each of the different social risks.

A direct obligation to contribute to a programme's funding does not exist for any of the other social security programmes, which are funded from general revenue. Individuals may indirectly contribute to the financing of the schemes by paying taxes. But in principle, there is no direct obligation to contribute to consider here.

6. The administration of social security arrangements

6.1. General remarks

The administration of Canada's social security systems is carried out by a great variety of different federal, provincial/territorial and municipal public authorities, as well as public and private corporations.

On the federal government level, a division of competences can be observed between the Department of Human Resources and Skills Development (with the Minister of Human Resources and Skills Development and the Minister of Labour), the Canada Revenue Agency and Health Canada. While the Department of Human Resources and Skills Development administers Old Age Security (OAS), the Canada Pension Plan (CPP) and the Employment Insurance (EI), the Canada Revenue Agency is responsible for collecting CPP and EI contributions. Additionally, the Revenue Agency administers all federal and most provincial/territorial cost-compensating family benefits. Health Canada enforces the Canada Health Act, the law establishing the national health care and care standards that must be met by provinces and territories in order to obtain a full federal financial contribution. In addition, Health Canada offers supplementary health care and care services in two territories as well as to isolated areas.

There are two more federal departments which also have social security-related competences. The Department of Finance Canada administers major federal transfer payments to provinces and territories. In particular it is responsible for processing the Canada Health Transfer and the Canada Social Transfer, which are the federal contributions to the provincially/territorially run health and social assistance programmes. Citizenship and Immigration Canada runs the Resettlement Assistance Program and the Interim Federal Health Program.

In Ontario, the Ministry of Health and Long-Term Care is responsible for administering the health care system. The delivery of health care and care is undertaken by providers such as physicians in private practice and hospitals or care facilities. The Ontario Workplace Safety and Insurance Board administers the Workplace Safety and Insurance Act of Ontario and the federal Government Employees' Compensation Act for federal employees in Ontario and federal employees assigned to work outside Canada. The Board is a public sector organisation, which was established through an act of Ontario's parliament. Its board of directors is appointed by the Lieutenant Governor in Council.[1049] As mentioned above, the federal Canada Revenue Agency runs most provincial/territorial cost-compensating family benefit programmes. However, in Ontario the provincial Ministry of Finance administers the Ontario Child Care Supplement for Working Families. Social assistance is carried out in Ontario by a unique two-tier system, splitting up competencies between the provincial government and municipalities. On the one hand, the provincial Ministry of Community and Social Services runs the Disability Support Program through its local offices and the Ministry of Revenue administers the Guaranteed Annual Income System. On the other hand, individual municipalities are responsible for the delivery of benefits under the Ontario Works programme.

[1049] The Lieutenant Governor in Council is the Lieutenant Governor – the representative of the Queen in the provinces, in this case in Ontario – acting on the advice of the provincial executive council or cabinet.

6.2. Administration with respect to the rights of aliens or undeclared workers

The nature of administration differs from one social security scheme to another. Consequently, relevant information will be provided when investigating the different schemes in chapters 7 to 13. However, most governmental authorities use the Social Insurance Number for the administration of social security. The issuance of this number with regard to the two groups under investigation is therefore discussed below.

6.2.1 The Social Insurance Number

Many of Canada's federal and provincial governmental authorities make use of the so-called Social Insurance Number (SIN) for the administration of their social security programmes. This is a nine-digit number that is used as a file number or account number or for data-processing purposes. Individuals have to produce the SIN on two occasions: first, when taking up work in Canada and, second, when receiving governmental benefits. The first case has already been described in subchapter 3.3. The second will be discussed under the respective benefits. The Social Insurance Number is displayed on the Social Insurance Number Card (SIN card). This card, however, is neither an authorisation to work in Canada nor accepted as an identity card.[1050]

Individuals who are not Canadian citizens or permanent residents and who are authorised or need authorisation to work in Canada under the Immigration and Refugee Protection Act are issued SINs that begin with the digit 9.[1051] This applies to foreign nationals who may be allowed to work in Canada with or without a work permit, such as temporary foreign workers, foreign students, refugees, diplomats, refugee claimants, or foreigners with an unenforceable removal order. These SINs and the relating SIN cards are only temporarily valid. For foreign nationals staying *in* Canada, the expiry date of the SIN is the same as the expiry date of the authorisation to remain in Canada. If no expiry date is indicated on the person's authorisation to remain in Canada, the expiry date of the SIN is two years after the Minister of Citizenship and Immigration gave the authorisation to remain in Canada.[1052] SINs may be renewed if the applicant fulfils the same requirements as for the initial application.[1053]

An application for a SIN and SIN card has to be supported by documents to prove the identity and status of the applicant.[1054] Citizens have to submit a birth certificate issued in Canada by the Vital Statistics Branch of the province or territory of birth, or a certificate of Canadian Citizenship, or a certificate of registration of birth abroad issued prior to 1977 by Citizenship and Immigration Canada. Permanent residents can prove their identity and status by one of the following documents: permanent resident card; confirmation of permanent residence and visa counterfoil; or record of landing issued before 28 June 2002. Other persons who are neither Canadian citizens nor permanent residents have to accompany their application for a SIN by one of the following documents: work permit/employment authorisation; study permit/student authorisation and a

[1050] See, for instance, Service Canada, *The Social Insurance Number Code of Practice* (Ottawa: Service Canada, 2009), pp. 4, 9, 12.
[1051] § 89 (9), (10), (10.1) EI Regulations in conjunction with § 90 IRPA.
[1052] See § 89 (10.2) EI Regulations. Different expiry dates are in force for applications of foreign nationals who are not in Canada (See § 89 (10.3) EI Regulations).
[1053] See § 89 (10.8) EI Regulations.
[1054] § 89 (3) EI Regulations.

contract of employment from a learning institution or an employer on the campus; visitor record indicating eligibility for work in Canada; or diplomatic identity card (Category D, I or J only) and a letter of permission of employment.[1055] For a renewal the applicant needs the same documents as for the initial application.

Persons in our category 'nationals who engage in undeclared work' can apply for a SIN and SIN card simply because of the fact that they are nationals. It is irrelevant for the application for a SIN and SIN card whether nationals are working and if so, whether that work has been declared.

Regarding irregular migrant workers, we have to distinguish between categories A and B. Category A workers – *i.e.* aliens who are both residing unlawfully and working unlawfully in Canada – cannot apply for a SIN and SIN card.[1056] Besides the fact that it would be impossible for them to apply for a SIN and SIN card, category A workers cannot normally be in possession of a valid SIN and SIN card in any case. As mentioned above, foreign nationals – other than permanent residents – who are authorised or need authorisation to work in Canada, are only issued SIN and SIN cards with an expiry date. This expiry date either corresponds to the expiry date of the authorisation to stay in Canada or is two years after the Minister gave the authorisation to stay in the country. This means that aliens who remain in Canada after the expiry of their authorisation to stay in the country are in most cases no longer in possession of a valid SIN and SIN card either. Only in very exceptional cases could this be possible. Most notably, where no expiry date is indicated on the person's authorisation to remain in Canada and this authorisation is withdrawn before the two-year period has elapsed, the person might be staying unlawfully in Canada, but still be in possession of a valid SIN and SIN card. In addition, former permanent residents could also have a valid SIN and SIN card. If a permanent resident loses his or her status[1057] and if he or she then becomes unlawfully resident in Canada, he or she may still be the holder of a valid SIN and SIN card, since permanent residents are issued SIN and SIN cards without expiry dates.

Category B workers – *i.e.* aliens who are residing lawfully but working unlawfully – also cannot apply for a SIN and SIN card. As mentioned above, a work permit or study permit in conjunction with a contract of employment from a learning institution or an employer on campus is a precondition for a SIN application. Applications of category B workers, who by definition lack such an authorisation to work, will, consequently, not be considered. The two other groups mentioned above which, by contrast, do not need a work permit for a SIN application, do not fall into our category B. First, persons with a visitor record are foreigners who are authorised by the IRPA to work in Canada without needing a work permit. Second, persons with a diplomatic identity card are also exempted from the obligation to obtain a work permit.

There is also the question whether a category B worker can be in possession of a valid SIN card. In other words, can a foreigner who has no authorisation to work have a valid SIN? Let us first look at former permanent residents. When they lose their permanent resident status, but are still staying lawfully in Canada, their SIN, if they had one, is still valid. As explained above, this has to do

[1055] See Service Canada, *Social Insurance Number Code of Practice*, p. 44 in conjunction with Service Canada, "What information/documents do I need to apply?" Service Canada. Available at: http://www.servicecanada.gc.ca/eng/sin/apply/proof.shtml.
[1056] They are by definition neither Canadian citizens nor permanent residents and are not – as required by § 89 (9), (10) and (10.1) EI Regulations in conjunction with § 90 IRPA – foreign nationals "who may be required under this [Immigration and Refugee Protection] Act to obtain authorization to work in Canada".
[1057] See § 46 IRPA.

with the fact that permanent residents are issued unlimited SIN cards. Other foreigners, who are not permanent residents, may also be in possession of a valid SIN, if their work permit has expired but they still have a regular residence status. However, this seems to be the exception, as the length of the authorisation to stay and the length of a work permit are mostly linked.[1058]

In chapter 2, we wrote that non-nationals who possess a work permit for a particular (type of) work only and who are engaging in activities for which they do not have permission will not be part of this research. Although these situations will not be investigated in subsequent chapters, it is worth mentioning here that foreigners in such situations usually do have a valid SIN. According to section 185 IRPR, work permits may be restricted to a certain type of work, an employer or a location of work. If this is the case and an individual changes – after having acquired a SIN card – his or her occupation, employer or location of work without being authorised to do so, he or she will then be working unlawfully but may still have a valid residence status and a valid SIN card.

6.2.2 Duty to report

Unlawful presence in Canada is a criminal offence. Similarly, both unlawful work in Canada and the employment of a foreigner without work authorisation are criminal offences.[1059] In more detail, they are dual offences, meaning that they can be prosecuted either as a summary offence, *i.e.* a less serious offence, or as an indictable offence, *i.e.* a more serious offence. However, social security administrations are not subject to a duty to report such an offence. The only requirement imposed by law is that if the irregular migrant worker is subject to a warrant – such as an immigration warrant for arrest[1060] – public agencies such as the social security administrations are legally obliged not to interfere with the execution of such a warrant. The notion of 'interference' is subject to some discussion and has not yet been clarified by case law.[1061]

[1058] For instance, holders of a temporary resident permit are only issued a work permit that does not exceed the expiry date of their resident permit. See Citizenship and Immigration Canada, *Foreign Worker Manual*, Program Manual Temporary Foreign Workers Guidelines 1 (Ottawa: Citizenship and Immigration, loose-leaf, 2010), p. 75.
[1059] § 124 (1) (a), (c) IRPA.
[1060] An immigration officer can issue an immigration warrant, *i.e.* a warrant for arrest, (a) if an individual is inadmissible to Canada *and* a danger to the public, (b) if an individual is unlikely to show up at an examination, hearing or removal, or (c) if an immigration officer is not satisfied that the person's identity has been established. See § 55 IRPA. Other possible examples of warrants are criminal arrest warrants or search warrants, both issued by courts.
[1061] See Portuguese-Canadian National Congress, "Moving towards visibility: Non-status immigrants and the social service sector," report on the undocumented support network project, April 2009. Available at: http://atwork.settlement.org/downloads/atwork/Moving_Towards_Visibility_Non-Status_Immigrants_2009.pdf.

7. The social risk of old age

The risk of old age is covered on a three-pillar basis: first, by the residence-based and tax-financed Old Age Security (OAS), second, by the employment-based and contribution-financed Canada Pension Plan (CPP),[1062] and finally, by private registered pension plans and private registered retirement savings plans, which are fiscally supported by the government. The first two pillars constitute Canada's public pension system and will be analysed in this chapter.

7.1. Old Age Security (OAS)

7.1.1. Irregular migrant workers

The OAS pension[1063] is granted to every resident of Canada reaching the age of sixty-five. For our research, two benefit entitlement criteria are relevant: first, either Canadian citizenship or legal residence in Canada and, second, a sufficiently long residence time. As we will see in the following, these two entitlement criteria make it difficult or even impossible for irregular migrant workers, who have either no status or a temporary status under immigration law, to qualify for benefits.

Let us begin with the citizenship/legal residence requirement. The Old Age Security Act[1064] (OAS Act) provides in subsection 4 (1) (a) that a person is eligible for a monthly old age pension only if "on the day preceding the day on which that person's application is approved that person is a Canadian citizen or, if not, is legally resident in Canada". In the event that the applicant is not residing in Canada, the pension can be exported,[1065] but in this case the applicant must have been a Canadian citizen or, if not, must have been legally resident in Canada on the day preceding the day on which that person ceased to reside in Canada.[1066]

The Old Age Security Regulations[1067] (OAS Regulations) specify the meaning of 'legal residence' for the purpose of the OAS Act. According to subsection 22 (a) OAS Regulations, legal residence

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[1062] The province of Quebec has established its own pension programme: the Quebec Pension Plan. Due to the report's focus on the province of Ontario, the Quebec Pension Plan will not be investigated.

[1063] In order to assist low-income pensioners and their partners, the OAS programme offers two additional benefits. First, the Guaranteed Income Supplement (GIS). This supplementary grant is provided to every OAS pensioner whose yearly income, or in the case of marriages or common-law partnerships combined income, does not exceed certain limits. Second, the Allowance Payable to Spouses or Common-law Partners. This supplementary benefit is provided to partners of OAS pensioners who are between sixty and sixty-four years of age and who are not entitled to an OAS pension. The allowance is intended to assist low-income senior couples living on the pension of just one spouse or common-law partner.

[1064] Old Age Security Act (OAS Act), R.S.C. 1985, c. O-9.

[1065] Export is possible if a pensioner has resided in Canada for at least twenty years after attaining the age of eighteen years. See § 9 (2), (4) OAS Act. Old age pensions of pensioners who do not fulfil this residency requirement will usually be suspended after pensioners have remained abroad for six consecutive months. See § 9 (1), (3) OAS Act. Exceptions apply where there is a bilateral social security agreement. Supplementary benefits for low-income pensioners and their partners are not exported beyond a period of six months abroad. See § 11 (7) (c) and (d) OAS Act; § 19 (6) (c) OAS Act.

[1066] § 4 (1) (b) OAS Act.

[1067] Old Age Security Regulations (OAS Regulations), C.R.C., c. 1246.

denotes that on the applicable day[1068] the person "is or was lawfully in Canada pursuant to the immigration laws of Canada in force on that day".[1069] This is exactly what irregular migrant workers with no status under immigration law, *i.e.* category A workers, do not have: the authorisation under Canadian immigration law to be in the country. Accordingly, irregular migrant workers with no status at the time of approval of the application or at the time of ceasing to reside in Canada are ineligible for an OAS old age pension.[1070] The situation for irregular migrant workers lawfully present in Canada, *i.e.* category B workers, is different. They are lawfully in Canada pursuant to the immigration laws of the country and are hence eligible for OAS benefits. An investigation of the policy of the competent government department confirms that those categories of foreigners which have been identified in subchapter 2.3. as category B workers fulfil the legal residence requirement under subsection 4 (1) OAS Act.[1071]

The second relevant entitlement criterion is a sufficiently long residence time in Canada. If a person is living in Canada at the time of application, he or she must have lived in Canada for at least ten years after reaching age eighteen. Someone who is residing outside the country when applying for the OAS pension must have lived in Canada for at least twenty years after reaching the age of eighteen. By fulfilling these minimum requirements, an applicant becomes eligible for a partial old age pension, which amounts to one-fortieth of the full pension for each year of residence after age eighteen.[1072] The question is whether a foreigner can invoke periods of unlawful residence or residence under a temporary immigration status in Canada for the calculation of his or her OAS pension.

'Residence' means, pursuant to subsection 21 (1) (a) OAS Regulations, that a person "makes his home and ordinarily lives in any part of Canada". In addition, some periods of absence of Canada are deemed as residence under section 21 OAS Regulations. However, since periods of absence are not relevant for this research, the focus will be on the meaning of the phrase "makes his home and ordinarily lives in any part of Canada".

The Federal Court stated in *Perera v. Canada* that "[w]hether or not the individual makes his home and ordinarily lives in Canada is a question of fact to be determined in the particular circumstances".[1073] More than ten years later, in *Chhabu v. Canada*, Judge Layden-Stevenson held

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[1068] The applicable day is determined according to § 4 OAS Act, quoted earlier.

[1069] Alternatively, if the person is or was absent from Canada on the applicable day, and this absence is deemed not to have interrupted the person's residence, then the person must had been lawfully in Canada pursuant to the immigration laws of Canada immediately prior to the commencement of the absence. Here too, then, legal residence means compliance with Canadian immigration laws. See § 22 (b) OAS Regulations. § 22 (c) OAS Regulations stipulates that 'legal residence' is also established if a person is not or was not resident in Canada but is deemed to be or to have been resident in Canada, most notably on the basis of a bilateral social security agreement. An analysis of Canada's bilateral social security agreements shows that deemed residence in Canada refers to periods of residence *outside* Canada, where a person is subject to the Canada Pension Plan or the comprehensive pension plan of a province. Therefore, this possibility of establishing legal residence for the purpose of the OAS Act is not applicable to persons who unlawfully reside *in* Canada.

[1070] Incidentally, they are also ineligible for any benefit supplementing the old age pension. For the GIS see § 11 (1) OAS Act in conjunction with § 2 and § 4 (1) OAS Act. For the Allowance Payable to Spouses or Common-Law Partners see § 19 (2) OAS Act in conjunction with § 22 OAS Regulations.

[1071] See Human Resources and Skills Development, "Residence – Legal status," Policy document, unpublished, § 4.1. This includes also those foreigners who are in Canada without legal status, but to whom an Order-in-Council applies.

[1072] § 3 (2), (3) OAS Act. For the requirements for a full pension see § 3 (1) OAS Act. For similar residence requirements with respect to the Allowance Payable to Spouses or Common-law Partners see § 19 (1) (c) OAS Act.

[1073] Federal Court of Canada, Trial Division, *Perera v. Canada* (1994), 75 F.T.R. 310, 1994 CarswellNat 495.

that the question of residence is one of "mixed fact and law. It is more factually than legally driven".[1074] On the basis of this case law, the Review Tribunals of the CPP and OAS have established, in the course of time, a number of factors to be taken into consideration for the determination of residence. Although the list below is not complete,[1075] this concerns the following factors:

- ties in the form of personal property (*e.g.*, house, business, furniture, automobile, bank account, credit card);
- social ties in Canada (*e.g.*, membership of organisations or associations, or professional membership);
- other ties in Canada (*e.g.*, hospital and medical insurance coverage, driver's licence, rental, lease, loan or mortgage agreement, property tax statements, electoral voters list, life insurance policies, contracts, public records, immigration and passport records, provincial social services records, public and private pension plan records, federal and provincial income tax records);
- ties in another country;
- regularity and length of stay in Canada and frequency and length of absences from Canada; and
- the person's mode of living *i.e.*, whether his or her living in Canada is substantially deep rooted and settled.[1076]

The Federal Court held that "the ultimate determination must be made having regard to all the circumstances".[1077] This suggests that periods of unlawful residence or residence under a temporary immigration status may also be taken into consideration, such as those of a former irregular migrant worker.

Pursuant to the policy of the government department Human Resources and Skills Development, legal presence (as discussed earlier) and residence are two separate conditions of eligibility under the OAS Act. Accordingly, these two concepts cannot be interchanged. "Persons can be in Canada legally but may not in fact be residing in Canada (*e.g.* Persons who work in foreign embassies or international institutions). On the other hand, they can reside in Canada without being lawfully present in the country (*e.g.* Persons admitted as visitors who fail to leave the country when their visa expires)."[1078] This distinction seems to be convincing. The legislators made a clear distinction when they set out a requirement for eligibility of, on the one hand, sufficient periods of 'residence' in Canada over a certain period of time and, on the other hand, 'legal residence' in Canada on a certain date. It follows that if they had intended to require lawfulness of residence also for sections 4 and 19 OAS Act, they would have specified it.

Nevertheless, we may ask how case law has interpreted the residence requirement with respect to foreigners. Let us begin with periods of unlawful residence. To our knowledge, the Federal Court has never dealt with the question whether periods of unlawful residence may be regarded as

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[1074] Federal Court, *Canada v. Chhabu* (2005), 2005 FC 1277, 35 Admin. L.R. (4th) 193, 280 F.T.R. 296, 2005 CarswellNat 2980, § 23.
[1075] *Ibid*.
[1076] See, *inter alia*, the Review Tribunal decisions *R-40690 v. Canada*, 20 November 2000; *D-55075 v. Canada*, 21 November 2000; *Z-87794 v. Canada*, 29 March 2006; *G-87650 v. Canada*, 9 May 2006.
[1077] Federal Court, *Canada v. Chhabu*, § 32.
[1078] Human Resources and Skills Development, "Residence – Legal status," § 4.

residence for the purpose of the OAS programme. However, it is difficult to say whether this is also the case with the Review Tribunals: for reasons of confidentiality, only summaries of the decisions are publicly available, in which relevant information is sometimes lacking.[1079]

Although terms such as 'not a lawful immigrant',[1080] 'illegal resident',[1081] or 'could not be counted as years of legal residence'[1082] are used in the decision summaries, it becomes obvious from the other parts of the relevant decisions that the Review Tribunals are not referring to periods of unlawful residence as we understand it. Rather, such terms refer to persons who temporarily stay in Canada for visit, study or work, as opposed to immigrants who permanently reside in Canada. However, in one case a Review Tribunal may have dealt with a person residing unlawfully. According to the decision summary, the appellant "resided in Canada illegally from 1968 until at least 1973, when he received a deportation notice. The notice was confirmed in 1975, but it is unclear when the appellant was actually deported". The Tribunal held that "illegal residence in Canada does not count towards meeting the residency requirements for an OAS pension" and concluded that there was no "proof that he was living legally in Canada". [1083] Attempts to clarify what precisely the immigration status of the appellant had been, unfortunately failed.[1084]

However, the case law of the Review Tribunals shows that immigration status is central, but not crucial for this determination. Whenever the Tribunals have to decide on periods of residence, they first look at the status of the appellant under immigration law. Periods of status as a permanent resident of appellants who were actually present in Canada are considered to fulfil the OAS residency requirement. However, this is not true for permanent residents who have stayed for periods of time outside Canadian territory. In such cases, Review Tribunals consider both the provisions on allowed absences in the OAS Regulations and the appellant's factual ties to Canada.[1085] On the other hand, periods as a visitor (for a temporary purpose such as visit, study or work) basically do not count as residence.[1086] Nevertheless, in some cases Review Tribunals have decided that even these periods have to be taken into consideration. This is mostly the case when,

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[1079] According to § 12 (4) of the Review Tribunal Rules of Procedure (SOR/92-19), the Tribunal's decision as well as all relevant documents have to be kept confidential. The only information which is publicly availably is summaries of the decisions. In order to gain more information on specific cases, I requested from the Office of the Commissioners of the Review Tribunals a copy of the decisions with personal data blackened out. This request was refused. See Tina Head, General Counsel of the Office of the Commissioners of the Review Tribunal, e-mail message to author, 17 January 2008. Therefore, the following analysis can only be based on the decision summaries.

[1080] Review Tribunal, *K-73793 v. Canada*, 9 June 2003. The term 'not a lawful immigrant' refers to periods when the appellant stayed in Canada as a visitor.

[1081] Review Tribunal, *E-86152 v. Canada*, 1 February 2006. Here the term 'illegal resident' refers to the status as a visitor in Canada.

[1082] Review Tribunal, *S-82462 v. Canada*, 28 July 2006. In this case the phrase 'could not be counted as years of legal residence in Canada' refers to periods when the appellant stayed in Canada on a student visa and on a work visa.

[1083] Review Tribunal, *V-71317 v. Canada*, 28 July 2003.

[1084] See Tina Head, General Counsel of the Office of the Commissioners of the Review Tribunal, e-mail message to author, 17 January 2008. The request to provide a copy of the decision with personal data blackened out was rejected.

[1085] See, for instance, Review Tribunal, *S-83280 v. Canada*, 13 March 2006. The Review Tribunal decided that the appellant, although he was a permanent resident of Canada and his periods of absence were in accordance with § 21 (4) (a) OAS Regulations and, where they exceeded one year, with an authorisation of the Canadian authorities, had not established residence in Canada for the purposes of the OAS Act. The Tribunal based its decision on the facts that the appellant did not give up his employment by the Indian government for nearly three years after his arrival in Canada, that he kept his government car and house in India and that he stayed with his children in India.

[1086] See for instance the Review Tribunal decisions *K-73793 v. Canada*, 9 June 2003; *E-86152 v. Canada*, 1 February 2006; or *S-82462 v. Canada*, 28 July 2006.

for weighty reasons,[1087] appellants were not able to apply earlier for permanent residence, and convinced the Tribunal that they made their decision to reside in Canada even before their actual application for permanent residence.[1088] But in general, Review Tribunals take the view that a period of Canadian residence begins on the date when the appellant formalises his or her intention to become a resident by applying for permanent residence status.[1089] This requirement would make it rather difficult to have periods of unlawful residence taken into consideration for OAS purposes and hence puts the above-mentioned policy of Human Resources and Skills Development Canada into perspective.

Let us now turn to category B workers. Aliens who are residing lawfully but working unlawfully are, in the Canadian context, visitors, holders of a temporary resident permit or foreigners subject to a conditional or unenforceable removal order who work without the required permission.

As mentioned before, case law usually does not consider periods in Canada as a visitor for visit, study or work purposes as residence for OAS purposes. Review Tribunals argue that these temporary statuses are conferred on non-residents only; and periods of presence in Canada as a non-resident cannot be included in the calculation for an entitlement to an OAS old age pension.[1090] Exceptions are sometimes made if there are weighty reasons for a delay in the application for permanent residence, if the Ministry or Review Tribunal is convinced that the intention for residence in Canada already existed before such an application and if there are factual ties with Canada.

Concerning persons under a conditional removal order, Review Tribunals normally regard the application for Convention refugee status to be tantamount to the beginning of Canadian residence.[1091] Even the later denial of the claim for refugee protection does not prevent Review Tribunals from regarding the refugee claimant as a Canadian resident for the purposes of the OAS Act.[1092] However, if Review Tribunals have doubts about the factual ties to Canada, periods as refugee claimants can be excluded from the calculation for an entitlement to an OAS benefit. In a case in 2004, the Tribunal held that the former refugee claimant was a Canadian resident for every year for which there were income tax returns, as these returns indicated that he received welfare from the province during the refugee process. Only one year, for which no such income tax return was established, was exempted from Canadian residence for the purposes of the OAS Act.[1093]

From the available summaries of Review Tribunal decisions it seems that these administrative bodies have not explicitly dealt with holders of temporary resident permits or persons under an unenforceable removal order.

[1087] Weighty reasons were held to exist, for instance, when a family member does not have the ability to sponsor the potential applicant until his or her immigration status is settled or when a family member on whom the potential applicant is financially dependent is looking for a new job. See Review Tribunal decisions *S-59142 v. Canada*, 2 November 2000 or *Z-87794 v. Canada*, 29 March 2006.

[1088] See the Review Tribunal decisions *S-59142 v. Canada*, 2 November 2000; *R-75142 v. Canada*, 22 October 2003; *Z-87794 v. Canada*, 29 March 2006; and *O-89370 v. Canada*, 11 July 2006.

[1089] See explicitly Review Tribunal, *W-76940 v. Canada*, 19 December 2003.

[1090] See Review Tribunal, *S-82462 v. Canada*, 28 July 2006.

[1091] See Review Tribunal, *V-62091 v. Canada*, 23 April 2001 or Review Tribunal, *K-75064 v. Canada*, 26 March 2004.

[1092] Review Tribunal, *K-75064 v. Canada*, 26 March 2004.

[1093] *Ibid*.

Having discussed the two entitlement criteria which are relevant to irregular migrant workers, we should say for the sake of completeness that work, *i.e.* work status or work history, is not a factor for determining eligibility for or the amount of an OAS pension.

To summarise, category A workers are ineligible for OAS benefits, due to their lack of status under immigration law. Former category A workers may have assumed that their periods of actual residence, even without status, would be taken into account as residence in terms of the OAS Act. An analysis of the case law of Review Tribunals, however, suggests that there will be difficulties, since these tribunals and the authorities often only consider periods in Canada after the formalisation of the intention to become a resident, *i.e.* after application for permanent residence, as residence in Canada for OAS purposes. Category B workers are in principle eligible for an OAS pension, as their presence in Canada is lawful.[1094] Even so, for entitlement to benefits they must prove at least ten years of residence in the country after age eighteen. If they make their home and ordinarily live in Canada for such a period of time, their residence is taken into consideration for OAS purposes. Here too, an analysis of case law of Review Tribunals illustrates that the application for permanent residence often plays a crucial role, making it difficult – although not impossible – for people with a temporary resident status to be considered as residents.

7.1.2. Nationals who engage in undeclared work

Compared with the Canada Pension Plan or private registered pension plans, the OAS programme is intentionally not related to the employment history of the beneficiary. Instead, it is linked to the residence history. This ensures that seniors who do not qualify for employment-related pensions are provided with a minimum income. Consequently, nationals who engage in undeclared work are able to qualify for OAS benefits, provided they have been resident in Canada. The fact that they have not declared their work to the social security authorities affects neither their entitlement to benefits nor the benefit rate.

7.2. The Canada Pension Plan (CPP)

7.2.1. Irregular migrant workers

Any insured person who has made contributions for at least one calendar year to the Canada Pension Plan (CPP) fund after reaching the age of eighteen, and who attains the age of sixty-

[1094] It is worth mentioning that when OAS benefits are applied for, Human Resources and Skills Development Canada asks the applicant to produce his or her Social Insurance Number. If the applicant does not comply with this request, which is highly likely to be the case for irregular migrant workers who are usually not in possession of a valid SIN, the department has established a routine to be followed. This includes an electronic search for the SIN, contact with the applicant, the provision of an application form for a SIN to the applicant and, if the requirements are fulfilled, even the assignment of a SIN. See Human Resources and Skills Development, "Section 2-1 – Old Age Security Pension," Appendix 2-1-C, Policy document, unpublished. However, Canadian law, in particular OAS law, does not require the provision of a SIN when applying for OAS benefits. The policy directives of Human Resources and Skills Development Canada therefore clearly note that "payments cannot be delayed or denied due to the lack of a SIN". See Human Resources and Skills Development, "Section 2-1 – Old Age Security Pension," Appendix 2-1-D, Policy document, unpublished. This means that category B workers who qualify for OAS benefits due to their residence status are able to exercise their rights. The lack of a SIN does not affect effective access to benefits.

five,[1095] is eligible for a retirement pension.[1096] The amount of the pension benefit depends on the person's contributions to the CPP, and if applicable the Quebec Pension Plan, and the age at which he or she starts receiving his or her pension. Possessing Canadian citizenship/a certain immigration status or being resident in Canada[1097] are not relevant factors for eligibility under the Canada Pension Plan.

The question is whether irregular migrant workers must contribute[1098] to the Canada Pension Plan and if so, whether they are able to contribute. Pursuant to subsection 8 (1) CPP, every employee in pensionable employment must make an employee's contribution to the CPP, to be deducted from his or her remuneration. Pensionable employment means, by and large, employment inside Canada.[1099] This raises the question what is to be understood by the term 'employment'; and does employment in contravention of Canadian immigration law also fall within the definition of this concept? Subsection 2 (1) CPP defines employment as "the performance of services under an express or implied contract of service or apprenticeship, and includes the tenure of an office". Thus far, the relevant authorities and the Canadian courts have not pronounced on the issue of whether employment which infringes immigration law can be considered as employment under the Canada Pension Plan. However, the Tax Court of Canada and the Federal Court of Appeal have dealt in the context of Canadian unemployment insurance with the question whether employment in violation of immigration law falls within the scope of insurable employment. Subsection 3 (1) (a) of the former Unemployment Insurance Act[1100] and subsection 5 (1) (a) of the current Employment Insurance Act[1101] identically define insurable employment as "employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral [...]". This definition of insurable employment for unemployment insurance purposes is almost the same as that of employment for Canada Pension Plan purposes. Moreover, the term 'contract of service' is interpreted by the Canada Revenue Agency, which is responsible for determining whether employment is pensionable or insurable, and by the Canadian courts in the same way for both types of social insurance.[1102] Therefore it might be valid to draw conclusions for the CPP from the case law on whether irregular migrant workers can form a valid contract of service and, as a consequence, can be engaged in insurable employment for unemployment insurance purposes. This unemployment insurance case law will be discussed in detail in subchapter 10.1.1. Here it is important to mention that the Federal Court of Appeal has formulated a basic principle in the context of the employment insurance for the illegality of contracts in case of unlawful work. The principle says that "where a contract is expressly or

[1095] Early retirement for insured persons between sixty and sixty-four may also be possible.
[1096] § 44 (1) (a) in conjunction with § 2 (1) CPP.
[1097] Leaving Canada does not affect the entitlement of a worker to a CPP retirement pension. A restriction for the export of benefit payments does not exist.
[1098] Voluntary contributions are not possible.
[1099] Pensionable employment is defined at § 6 to § 7 Canada Pension Plan and § 15 to § 34.1 Canada Pension Plan Regulations (CPP Regulations), C.R.C., c. 385. In certain cases employment outside Canada is also considered as pensionable employment – for instance if the employee ordinarily reports for work at an establishment in Canada of his employer – and in certain cases employment inside Canada is excepted from being regarded as pensionable employment – for example seconded employment to Canada.
[1100] Unemployment Insurance Act, R.S.C. 1970-71-72, c. 48 (repealed).
[1101] Employment Insurance Act (EI Act), 1996, c. 23.
[1102] See for instance the case law on the distinction between contract of service (for employees) and contract for services (for self-employed), which is applied to both types of social insurance. For one of the leading cases, see Federal Court of Canada, Appeal Division, *Wiebe Door Services Ltd. v. Minister of National Revenue* (1986), [1986] 2 C.T.C. 200, 46 Alta. L.R. (2d) 83, [1986] 5 W.W.R. 450, [1986] C.E.B. & P.G.R. 8023, 86 C.L.L.C. 14,062, 87 D.T.C. 5025, [1986] 3 F.C. 553, 70 N.R. 214, 86 D.T.C. 553, 1986 CarswellNat 366.

impliedly prohibited by statute [author's note: and according to case law this is the case for contracts with immigrants who do not have an employment authorisation though obliged to do so under Canadian immigration law], a court may refuse to grant relief to a party when, in all of the circumstances of the case, including regard to the objects and purposes of the statutory prohibition, it would be contrary to public policy, reflected in the relief claimed, to do so".[1103] So a contract will not be declared illegal if this is not contrary to public policy. Public policy manifests itself in such cases in two ways: first, the belief that a person should not benefit from his or her own wrong, and second, the understanding that the purpose of the involved statutes should be respected. As regards the latter, the Federal Court of Appeal found the objective of the Unemployment Insurance Act to be "to make benefits available to the unemployed"[1104] – this was derived from a Supreme Court decision.[1105] And this overall purpose was not undermined by granting unemployment benefits to the appellant, who worked in Canada without the employment authorisation that he was obliged to obtain. The same conclusion could be reached for the Canada Pension Plan, since the overall objective seems to be similar. According to the Supreme Court of Canada, the Canada Pension Plan "was designed to provide social insurance for Canadians who experience a loss of earnings owing to retirement, disability, or the death of a wage-earning spouse or parent".[1106] And Service Canada considers the Canada Pension Plan to ensure "a measure of protection to a contributor and his or her family against the loss of income due to retirement, disability and death".[1107]

Since the Federal Court of Appeal concluded from the objectives of the former Unemployment Insurance Act and the former Immigration Act that it would not be contrary to these acts to grant relief, the Federal Court of Appeal – and subsequently lower instances, such as the Tax Court of Canada and the Ministry of National Revenue – have focused in determining whether unlawful work can constitute insurable employment on the public policy aspect, namely that a person should not benefit from his or her own wrong. This is done by applying the *bona fide* test. If a foreigner acted in good faith when he or she engaged in employment in Canada in violation of the immigration law, the person's contract of service was legal and thus insurable employment took place.

From my point of view, the same interpretation of 'contract of service' for both types of social insurance and the definition of a similar overall objective for them – namely to provide monetary protection against loss of income in case of unemployment or in case of retirement, disability and death – would basically make it possible to apply the principle of illegality of contracts and the resultant *bona fide* test for the purposes of the Canada Pension Plan too.

The *bona fide* test is a test which only can be applied *ex post*, *i.e.* after the employment took place. This is so because the test asks whether the irregular migrant worker was acting in good faith when working in Canada without employment authorisation. When we apply the above-described

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[1103] Federal Court of Canada, Appeal Division, *Still v. Canada (Minister of National Revenue)* (1997), 221 N.R. 127, 154 D.L.R. (4th) 229, 98 C.L.L.C. 240-001, [1998] 1 F.C. 549, 1997 CarswellNat 2193, 1997 CarswellQue 2452, 1997 CarswellNat 2702, § 48.
[1104] *Ibid.*, § 50.
[1105] See Supreme Court of Canada, *Abrahams v. Canada (Attorney General)*, (1983) [1983] 1 S.C.R. 2.
[1106] Supreme Court of Canada, *Granovsky v. Canada (Minister of Employment & Immigration)* (2000), [2000] 1 S.C.R. 703, § 9.
[1107] Service Canada, "General information about the Canada Pension Plan," Service Canada. Available at: http://www.servicecanada.gc.ca/eng/isp/cpp/cppinfo.shtml.

principle of illegality of contracts and hence the *bona fide* test to the Canada Pension Plan, it will have the following consequences. The competent administration or court will either reach the conclusion that the irregular migrant worker was aware of acting illegally when working in Canada without employment authorisation or that the irregular migrant worker was not aware of it. In the former case no relief will be granted, the employment contract will be deemed invalid and hence there will be no pensionable employment, no duty to contribute to the CPP and no entitlement to CPP benefits. In the latter case the reverse will apply: the contract of service will be legal, the employment will be deemed pensionable and the employer will be obliged to pay the CPP contributions in arrears. Once the contributions have been paid, entitlement to benefit will arise.

Employers do not usually declare work by irregular migrant workers, not being particularly keen to declare that employees are working for them whom they are not allowed to employ. Irregular migrant workers likewise want to avoid contact with the public authorities due to their violation of immigration law. The fact that the employment of an irregular migrant worker is not declared, *i.e.* that irregular work is at the same time undeclared work, would to my mind not relieve the competent administration of court from applying the *bona fide* test. Even in the case of undeclared work, the possibility cannot be completely excluded that the employee was not aware of acting illegally when working in Canada without employment authorisation.

One can also ask whether declared work by irregular migrant workers can take place at all. Can employers make valid contributions to the CPP, on the basis of which irregular migrant workers could possibly claim a benefit? A look at the administrative procedures shows that the Social Insurance Number (SIN) plays a decisive role in this respect. Employers have to remit CPP deductions to the Canada Revenue Agency between a few days and three months after the payment of the salaries.[1108] This money transfer must be accompanied by a Remittance Voucher, including information on the total amount of deductions and the number of employees concerned. Once a year, employers have to provide information on the individual employees by filing T4 slips and a T4 summary. For the filing of a T4 slip, the Social Insurance Numbers of the employees are required. Employers must make "a reasonable effort to obtain the number from the person", otherwise they will be subject to fines.[1109] However, if employers cannot obtain a SIN, they must file the T4 slips without the number.[1110] The consequences for an employee are that contributions without a SIN or with an incorrect SIN are not assigned to the individual's Record of Earnings.[1111] As analysed in subchapter 6.2.1., neither category A nor category B workers can apply for a SIN. Moreover, neither category of immigrant worker can usually hold a valid SIN. Only under very exceptional circumstances, such as loss of permanent residence status or expiry of work permit while still having a regular residence status, is it possible to engage in unlawful work and hold a

[1108] The due date depends on the total of CPP contributions, EI premiums and income tax deducted by the employer two calendar years ago. See also subchapter 3.3.
[1109] See § 237 (2) (a) and § 162 (5) Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.). See also Canada Revenue Agency, "Social Insurance Number legislation that relates to the preparation of information slips," Circular 82-2R2, p. 2. Available at: http://www.cra-arc.gc.ca/E/pub/tp/ic82-2r2/ic82-2r2-e.html.
[1110] Canada Revenue Agency, *Employers' guide: Filing the T4 slip and summary*, doc. no. RC4120 (E) (Ottawa: Canada Revenue Agency, 2010), p. 8.
[1111] See Service Canada, "General information Canada Pension Plan,"; Canada Revenue Agency, *Employers' guide*, p. 8; or Service Canada, *Social Insurance Number Code of Practice*, p. 32 ff. See also § 95 in conjunction with § 98 CPP.

valid SIN. Therefore, even if contributions with respect to irregular migrant workers were made, they could not normally be attributed to an individual's Record of Earnings.[1112]

Incidentally, a Social Insurance Number is also required for the application for CPP benefits. This is explicitly stipulated in section 52 CPP Regulations. Without a valid SIN an application will not be processed.[1113] Case law has confirmed that without a SIN a person cannot claim benefits under the OAS Act.[1114]

Let us finally turn to the question whether there is an obligation for employers of irregular migrant workers to contribute to the CPP. We have already mentioned above that the *bona fide* test can only take place *ex post*. From this it becomes clear that the question whether there is an obligation cannot be answered in advance. Employers are prohibited from employing irregular migrant workers. If they nevertheless do so, only then one can ask whether a valid contract of service was concluded and whether there was an obligation to contribute to the CPP.

7.2.2. Nationals who engage in undeclared work

The crucial criteria to be fulfilled for entitlement to a CPP retirement pension are age and contributions to the plan. As regards the latter, we have heard that the making of at least one year's employee's contribution on the basis of pensionable employment is necessary in order to qualify for a CPP retirement pension.[1115]

Employers are under an obligation to deduct the employee's CPP contribution from his or her salary and to remit it, together with the employer's CPP contribution, in due time to the Canada Revenue Agency.[1116] This remittance must be accompanied by documentation which indicates the total amount of deductions and the number of employees. Once a year, individual information on the employees has to be provided by the employer. As outlined in subchapter 3.3., by definition this does not happen with respect to undeclared workers: CPP contributions are not withheld from wages and are not remitted to the Canada Revenue Agency. Consequently, employees whose work has never been declared for social insurance purposes, including CPP purposes, are not entitled to a CPP retirement pension. Or to be more precise, periods during which nationals engage in undeclared work, cannot be taken into consideration for determining eligibility to a CPP retirement pension.

One can ask how this situation would change if previously undeclared work were then declared, for instance following a social inspection or a benefit application. In such cases, the Canada Revenue Agency has to make an assessment regarding the insurability of the work done. If it can be established that work was performed under conditions of pensionable employment, even though

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[1112] See Human Resources and Skills Development, "Retirement Pension," Policy document, unpublished; Human Resources and Skills Development, "Applications – General," Policy document, unpublished, § 5.2.1; Human Resources and Skills Development, "Section 2-6 – Survivor's Pension," Policy document, unpublished, § 7A.
[1113] See for instance Human Resources and Skills Development, "Section 2-6 – Survivor's Pension," § 7A.
[1114] Tax Appeal Board, *Kroeker v. Minister of National Revenue* (1969), 1969 CarswellNat 146, [1969] Tax A.B.C. 518.
[1115] § 44 (1) in conjunction with § 2 (1) CPP.
[1116] § 21 (1) CPP.

it was not declared, the employer will be liable to pay contributions in arrears in addition to fines and interest.[1117,1118] This payment then counts as contributions for the CPP.

However, this all depends on whether pensionable employment can be established. In this context one can ask whether a contract of service which was formed or executed in breach of Canada Pension Plan provisions is legal, so that pensionable employment could arise at all. In other words, does the fact that the purpose or performance of the employment contract is contrary to certain legal requirements, *i.e.* the Canada Pension Plan obligation to pay contributions, or to public policy, entail the illegality of that contract? We will address this question in detail below in the context of Canada's Employment Insurance, in the chapter on unemployment. Here we will summarise the main results and put them in relation to the Canada Pension Plan.

To start with, the doctrine of illegality of contracts in general and the situation for undeclared workers in particular is far from clear in Ontario and Canada. Therefore the following statements are only appraisals.

First, it is unlikely that there is statutory illegality of employment contracts when employer and employee agree upon the evasion of CPP contributions. Although the Canada Pension Plan requires contributions to be made and provides for penalties in case of non-compliance, I see no "clear implication or necessary inference from the statute that contracts which infringe it should be void".[1119] On the contrary, the Canada Pension Plan has an interest in there being a valid contract of service in order to provide statutory protection against the risk of old age to the employee and so as not to render obligations under the Canada Pension Plan impossible.

Second, it is likely that such employment contracts would be contrary to public policy and hence illegal. Still, Canadian courts have in recent years modified the rigid doctrine of illegality of contracts and provided for the possibility of relief. This could pave the way for employment contracts which have been concluded with the intention of not declaring the work to be regarded as partially legal, by disregarding the invalid non-declaration understanding. However, this issue has still to be clarified by case law.

Third, in situations where employer and employee have entered into a 'normal' employment contract and where the employer subsequently omits to declare the work and pay contributions, it is likely that no issue of validity of contracts arises – irrespective of whether the employee knew or should have known about it.

[1117] See §§ 21 to 23 CPP.
[1118] Incidentally, the employee would then be subject to personal income tax for all the years of undeclared work.
[1119] Gerald Henry Louis Fridman, *The law of contract in Canada*, 4. ed. (Toronto: Carswell, 1999), p. 369.

8. The social risk of death

In the event of death, the Canadian social security system provides financial benefits in order to make up for the loss of income for dependants of the deceased. A distinction must be made between work-related death, *i.e.* death as the result of an occupational injury or disease, and death in general. The latter is covered by the Old Age Security (OAS) programme and the Canada Pension Plan (CPP)/Quebec Pension Plan (QPP); the former by federal, provincial or territorial government workers' or employees' compensation programmes.

8.1. Old Age Security (OAS)

8.1.1. Irregular migrant workers

The OAS programme offers low-income seniors whose spouse or common-law partner has died financial assistance in order to alleviate difficulty. This monetary benefit is called Allowance Payable to Survivors. The entitlement criteria relevant to irregular migrant workers are, first, Canadian citizenship/legal presence at the time when the application is approved or when the person last lived in Canada,[1120] and, second, at least ten years of residence in Canada.[1121] Both these criteria must be fulfilled by the survivor. There is no requirement with respect to the deceased person.

We have already discussed the issues of legal presence and residence with respect to irregular migrant workers in the chapter on 'The social risk of old age'. Since these criteria are identical for an OAS old age pension and for an OAS Allowance Payable to Survivors, we can draw the following conclusion.

The explicit requirement of legal presence, *i.e.* being lawfully in Canada pursuant to Canadian immigration law, prevents workers residing unlawfully from being eligible for the Allowance Payable to Survivors. Periods of actual residence in Canada of former category A workers may, in principle, be counted as residence for OAS purposes. However, an analysis of case law has suggested that it is difficult to prove the existence of sufficient residential ties with Canada during such periods of unlawful residence. Category B workers may qualify for the Allowance Payable to Survivors due to their lawful presence in Canada, but to do so they have to prove at least ten years of residence in Canada. Migrants who are residing lawfully but working unlawfully have the status of visitors for visit, study or work purposes, holders of a temporary resident permit or persons subject to a conditional or unenforceable removal order. Periods of residence under these statuses may in principle be taken into account when determining the residence history of the applicant. In practice, however, the applicant might face problems with providing evidence that during these periods of time he/she made his/her home and ordinarily lived in Canada.

It is important to mention that the benefit rate is based on the annual income of the survivor. This means that survivors with earnings above the prescribed limit are ineligible for a survivor's

[1120] § 21 (2) OAS Act in conjunction with § 22 OAS Regulations.
[1121] § 21 (1) (b) OAS Act. The Allowance Payable to Survivors is not exportable beyond a period of six months of absence. See § 21(9) (b) OAS Act.

benefit. By definition, irregular migrant workers have income from work, so a category B worker may only be entitled to an Allowance Payable to Survivors if his/her income is below the relevant threshold.

We have already mentioned that there are no requirements with regard to the deceased spouse or common-law partner – except that the person must have passed away. As a consequence, survivors of irregular migrant workers may also be eligible for an OAS survivor's pension.

8.1.2. Nationals who engage in undeclared work

As is the case with the OAS retirement pension, nationals who perform undeclared work may qualify for an OAS Allowance Payable to Survivors if they are resident for at least ten years in Canada. Their Canadian citizenship allows them to pass the citizenship/legal presence requirement. The passing of the residency requirement depends on their actual residence in the country.

Unlike the basic OAS old age pension rate, the OAS survivor's pension rate depends on the applicant's income from work or other relevant sources.[1122] This means that applicants or beneficiaries with income exceeding the prescribed limits are no longer entitled to a benefit. Canadians performing undeclared work *de iure* qualify for an OAS Allowance Payable to Survivors, as long as their income from work does not exceed the relevant threshold. In practice, however, they will not declare their income for OAS purposes and hence may succeed in collecting benefits to which they are not legally entitled. Here it is important to mention that the income for OAS purposes is assessed on the basis of the income tax return[1123] and that the income of employees whose work is not declared for social insurance purposes is automatically not declared for income tax purposes either. In more detail, the Canada Revenue Agency, which administers the federal income tax system, is also mandated to collect Canada Pension Plan (CPP) and Employment Insurance (EI) contributions. Not declaring work with respect to the CPP and the EI while reporting income for income tax purposes is simply impossible. An employer has to file an information return once a year, consisting of the T4 slips and the related T4 summaries, in which as well as the employment income earned, income tax, CPP contributions and EI premiums deducted are reported.[1124] As soon as an employer submits income tax information on a particular employee, the Canada Revenue Agency, in its role as a social security authority, is aware of this employee. This means that nationals who are undeclared workers, as defined for the purpose of our research, are also not paying personal income tax with respect to their work in Canada. It also means that this income from undeclared work is not taken into consideration for the calculation of the OAS survivor's benefit rate.

For the sake of completeness it should be mentioned that survivors of a Canadian who worked in the black economy may qualify for benefits independently of this fact.

[1122] This relates for instance to certain income replacement benefits, to investment income or to rental income.
[1123] If an income tax return is not available, the income test is based on an explicit statement of income by the applicant.
[1124] See also subchapter 3.3.

8.2. The Canada Pension Plan (CPP)

8.2.1. Irregular migrant workers

The social insurance Canada Pension Plan (CPP) offers three types of survivor's benefits: the death benefit,[1125] the survivor's pension[1126] and the orphan's pension.[1127] For all three benefits it is necessary for the deceased contributor to have paid sufficient contributions to the plan.[1128] The minimum contributory requirement is at least three years.[1129] There are no citizenship/immigration status requirements and no residence requirements[1130] – neither with respect to the deceased contributor, nor with respect to the qualifying survivor.

While analysing the access of irregular migrant workers to the CPP retirement pension, we have already dealt with the question whether this group may make a contribution to the CPP. The conclusion was that the lack of employment authorisation in Canada is likely to result in an invalid employment contract, which means that the work cannot be regarded as insurable. Only when it can be established *ex post* that the foreigner acted in good faith when he/she violated the Immigration and Refugee Protection Act may insurance be possible. What is more, the lack of a valid SIN usually prevents employers of irregular migrant workers from making a correct and assignable contribution. As a consequence, survivors of deceased irregular migrant workers usually cannot qualify for a CPP survivor's benefit.

The situation where the survivor is an irregular migrant worker and the deceased was a contributor to the Canada Pension Plan is different. Irregular migrant workers are able to fulfil all legal requirements for entitlement to survivor's benefits: to be an heir or to be the one who paid the funeral costs (death benefit), or to be a surviving relative (death benefit, survivor's pension and orphan's pension).

Incidentally, section 52 CPP Regulations requires the Social Insurance Number of both the applicant for CPP death, survivor's and orphan's benefits and the deceased contributor to be furnished to the competent authorities, in the application or when requested to do so by the Minister. The department Human Resources and Skills Development Canada has established a procedure to be followed in case no SIN is produced, which includes an electronic search for the SIN, contact with the applicant and the provision of an application form for a SIN to the applicant.[1131] If a valid SIN still cannot be produced,[1132] which will be the case for irregular

[1125] The death benefit is a one-time payment that should primarily be paid to the estate of a deceased CPP-contributor. If there is no estate, the CPP payment will be paid on application to the person who incurred the funeral expenses, the spouse or common-law partner or the next of kin, in that order.
[1126] The survivor's pension grants a basic income for the surviving spouse or the common-law partner of a deceased contributor. The spouse or common-law partner must be at least fifty-five years of age at the time the contributor died, support a dependent child of the deceased person or be disabled.
[1127] The orphan's pension is intended to provide basic financial support for dependent children of the deceased. Children are considered to be dependent when they are either under the age of eighteen or, in case of full-time studies, between eighteen and twenty-five, or disabled.
[1128] § 44 (1) Canada Pension Plan.
[1129] For all details with respect to the minimum contributory requirement see § 44 (3) CPP.
[1130] Like all Canada Pension Plan benefits, CPP survivor benefits are exportable. Payments are made anywhere in the world, provided the eligibility criteria are fulfilled.
[1131] See for instance Human Resources and Skills Development, "Section 2-6 – Survivor's Pension," § 7A.

migrant workers, the department advises its employees not to insist on the provision of a SIN, unless the information is needed for administrative purposes.[1133] There is a need for administrative purposes, if the benefit is related to a person's Record of Earnings.[1134] This would be the case for a deceased person who was a contributor to the Canada Pension Plan. However, there is no such administrative need with respect to the survivors.

8.2.2. Nationals who engage in undeclared work

We mentioned above that in order to open a right to survivor's benefits, the deceased must have been a contributor to the Canada Pension Plan for a specified number of years. Nationals who engage in undeclared work, as defined for the purposes of our research, are not contributors to the Canada Pension Plan. This has already been concluded in the context of the CPP retirement pension. Therefore, periods of undeclared employment cannot be taken into account when determining the minimum qualifying period of the deceased with regard to survivor's benefits. A survivor can only qualify for benefits if the deceased had enough years of contributions from declared work.

The question of retrospective declaration of work has also been discussed with respect to CPP retirement benefits. We concluded that if it can be established that pensionable work did indeed take place, the employer will have to pay CPP contributions in retrospect. This could allow the survivor of a Canadian black-economy worker to qualify for CPP survivor's benefits. However, we also pointed to the fact that it is not certain whether a contract of service which includes an agreement to evade CPP and other contributions and income tax will be valid. The doctrine of illegality of contracts, in particular with respect to undeclared work, is far from clear. In the chapter on 'The social risk of unemployment' below, our analysis based on case law will show that decisions in two directions are possible: either that the evasion agreement renders the whole employment contract null and void *ex tunc* or that the illegality of the evasion agreement does not affect the validity of the rest of the employment contract.

In contrast to this, there are no obstacles if the survivor is a Canadian undeclared worker and the deceased was a contributor to the Canada Pension Plan. The fact that a Canadian is performing undeclared work does not prevent him or her from being the surviving spouse, common-law partner, child, other kinsman, or payer for the funeral of a deceased CPP-contributor. This means that surviving undeclared workers may qualify for benefits, simply because they were related to the deceased or paid the funeral costs.

[1132] The validity of a SIN is checked through a number of security mechanisms, which are not made public. See Human Resources and Skills Development, "Social Insurance Number Validation," Policy document, unpublished, § 5.2.

[1133] *Ibid.*, § 5.1.

[1134] *Ibid.*, § 2 and § 5.1. See also Tax Appeal Board, *Kroeker v. Minister of National Revenue*.

8.3. Ontario Workers' Compensation

8.3.1. Irregular migrant workers

Ontario's Workplace Safety and Insurance Act provides for three types of benefit for survivors of a fatal work-related injury or disease: a lump sum payment,[1135] a monthly benefit,[1136] and the coverage of burial expenses. The relevant entitlement criterion for all three benefits is that the deceased worker was employed by an insured employer.[1137] A worker is defined as a person "who has entered into or is employed under a contract of service or apprenticeship".[1138] Accordingly, an employer means "every person having in his, her or its service under a contract of service or apprenticeship another person engaged in work in or about an industry".[1139] Workers' Compensation insurance, in general, applies to employers engaged in the industries listed in Schedule 1 and 2 of Ontario Regulation 175/98 to the Workplace Safety and Insurance Act.

The decisive point is thus that the deceased person had an employment contract with an employer covered by Workers' Compensation insurance. Here the question arises whether a foreigner who works in Canada though prohibited from doing so under the Immigration and Refugee Protection Act could have entered into a contract of service for the purpose of Ontario's Workers' Compensation insurance?

The definition of worker under subsection 2 (1) Workplace Safety and Insurance Act ("person who has entered into or is employed under a *contract of service* or apprenticeship"), resembles the crucial definitions of employment under subsection 2 (1) Canada Pension Plan ("performance of services under an express or implied *contract of service* or apprenticeship", see above, subchapter 7.2.1.) and of insurable employment under subsection 5 (1) (a) Employment Insurance Act ("employment in Canada by one or more employers, under any express or implied *contract of service* or apprenticeship", see subchapter 10.1.1.) [emphases added by the author]. However, one should not be tempted to draw conclusions from our findings regarding the Canada Pension Plan and the Employment Insurance for Ontario's Workers' Compensation programme, since the interpretation of the term 'contract of service' differs between the two types of federal insurance on the one hand and the provincial programme on the other. Employee status under the CPP and EI is an indicator in determining an individual's status as a worker under the Workplace Safety and Insurance Act, but it is only one amongst many.[1140]

In the leading decision on the access of foreigners who are working unlawfully to unemployment benefits, *Still v. Canada*, the Federal Court of Appeal argued that employment contracts with individuals who lack the required work permit should not *automatically* be declared illegal, because so many statutes predicate entitlement on an existing contract of service. In doing so the court asked: "What if the applicant had been injured on the job? Would an Ontario court conclude

[1135] The lump sum payment is granted to surviving spouses or common-law partners or, in their absence, to surviving dependent children of the deceased worker.
[1136] The monthly benefit assists dependants, such as spouses or common-law partners, children, parents of children etc.
[1137] See § 48 in conjunction with § 11 (1) WSI Act.
[1138] § 2 (1) WSI Act.
[1139] § 2 (1) WSI Act.
[1140] Ontario Workplace Safety and Insurance Board, *Operational Policy Manual: Workers and independent operators*, doc. no. 12-02-01 (Toronto: Workplace Safety and Insurance Board, loose-leaf, 2007).

that she was not entitled to benefits under the Workers' Compensation Act of that province?"[1141] This in itself may be seen as an indication that irregular migrant workers and their survivors may rely on Workers' Compensation benefits – an indication which will be confirmed in the following.

Unlike under the unemployment insurance regime, just a few cases concerning injured or deceased foreigners without a work permit and possible entitlements to Ontario's Workers' Compensation benefits have been brought before court. This might have to do with the fact that, as will be demonstrated in the following, the Workplace Safety and Insurance Board, as the first instance, usually grants compensation. The Workplace Safety and Insurance Appeals Tribunal[1142] (formerly the Workers' Compensation Appeals Tribunal) has thus only had to deal with this issue in a very few cases – and has not paid very close attention to it.

From the documented case law it is obvious that the board generally grants Workers' Compensation benefits to injured irregular migrant workers or survivors of deceased irregular migrant workers. In decision no. 519/91, the deceased worker was a migrant who was both residing and working unlawfully, and had obtained someone else's Social Insurance Number card. The tribunal noted: "[...] the Board granted the worker's widow entitlement to funeral expenses and survivors' benefits [...]. The entitlement is not at issue".[1143] In other cases too, survivors of irregular migrant workers or injured irregular migrant workers were attributed Workers' Compensation benefits.[1144] The lack of a work authorisation or a residence authorisation at the time of the industrial accident has never come up for discussion.

However, the fact that the board grants Workers' Compensation cash benefits does not resolve the question from a legal point of view. Does it mean that in the opinion of the board a contract of service concluded with a foreigner who is prohibited by law from working in Canada is automatically to be considered as a legal contract of service? Or does it mean that the legality of the contract is not a requirement after all? In a recent case about a fatal work-related car accident involving a foreigner who lacked an employment authorisation, the WSI Appeals Tribunal candidly noted that although the issue of irregular labour migrants' entitlement to benefits has been raised in some other cases, "it has not been adjudicated in terms which would assist the Panel".[1145] The panel likewise failed to adjudicate on the issue. Instead it declared that "[a]s will be seen from our determination of the status of the [surviving] families as 'dependents' of the deceased passengers, which is set out below, this 'illegal immigrant' question and its possible impact on the 'worker' status of [one of the deceased workers] have been rendered moot or academic in this application and, accordingly, the Panel has decided not to make any ruling on [this issue]".[1146]

[1141] Federal Court of Canada, Appeal Division*, Still v. Canada*, § 43.
[1142] The Workplace Safety and Insurance Appeals Tribunal (WSIAT) is the final level of appeal concerning disputes under Ontario's Workplace and Insurance Act.
[1143] Workers' Compensation Appeals Tribunal, Decision no. 519/91, 23 December 1991.
[1144] See for instance Workplace Safety and Insurance Appeals Tribunal, Decision no. 42/06, 14 August 2006, 2006 ONWSIAT 1781; Workplace Safety and Insurance Appeals Tribunal, Decision no. 1648/05, 27 February 2009, 2009 ONWSIAT 477; or Workplace Safety and Insurance Appeals Tribunal, Decision no. 446/08, 19 May 2009, 2009 ONWSIAT 1229.
[1145] Workplace Safety and Insurance Appeals Tribunal, Decision no. 1921/06, 4 March 2008, 2008 CarswellOnt 4079, § 93.
[1146] *Ibid.*

For the sake of completeness it should be mentioned that a survivor's lack of residence or work authorisation in Canada likewise does not curtail entitlement to benefits. In other words, no legal provision under the Workplace Safety and Insurance Act explicitly or implicitly requires a regular status under Canadian immigration law on the part of the surviving dependant. It is also worth mentioning in this context that survivor's benefits under the Ontario's Workers' Compensation insurance are also paid out outside the province – within or outside Canada.[1147]

Concerning the question whether irregular migrant workers and their employers must contribute to the financing of Ontario's Workers' Compensation programme, we can refer to some of our findings in subchapter 3.3. There we wrote that most of Ontario's employers are required to affiliate with the provincial Workers' Compensation programme. For those employers who are engaged in industries listed in Schedule 1 of Ontario Regulation 175/98 to the Workplace Safety and Insurance Act, it is obligatory to pay contributions. However, contributions only have to be paid by employers, not by the workers. Employers are prohibited from requiring or permitting workers to contribute to the Workers' Compensation insurance.[1148] The premium rate depends on the health and safety risk of the employer's type of business, the size of the employer's payroll and the employer's health and safety record.[1149] The fact that an irregular migrant worker is regarded as a worker for benefit entitlement purposes makes it very likely that this is also the case for contribution purposes. If so, then Schedule 1 employers would be obliged to include the earnings of irregular migrant workers in the payroll when calculating their Workers' Compensation premiums. Since Schedule 1 employers usually only have to report the total amount of wages, there are no practical obstacles to including the salary of irregular migrant workers. As illustrated, such obstacles do arise under other social security programmes, where information on the single employee, such as the Social Insurance Number, has to be produced when paying contributions.

8.3.2. Nationals who engage in undeclared work

As illustrated above, survivor's benefits under the Workplace Safety and Insurance Act are paid to workers employed by insured employers. Insured employers are defined under the Workplace Safety and Insurance Act and either must mandatorily or can voluntarily affiliate with the WSI Board.[1150] We have defined undeclared work as work performed without meeting the obligation to inform the social security authorities. This has the implication that nationals who engage in undeclared work are by definition employed by a mandatorily insured employer.

In the context of mandatorily insured employers, the non-declaration of work does not prevent an individual from being considered as a 'worker' for Ontario's Workers' Compensation purposes. Case law makes it clear that the failure of employers to register with the WSI Board does not exclude the worker and survivors from protection under the Workers' Compensation scheme.[1151]

[1147] See Ontario Workplace Safety and Insurance Board, *Operational Policy Manual: Leaving the province/country*, doc. no. 15-06-07 (Toronto: Workplace Safety and Insurance Board, loose-leaf, 2008).
[1148] § 95.1 WSI Act.
[1149] § 81 (5) WSI Act and WSI Board policies.
[1150] See subchapter 3.3.
[1151] See, among other decisions, Workers' Compensation Appeals Tribunal, Decision no. 525, 19 March 1987, 1987 WL 718237; Workers' Compensation Appeals Tribunal, Decision no. 965/87I, 20 May 1988, 8 W.C.A.T.R. 214; Workplace Safety and Insurance Appeals Tribunal, Decision no. 756/02, 30 December 2002, 2002 CarswellOnt 8638;

For instance, in decision no. 838/05 the tribunal dealt with an industrial accident in the course of employment which was not registered with the WSI Board. The panel held that "it is now well established in Tribunal case law that the question to be asked is not whether an employer completed the necessary paperwork to start its coverage but whether at the time of the accident, it was engaged in an industry capable of being classified in Schedule 1".[1152] And in decision no. 756/02 the panel noted that "Tribunal decisions have generally held that the relevant issue, in determining whether workers or employers are covered by the Act, is whether an employer's business falls within those listed in Schedule 1 or Schedule 2 and not whether it is registered with the Board".[1153]

The origins of this case law go back to the 1980s.[1154] The irrelevance of compliance with the registration procedure for protection under the Workers' Compensation programme was legally argued as follows: the Workers' Compensation law stipulates that all employers engaged in an industry included in Schedule 1 are liable to pay contributions.[1155] This provision does not require an employer to register with the board in order to be included in Schedule 1. And the authority to determine which industry is to be included rests, after all, with the WSI Board alone.[1156]

Many of these cases have been brought before the WSI Appeals Tribunal by employers or insurers who have had an interest in injured, ill or deceased workers, though not registered, being considered as workers under the Workers' Compensation law. This is because once the Workplace Safety and Insurance Act is applicable, the worker's right to commence an action against the employer or insurer is taken away or the amount that an employer or insurer would be liable to pay in an action is limited by Workers' Compensation law.[1157]

It has already been outlined in subchapter 3.3. how employers who fail to affiliate with the WSI Board, who fail to keep an accurate record of all wages, or who fail to file the annual statement setting out the total wages commit an offence and are liable to either a fine or imprisonment.[1158] In addition, employers who do not pay premiums when they become due are liable to pay interest on the outstanding premiums.[1159] It is worth mentioning here that employers who have not paid premiums (in due time) at the moment that a labour accident occurs may be required to pay the WSI Board the amount or the capitalised value of the benefits payable.[1160] In other words, survivors of undeclared workers who sustained a fatal labour accident receive their benefits from the WSI administration and the WSI administration, in turn, may oblige the employer to reimburse the benefits. The WSI Act leaves the decision on full or partial reimbursement to the WSI Board. When the WSI Board considers it appropriate, there may be no reimbursement or only partial reimbursement.[1161]

Workplace Safety and Insurance Appeals Tribunal, Decision no. 838/05, 30 May 2005, 2005 CarswellOnt 10335; Workplace Safety and Insurance Appeals Tribunal, Decision no. 334/07, 5 March 2007, 2007 CarswellOnt 9162.

[1152] Workplace Safety and Insurance Appeals Tribunal, Decision no. 838/05, § 21.

[1153] Workplace Safety and Insurance Appeals Tribunal, Decision no. 756/02, § 48.

[1154] See Workers' Compensation Appeals Tribunal, Decision no. 525.

[1155] See § 4 and § 5 outdated Workers' Compensation Act, R.S.O. 1990, c. W.11, and § 88 WSI Act.

[1156] See § 69 (2) (a) and § 75 (2) (a) outdated Workers' Compensation Act, and § 118 (2) 1. WSI Act.

[1157] See § 31 WSI Act.

[1158] § 151 (1) and § 152 (1) in conjunction with 158 (1) WSI Act.

[1159] § 89 (1) WSI Act.

[1160] § 89 (2) WSI Act.

[1161] § 89 (3) WSI Act.

Needless to say, undeclared workers who are surviving dependants of a fatal labour accident or an occupational disease are also eligible for benefits. The fact that the survivor works, whether in the formal or in the informal economy, has no impact either on the survivor's entitlement to survivor's benefits or on their amount.

9. The social risk of incapacity for work

The risk of becoming incapacitated for work and losing one's livelihood is covered, in the main, by three types of Canadian social insurance: Employment Insurance (EI), the Canada Pension Plan (CPP)/Quebec Pension Plan (QPP) and the various workers' compensation programmes. These types of statutory insurance address both short-term sickness and long-term disability. EI provides sickness benefits; the workers' compensation programmes offer short-term and long-term incapacity for work benefits; and the CPP/QPP offers disability benefits. Whereas workers' compensation programmes only take into account incapacity resulting from occupational accidents or diseases, the CPP/QPP and EI cover cases of incapacity regardless the cause. What is more, EI law also provide for incapacity for work benefits during periods of maternity and paternity.

9.1. Employment Insurance (EI)

9.1.1. Irregular migrant workers

Canada's Employment Insurance (EI) provides, as well as regular unemployment benefits, sickness benefits for employees who are temporarily[1162] incapable of work and maternity and parental benefits for employed parents who are off work because of pregnancy or caring for a new-born or adopted child. The EI Act says nothing about the implications for Employment Insurance of unlawful work by foreigners, and unlawful residence is not issue in the EI Act either.[1163]

Entitlement to sickness, maternity and parental benefits depends on the ability to show a significant attachment to the work force, *i.e.* on having worked sufficiently long in insurable employment.[1164] For entitlement to sickness benefits there is another qualifying criterion which may be relevant for our research: the claimant must be unable to work because of illness, injury or quarantine and must demonstrate that he or she would be otherwise available for work.[1165] The condition that the claimant must demonstrate that he or she would be otherwise available for work does not apply to maternity or parental benefits.

First it must be asked whether irregular migrant workers can be employed in insurable employment. This question will be addressed in detail below in the discussion in chapter 10 of unemployment benefits under the Employment Insurance. Here we can summarise by saying that the performance by irregular migrant workers of work in Canada, although this is explicitly prohibited under Canadian immigration law, may render the employment contract illegal and, as a consequence, mean that the employment is not insurable under the EI Act. The Federal Court of Appeal held with respect to the Employment Insurance that whenever employment contracts are concluded with foreigners who do not possess the required work permit, relief may be refused and thus contracts may be declared illegal, where it would be contrary to public policy. Whether or not

[1162] The benefit payment ends when the conditions for the claim cease to exist, but no later than fifteen weeks after the beginning of the benefit period.
[1163] It is worth mentioning that residence in Canada is not relevant for the enjoyment of maternity or parental benefit, which in principle can be exported. The situation for sickness benefits is different. As a rule, these cannot be exported. See § 37 (b) EI Act.
[1164] Usually the claimant must have worked in insurable employment for six hundred hours within the last fifty-two weeks or since the last claim. See § 6 (1), 7 and § 7.1 EI Act and § 93 EI Regulations.
[1165] See § 18 (b) EI Act and § 40 (4) EI Regulations.

a contract of service is declared illegal in a specific case has to be assessed according to the claimant's good faith. Only when the work in contradiction to Canadian laws was carried out *bona fide* is relief granted. From subsequent case law it has become clear that foreigners who were familiar with immigration rules, *e.g.* they had previously possessed an employment or student authorisation, are usually not considered to have acted in good faith. Exceptions apply to situations where actions by the immigration authorities mislead the persons concerned, such as information provided by official publications or immigration officers, and to situations where the foreigner's status under immigration law changes. However, the case law here has only dealt with persons who had a lawful residence status in Canada. For foreigners without such a status it appears to be extremely difficult to demonstrate good faith.

Concerning sickness benefit, foreigners without the permission to work in Canada may face another obstacle to entitlement to benefit: proof that they would otherwise be available for work, *i.e.* proof that availability for work is not restricted for reasons other than sickness. To what extent is the restriction resulting from the lack of a work permit or residence authorisation taken into consideration in determining a person's availability? Case law has to date not addressed this question in the context of sickness benefits under EI. In our analysis of unemployment benefits under EI,[1166] we will see that lower-instance case law has held that the lack of employment authorisation is in principle a handicap for availability for work. Nevertheless, case law has considered a foreigner without a work permit to be available for work if he or she can establish that he or she seeks employment for which he or she could reasonably expect to obtain a work permit. The question is now whether these findings are also applicable to sickness benefits under the EI. To my mind, the finding that foreigners without a work permit are in principle unavailable for work in Canada is also valid in the context of sickness benefits. I take this point of view because the EI Act works with only one concept of availability for work for both unemployment and sickness benefits.[1167] The answer to the question whether the test for relief is also applicable to sickness benefits appears to be different. The requirements set out by case law would be rather difficult for a sick person to meet. A sick employee is not usually looking for work. Therefore it is extremely unclear to what extent the test for unemployment benefits can be applied to sickness benefits.[1168]

To sum up, irregular migrant workers may only exceptionally qualify for sickness, maternity or parental benefits under Canada's Employment Insurance. This concerns irregular migrant workers for whom it is established that they worked *bona fide* in Canada. Where foreigners have worked regularly in Canada, but, at the time of application or shortly thereafter, lose their authorisation to stay or to work in Canada, entitlement to benefits may be possible. This is at least true for

[1166] See below, chapter 10.

[1167] See also Service Canada, *Employment Insurance: Digest of benefit entitlement principles*, § 11.3.0. Available at: http://www.servicecanada.gc.ca/eng/ei/digest/table_of_contents.shtml.

[1168] The availability for work requirement likewise cannot be avoided in the exceptional case of export of benefits. We have already mentioned that, as a rule, the export of EI sickness benefits is not possible. See § 37 (b) EI Act. An exception applies to situations where beneficiaries undergo medical treatment abroad. The question of whether the person would otherwise be available for work is still relevant during the period of absence. See Service Canada, *Employment Insurance: Digest*, § 11.6.3. Another exception applies to the enjoyment of benefits in the United States. However, in this case too, the requirement of availability for work cannot be circumvented. See 55 (6) (a) (i) EI Regulations and Article VI of the Agreement between Canada and the United States respecting Unemployment Insurance, signed on 6 and 12 March 1942.

maternity or parental benefits, which incidentally can also be enjoyed abroad.[1169] Whether this is also true for sickness benefits is rather questionable. There the requirement that the availability for work should not be restricted for reasons other than sickness is likely to make it impossible for foreigners without work authorisation to qualify for benefits.

9.1.2. Nationals who engage in undeclared work

As is the case for irregular migrant workers, the crucial entitlement criterion to be fulfilled by Canadian undeclared workers is that of having worked sufficiently long in insurable employment. Whether or not contributions have been paid to Employment Insurance is irrelevant for entitlement to benefits. The only requirement is that work in insurable employment should have taken place for the minimum period of time. Nationals who engage in undeclared work are by definition employed in insurable employment. This is because we have defined undeclared work as work performed without the social security authorities being informed, *although an obligation to inform them existed*. Since the obligation to declare work for EI purposes only arises if the employee engages in insurable employment, the group under investigation is by definition working in insurable employment.

However, in chapter 10 on unemployment we ask whether the fact that laws or public policy are violated by the non-payment of premium impacts on the validity of the employment contract and changes the position that an undeclared worker is deemed to work in insurable employment. We find that the doctrine of illegality of contracts, in particular with respect to undeclared work, is far from clear. If employer and employee conclude an employment contract and agree to evade EI premiums, decisions in two directions are possible: either that the evasion agreement renders the whole employment contract null and void *ex tunc* or that the illegality of the evasion agreement does not affect the validity of the rest of the employment contract. In the first case, no insurable employment would have taken place. If the employer and employee conclude a 'normal' employment contract and the employer subsequently omits to declare the work and to pay contributions, it is likely that no issue of validity of contracts will arise – irrespective of whether the employee knew or should have known about it.

We will also show below how a benefit application by an undeclared worker will be handled in practice. Here is a short summary. Once the Employment Insurance Commission, which is in charge of determining eligibility for EI benefits, or the Canada Revenue Agency, which is in charge of collecting EI premiums, finds out about undeclared work, they will start an investigation. If the investigation brings to light the fact that insurable employment in terms of the EI Act has taken place, the employer will be subject to premium payment in arrears and payment of interest and penalties. The employee, on the other hand, has built up rights based on this insurable employment. If it can be proven that the employee worked sufficiently long in insurable employment and fulfils all other eligibility criteria, entitlement to sickness, maternity or parental benefits arises. This entitlement does not depend on the payment of premiums. Even if the

[1169] For the sake of completeness we shall note that there are no requirements regarding the child. In other words, the receipt of maternity or parental benefits is also possible for children with an irregular immigration status in Canada. However, this is a rather theoretical possibility, since children born on Canadian soil are Canadians anyway.

premiums are never recovered from the employer, the former undeclared worker will receive benefits if he/she is otherwise entitled.[1170]

9.2. Ontario Workers' Compensation

9.2.1. Irregular migrant workers

The Ontario Workplace Safety and Insurance Act provides for a number of benefits in the event of an industrial accident or an occupational disease. These include the Loss of Earnings (LOE) benefit for incapacity for work; the Loss of Retirement Income (LRI) benefit for being still impaired at the age of sixty-five; the coverage of health care costs; and the Non-Economic Loss (NEL) benefit to compensate for physical, functional, or psychological loss and permanent impairment.[1171] The eligibility criteria for the different benefits slightly differ, but the scope *ratione personae* is the same for the whole programme: in a nutshell, those who are protected are individuals who have an employment contract with an employer covered by the Workers' Compensation insurance.

As we have already seen, in the context of the survivor's benefits under Ontario's Workers' Compensation insurance, both the competent administration and the competent justice regard irregular migrant workers as workers in terms of the Workplace Safety and Insurance Act. Accordingly, irregular migrant workers are eligible for incapacity for work benefits under Ontario's Workers' Compensation insurance. Unfortunately, to date, there has been no clarification of the reason why employment contracts in violation of immigration law trigger entitlement to benefits. Is it because these contracts are not considered as invalid for Workers' Compensation purposes? Is it that the invalidity of an employment contract does not impact on Workers' Compensation law?

Another relevant issue, at least for the receipt of LOE benefits, is the beneficiary's cooperation in his/her reemployment (early and safe return to work) and in Labour Market Re-entry (LMR) services. Employers of workers who have been injured in labour accidents are, in general, under the obligation to re-employ their worker when the worker is medically able to perform at least suitable work.[1172] If employers are unable or unwilling to co-operate in the early and safe return to work of the worker, the Workplace Safety and Insurance Board provides the worker with Labour Market Re-Entry services.[1173] The LMR services help the injured worker in getting back into the workforce. The services include a labour market re-entry assessment and, possibly, a labour market re-entry plan. The injured worker, in turn, is under the obligation to co-operate in reemployment offered by the employer or in LMR services offered by the Workplace Safety and Insurance Board – according to his/her physical and psychological capacity. If the worker does no

[1170] See below subchapter 10.1.2.
[1171] Ontario's Workers' Compensation benefits are also paid out outside of Ontario, as long as this is in accordance with medical rehabilitation measures, back-to-work measures and other obligations. However, it is important that the beneficiary informs the WSI Board about his or her departure. Otherwise, benefits may be suspended. See Ontario Workplace Safety and Insurance Board, *Operational Policy Manual: Leaving the province/country*.
[1172] § 41 WSI Act.
[1173] § 42 (1) WSI Act.

co-operate, the Board, at its discretion, may reduce or suspend payments during any period of non-co-operation.[1174]

One can now ask whether irregular migrant workers who have a labour accident and who still lack a work permit at the time when they are receiving LOE benefits are able to accept reemployment or to co-operate in LMR services. An analysis of the practice of Ontario's Workplace Safety and Insurance Board and of the case law of the Workplace Safety and Insurance Appeals Tribunal (WSIAT) [1175] shows that foreigners with no work authorisation in Canada are regarded as being unable to accept reemployment or participate in LMR services. For instance, from WSIAT decision no. 42/06 it becomes obvious that the claims adjudicator of the Workplace Safety and Insurance Board denied entitlement to LMR services, because the worker was not in a position to lawfully work in Canada. The adjudicator stated that the worker would be able to participate in the labour market re-entry programme once she had obtained the necessary work permit.[1176] Another example would be decision no. 1648/05, where the Appeals Tribunal granted LMR services and noted that previous concerns about the injured worker's permission to work in Canada and the receipt of LMR services were no longer an issue as the worker had obtained permanent residence status.[1177] However, despite the fact that foreigners with no work authorisation are considered to be unable to participate in back-to-work measures, there are no consequences with respect to their entitlement to incapacity for work benefits. In other words, both the Board and the Appeals Tribunal confirmed that non-co-operation in back-to-work measures due to a lack of work authorisation in Canada does not interfere with the foreign beneficiary's entitlement to incapacity for work benefits. The benefits are neither reduced nor suspended.[1178]

9.2.2. Nationals who engage in undeclared work

Nationals who engage in undeclared work are protected by Ontario's Workers' Compensation insurance. We have outlined already in the context of survivor's benefits under the WSI Act how the WSI Appeals Tribunal has ruled over the past decades that it is not registration with the WSI Board that is decisive, but the categorisation of the employer as engaged in an industry listed in Schedule 1 of Ontario Regulation 175/98 to the Workplace Safety and Insurance Act. Since undeclared workers are by definition workers of employers who are mandatorily insured, *i.e.* Schedule 1 employers, they may be entitled to incapacity for work benefits in case of a loss of income due to a work-related accident or disease.

It will also be recalled that employers who are not paying premiums at the time of a labour accident may be required to pay the WSI Board the full or the partial amount or the full or the partial capitalised value of the benefits payable.[1179]

By definition, employers of undeclared workers either do not register at all with the WSI Board or do so but do not include the wages of the undeclared worker in the total amount of wages reported

[1174] § 43 (7) in conjunction with § 41 and § 42 WSI Act.
[1175] The Workplace Safety and Insurance Appeals Tribunal is the final level of appeal for disputes under Ontario's Workplace and Insurance Act.
[1176] Workplace Safety and Insurance Appeals Tribunal, Decision no. 42/06.
[1177] Workplace Safety and Insurance Appeals Tribunal, Decision no. 1648/05.
[1178] See for instance Workplace Safety and Insurance Appeals Tribunal decisions no. 42/06 or no. 1648/05.
[1179] See above, subchapter 8.3.2. See also § 89 (2) and (3) WSI Act.

to the WSI Board. This may cause problems for the WSI Board in correctly assessing the pre-accident or pre-disease wages of the worker.[1180]

9.3. The Canada Pension Plan (CPP)

9.3.1. Irregular migrant workers

The Canada Pension Plan offers basic financial security for contributors who are unable to work at any job due to severe and prolonged[1181] mental or physical disability, irrespective of the cause of disability.[1182] In addition, the plan provides a benefit for dependent children of the disabled person.[1183] For both benefits, the relevant entitlement criterion with respect to our research is that the disabled worker has contributed sufficiently to the Canada Pension Plan.[1184] We have already shown in our analysis of the CPP retirement pension and the CPP survivor's benefits that there are two main obstacles for irregular migrant workers: first, the lack of employment authorisation is likely to result in an invalid employment contract and hence mean that the work cannot be regarded insurable. Only when it can be established *ex post* that the foreigner acted in good faith when he/she violated the Immigration and Refugee Protection Act may insurance be possible. Second, the lack of a valid SIN usually prevents employers of irregular migrant workers from making a correct and assignable contribution to the CPP. What is more, a valid SIN may be also required for an application for benefits. We wrote in subchapter 8.2.1. that the department Human Resources and Skills Development Canada, based on section 52 CPP Regulations, requires a Social Insurance Number if the information is needed for administrative purposes. There is a need for administrative purposes, if the benefit is related to a person's Record of Earnings. Accordingly, applicants for a CPP disability benefit or a CPP disabled contributor's child's benefit are obliged to furnish their SIN. Otherwise no entitlement to benefits can be established. Concerning the dependent child, on the other hand, no SIN is required.[1185]

This brings us to the question whether a child who has no permission to be in Canada may qualify for a disabled contributor's child's benefit. From a legal point of view this is possible. The Canada Pension Plan only requires of the child of a disabled contributor that he or she is dependent on the contributor, *i.e.* the child must be either under eighteen years of age or, if attending school or university full-time, between eighteen and twenty-five.[1186] There should be no practical obstacles either, not least since the authorities would not insist on the provision of a SIN. Still, it should be recalled that there is only entitlement to a disabled contributor's child's benefit if the disabled

[1180] The determination of previous earnings is crucial for benefit entitlement. In more detail, the Loss of Earnings (LOE) benefit and the Loss of Retirement Income (LRI) benefit are only paid to injured or ill workers who have suffered a loss of earnings. What is more, the rate of the LOE benefit relates to the average earnings before the impairment.

[1181] The disability is prolonged when it is expected to last for at least one year or to be terminal.

[1182] § 44 (1) (b) CPP. It is worth mentioning that if the state of health of the disabled person improves, so that he or she is able to work again, the benefit payments will be ceased.

[1183] § 44 (1) (e) CPP.

[1184] § 44 (1) (b) (i) and 44 (1) (e) (i) CPP. It should be recalled that CPP payments are made anywhere in the world. No export restrictions apply.

[1185] For more information on all this see our analysis of the status of irregular migrant workers under the CPP in subchapter 7.2.1. and subchapter 8.2.1.

[1186] § 44 (1) (e) in conjunction with § 42 (1) CPP.

parent contributed sufficiently to the CPP. In other words, the parent of the child residing unlawfully must not be an irregular migrant worker.

9.3.2. Nationals who engage in undeclared work

As is the case for all CPP benefits, sufficient contributions to the CPP fund are crucial for eligibility for benefits. We have already shown in our analysis of the CPP retirement pension and the CPP survivor's benefits that Canadians who do not declare their work and hence do not contribute to the Canada Pension Plan cannot build up rights. As a consequence, they do not qualify for the disability benefit, and their children are not entitled to the disabled contributor's child's benefit.

The question of retrospective declaration of work has also been discussed with respect to the other CPP benefits. To recall, if it can be established that pensionable work indeed took place, the employer will have to pay CPP contributions in arrears. This could then allow the disabled worker, and if applicable the worker's child, to qualify for CPP disability or disabled contributor's child's benefits. However, we also pointed out that it is uncertain whether a contract of service which includes an agreement to evade CPP and other contributions and income tax will be valid. We concluded that there are two possible conclusions: either the evasion agreement renders the whole employment contract null and void *ex tunc,* or the illegality of the evasion agreement does not affect the validity of the rest of the employment contract.

10. The social risk of unemployment

Statutory protection against the employee's risk of losing his or her source of income by becoming unemployed is provided by federal Employment Insurance (EI).

10.1. Employment Insurance (EI)

10.1.1. Irregular migrant workers

Employment Insurance provides a financial benefit and support measures, such as training, job search and labour market information, in the event of a worker becoming unemployed through no fault of his or her own. Support measures are only granted to (former) beneficiaries of financial unemployment benefits.[1187] The Employment Insurance Act (EI Act) is silent on the legal position of irregular migrant workers. Neither authorisation to work nor authorisation to stay in Canada is a precondition for insurance or the receipt of benefits. However, there are two benefit entitlement criteria which may bear relevance with respect to irregular migrant workers: first, the applicant must have been employed, for a minimum number of hours, in insurable employment;[1188] and, second, the applicant must be available for work.[1189]

Let us first analyse the requirement of having been in insurable employment. The concept of insurable employment is specified in section 5 EI Act and sections 2 to 9 Employment Insurance Regulations (EI Regulations). In general, insurable employment is employment under a contract of service inside Canada.[1190] This poses the question whether employment in contravention of immigration law can be considered as employment under a contract of service and hence insurable employment. The Tax Court of Canada and the Federal Court of Appeal dealt with this issue in a number of cases, mainly in the second half of the 1990s. The cases were about lawfully resident immigrants other than permanent residents, who worked in Canada although they were not in possession of a valid work permit. In most cases, the immigrants continued working (and paying employment insurance premiums) after the expiration of their employment authorisation. When they applied for unemployment benefits, their applications were rejected with respect to the period during which they worked without authorisation. The Ministry of National Revenue – which is in charge of deciding whether employment is insurable or not – argued that during these periods the applicants were not engaged under a valid contract of service and consequently not in insurable employment within the meaning of the EI Act.

The Tax Court of Canada handled the first cases rather inconsistently. In some cases it found that working under an employment contract in contravention of immigration law due to the lack of the required authorisation meant that an illegal contract of service had been formed. Such an illegal employment contract is null and void as to its effects with regard to a third party, such as the Minister of National Revenue.[1191] The court based its findings on the doctrine of illegality of

[1187] See § 58 EI Act.
[1188] § 7 in conjunction with § 2 (1) EI Act.
[1189] § 18 (a) EI Act.
[1190] Under certain conditions, employment outside Canada may also be considered as insurable employment. Conversely, under certain conditions employment inside Canada is not considered as insurable employment.
[1191] See Tax Court of Canada, *Mohamed v. Canada (Minister of National Revenue)* (1995), [1995] T.C.J. no. 458; Tax Court of Canada, *Kaur v. Canada (Minister of National Revenue)*, (1995), [1995] T.C.J. no. 950; Tax Court of

contracts. In other cases, by contrast, the Tax Court of Canada decided in favour of the immigrant worker and put emphasis on the limited legal consequences of immigration law. In *Sivasubramaniam v. Canada*, Judge Watson found that "the Immigration Act and Regulations address immigration consequences by providing for offences relating to immigration but not to affect the validity of contracts that a person enters into in Canada".[1192] In *Polat v. Canada*, Judge Taylor accepted that a contract in contravention of immigration law "might be regarded as 'illegal and void' under the provisions of the Immigration Act, and that engaging in such activity could bring serious consequences". But he did "not see that to be the problem before this Court".[1193]

It is worth illustrating how the judges of the Tax Court of Canada have reacted to the fact that immigrants kept on paying unemployment insurance premiums during periods of unlawful work. While in *Sivasubramaniam v. Canada* Judge Watson saw it as "grossly unfair to collect unemployment insurance premiums for several years on the basis of an employer/employee relationship and then to attempt to evade the issue of benefits by claiming, after the fact, that the contract of service was invalid",[1194] Judge Mogan in *Still v. Canada* was "troubled by the decision in Sivasubramaniam because it seems to support the principle that an alien who works in Canada and does not obtain a valid work permit is entitled to unemployment insurance benefits if he or she has paid unemployment insurance premiums".[1195] Instead, he recommended that the appellant applies for a refund of her unemployment insurance premiums.[1196] Subsection 96 (1) EI Act (former subsection 63 (1) Unemployment Insurance Act) provides for a refund of EI premiums if a person made a premium payment during a year in which the person was not in insurable employment, provided that the person applies for this refund and does so within three years of the end of the year concerned.[1197]

The latter case, the *Still* case, was the only one in that series which was heard by the higher instance, *i.e.* the Federal Court of Appeal.[1198] Due to this fact and the fact that the Federal Court of Appeal analysed in depth the question of work in breach of immigration law and its consequences for the formation of a contract of service and, where applicable, for unemployment insurance, *Still v. Canada* has become the leading case.

In contrast to the applicants in most other cases, Ms Still had never had an employment authorisation when she started to work in Canada. She was lawfully admitted to Canada and

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Canada, *Sah v. Canada (Minister of National Revenue)* (1995), [1995] T.C.J. no. 982; Tax Court of Canada, *Still v. Canada (Minister of National Revenue)* (1996), [1996] T.C.J. no. 1228; Tax Court of Canada, *Isidore v. Canada (Minister of National Revenue)* (1997), 1997 CarswellNat 3050, 1997 CarswellNat 3051; and Tax Court of Canada, *Saad v. Canada (Minister of National Revenue)* (1997), 1997 CarswellNat 3048.

[1192] Tax Court of Canada, *Sivasubramaniam v. Canada (Minister of National Revenue)* (1995), 1995 CarswellNat 2694, § 11.

[1193] Tax Court of Canada, *Polat v. Canada (Minister of National Revenue)* (1996), 1996 CarswellNat 2801, § 7.

[1194] Tax Court of Canada, *Sivasubramaniam v. Canada*, § 12.

[1195] Tax Court of Canada, *Still v. Canada*, § 11.

[1196] *Ibid*., § 12.

[1197] In this context it should be mentioned that, according to case law, the fact that an immigrant was obliged to pay unemployment insurance premiums while working in insurable employment, but did not have a chance to collect unemployment benefits due to restrictions in his or her work permit, does not raise any discrimination issue under the Canadian Charter of Rights and Freedoms. See amongst others Umpire, CUB 22727 (*Acquaah*), 15 July 1993.

[1198] The case *Polat v. Canada* was also brought before the Federal Court of Canada, Appeal Division. However, in that case, which was decided ten days after *Still v. Canada*, the Federal Court of Appeal merely referred in a few words to its *Still* judgment. See Federal Court of Canada, Appeal Division, *Polat v. Canada (Minister of National Revenue)* (1997), 1997 CarswellNat 2054.

applied for permanent residence. After her application she received a document from the immigration authority, which she misinterpreted as meaning that she was now allowed to work in Canada. After that she started working as a housekeeper, in breach of the relevant provisions under immigration law.

The judges of the Federal Court of Appeal made it clear from the very first that neither the (former) Unemployment Insurance Act nor the (former) Immigration Act explicitly or implicitly regulate this issue and that, as a consequence, "[i]f benefits are to be denied this applicant, it will not be for the reason that Parliament so intended, but for the same reason the common law refuses to lend its assistance to parties to a contract which is deemed illegal – public policy".[1199] They also clarified that the issue is not whether a breach of one federal statute disentitles a person to benefits under another federal statute – "any right of set-off would have to be found in the applicable legislation".[1200]

The analysis focused on the doctrine of illegality of contracts and its consequences for the issue at stake.[1201]. According to the Federal Court of Appeal, case law "supports the understanding that if the making of a contract is expressly or impliedly prohibited by statute then it is illegal and void *ab initio*".[1202] This is what the literature calls statutory illegality. However, due to its rigidity this classical doctrine of illegality has been adapted by case law over time and a modern approach has been developed, providing for exceptions. The Federal Court of Appeal found that if the classical model of illegality was applied, the contract of Ms Still would have been illegal and void *ab initio* and, consequently, insurable employment within the meaning of unemployment insurance would not have been constituted.[1203] But the court rejected the application of the strict classical model, arguing that it has long since lost its persuasive force and there are inconsistencies in its application. Moreover, the court based its decision on the fact that many statutes require an existing contract of service for entitlement or eligibility, which would make it unreasonable automatically to declare any employment contract invalid by virtue of illegality.[1204] Instead the Federal Court of Appeal formulated a principle which, in its opinion, reflected better the modern approach and the public law environment: "where a contract is expressly or impliedly prohibited by statute, a court may refuse to grant relief to a party when, in all of the circumstances of the case, including regard to the objects and purposes of the statutory prohibition, it would be contrary to public policy, reflected in the relief claimed, to do so".[1205] It then continued: "Public policy is, of course, a variable concept which is more easily illustrated than defined [...]. In the present case, the public policy dimension manifests itself in two ways. The first is reflected in the strongly held

[1199] Federal Court of Canada, Appeal Division, *Still v. Canada*, § 10.
[1200] *Ibid*., § 11.
[1201] The Court accepted that the doctrine of illegality of contracts may vary from province to province, let alone Quebec. It held, however, that it has to decide this issue in the federal context and expressed the importance of consistency in decision-making with regard to entitlement to benefits under federal unemployment insurance. Before and after the *Still* decision of the Federal Court of Appeal, the Tax Court also discussed this issue, in particular in the context of the civil law province of Quebec. In its last judgments in this series the Tax Court found, in a kind of reconciliation, that "the civil law principles with respect to nullity of a contract [...] do not on the face of it differ from common law principles" and that "therefore [...] Still must serve as a reference both in the common law provinces and in the Province of Québec". See Tax Court of Canada, *Luzolo v. Canada (Minister of National Revenue)* (1999), [1999] T.C.J. no. 822, 1999 CarswellNat 3799, §§ 13, 15.
[1202] Federal Court of Canada, Appeal Division, *Still v. Canada*, § 17.
[1203] *Ibid*., § 41.
[1204] *Ibid*., § 43.
[1205] *Ibid*., § 48.

belief that a person should not benefit from his or her own wrong. This is an alternative way of expressing moral disapprobation for wrongful conduct. The second rests in the understanding that relief should not be available to a party if it would have the effect of undermining the purposes or objects of the two federal statutes [author's note: the Immigration Act and the Unemployment Insurance Act] which are involved in this judicial review application".[1206] After very briefly assessing the objectives of the two acts, the court emphasised moral disapprobation for wrongful conduct. It found that when an individual was acting *bona fide*, in good faith, public policy weighs in favour of them. In the present case, Ms Still was a legal immigrant to Canada, who acted in good faith when she started working after receiving the document from the immigration authorities. However, the Federal Court of Appeal also looked at other cases already decided by the Tax Court of Canada, and briefly analysed them with respect to the good faith of the individuals concerned. It becomes clear that this question of good faith has to be answered on a case-by-case basis. What can be observed is that whenever the applicant was already familiar with immigration law – in other words, whenever he or she had already obtained an employment or student authorisation previously – the Federal Court of Appeal assumed in its short analysis that the person was aware that he or she was acting illegally when working in Canada without the required authorisation and thus no relief should be granted.

Further minor arguments which were brought by the Federal Court of Appeal were that the denial of unemployment benefits would be a disproportionate penalty for the breach of the immigration law provision, when the immigration law itself has not foreseen a penalty for unknowingly contravening the Immigration Act; and that both Ms Still and her employer paid unemployment insurance premiums and consequently did not affect the solvency of the fund.[1207] In the end, the court held that Ms Still's employment without a valid work permit constituted insurable employment within the meaning of the Unemployment Insurance Act.

Subsequent case law of the Tax Court of Canada has made use of the 'good faith test' in order to determine whether the behaviour of the applicant, *i.e.* working in breach of immigration law, is in line with public policy and, consequently, whether relief should be granted from the principle that a contract is void *ab initio* when it is expressly or impliedly prohibited by statute.[1208] What we can see from this case law is that – as already indicated by the Federal Court of Appeal in its *Still* decision –good faith is basically not indicated when applicants had already had an employment or student authorisation and thus were aware that they needed some sort of permission to work in Canada.[1209] In two decisions of the Tax Court, however, good faith was assumed in such cases and, therefore, relief was granted to the appellants: in *Haule v. Canada*, the appellant was in possession of a valid student authorisation which allowed him to accept work on the campus of his university, while prohibiting him from engaging in all other kinds of employment in Canada. When he worked for a research institution outside the campus, he considered this work still to be within the scope of his student authorisation, since the employment contract was made between

[1206] *Ibid*., § 49.
[1207] *Ibid*., § 55.
[1208] Only in *Jablonski v. Canada*, which was pronounced less than two months after the *Still* decision, does this test seem not to be applied. See Tax Court of Canada, *Jablonski v. Canada (Minister of National Revenue)* (1998), Doc. 97-108(UI).
[1209] See Tax Court of Canada, *Polat v. Canada (Minister of National Revenue)* (1998), 1998 CarswellNat 2575; Tax Court of Canada, *Lessuru v. Canada (Minister of National Revenue)* (1998), [1998] T.C.J. no. 345; Tax Court of Canada, *Amer v. Canada (Minister of National Revenue)* (1999), [1999] T.C.J. no. 213; and Tax Court of Canada, *Mia v. Canada (Minister of National Revenue)* (2001), 2001 CarswellNat 3549.

the university and the research institution. In making this assumption the appellant relied on a Citizenship and Immigration Canada publication and a conversation with an immigration official.[1210] In *Luzolo v. Canada*, the appellant applied for and received a work permit when he was a refugee claimant. When he was granted refugee status, the appellant thought that he would no longer need a separate authorisation for employment in Canada. His employer did not advise or inform him that he needed a work permit.[1211] From these two cases and the Federal Court of Appeal's decision in *Still v. Canada* as well as from the comment in the *Still* decision on the *Sivasubramaniam* case, the following can be concluded: good faith may be assumed in situations where the immigration status changes or where the actions of the immigration authorities mislead the person concerned, in particular where immigration officials give the advice that no work permit is needed.

In recent years, no more disputes about whether irregular work can constitute insurable employment or not have been brought before Canadian courts. This may relate to the fact that the Federal Court of Appeal and subsequently the Tax Court of Canada have established clear criteria to resolve this issue, which are directly applied by the Ministry of National Revenue. But it may also relate to new measures to prevent unlawful work, such as the introduction of expiry dates for Social Insurance Numbers of individuals who are not Canadian citizens or permanent residents, which links the validity of the SIN with the authorised period to remain in Canada.

To sum up, category B immigrants, *i.e.* aliens who are lawfully resident but unlawfully working in Canada, may fulfil the criteria for insurable employment, provided they acted in good faith when they worked in breach of Canadian immigration law.

The question is, can category A immigrants, *i.e.* immigrants who are not only working but also staying in Canada contrary to immigration law, also be employed in insurable employment? This in turn raises the question whether they can act *bona fide*. Although such cases have to our knowledge never been brought before Canadian courts, the question has already been addressed by the Federal Court of Appeal in its decision in *Still v. Canada*. When discussing the public policy that a person should not benefit from his or her own wrong, the court noted: "Moral disapprobation is likely to arise in those cases where a person gains entry to this country through stealth or deception, obtains employment and then seeks unemployment benefits after losing his or her job [...] While moral disapprobation of employment obtained in flagrant disregard of Canadian laws is not an unreasonable policy consideration, this sentiment should not be permitted to degenerate into the belief that everyone who gains employment in Canada without a work permit should be so judged".[1212] And when analysing the question of good faith in this specific case, the court noted as the first argument in favour of the applicant: "Ms. Still is not an illegal immigrant".[1213]

This could be seen as an indication that it would be extremely difficult for a person irregularly working and staying in Canada to convince the Canadian authorities or courts of the good faith of their actions. This seems to be impossible for persons who have entered Canada clandestinely. Whether it is possible for persons who have overstayed their permission to reside in Canada and

[1210] See Tax Court of Canada, *Haule v. Canada (Minister of National Revenue)* (1998), [1998] T.C.J. no. 1079, 1998 CarswellNat 3472.
[1211] See Tax Court of Canada, *Luzolo v. Canada.*
[1212] Federal Court of Canada, Appeal Division*, Still v. Canada*, § 53.
[1213] *Ibid*., § 54.

engaged in the Canadian labour market without the required authorisation remains open to question.

As mentioned above, there is a second entitlement criterion for unemployment benefits which may be relevant with respect to persons who lack the permission to work in the country: availability for work. Section 18 (a) EI Act states that "[a] claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was available for work". Irregular migrant workers have no authorisation to work in Canada. The question is whether a person who is not allowed to work in Canada can be available for work. The meaning of the word available is not precisely defined in the EI Act and the Regulations relating to it. Case law has established that it is basically a question of fact[1214] or a question of mixed fact and law.[1215] Three criteria need to be considered for the determination of availability for work: "the desire to return to the labour market as soon as a suitable job is offered, the expression of that desire through efforts to find a suitable job, and not setting personal conditions that might unduly limit the chances of returning to the labour market".[1216]

The last of the three criteria, *viz* availability without any undue restrictions placed by the claimant, has been at issue when courts have had to decide on foreigners' availability for work. Several times, case law has been confronted with the question whether aliens with a restricted work permit, mostly restricted to one specific employer, or with a study permit, which only allows the holder to work on campus, may fulfil the criterion of availability for work.[1217] This is, however, not relevant for our research, since only immigrants who have no work permit at all are included.[1218] Unfortunately, cases have been rare where individuals lack a work permit at all.

One of the decisions where this happened was *Mota*. Ms Mota was a student in Canada who lawfully worked at the university as a teaching assistant.[1219] This was insurable employment for which unemployment insurance premiums were deducted. After finishing her studies – when she applied for unemployment benefits – she had the residence status of visitor and no further employment authorisation. The Canada Employment Insurance Commission and the Umpire found her to be in a catch-22 situation. On the one hand, she had to have an offer for a specific job

[1214] See Federal Court of Canada, Appeal Division, *Rondeau v. Simard* (1977), [1977] 1 F.C. 519, (sub nom. Rondeau v. Canada (Unemployment Insurance Commission)) 13 N.R. 567, 13 N.R. 567, 1977 CarswellNat 9, § 13. See also, *inter alia*, Umpire, CUB 13363A (*Ralph*), 6 May 1988; Umpire, CUB 13001A (*Bedard*), 14 June 1989; Umpire, CUB 17771 (*Durrant*), 11 January 1990; Umpire, CUB 17843 (*Fryer*), 21 February 1990; Umpire, CUB 18347 (*Garraway*), 25 June 1990; Umpire, CUB 18430 (*Krywulak*), 3 July 1990 and Umpire, CUB 17778 (*Bal*), 19 April 1991.

[1215] See Federal Court of Canada, Appeal Division, *Canada (Attorney General) v. Bertrand* (1982), 82 C.L.L.C. 14,188, 136 D.L.R. (3d) 710, 1982 CarswellNat 473. See also Umpire, CUB 13115 (*McAllister*), 19 January 1987; Umpire, CUB 14357 (*Mota*), 9 October 1987; Umpire, CUB 63940 (*Desmedt*), 18 July 2005.

[1216] Federal Court of Canada, Appeal Division, *Faucher v. Canada (Employment & Immigration Commission)* (1997), 147 D.L.R. (4th) 574, (sub nom. Faucher v. Commission de l'emploi & de l'immigration du Canada) 215 N.R. 314, 1997 CarswellNat 664, § 3. See also Federal Court of Canada, Appeal Division, *Canada (Attorney General) v. Whiffen* (1994), 2 C.C.E.L. (2d) 219, 94 C.L.L.C. 14,017, 165 N.R. 145, 113 D.L.R. (4th) 600, 1994 CarswellNat 828, § 3.

[1217] See amongst others Umpire, CUB 8763 (*Tenjo, Magedaragamage and O'Seaghdha*), 4 January 1984; Umpire, CUB 12624 (*Faherty*), 30 September 1986; Umpire, CUB 13136 (*Chen*), 21 January 1987; Umpire, CUB 44956 (*Juris*), 20 May 1999; Umpire, CUB 49652 (*Casha*), 13 October 2000; Umpire, CUB 63940 (*Desmedt*), 18 July 2005; or Umpire, CUB 67472 (*Roedel*), 8 January 2007.

[1218] See the definition of irregular migrant workers in chapter 2.

[1219] See Umpire, CUB 14357 (*Mota*), 9 October 1987.

before she could apply for a work permit. But on the other hand, she was refused unemployment benefits because she needed to have a work permit to be considered available. The Umpire mitigated this problem by granting unemployment benefits upon the fulfilment of the following condition: the claimant's job search had to establish that she was seeking work, which would not adversely affect employment opportunities for Canadian citizens or permanent residents,[1220] but which she herself stands some chance of obtaining. If the applicant can fulfil this requirement, she should be entitled to unemployment benefits for a reasonable period of time which allows her to obtain such employment.

This principle established in the *Mota* case served as a reference in similar cases.[1221] In all these cases, claimants had either a legal residence status in Canada or, due to a reciprocal agreement with the United States, a legal residence status in the U.S. Whether the principle could also be applied to persons who additionally lack authorisation to reside in Canada is questionable.[1222]

Let us finally turn to the question whether there is an obligation for employers of irregular migrant workers to contribute to EI. We have already mentioned on several occasions that the *bona fide* test can only take place *ex post*. From this it becomes clear that the question whether there is such an obligation cannot be answered in advance. Employers are prohibited from employing irregular migrant workers. If they nevertheless do so, only then can one ask whether a valid contract of service was concluded and whether there was an obligation to contribute to EI.

10.1.2. Nationals who engage in undeclared work

The employment history for Employment Insurance purposes is not measured according to an employee's contributions, as is the case for the Canada Pension Plan, but with reference to an employee's time in insurable employment, expressed as hours worked.[1223] Nationals who engage in undeclared work are by definition employed in insurable employment. This is so because we have defined undeclared work as work performed without the social security authorities being informed about it, *although an obligation to do so exists*. Since the obligation to declare work for EI purposes only arises if the employee engages in insurable employment, the group under investigation is regarded by definition as being in insurable employment.

Nevertheless, one can ask whether the fact that laws or public policy are violated impacts on the validity of the employment contract and changes the situation that an undeclared worker works in

[1220] This was a requirement for obtaining a work permit under the former Immigration Regulations, SOR/78-172.
[1221] See, for instance, Umpire, CUB 20367A (*Hannak*), 23 February 1993; Umpire, CUB 23864 (*Belopolsky*), 30 December 1993; Umpire, CUB 35794 (*Ritterman*), 11 October 1996; Umpire, CUB 63129 (*Suarez*), 6 April 2005. In the first two cases it was even more simple for the claimants to convince the Umpire from their chance to get a work authorisation (in these cases for the U.S.), since they fell under the Canada-U.S. Free Trade Agreement. In the third case, nothing in the record indicated that she had found or applied for employment for which she could reasonably expect to get a work permit and, thus, her appeal was dismissed. In the last case, the Umpire referred to case back to the Board or Referees' to obtain more information.
[1222] Here it is to mention that unemployment benefits usually cannot be exported. See § 37 (b) EI Act. Exceptions are only made in cases of short term absence, such as for a *bona fide* job interview or for a *bona fide* job search abroad. See § 55 EI Regulations. Special rules exist for export to the United States. However, also in this case the requirement of availability for work cannot be circumvented. See 55 (6) (a) (i) EI Regulations and Article VI of the Agreement between Canada and the United States respecting Unemployment Insurance, signed on 6 and 12 March 1942.
[1223] See § 7 EI Act.

insurable employment. With regard to irregular migrant workers, we found that employment contracts concluded with irregular migrant workers are invalid – unless there is evidence for good faith – because the formation of the contract is expressly prohibited by statute. In the context of undeclared work by Canadian citizens, we can ask whether the contract is rendered illegal by the fact that its purpose or performance is contrary to statute, *i.e.* the EI Act's obligation to pay premiums, or to public policy.

The law on illegality of contracts is far from simple and clear. Judge Robertson, in the above-cited *Still v. Canada* case, talks about a "plethora of conflicting decisions and great uncertainty as to the principles which should be guiding the courts".[1224] We can see, however, that case law and legal literature divide the doctrine of illegality of contracts into two categories: first, common law illegality and, second, statutory illegality.

According to the latter doctrine, *i.e.* that of statutory illegality, contracts which are expressly or implicitly prohibited by statute are in principle invalid and void *ab initio*.[1225] Pursuant to sections 67 and 68 EI Act, the employer and the employee are obliged to pay a premium to Employment Insurance. It is the employer who is responsible for deducting and remitting the premiums – see subsection 82 (1) EI Act. If the employer fails to deduct and remit the premiums, the employer is guilty of an offence and subject to a penalty – see subsection 106 (1) EI Act. We can ask whether the formation of an employment contract in which employer and employee agree to completely hide their work from the social security authorities and hence to evade the payment of premiums is prohibited under the EI Act. An explicit prohibition of such contracts cannot be found in the statute. The provisions do not state "no contract shall be entered into with the intention of evading payment of EI premiums in violation of sections 67 and 68 EI Act". But do these sections of the EI Act impliedly prohibit the formation of such a contract? The oft-cited test for implicit statutory prohibition was formulated in *Melliss v. Shirley and Freemantle Local Board of Health*.[1226] According to this test, the contract is impliedly prohibited by statute if the statute imposes a penalty for the breach of the prohibition, when the penalty is imposed with intent merely to deter persons from entering into the contract or when it is intended that the contract should not be entered into so as to be valid at law. Fridman, based on case law, summarised the essence of this test with the words "[t]hat there must be a clear implication or necessary inference from the statute that contracts which infringe it should be void".[1227] If we look at the EI Act we can see an obligation to pay premiums or, in other words, a prohibition of omission to pay premiums. Non-compliance with this obligation leads to a penalty. To my mind, however, the penalty is not purely intended to deter persons from entering into an employment contract in which the evasion of premium payment is agreed upon. The penalty rather has the intent to force employers to comply with their legal obligation to deduct and remit premiums. Also, I see no intention in the EI Act that

[1224] See Federal Court of Canada, Appeal Division, *Still v. Canada*, § 12. Also the Supreme Court of Canada referred to this statement of Judge Robertson in Supreme Court of Canada, *Transport North American Express Inc. v. New Solutions Financial Corp.* (2004), 2004 SCC 7, 40 B.L.R. (3d) 18, 316 N.R. 84, 235 D.L.R. (4th) 385, [2004] 1 S.C.R. 249, 183 O.A.C. 342, 18 C.R. (6th) 1, 17 R.P.R. (4th) 1, 70 O.R. (3d) 255 (note), 2004 CarswellOnt 512, § 20. For similar statements see the Chair of the British Columbia Law Institute in British Columbia Law Institute, "Report on relief under legally defective contracts: The Uniform Illegal Contracts Act," *BCLI Report*, no. 52 (2008).

[1225] See for instance Fridman, *Law of contract*, p. 365 ff.; or Stephen Michael Waddams, *The law of contracts*, 4. ed. (Toronto: Canada Law Book, 1999), p. 411.

[1226] Queen's Bench Division, England, *Melliss v. Shirley and Freemantle Local Board of Health* (1885), 16 Q.B.D. 446 at 451-52, cited with approval in Alberta Supreme Court, *Pimvicska v. Pimvicska* (1974), 50 D.L.R. (3d) at 572. For this reference see Fridman, *Law of contract*, p. 368.

[1227] Fridman, *Law of contract*, p. 369.

the validity of the employment contract should depend on compliance with the Act's obligations. Therefore, in my opinion, the employment contract is not rendered statutorily illegal by the fact that undeclared work is agreed upon by employer and employee.

Let us turn now to common law illegality. Common law illegality has its origins in British case law of the eighteenth century,[1228] which was followed by Canadian case law. According to the concept of common law illegality, courts may render contracts invalid on the grounds that they are contrary to public policy. The guiding principle is: *ex dolo malo non oritur actio*, *i.e.* no court will lend its aid to a person who founds his cause of action upon an immoral or illegal act. One can now ask whether an employment agreement to perform undeclared work would be contrary to public policy.

Canadian case law basically considers tax fraud to be an act *against the law and hence against public policy*, and contracts which include an arrangement for income tax fraud, sales tax fraud or other tax fraud to be illegal and not enforceable. For instance, this has been the case for marital agreements,[1229] for mortgage or chattel mortgage,[1230] for shipment contracts,[1231] for sale of land contracts,[1232] or for contracts for the sale of goods.[1233]

With respect to employment contracts, there is little case law. In 1994, the Alberta Court of Queen's Bench, which is the Superior Trial Court for the Province, found a consulting agreement between two companies not to be a scheme to conceal an employee-employer relationship and hence not to defraud Revenue Canada for income tax and social insurance purposes. The aspect of this judgment of interest to us is that Judge Andrekson held that "the contract is not void for failure of consideration, nor is it void as a matter of public policy as an effort to avoid the taxation consequences of employment" and that therefore "the Consulting Contract is not void for illegality".[1234] Conversely, this would mean that if there had been an effort to avoid the taxation consequences of employment, the consulting contract between the two companies would have been null and void.

[1228] See King's Bench Division, England, *Holman v. Johnson* (1775), 98 E.R. 1120, 1 Cowp. 341. See also Federal Court of Canada, Appeal Division, *Still v. Canada*, § 15.

[1229] Newfoundland Court of Appeal, *Bursey v. Bursey* (1999), 174 Nfld. & P.E.I.R. 291.

[1230] See Saskatchewan Court of Appeal, *Williams v. Fleetwood Holdings Ltd.* (1973), 41 D.L.R. (3d) 636; or New Brunswick Court of Appeal, *Tucker Estate v. Gillis* (1988), 53 D.L.R. (4th) 688.

[1231] New Brunswick Court of Queen's Bench (Trial Division), *Mazerolle v. Day & Ross Inc.* (1986), 70 N.B.R. (2d) 119.

[1232] Ontario Supreme Court, *Stuart v. Kingman* (1978), 21 O.R. (2d) 650, 91 D.L.R. (3d) 142.

[1233] New Brunswick Court of Queen's Bench, *Matériaux de construction Castonguay Inc. v. Pelletier* (1982), 38 N.B.R. (2d) 111.

[1234] Alberta Court of Queen's Bench, *Advanced Agricultural Testing Inc. v. Palmer Ranch (1984) Ltd.* (1994), 1994 CarswellAlta 228, 23 Alta. L.R. (3d) 404, § 49. See also New Brunswick Court of Queen's Bench, *Jackson v. Norman W. Francis Ltd.* (1999) [1999] N.B.R. (2d) (Supp.) no. 4., where the judge found that Mr. Jackson was an independent contractor, not an employee. The judge remarked: "[t]hat method of payment for the work performed by Mr. Jackson and various expenses claimed by L.A. Jackson & Associates appear to be questionable under the legislation with respect to income tax, pensions, unemployment insurance and workers' compensation. However it seems to me that this is not a case of a blatant fraud or of 'a fictitious figure for expenses in order to defraud the revenue' such as in *Napier v. National Business Agency Ltd*".

An often-cited judgment in Canadian case law – with respect to all sorts of contracts – is the *Napier v. National Business Agency* decision by the British Court of Appeal of 1951.[1235] This case was about an employment contract according to which part of the salary were paid out as salary and part as expenses, in order to avoid the proper payment of income tax and other contributions. Thus this case was not about undeclared work, as defined for the purposes of our research, but about under-declared work. Still, the case might provide some guidance. The employee in the *Napier* case claimed damages for wrongful dismissal. The Court of Appeal, however, found that the insertion of a fictitious figure for expenses in order to defraud the revenue is contrary to public policy and hence illegal. As a consequence, the Court considered the whole employment contract to be illegal and unenforceable. The *Napier* case still serves as a leading case in England. The English Employment Appeals Tribunal has thus far rejected arguments that the doctrine of illegality of contracts should not apply to employment contracts out of employment law considerations.[1236] However, in recent years case law has softened the application of this doctrine, by assuming illegality in employment performance rather than illegality in employment contract formation and hence providing for relief if the employee was unaware of such illegality;[1237] or, exceptionally, by not rendering the whole employment contract null and void, for instance in a case of undeclared payments for a period of four weeks out of a total period of employment of sixteen years.[1238]

Canadian courts, to our knowledge, have thus far not explicitly pronounced on whether employment contracts concluded with the intention of avoiding the payment of social insurance contributions and other taxes are illegal or not. From all what we have seen above we can assume that it is very likely that such employment contracts would be contrary to public policy and hence illegal. Still, as is the case in England, Canadian courts have in recent years adjusted the rigid doctrine of illegality of contracts and provided for the possibility of relief. This was the case in the *Still v. Canada (Minister of National Revenue)* judgment, which was discussed above in the context of irregular migrant workers and where relief was granted because the employee acted in good faith when she violated alien employment law; and it was also the case in *Transport North American Express Inc. v. New Solutions Financial Corp.*, where it was considered that public policy ought to allow an otherwise illegal agreement to be partially enforced rather than declaring it completely void *ab initio*.[1239] This could pave the way for employment contracts concluded with the intention of not declaring the work to be partially legal, by disregarding the invalid non-declaration understanding. However, this is not certain, as the issue has yet to be clarified by case law.

[1235] Court of Appeal, England, *Napier v. National Business Agency Ltd.* (1951), [1951] 2 All E.R. 264. See also Court of Appeal, England, *Miller v. Karlinski* (1945), 62 T.L.R. 85.

[1236] See Ian Smith and Gareth Thomas, *Smith & Wood's employment law*, 9. ed. (Oxford: Oxford University Press, 2008), p. 109. The authors refer to Employment Appeals Tribunal, England, *Newland v. Simons and Willer (Hairdressers) Ltd.* (1981), [1981] I.C.R. 521, [1981] I.R.L.R. 359.

[1237] See Smith and Thomas, *Smith & Wood's employment law*, p. 110 ff. The authors refer to Court of Appeal, England, *Hewcastle Catering Ltd v. Ahmed* (1991), [1992] I.C.R. 626, [1991] I.R.L.R. 473.

[1238] Employment Appeals Tribunal, England, *Hyland v. J H Barker (North West) Ltd.* (1985), [1985] I.C.R. 861, [1985] I.R.L.R. 403.

[1239] Supreme Court of Canada, *Transport North American Express Inc. v. New Solutions Financial Corp*. The concept of partial illegality was then also incorporated into the Uniform Illegal Contracts Act, a proposal by the Uniform Law Conference of Canada. The proposal is available at the website of the Uniform Law Conference of Canada: http://www.ulcc.ca/en/us/Uniform_Illegal_Contracts_Act_En.pdf.

So far we have dealt with employment contracts where employer and employee agree to evade the payment of social insurance contributions. But what about situations where employer and employee entered into a 'normal' employment contract and where the employer subsequently omits to declare the work and pay premiums? Case law sometimes differentiates between illegality of the formation and objective of the contract on the one hand, and illegality of performance on the other. Regarding illegality of performance, no distinction between statutory illegality and common law illegality needs to be made.[1240] Case law basically takes the view that the innocent party can enforce a contract which is performed in an illegal way, but which was formed in a correct manner. Innocent means that the party must not contribute to the illegal performance and must not know about it.[1241] Under certain circumstances, even parties who perform the contract in an illegal way or who know about its illegal performance may enforce it. This is the case when the statute neither expressly nor impliedly makes an illegal performance capable of rendering the contract illegal, but only penalises infringement without touching upon the validity of the contract.[1242] We have already mentioned that the provisions on non-payment of premiums do not destroy the validity of the contract. Consequently, employment contracts would be valid in situations where an employer, after an employment agreement was concluded in compliance with the laws, fails to declare the work – irrespective of whether the employee knew or should have known about it. In my opinion, therefore, no issue of illegality arises.

In practice, the administration proceeds as follows when confronted with benefit applications by an undeclared worker.[1243] The authority in charge of determining an applicant's eligibility is the Canada Employment Insurance Commission,[1244] an entity within the department Human Resources and Skills Development Canada. When examining whether an applicant has accumulated sufficient hours of insurable employment, the Commission takes the information from an individual's Record of Employment.[1245] A benefit application which refers to work for which no Record of Employment exists or for which there are indications that a false Record of Employment has been used will usually have the following consequences: the Canada Employment Insurance Commission will contact the Canada Revenue Agency for clarification[1246] and, if necessary, an audit or investigation of the employer will be conducted.[1247] If the work is assessed as insurable employment, EI premiums are due and hours of insurable employment will

[1240] Concerning formation, statutory illegality occurs when statutes prohibit the making of a contract, while common law illegality occurs, *inter alia*, when the contract requires anything to be done that is prohibited by law. Concerning the performance of an employment contract in violation of statutes which prescribe the declaration of work and payment of social insurance premiums, this distinction is obsolete: illegality in performance occurs when the performance is prohibited by law.

[1241] See for instance Court of Appeal, England, *Archbolds (Freightage) Ltd v. S Spanglett Ltd* (1961), [1961] 1 All E.R. 417, 1961 WL 21058. See also Fridman, *Law of contract*, pp. 377-78; and Waddams, *Law of contracts*, pp. 414-15.

[1242] This is more or less the same test as that applied for impliedly statutory illegality, as described above. See also Fridman, *Law of contract*, p. 378.

[1243] This analysis is based on law, case law and information provided by the Canadian government.

[1244] See § 48 (3) EI Act.

[1245] See § 20 EI Regulations.

[1246] § 122 in conjunction with § 90 (1) (d) EI Act states that whenever on the question arises of how many hours an insured person has worked in insurable employment in the consideration of a claim for benefits, this has to be determined by the Canada Revenue Agency.

[1247] See for instance Tax Court of Canada, *Hughes v. Canada* (1993), [1993] 2 C.T.C. 2894, 95 D.T.C. 295, 1993 CarswellNat 1098; Federal Court of Canada, Appeal Division, *Bernard v. Canada (Minister of National Revenue)* (2002), 2002 FCA 400, 296 N.R. 206, 2002 CarswellNat 2944; Federal Court of Canada, Appeal Division, *Canada (Attorney General) v. Langelier* (2002), 2002 FCA 157, 292 N.R. 172, 2002 CarswellNat 2018.

be assigned to the Record or Employment.[1248] The previously undeclared worker then has the chance to obtain unemployment benefits. The payment or non-payment of the EI premiums will not affect entitlement to benefits. Even if the premiums are never recovered from the employer, the unemployed person will receive benefits if he/she is entitled to do so.

[1248] For the assessment for the premiums owing, see § 85 EI Act. In addition, the employer may be subject to penalties. See subchapter 3.3.

11. The social risk of health care

This chapter will try to answer two basic questions. First, do the two groups under investigation have access to health care? Second, are the two groups covered under statutory health care insurance? Accordingly, the chapter will be divided into two main subchapters.

Statutory health insurance is usually organised on the provincial and territorial level. Nevertheless, these health insurance plans are in line with federal health care policies, expressed in the Canada Health Act[1249]. This Act sets national standards which have to be fulfilled in order to receive full federal transfer payments. Ontario has set up the statutory Ontario Health Insurance Plan (OHIP).

In addition, the federal government runs a health insurance plan for certain migrants who are unable to pay their health care costs (the Interim Federal Health Program). It is designed as a temporary health insurance plan which ends as soon as the person concerned is covered by provincial or territorial health insurance or is removed from Canada.

In case of industrial accidents or occupational diseases, Ontario's Workplace Safety and Insurance Act provides for the coverage of health care costs. This includes, amongst other things, health care services provided by a health care practitioner, a hospital or a health facility, prescribed drugs, assistive devices and prostheses or the services of an attendant.[1250] It is open to any insured worker who needs health care due to an occupational accident or disease.[1251]

What is more, health benefits are also provided under Ontario's social assistance schemes, *i.e.* the Ontario Work Act and the Ontario Disability Support Program Act. Health benefits include, in general, the coverage of the costs for prescribed drugs, dental services, diabetic supplies and surgical supplies, certain transportation and the consumer contribution for assistive devices.[1252] These schemes are open to persons who qualify for income assistance (Ontario Work) or for income support (Ontario Disability Support Program).

In this chapter, the Ontario Health Insurance Plan (OHIP) and the Interim Federal Health Program (IFH) will be analysed. Health care benefits under Ontario's Workers' Compensation law have already been investigated in the context of incapacity for work – see subchapter 9.2. Health care benefits under Ontario's social assistance laws will be analysed below in the chapter on financial need – see subchapter 13.

11.1. Access to health care

Except for Quebec, there is no general legal duty in Canada to help a person in peril. This is true of both tort law in the common law provinces and criminal law in the whole of Canada. The federal Criminal Code[1253] does not know of any crime such as 'non-assistance of a person in danger'.

[1249] Canada Health Act, R.S.C. 1985, c. C-6.
[1250] § 32 WSI Act.
[1251] § 33 (1) WSI Act.
[1252] See § 55 (1) Ontario Regulation 134/98, Enabling Statute: Ontario Works Act, S.O. 1997, c. 25, Sched. A; and § 44 (1) Ontario Regulation 222/98, Enabling Statute: Ontario Disability Support Program Act, S.O. 1997, c. 25, Sched. B.
[1253] Criminal Code, R.S.C. 1985, c. C-46.

Only in Quebec do the Quebec Charter of Human Rights and Freedoms[1254] and the Quebec Civil Code[1255] impose a duty to help anyone in peril. Some of the common law provinces, such as Ontario, provide an incentive for people to voluntarily render medical and other assistance, by basically not making them liable for damages while providing assistance.[1256] Yet this is only an incentive – an obligation to help anyone in need does not exist in these provinces.

Doctors may be held liable under criminal law and tort law once they undertake to provide medical treatment[1257] or once they omit to do anything that it is their legal duty to do.[1258] Still, in general they are not under a legal obligation to enter into a patient-physician relationship and to provide medical treatment – for exceptions in life-threatening situations in public hospitals see below.[1259]

Concerning professional codes of ethics, in Ontario there is no obligation to accept a new patient or to render medical assistance. The body that regulates the practice of medicine in the province and of which all doctors in Ontario must be members in order to practise medicine is the College of Physicians and Surgeons of Ontario. In its Practice Guide, which articulates the principles of medical practice and provides assistance to the profession in determining its specific duties and the reasons for those duties, no such obligation can be found.[1260] Maybe one can interpret a duty to render medical assistance out of general principles, such as that of altruism. The Guide reads: "[a]ltruism, as a principle of action, is the highest commitment to service. Altruism in medicine is defined as practising unselfishly and with a regard for others." However, a concrete obligation cannot be found there. What is more, the College of Physicians and Surgeons of Ontario has drawn up a regulation on professional misconduct under Ontario's Medicine Act.[1261] Subsection 1 (1) 19 of this Ontario Regulation 856/93 states that "[r]efusing to perform a medically necessary service unless all or part of the fee is paid before the service is performed" is a form of professional misconduct for the purposes of the Health Professions Procedural Code.[1262] Medically necessary services are all services which are covered by the Ontario Health Insurance Plan (OHIP). Since a physician can only charge patients directly for services that are not paid for by the OHIP,[1263] this provision ensures that physicians who do not work with OHIP and physicians who do work with OHIP, but whose patients are not covered by it do not make treatment dependent on payment *in*

[1254] Quebec Charter of Human Rights and Freedoms, R.S.Q., c. C-12.
[1255] Civil Code of Quebec, S.Q. 1991, c. 64.
[1256] See Ontario Good Samaritan Act, S.O. 2001, c. 2.
[1257] For criminal law see in particular § 216 and § 217 Criminal Code, which deal with the crime of violating duties tending to preservation of life.
[1258] See here in particular § 219, § 220 and § 221 Criminal Code, which deal with the crime of criminal negligence
[1259] In *St-Germain v. The Queen* the criminal responsibility of a doctor who failed to treat a person at the emergency ward and instead directed the ambulance attendants to take the person to another hospital, where the person subsequently died, was at stake. Unfortunately, this case is not reported. See Quebec Court of Appeal, *St-Germain v. The Queen* (1976), Doc. 10-000108-744, not reported. From secondary sources we only know that the doctor was acquitted of the charge of criminal negligence. See *Canadian Encyclopedic Digest: Medicine (Western)* (Toronto: Carswell, 2010), § 148 at Medical malpractice, Criminal liability. Available at Westlaw. See also Guy Cournoyer and Gilles Ouimet, *Code criminel annoté* (Cowansville: Éditions Yvon Blais, 2010). Available at Westlaw at § 219 at Infractions contre la personne et la réputation: Négligence criminelle.
[1260] See College of Physicians and Surgeons of Ontario, *The Practice Guide: Medical Professionalism and College Policies*, Rev. online 2008. Available at:
http://www.cpso.on.ca/policies/guide/default.aspx?id=1696.
[1261] See Ontario Regulation 856/93, Enabling Statute: Medicine Act, S.O. 1991, c. 30.
[1262] The Health Professions Procedural Code is incorporated as Schedule 2 in the Regulated Health Professions Act, S.O. 1991, c. 18.
[1263] See College of Physicians and Surgeons of Ontario, "Block Fees and Uninsured Services," Policy statement no. 3-10, published in *Dialogue*, no. 2 (2010).

advance. However, this provision does not impose an obligation on physicians to accept a new patient.[1264]

Let us now have a closer look at other provincial statutes which govern the operation of the medical system. Health care in Ontario is basically provided through public and private hospitals, physicians in private practice and Community Health Centres.

The vast majority of *hospitals* are *public* ones.[1265] This means that they operate under the framework of the Public Hospitals Act.[1266] Their legal form is mostly that of a non-profit corporation. The Ontario Ministry of Health and Long-Term Care provides annual, global funding to such hospitals. As regards access to public hospitals, the Public Hospitals Act distinguishes between out-patient and in-patient treatment. As a rule, hospitals are not required to accept a person as an in-patient who is not a resident or a dependant of a resident of Ontario.[1267] Residence in Ontario is defined as actual residence in a municipality for at least three of the last six months.[1268] This resembles the requirement of residence for OHIP health insurance coverage. The only exception, *i.e.* the only situation where a hospital is required to admit a non-resident as an in-patient, is life-threatening situations. In the wording of the law: "by refusal of admission life would thereby be endangered".[1269] The literature refers to a general obligation of public hospitals to provide services in life-threatening situations to uninsured individuals.[1270] What is not provided even if the patient is not insured, is coverage of the costs. Non-insured patients will be billed for all health care services received. However, if costs cannot be recovered, the hospital has to pay them itself.

The operation of *private hospitals* is regulated by the Private Hospitals Act.[1271] These hospitals are either for-profit or non-profit corporations. Most of them receive funding from the Ontario Ministry of Health and Long-Term Care.[1272] Private hospitals are highly specialised, working in one particular field of health care, such as addiction treatment,[1273] palliative care for terminally ill patients,[1274] hernia treatment,[1275] surgical procedures,[1276] or chronic care.[1277] Such hospitals

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[1264] For this interpretation see also Ontario Ministry of Health and Long-Term Care, "Presenting health cards for health services," Bulletin no. 4428 (2005). Available at: http://www.health.gov.on.ca/english/providers/program/ohip/bulletins/4000/bul4428.pdf.

[1265] Only seven out of more than two hundred hospitals are private ones under the Private Hospitals Act. See Ontario Ministry of Health and Long-Term Care, "Public information: Hospitals," Ministry of Health and Long-Term Care. Available at: http://www.health.gov.on.ca/english/public/contact/hosp/hosp_mn.html.

[1266] Public Hospitals Act, R.S.O. 1990, c. P.40.

[1267] § 21 (a) Public Hospitals Act.

[1268] § 1 Public Hospitals Act.

[1269] § 21 (a) Public Hospitals Act.

[1270] Committee for Accessible AIDS Treatment, *Status, access & health disparities: A literature review report on relevant policies and programs affecting people living with HIV/AIDS who are immigrants, refugees or without status in Canada* (Toronto: Committee for Accessible AIDS Treatment, 2006), p. 37; Minister of Health, *Canada Health Act: Annual Report 2005 – 2006* (Ottawa: Minster of Health, 2006), p. 84.

[1271] Private Hospitals Act, R.S.O. 1990, c. P.24.

[1272] Ontario Ministry of Health and Long-Term Care, "Public information: Health services in your community," Ministry of Health and Long-Term Care. Available at: http://www.health.gov.on.ca/english/public/contact/hosp/hospfaq_dt.html.

[1273] Bellwood Health Services.

[1274] Beechwood Private Hospital.

[1275] Shouldice Hospital.

[1276] For instance, the Don Mills Surgical Unit.

[1277] Woodstock Private Hospital.

basically do not have emergency rooms. Regarding admittance to private hospitals, Regulation 937 to the Private Hospital Act rules that no patient will be admitted to or treated in a private hospital, unless "under the active care of a legally qualified medical practitioner".[1278] Normally, hospitals require medical referral for admittance. It is up to the hospitals to decide whom they accept for treatment.

Physicians in private practice are free to choose to whom they provide medical treatment. Section 13 Ontario Health Insurance Act stipulates that there is no obligation for physicians or practitioners to treat an insured person. Accordingly, there is also no obligation to treat uninsured individuals.

Hospitals and physicians in private practice who have not opted out of the health insurance system do not directly charge patients for health care services, provided that patients can prove that they are insured. Their insured status is normally demonstrated by showing the OHIP health card. Health care providers may verify the eligibility of the card holder and validity of the health card by using the Ministry's electronic Health Card Validation system.[1279] Insured patients who do not bring along their health cards may be charged by the health care provider, but can get their costs reimbursed.[1280] Emergency rooms are equipped with a Health Number Look Up service, so that the insurance status of patients who are unable to provide the health card can be verified.[1281]

To sum up, private hospitals and physicians in private practice are free to decide to whom they provide treatment. This is also true whether the person seeking health care is insured under public or private health insurance. It is likely that a person's status under immigration law does not directly influence the admission decision. It will, however, have an indirect impact when hospitals look at the status of insurance or the ability of the patient to pay the medical treatment. By contrast, the fact that a person is an undeclared worker should not affect the admission decision – either directly or indirectly.

Public hospitals, on the other hand, are only free in their admission decision as regards non-residents. By implication, this means that they have to treat residents of Ontario. The exact meaning of this provision in not clear. But there is some indication that it might be interpreted in the same way as residence for OHIP purposes. If so, there would be, in general, no responsibility to treat category A immigrants. An obligation to accept category B immigrants would depend on their residence status. Nevertheless, in life-threatening situations public hospitals are required to treat everyone.

Health care providers in Ontario have no mandate to report people who lack immigration status. However, in the literature it is reported that there have been cases where contact with health care providers has led to deportation.[1282]

[1278] § 3 Ontario Regulation 937, R.R.O. 1990, Enabling Statute: Private Hospitals Act, R.S.O. 1990, c. P.24.

[1279] For more information see Ontario Ministry of Health and Long-Term Care, *Health Card Validation reference manual* (Toronto: Ministry of Health and Long-Term Care, 2010).

[1280] To this end the provider must submit the Health Number Release Form (form no. 1265-84) to the Ministry of Health and Long-Term Care. See Ontario Ministry of Health and Long-Term Care, "Public information: Health services."

[1281] Minister of Health, *Canada Health Act: Annual Report 2008 – 2009* (Ottawa: Minster of Health, 2010), 88.

[1282] See Jacqueline Oxman-Martinez, "Intersection of Canadian policy parameters affecting women with precarious immigration status: A baseline for understanding barriers to health," in *Journal of Immigration Health* vol. 7, no. 4 (2005), p. 254.

Community Health Centres (CHCs) have a special status amongst health care providers. They are non-profit organisations which provide primary health care and run health promotion programmes. For the most part, they are funded by the Ontario Ministry of Health and Long-Term Care. It is remarkable that there is no specific legislation regulating the operation of Community Health Centres.[1283] There are only policy guidelines issued by the Ministry.[1284]

The centres particularly target communities which face barriers in accessing health care and have a higher risk of ill health. These barriers include race, language, poverty or homelessness. The specific target groups differ from centre to centre. Many of them have identified immigrants as their priority population, or one of them.[1285] Access to health care services basically depends on the individual centre's policy. Some restrict eligibility to residents in its catchment area, others to those belonging to the target population. However, what should not prevent individuals from accessing the centres' services is their insurance status. The policy manual of the Ontario Ministry of Health and Long-Term Care states that "CHCs' services are made available regardless of a client's health card status".[1286] Many centres explicitly announce that their health services are free[1287] or that they are also available to uninsured individuals.[1288]

As mentioned, CHCs only provide primary health care. Secondary health care, *i.e.* hospitalisation, is not included in their services. CHCs do not in any case have any funds to cover the hospitalisation costs of uninsured persons. But what they do is to negotiate with hospitals on a case-by-case basis a reduction of the treatment costs. This is very often possible due to personal connections between CHC staff and hospital employees.[1289]

Community Health Centres seem to be the most important contact point for uninsured irregular migrant workers in health issues. This can be deduced from both the literature[1290] and personal interviews of the author with Canadian experts.[1291] Reasons for this may be their accessibility and coverage of the costs of primary health care, their provision of information and support in lowering the costs of secondary health care, and the confidentiality with which they treat patient information.[1292] Nevertheless, the literature also reports problems for uninsured immigrants in

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[1283] Minister of Health, *Canada Health Act: Annual Report 2008 – 2009* (Ottawa: Minster of Health, 2010), pp. 92-93.
[1284] Ontario Ministry of Health and Long-Term Care, *Community Health Centre: Policy & procedures manual* (Toronto: Ministry of Health and Long-Term Care, 2001).
[1285] See for instance Access Alliance Multicultural Community Health Centre in Toronto (Available at: http://www.accessalliance.ca), Davenport-Perth Neighbourhood and Community Health Centre in Toronto (Available at: http://www.dpnc.ca) or Hamilton Urban Core Community Health Centre in Hamilton (Available at: http://www.hucchc.com).
[1286] Ontario Ministry of Health and Long-Term Care, *Community Health Centre*.
[1287] Oshawa Community Health Centre (Available at: http://www.ochc.ca).
[1288] For instance Planned Parenthood Toronto (Available at: http://www.ppt.on.ca/community.asp) or West Hill Community Services in Scarborough (Available at: http://www.westhill-cs.on.ca/community/index.html).
[1289] Committee for Accessible AIDS Treatment, *Status, access & health disparities*, pp. 38-39.
[1290] *Ibid.*
[1291] See Naomi Alboim, professor at the School of Policy Studies of Queen's University, interview with author, 2 July 2007; Ratna Omidvar, Executive Director of The Maytree Foundation, interview with author, 6 July 2007; and Perez Oyugi, international manager for the Red Cross Canada, interview with author, 6 July 2007.
[1292] Many Community Health Centres explicitly guarantee that all information provided to the centre is held in the strictest confidence. See for instance West Hill Community Services in Scarborough (Available at: http://www.westhill-cs.on.ca/community/index.html). Ontario's law only provides for professional secrecy for medical personnel with respect to information about the condition of patients and with respect to any professional

accessing Community Health Centres, for instance because of capacity restrictions or because of non-compliance with enrolment requirements, such as possessing identification documents or evidence that they live in the clinic's prescribed area.[1293]

11.2. Health cost coverage

11.2.1. The Ontario Health Insurance Plan (OHIP)

11.2.1.1. Irregular migrant workers

The Canada Health Act is the national law establishing the health care standards that must be met by provinces and territories in order to obtain full federal financial contribution. This Act declares it as the primary objective of Canadian health care policy to "protect, promote and restore the physical and mental well-being of *residents* of Canada and to facilitate reasonable access to health services without financial or other barriers [emphasis added by the author]".[1294] A resident is defined by the Act itself as "a person lawfully entitled to be or to remain in Canada who makes his home and is ordinarily present in the province, but does not include a tourist, a transient or a visitor to the province".[1295]

Ontario's Health Insurance Act followed this national instruction and stipulates in subsection 11 (1) that "[e]very person who is a resident of Ontario is entitled to become an insured person upon application". What residence means for OHIP purposes is further specified in Regulation 552 to the Health Insurance Act. Here one finds again the two criteria set by the federal Canada Health Act: lawful entitlement to be in Canada and ordinary residence in the province.[1296]

To be *ordinarily resident* in Ontario basically means to make one's primary place of residence in Ontario and to be present in Ontario for a specified period of time.[1297] In principle, one must be in Ontario for at least 153 out of the first 183 days after becoming a resident and for at least 153 days in any twelve month period. Ordinary residence is assessed according to the factual situation. The Ontario Ministry of Health and Long-Term Care considers the primary residence requirement as satisfied when a document is produced that displays the name and the current home address of the applicant and confirms that the primary place of residence is in Ontario. The Ministry has published a list of documents which meet this requirement. Among them are statements of social security benefits paid (Old Age Security, Canada Pension Plan, Ontario Workers' Compensation or Child Tax Benefit); income tax assessments; utility bills (home telephone, cable TV, hydro, gas, water); mortgage, rental or lease agreements; insurance policies (home, tenant, auto or life); or

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services provided to the patient. See § 29 and § 31 (1) in conjunction with § 4 Personal Health Information Protection Act, S.O. 2004, c. 3, Sched. A. The notion of professional secrecy with respect to other information obtained, for example about a patient's immigration status, does not exist. On the other hand there is no legal duty to report an irregular immigration status in Canada. See above, subchapter 6.2.2.

[1293] Paul Caulford and Yasmin Vali, "Providing health care to medically uninsured immigrants and refugees," *Canadian Medical Association Journal*, vol. 174, no. 9 (2006), p. 1254.

[1294] § 3 Canada Health Act.

[1295] § 2 Canada Health Act.

[1296] § 1.2, § 1.3 (1) Ontario Regulation 552, R.R.O. 1990, Enabling Statute: Health Insurance Act, R.S.O., 1990, c. H.6.

[1297] § 1.3 (1) 2. and § 1.5 (1) Regulation 552.

monthly mailed bank account statements.[1298] Irregular migrant workers, with no or a weak status under immigration law, may also have their primary place of residence in Ontario. And some of these documents can certainly also be provided by them. This means that irregular migrant workers are able to demonstrate to the Ministry that their primary place of residence is in Ontario.

The other requirement, *i.e. lawful entitlement to be in Canada*, finds its expression in the demand for Canadian citizenship[1299] or a certain status under immigration law.[1300] Foreigners who are not entitled to be in Canada are ineligible. That is to say, category A workers are ineligible for insurance under the Ontario's statutory health insurance. Category B workers, by contrast, may be eligible for OHIP insurance, provided that they are resident in Ontario. The following eligible categories of foreigners under section 1.4 Regulation 552 could perform irregular work in Canada:

- point 4: protected persons. If protected persons do not have permanent resident status or temporary resident status (visitor for a temporary purpose such as visit, study or work or holders of a temporary resident permit) in combination with an authorisation to work, they are irregular migrant workers (category B) and still eligible for OHIP coverage.
- point 5: persons who have applied for permanent residence and whose fulfilment of the eligibility requirements to apply for permanent residence have been confirmed by Citizenship and Immigration Canada, even if the application has not yet been approved. Such persons are staying in Canada under a non-enforceable removal order, since the removal order has been stayed. We considered them for the purposes of our research as being lawfully in the country. However, if they are working without authorisation, this makes them category B workers.
- point 9: spouses or dependants of either holders of a valid work permit or members of the clergy of a religious denomination, as long as the spouses or dependants are legally entitled to stay in Canada. These spouses or dependants are irregular migrant workers (category B) if they take up work without authorisation.
- point 10: certain holders of a temporary resident permit. As long as they work without work authorisation, they are category B workers.
- point 11: under certain conditions, applicants for Canadian citizenship on the basis of an adoption by a Canadian citizen while a minor. These adopted persons do not necessarily have authorisation to work in Canada. If they nevertheless perform work, they do so irregularly.

Section 1.4 points 6, 7 and 12 of Regulation 552 establish eligibility for insurance on the basis of a valid work permit (and actual work). Thus foreigners who do not fall into one of the other categories can still enjoy insurance if they have a valid work permit and if they are ordinarily resident in Ontario. This is an interesting observation. Instead of extending the categories of eligible foreigners to further immigration statuses, the legislators have opted to make them all eligible if they possess a work permit (and are actually working). This has the consequence, for instance, that a foreigner who is subject to an unenforceable removal order and who does not fall into any of the eligible categories is ineligible for OHIP coverage, whereas the same foreigner becomes eligible for OHIP coverage if he or she gets a work permit under section 206 IRPR and works in full-time employment. In both cases the foreigner may be a resident of Ontario. But only when the foreigner has the authorisation to work and take up employment, can he or she enjoy

[1298] Ontario Ministry of Health and Long-Term Care, "Ontario Health Insurance Coverage Document List," form no. 014-9998E-82E.
[1299] Alternatively the person must be registered as an Indian under the Indian Act.
[1300] § 1.3 (1) 1. and § 1.4 Regulation 552.

statutory health insurance coverage. This does not seem to completely fit within the logic of Canada's and Ontario's health insurance, where insurance is based on residence. Moreover, the legislators definitely demand more from such foreigners. They must work – whereas the sole requirement for others is that they are resident – and that any work they do is in compliance with the law.

It is also worth mentioning that foreign workers physically present in Ontario because they have a work permit issued under the 'Seasonal Agricultural Worker Programme' are insured under the OHIP even if they do not fulfil the condition of being resident in the province.[1301] Here, then, an exception has been made to provide short-term foreign workers who do not establish their primary residence in Ontario with public health insurance. By contrast, other foreigners who have not yet established residence only enjoy a limited health insurance package under the federal IFH programme. This is discussed in more detail below in subchapter 11.2.2.

One of the principles to be followed by provincial and territorial health insurance plans in order to receive federal funding is portability.[1302] This entails that provinces and territories "must not impose any minimum period of residence [...] or waiting period, in excess of three months".[1303] Accordingly, Ontario's Health Insurance Act does not set a condition of having lived in Ontario for a certain period of time. Instead, it lays down a general waiting period of three months for OHIP coverage.[1304] Some applicants are exempted from this. These include Canadian citizens, protected persons and certain permanent residents, as well as newborns in Ontario.[1305]

Canadian-born children of irregular migrant workers may be covered by OHIP, regardless of the residence, work or insurance status of their parents. It has already been mentioned that individuals born on Canadian soil are Canadian citizens.[1306] Canadian citizens are, pursuant to section 1.4 Regulation 552, eligible for OHIP coverage. The question is how to affiliate them with OHIP. The Ministry of Health and Long-Term Care has to this end developed a specific application procedure. This should enable insurance, "even if their parents do not qualify for Ontario health coverage because they hold either an OHIP-ineligible immigration status or they have no immigration status".[1307] If the baby is born in an Ontario hospital or at home and attended by a registered midwife, the hospital staff or midwife provides the parents with the Ontario Health Coverage Infant Registration form.[1308] There the parents are only asked to confirm that they have their primary place of residence in Ontario and are present in Ontario for at least 153 days in any twelve-month period. If the baby is born outside Ontario, but still in Canada and is hence a Canadian citizen, parents have to contact an OHIP office in order to affiliate the child with OHIP. In such cases the following documents need to be produced: first, a confirmation of the birth (letter from hospital or physician, or certificate from the Registrar-General) within ninety days of the

[1301] § 1.3 (2) 4 Regulation 552.
[1302] § 7 (d) Canada Health Act.
[1303] § 11 (1) (a) Canada Health Act.
[1304] § 5 Regulation 552.
[1305] See § 6.2 and § 6.3 Regulation 552.
[1306] See subchapter 2.1.
[1307] Ontario Ministry of Health and Long-Term Care, "Public information: OHIP eligibility of Canadian-born children of OHIP-ineligible parents," Ministry of Health and Long-Term Care. Available at: http://www.health.gov.on.ca/english/public/pub/ohip/eligibility_2.html.
[1308] Ontario Ministry of Health and Long-Term Care, "Ontario Health Coverage Infant Registration form," form no. 4440-82.

birth, or after this period a Canadian citizenship document; second, a completed registration form; third, an identity document of one of the parents; and finally, a document proving the parent's and child's residence in Ontario. As illustrated above, this residency document can be for instance a utility bill or a lease or tenancy agreement.

11.2.1.2. Nationals who engage in undeclared work

The only eligibility requirement for OHIP coverage is to be resident in Ontario. As we have seen, residence for the purpose of the Ontario Health Insurance Act means entitlement to be in Canada and ordinary residence in the province. One way to demonstrate entitlement to be in Canada is to possess Canadian citizenship. Undeclared Canadian workers by definition possess Canadian citizenship and are hence able to comply with the entitlement to be in Canada requirement. Upon application they are therefore insured under Ontario's statutory health insurance if they ordinarily reside in the province. The fact that their work is not declared to the social security authorities has no impact at all on their eligibility – neither *de iure*, nor *de facto*.

11.2.2. Interim Federal Health (IFH)

11.2.2.1. Irregular migrant workers

The Interim Federal Health (IFH) programme is designed to cover the costs of essential health care services[1309] for certain immigrants who are not able to pay them by themselves. The programme is based on a 1957 Order-in-Council. The terms of the IFH programme can be found in the documented policy of the department Citizenship and Immigration Canada.

From this policy it follows that the applicant must be an immigrant who is not able to pay on his or her own for health care services and must not fall under the personal scope of application of a public or private health insurance plan. The following classes of immigrants are covered by the IFH programme:

- refugee claimants (already eligible to have claim heard);
- Pre-Removal Risk Assessment applicants, who received a negative decision on their refugee claim. Other Pre-Removal Risk Assessment applicants, such as tourists, are ineligible.
- Convention refugees or persons in need of protection, until they qualify for provincial health insurance, which takes a maximum of three months;
- members of the Convention Refugee Abroad Class and members of the Humanitarian Protected Person Abroad Class. These persons normally already enter Canada as permanent residents and are eligible for provincial health care immediately or after a

[1309] Essential health care services include, most notably, essential and emergency health services for the treatment and prevention of serious medical conditions and the treatment of emergency dental conditions; contraception, prenatal and obstetrical care; and essential prescription medications. The policy guidelines provide detailed information about the included treatment (with or without prior authorisation) and excluded treatment. See Citizenship and Immigration Canada, *Interim Federal Health Program - Information Handbook for Health-Care Professionals* (Ottawa: Citizenship and Immigration, 2006).

maximum of three months. In the meantime, or for additional health benefits during the first year, they are covered by the IFH;
- victims of human trafficking under a temporary resident permit;
- failed refugee claimants while still lawfully in Canada, unless they become eligible for provincial health insurance through an approved application for permanent residence, for instance on humanitarian and compassionate grounds; and
- persons detained for immigration purposes.[1310]

Additionally, in-Canada dependent children of most of the above-mentioned classes of immigrants fall under the protection of the IFH programme.

This list of eligible classes of migrants concerns foreigners with a precarious residence status who are not covered by statutory health care plans. Foreigners residing unlawfully, both those who have come to the attention of authorities and are subject to an enforceable removal order and those who have not come to the attention of the authorities, are basically not covered by the IFH programme.[1311] An exception only exists for foreigners detained for immigration purposes who are subject to an enforceable removal order and who are awaiting their removal. As a consequence of this, category A workers are ineligible for IFH support.

By contrast, category B workers may qualify for IHF coverage on the basis of their status under Canadian immigration law. To recall, immigrants who are staying lawfully and working unlawfully may have the residence status as a visitor for visit, study or work purposes or as a holder of a temporary resident permit, or may be staying in Canada under a conditional or unenforceable removal order.

Refugee claimants, the first eligible group under Citizenship and Immigration Canada's policy, are usually staying in Canada under such a conditional removal order. Pre-Removal Risk Assessment applicants are subject to an unenforceable removal order. Victims of human trafficking must by definition be holders of a temporary resident permit. Failed refugee claimants who appeal their decision are under an unenforceable removal order in Canada. As for protected persons, their residence status varies. They can be permanent residents, temporary residents or foreigners subject to a conditional or unenforceable removal order. As permanent residents, however, they do not fall into the category of irregular migrant worker. And detained persons do not have the possibility of performing unlawful work at all.

Thus category B workers who possess one of above-mentioned statuses may qualify for IHF coverage. However, possessing a certain status under Canadian immigration law is only one criterion to be met for IFH coverage. The other one is inability to bear the health care costs. Irregular migrant workers have income from work by definition. Only when their income is

[1310] See Robb Stewart, Senior Advisor of the Health Management Branch at Citizenship and Immigration Canada, e-mail message to author, 29 January 2009. See also Citizenship and Immigration Canada, *Processing claims for refugee protection in Canada*, Program Manual Protected Persons 1 (Ottawa: Citizenship and Immigration, loose-leaf, 2010), p. 69; Citizenship and Immigration Canada, *In Canada processing of Convention Refugees Abroad and members of the Humanitarian Protected Persons Abroad Classes*, Program Manual Inland Processing 3, Part 1, General (Ottawa: Citizenship and Immigration, loose-leaf, 2010), p. 15 ff.; Citizenship and Immigration Canada, *Temporary Resident Permits*, p. 28 ff.; Committee for Accessible AIDS Treatment, *Status, access & health disparities*, p. 40.

[1311] See also Robb Stewart, Senior Advisor of the Health Management Branch at Citizenship and Immigration Canada, e-mail message to author, 29 January 2009.

insufficient to pay the medical bill and only when they do not have public or private health insurance coverage, are they entitled to IFH benefits. In practice, no investigation of the financial situation of the foreigner will be carried out. Given the specific situation and precarious status of the eligible immigrants, IFH officers usually do not conduct an investigation, but merely ask if the applicant fulfils these criteria. Only where there is an indication that the applicant can cover the costs or the costs are covered by an insurance plan will an investigation be conducted.[1312]

11.2.2.2. Nationals who engage in undeclared work

The Interim Federal Health Program is a health insurance plan for certain immigrants who cannot afford essential medical treatment and who are covered neither by OHIP nor by private health insurance. The personal scope of application comprises only non-citizens. Consequently, Canadians who engage in undeclared work are excluded by virtue of their citizenship.

[1312] Citizenship and Immigration Canada, *Processing claims refugee protection*, p. 69. It is worth noting that foreigners entitled to IFH coverage are issued an Interim Federal Health Certificate. When they present this certificate, health care providers must bill the IFH Program directly. The certificate confers programme eligibility for twelve months. Upon determination of an IFH officer, this period can be shorter. Extensions are possible for a maximum of twelve months at a time.

12. The social risk of family

The federal government of Canada as well as the governments of the provinces and territories have established a comprehensive system of family benefits in order to compensate the cost of having and raising children. Generally, two different types of family benefits can be distinguished in the Canadian context: cost-compensating benefits – intended to compensate part of the cost of raising children or of providing care for them – and income replacement benefits. The benefits for cost-compensation are the federal Universal Child Care Benefit (UCCB), the Canada Child Tax Benefit (CCTB), the Children's Special Allowance (CSA) and the provincial and territorial contributions to the National Child Benefit initiative, as well as other provincial and territorial programmes. On the other hand, maternity and parental benefits of the federal Employment Insurance (EI) plan as well as maternity, paternity, parental and adoption benefits of Quebec's Parental Insurance Plan (QPIP) are meant to replace income lost due to absence of work relating to the birth or adoption of a child.

This chapter analyses the Universal Child Care Benefit (UCCB), the Canada Child Tax Benefit (CCTB), the Ontario Child Care Supplement for Working Families (OCCS) – which is Ontario's contribution to the National Child Benefit initiative – and the Ontario Child Benefit. Maternity and parental benefits under the federal Employment Insurance have already been investigated above in subchapter 9.1.

The Children' Special Allowance (CSA) will not be investigated. This benefit is provided on behalf of children who are in the care of federal, provincial, appointed or otherwise authorised child welfare authorities, for their care, maintenance, education, training and advancement. The CSA is paid out to the welfare authorities, or if the child resides in a private home of foster parents, to the foster parent.[1313] Due to the fact that it is usually the welfare institution who receives the benefit, it will be excluded from this research.

12.1. The Universal Child Care Benefit (UCCB)

12.1.1. Irregular migrant workers

The federal Universal Child Care Benefit (UCCB), which came into effect on 1 July 2006 and replaced the "Under 7 Supplement", is a direct monthly flat rate payment for parents with children under the age of six. The UCCB is intended to support parents in maintaining a balance between family and work by providing a grant to expand child care choices, regardless of whether the parents provide care on their own or use institutionalised day care programmes.[1314]

Irregular migrant workers are not *per se* excluded from benefit eligibility. Still, as we will see in the following, some entitlement criteria make it impossible or at least difficult for certain irregular

[1313] See Children's Special Allowance Act, S.C. 1992, c. 48.
[1314] See § 3 Universal Child Care Benefit Act, S.C. 2006, c. 4; see also Government of Canada, "The Universal Child Care Plan provides support," Government of Canada. Available at: http://www.universalchildcare.ca/eng/support/index.shtml.

migrant workers with a certain family status to qualify for benefits under the Universal Child Care Benefit Act.

We will start our investigation with the citizenship/immigration status requirement. Section 122.6 Income Tax Act in conjunction with section 2 Universal Child Care Benefit Act demands Canadian citizenship or a certain residence status from either the applicant him- or herself, or from his or her cohabitating spouse or common-law partner. Section 122.6 Income Tax Act reads: "'eligible individual' [...] means a person who [...] is, or whose cohabiting spouse or common-law partner is, a Canadian citizen or a person who
(i) is a permanent resident within the meaning of subsection 2 (1) of the Immigration and Refugee Protection Act,
(ii) is a temporary resident within the meaning of the Immigration and Refugee Protection Act, who was resident in Canada throughout the eighteen month period preceding that time, or
(iii) is a protected person within the meaning of the Immigration and Refugee Protection Act,
(iv) was determined before that time to be a member of a class defined in the Humanitarian Designated Classes Regulations made under the Immigration Act [...]".

Category A migrant workers, who are by definition present in Canada in breach of Canadian immigration law, do not fulfil this requirement in person. This means that unlawfully resident irregular migrant workers who are single parents are ineligible for the benefits under the UCCB Act. The same is true if the cohabitating spouse or common-law partner of an unlawfully resident irregular migrant worker is also unlawfully present in Canada.

However, we may ask whether a category A irregular migrant worker can be an eligible individual if he or she cohabits with a spouse or common-law partner who fulfils the citizenship or residence requirement? In other words, can an alien who is unlawfully resident in Canada meet the requirement of 'cohabitation'? Section 122.6 Income Tax Act says that spouses or common-law partners are considered to be cohabitating when they are not living separate and apart from each other.[1315] Case law has dealt with this issue in cases relating to the Canada Child Tax Benefit or the Goods and Services Tax credit. Since all these benefits refer to the same definition of cohabitation under the Income Tax Act,[1316] this case law may provide clarification.

The Tax Court has held that "[i]t must be presumed that when Parliament uses an expression [author's note: the expression 'living separate and apart' in the Income Tax Act] of such long standing currency in matrimonial law it intends it to be given the meaning attributed to it in matrimonial cases. Second, had Parliament intended it to be given a different meaning it would, in a statute that is remarkable for its specificity, have said so".[1317] This finding has been confirmed in further decisions of the Tax Court of Canada.[1318] So what was the "meaning attributed to it in

[1315] In addition, 'living separate and apart' has to be the consequence of a breakdown of the marriage or common-law partnership and has to last for a period of at least ninety days.
[1316] See § 122.5 (1) and § 122.6 Income Tax Act.
[1317] Tax Court of Canada, *Kelner v. R.* (1995), [1996] 1 C.T.C. 2687, 17 R.F.L. (4th) 288, 1995 CarswellNat 1207, § 30.
[1318] See Tax Court of Canada, *Rangwala v. R.* (2000), [2000] 4 C.T.C. 2430, 54 D.T.C. 3652, 2000 CarswellNat 2009; Tax Court of Canada, *Raghavan v. R.* (2001), [2001] 3 C.T.C. 2218, 2001 CarswellNat 1137; Tax Court of Canada, *Roby v. R.* (2001), [2002] 1 C.T.C. 2579, 2001 CarswellNat 2756; and Tax Court of Canada, *Leblanc c. R.* (2008), 2008 D.T.C. 2580, 2008 CarswellNat 1352.

matrimonial cases"? The Tax Court of Canada was referring in particular to the provincial court decision in *Cooper v. Cooper*.[1319]

In *Cooper v. Cooper*, the Ontario Supreme Court distilled from previous case law[1320] six circumstances which were present when the parties lived separate and apart from each other:

- spouses occupying separate bedrooms;
- absence of sexual relations;
- little, if any, communication between spouses;
- wife performing no domestic services for husband;
- eating meals separately; and
- no social activities together.[1321]

The Tax Court of Canada made it clear that these criteria are useful guidelines, but that they are not exhaustive, and that no single criterion is determinative.[1322] And it concluded that "it is a question of fact whether spouses are living separate and apart and each case is to be decided upon its own facts".[1323]

Status under immigration law does not seem to be of relevance for the determination of cohabitation of spouses or common-law partners. All the above-mentioned circumstances used as guidelines to establish whether couples live separate and apart from each other can be present in a relationship with a person who is not allowed to stay or work in Canada. From this it follows that an irregular migrant worker of category A can overcome the citizenship or legal residence requirement of section 122.6 Income Tax Act by cohabitating with a person who does meet this particular precondition.

Let us turn now to category B workers and ask whether they can pass the citizenship/immigration status requirement. In Canada, category B immigrants have the status of visitors for visit, study or work purposes, are holders of a temporary resident permit or are subject to a conditional or unenforceable removal order. Earlier, we described the categories of persons under Canadian immigration law that may qualify for the UCCB. Visitors and holders of a temporary resident permit pass the immigration status requirement under section 122.6 Income Tax Act, provided they have resided in Canada throughout the eighteen months before the application.[1324] By contrast, foreigners subject to a conditional or unenforceable removal order in general do not meet

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[1319] Ontario Supreme Court, *Cooper v. Cooper* (1972), 10 R.F.L. 184, 1972 CarswellOnt 98.

[1320] See British Columbia Supreme Court, *Rushton v. Rushton* (1968), 1 R.F.L. 215, 66 W.W.R. 764, 2 D.L.R. (3d) 25; British Columbia Supreme Court, *Smith v. Smith* (1970), 2 R.F.L. 214, 74 W.W.R. 462; and Ontario Court of Appeal, *Mayberry v. Mayberry* (1971), [1971] 2 O.R. 378, 3 R.F.L. 395, 18 D.L.R. (3d) 45.

[1321] Ontario Supreme Court, *Cooper v. Cooper*, § 23.

[1322] Tax Court of Canada, *Roby v. R.*, § 9.

[1323] Tax Court of Canada, *Rangwala v. R.*, § 1. In *Rangwala*, the Tax Court of Canada was dealing with the meaning of the phrase 'living separate and apart' in the context of child tax benefits under the Income Tax Act. When concluding that the interpretation is a question of fact it referred to § 18 of Tax Court of Canada, *Minister of National Revenue v. Longchamps* (1986), 86 D.T.C. 1694, [1986] 2 C.T.C. 2231, 1986 CarswellNat 455, where alimony and maintenance payments under the Income Tax Act were at stake.

[1324] § 122.6 Income Tax Act. The question whether a person with a temporary resident status is able to be a resident in terms of this condition does not have to be discussed here. The formulation of this requirement itself implies that a temporary resident is able to be 'resident' in Canada. See also Canada Revenue Agency, *Canada Child Benefits: Including related federal, provincial, and territorial programs*, doc. no. T4114(E) (Ottawa: Revenue Agency, 2010), p. 7.

the requirement. Only if they have been declared a protected person are they able to do so.[1325] Whether category B workers can fulfil the immigration status requirement in person therefore depends on their immigration status.

In addition to the citizenship/immigration status requirement for the applicant or the cohabitating spouse or common-law partner, applicants must reside in Canada.[1326] The notion of residence in the UCCB sections of the Income Tax Act has to be understood in the context of the whole Income Tax Act.[1327] We must therefore analyse how a person's residence is determined for income tax purposes.

Although it is a central term of the Income Tax Act,[1328] neither the Act itself nor the Income Tax Regulations[1329] gives a definition of the term 'residence'. The only useful information can be found in subsection 250 (3) of the Income Tax Act, which states that "a reference to a person resident in Canada includes a person who was at the relevant time ordinarily resident in Canada". Consequently, it was up to the courts to interpret the term 'residence' for income tax purposes. The leading authority on this question is the Supreme Court of Canada's decision in *Thomson v. Minister of National Revenue*.[1330] According to this decision, a person is 'ordinarily present', as referred to in subsection 250 (3) Income Tax Act, who is "in the place where in the settled routine of his life he regularly, normally or customarily lives".[1331] With regard to the meaning of the term 'residence', the Supreme Court stated the following:

> "For the purpose of income tax legislation, it must be assumed that every person has at all times a residence. It is not necessary to this that he should have a home or a particular place of abode or even a shelter. He may sleep in the open. It is important only to ascertain the spatial bounds within which he spends his life or to which his ordered or customary living is related. [...] But in the different situations of so-called 'permanent residence', 'temporary residence', 'ordinary residence', 'principal residence' and the like, the adjectives do not affect the fact that there is in all cases residence; and that quality is chiefly a matter of the degree to which a person in mind and fact settles into or maintains or centralizes his ordinary mode of living with its accessories in social relations, interests and conveniences at or in the place in question. It may be limited in time from the outset, or it may be indefinite, or so far as it is thought of, unlimited".[1332]

[1325] If an application for Pre-Removal Risk Assessment is accepted and the foreigner is declared as a protected person (Convention refugee or person in need of protection), the removal order will be stayed and hence becomes unenforceable. See § 232 (d) IRPR; or see Community Legal Education Ontario, "Immigration and refugee fact sheet: Pre-Removal Risk Assessment," p. 4. Available at: http://www.cleo.on.ca/english/pub/onpub/PDF/immigration/prra.pdf.

[1326] § 122.6 Income Tax Act. Alternatively, the applicant must have previously resided in Canada. However, this requires the person to be the cohabiting spouse or common-law partner of a person who is deemed under § 250(1) to be resident in Canada throughout the taxation year in question.

[1327] Canada Revenue Agency, *Canada Child Benefits*, pp. 6, 16.

[1328] The Income Tax Act links income tax liability to residence in Canada. § 2 (1) of the Income Tax Act provides, that "an income tax shall be paid [...] on the taxable income for each taxation year of every person resident in Canada at any time in the year".

[1329] Income Tax Regulations, C.R.C., c. 945.

[1330] Supreme Court of Canada, *Thomson v. Minister of National Revenue* (1945), [1946], S.C.R. 209, [1946] C.T.C. 51, 2 D.T.C. 812, 1945 CarswellNat 23.

[1331] *Ibid.*, § 71.

[1332] *Ibid.*, §§ 49, 50.

In *Lee v. Minister of National Revenue*,[1333] the Tax Court of Canada exemplified this general concept by listing thirty-four non-exclusive indicia of residency for Canadian income tax purposes. The indicia include amongst others

- regularity and length of visits in the jurisdiction asserting residence,
- ties within the jurisdiction,
- ties elsewhere,
- permanence or otherwise of purposes of stay,
- ownership of a dwelling in Canada or rental of a dwelling on a long-term basis,
- residence of spouse, children and other dependent family members in a dwelling maintained by the individual in Canada,
- memberships with Canadian churches or synagogues, recreational and social clubs, unions and professional organisations,
- registration and maintenance of automobiles, boats and airplanes in Canada,
- holding credit cards issued by Canadian financial institutions and other commercial entities,
- local newspaper, magazine and other periodical subscriptions sent to a Canadian address,
- subscriptions for life or general insurance including health insurance through a Canadian insurance company,
- mailing address in Canada,
- telephone listing in Canada,
- Canadian bank accounts other than a non-resident bank account,
- Canadian driver's licence,
- membership in a Canadian pension plan,
- will prepared in Canada,
- legal documentation indicating Canadian residence,
- filing a Canadian income tax return as a Canadian resident,
- ownership of a Canadian vacation property,
- active involvement in business activities in Canada,
- employment in Canada,
- maintenance or storage in Canada of personal belongings including clothing, furniture, family pets, etc, and
- obtaining landed immigrant status or appropriate work permits in Canada.[1334]

The Tax Court of Canada noted that "no one or any group of two or three items will in themselves establish that the individual is resident in Canada".[1335] Nevertheless, if a number of indicia accumulate it may indicate that the individual is a resident of Canada for income tax purposes.

Case law demonstrates that the question of residence is one of mixed fact and law. The circumstances of the individual have to be taken into consideration on a case by case basis, in order to determine whether or not an individual has established or maintained *residential ties with Canada* and, thus, becomes or remains resident. Residence status, such as permanent residence (formerly called landed immigrant) or work status under Canadian immigration law may have an influence on residence status under income tax law, but are not the determining factors. However, in practice the Canada Revenue Agency considers individuals who enter Canada and apply for and

[1333] Tax Court of Canada, *Lee v. Minister of National Revenue* (1989), [1990] 1 C.T.C. 2082, 90 D.T.C. 1014, 1989 CarswellNat 429.
[1334] *Ibid.*, § 18.
[1335] *Ibid.*, § 18.

obtain permanent residence status and provincial health coverage, except in exceptional circumstances, to have established significant residential ties with Canada.[1336]

Thus far, courts have not pronounced on whether unlawful residence can also be regarded as residence for tax purposes. In my opinion, there are good reasons to assume that this is the case. First, neither law nor case law explicitly excludes persons with no residence status from the scope of the Income Tax Act. Second, the central findings of the leading decision of the Supreme Court of Canada were that for income tax purposes "it must be assumed that every person has at all times a residence"; and this residence is "a matter of the degree to which a person in mind and fact settles into or maintains or centralises his ordinary mode of living with its accessories in social relations, interests and conveniences at or in the place in question".[1337] There is no reason why an individual residing unlawfully cannot reside in such a manner in Canada. Quite the contrary: it would contradict the Supreme Court's findings if an unlawful resident who has no or hardly any ties with his or her country of origin and who has settled in Canada, were found not to reside in Canada for income tax purposes. Residence for income tax purposes is defined by case law as a question of mixed fact and law. Attaching importance solely to status under immigration law therefore does not seem to be what the Supreme Court and Tax Court of Canada intended. Third, the interpretation of the term 'residence' has its main effect on tax liability. Subsection 2 (1) Income Tax Act provides that "an income tax shall be paid [...] on the taxable income for each taxation year of every person resident in Canada at any time in the year". This suggests that the lawmakers intended a broad interpretation of the term 'residence'. If an unlawful resident generates income in Canada for which no income tax liability under other jurisdictions exist, there are good reasons to assume liability in Canada.

If we assume that an unlawful resident can be, from a legal point of view, a resident for income tax purposes, then, consequently, this individual also meets the requirement of residence in Canada for the UCCB.

The same goes for lawfully resident irregular migrant workers. The Supreme Court of Canada held, as mentioned above, that "in the different situations of so-called 'permanent residence', 'temporary residence', 'ordinary residence', 'principal residence' and the like, the adjectives do not affect the fact that there is in all cases residence; [...] It may be limited in time from the outset, or it may be indefinite, or so far as it is thought of, unlimited".[1338] This suggests that the mere fact that an individual has the status of a temporary resident or stays in Canada under a conditional or non-enforceable removal order – the immigration statuses of category B immigrants – does not prevent him or her from establishing residence for income tax purposes; and hence not from meeting the residence requirement for the UCCB.

For the sake of completeness, the conditions to be fulfilled *by the child* do not pose any legal questions with respect to unlawfully resident children of irregular migrant workers. The child, under the age of six, must *not* be a person in respect of whom a personal tax credit has been deducted or a particular allowance has been paid. No reference is made to the residence status of the child and all of these criteria can be met regardless of status under immigration law. From this

[1336] See Canada Revenue Agency, "Determination of an Individual's Residence Status," Interpretation Bulletin no. IT-221R3, § 16. Available at: http://www.cra-arc.gc.ca/E/pub/tp/it221r3-consolid/it221r3-consolid-e.pdf.
[1337] Supreme Court of Canada, *Thomson v. Minister of National Revenue*, § 50.
[1338] *Ibid.*, § 50.

it follows that an applicant would be eligible for the UCCB in respect of a child who is unlawfully resident in Canada.

In practice, irregular migrant workers may face obstacles when applying for a UCCB. Applicants for most provincial and federal child benefit programmes, including the UCCB, must provide their Social Insurance Number upon application.[1339] However, this is something irregular migrant workers usually do not have. They cannot apply for a SIN and, apart from exceptional situations, cannot possess a valid SIN.[1340] Nevertheless, the Canada Revenue Agency offers applicants who cannot acquire a SIN the possibility of getting their application processed. For this, applicants must explain why they cannot get a SIN and must provide either a visitor record, a passport from the country of emigration or a temporary resident permit or extension to a temporary resident permit.[1341] A visitor record is an immigration document issued to temporary residents in particular situations. For instance, visitors who do not need a work permit under immigration law and who intend to work in Canada are given this document. A temporary resident permit is also a specific immigration document – see subchapter 2.1. This suggests that the exception from the requirement to provide a SIN focuses on certain foreigners who are staying temporarily in Canada and cannot apply for a SIN due to a lack of a work permit.[1342] It is rather questionable whether unlawfully resident individuals are also intended to be covered by this exception.

12.1.2. Nationals who engage in undeclared work

Canadians whose work is not declared to the social security authorities face no obstacles – either legal or practical – to qualifying for the UCCB. Their Canadian citizenship enables them to meet the citizenship/immigration status requirement. In addition, their Canadian citizenship paves the way to residing in the country. Therefore undeclared Canadian workers who are resident in Canada are eligible for the monthly flat rate payment under the Universal Child Care Benefit Act.

Since the SIN and the SIN card are used for many purposes as a proof of identification, Canadians usually have them. As described in subchapter 6.2.1., their citizenship enables them to receive a SIN. Consequently, nationals face no obstacles in getting their application for the UCCB processed.

12.2. The Canada Child Tax Benefit (CCTB)

12.2.1. Irregular migrant workers

The Canada Child Tax Benefit (CCTB) aims to support parents with the cost of raising children until the age of eighteen.[1343] Apart from the age of the child, the eligibility criteria for the CCTB

[1339] Canada Revenue Agency, *Canada Child Benefits*, p. 9.
[1340] See subchapter 6.2.1.
[1341] Canada Revenue Agency, *Canada Child Benefits*, p. 9.
[1342] Such as holders of a temporary resident permit who can support themselves without working and therefore are not issued a work permit under § 208 (b) IRPR.
[1343] The monthly CCTB payment may have three components: the basic benefit, the National Child Benefit Supplement (NCBS) and the Child Disability Benefit (CDB). The NCBS provides an additional payment for low-income families with children. It is the federal contribution to the National Child Benefit. The CDB supports parents

are basically the same as for the UCCB. This is because section 2 Universal Child Care Benefit Act simply refers for eligibility to the Canada Child Tax Benefit subdivision of the Income Tax Act.[1344] Hence, the applicant or the cohabitating spouse or common-law partner must pass the citizenship/immigration status test and the applicant must reside in Canada.

To sum up the results of our investigation of the UCCB:[1345] unlawfully resident irregular migrant workers and certain lawfully resident irregular migrant workers under a conditional or unenforceable removal order are not able to pass the citizenship/immigration status requirement in person. Therefore such foreigners are ineligible for UCCB benefits, and consequently also for CCTB benefits, if they are single parents or if they are cohabitating with a spouse or common-law partner who does not pass the citizenship/immigration status test either. If their partner has an eligible status for UCCB/CCTB purposes, excluded foreigners are able to circumvent the citizenship/immigration status requirement. In contrast to this, irregular migrant workers who are temporary resident under Canadian immigration law and who have resided in Canada throughout an eighteen month period preceding the applicable time and irregular migrant workers who are protected persons are able fulfil the citizenship/immigration status requirement in person. The second relevant criterion for entitlement to UCCB and CCTB benefits is residence in Canada. On the basis of an analysis of case law, we suggested that foreigners can be resident in Canada within the meaning of the Income Tax Act, irrespective of their status under Canadian immigration law.

Contrary to the UCCB, the CCTB benefit rate depends on the family net income.[1346] The higher the income, the lower the benefit payable (possibly down to zero). The family net income is calculated according to the income tax return of the applicant and the cohabitating spouse or common-law partner, if there is one.[1347] Consequently, an income tax return must be filed in order to get the CCTB amount calculated and receive a CCTB benefit. This obligation relates to the applicant and, if there is a spouse or common-law partner, to both of them. A return must be filed for every year for which the CCTB should be received, even if there is no income to report.[1348] Without an income tax return, there is no entitlement to CCTB benefits.

The question is whether irregular migrant workers are able to file an income tax return. Here, once more, the Social Insurance Number (SIN) comes into play. We wrote above that neither category A nor category B workers can apply for a SIN, and workers in neither category – other than in exceptional circumstances – can be in possession of a valid SIN.[1349] Canada operates a self-assessment income tax system. The self-assessed tax is reported by filing an income tax return.[1350] For this income tax return, subsection 237 (1.1) Income Tax Act explicitly requires the SIN to be produced. So what happens when an income tax return is filed without producing a SIN? According to the Canada Revenue Agency, the tax return would not be processed and it would be

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caring for children with severe and prolonged mental or physical impairments. The basic eligibility criteria are the same for all three components of the CCTB. For the CDB, there is the additional requirement of a severe impairment in physical and mental functions of the child, which lasts, or is expected to last, at least twelve months.

[1344] See § 122.6 ff. Income Tax Act.

[1345] For the investigation see the previous subchapter 12.1.1.

[1346] This is true for all three components of the CCTB.

[1347] See § 122.61 Income Tax Act.

[1348] Canada Revenue Agency, *Canada Child Benefits*, p. 9.

[1349] See subchapter 6.2.1.

[1350] See § 150 Income Tax Act.

returned to the filer.[1351] Consequently, an irregular migrant worker basically cannot report his or her income. For the payment of income tax this means that while irregular immigrants might be liable to income tax on the basis of their residence in Canada, they cannot report it.[1352] For the receipt of CCTB benefit this means that irregular migrant workers usually cannot comply with the requirement to file an income tax return. The Canada Revenue Agency needs an income tax return in order to calculate the CCTB, even if there has been no income. It would also not be sufficient to provide one income tax return of a family, since in the case of marriages or common-law partnerships the tax returns of both persons are required. Hence irregular migrant workers usually cannot qualify for CCTB benefits.

Worth mentioning, like for the UCCB, eligible individuals may also qualify for the CCTB for unlawfully resident children. The immigration status does not have a bearing on eligibility and practical obstacles do not exist.

12.2.2. Nationals who engage in undeclared work

Canadians whose work is not declared to the social security authorities may qualify for the Canada Child Tax Benefit on the basis of their Canadian citizenship and their residence in Canada. The citizenship/immigration status requirement and the residence requirement, both set out in section 122.6 Income Tax Act, may be met by virtue of Canadian citizenship; at any rate, Canadian citizenship certainly does not hinder this requirement being satisfied. Moreover, Canadian citizenship makes the possession of a Social Insurance Number possible, which is a requirement for getting the income tax return processed and consequently for qualifying for a CCTB benefit.

The non-declaration of work, and hence the non-payment of social insurance premiums and income taxes on this work, does not prevent Canadians who are undeclared workers from filing an income tax return. They must pay income tax and file an income tax return if they have certain types of income other than employment income.[1353] And even if there is no other income and thus no income to report, the undeclared worker may file an income tax return for the purpose of qualifying for this or another tax benefit.

It should however be mentioned that the non-declaration of income from work for tax and social security purposes leads to a lower total for the official family income, used in the calculation of the Ontario Child Benefit and OCCS rate. As a consequence, an undeclared worker will either fraudulently receive excessively high benefits, or fraudulently receive benefits to which he or she is not entitled at all.

[1351] See Guidy Mamann, "Illegal workers create a taxing issue," *Metro newspaper of Toronto*, 23 July 2007, p. 6. In this newspaper article the author refers to an interview with Sam Papadopoulos, Communication Manager of the Canada Revenue Agency, as his source.

[1352] It would be possible for an irregular migrant worker or his/her employer to make income tax payments, but these could not be processed as the payments of a particular taxpayer. The tax return unaccompanied by a SIN would therefore be returned to the filer, while the payments would be deposited. See Guidy Mamann, "Illegal workers create a taxing issue," p. 6.

[1353] § 150 (1), (1.1) Income Tax Act.

12.3. The Ontario Child Benefit and the Ontario Child Care Supplement for Working Families (OCCS)

12.3.1. Irregular migrant workers

The Ontario Child Benefit and the Ontario Child Care Supplement for Working Families (OCCS)[1354] are initiatives of Ontario's government to support families with the cost of raising children under the age of eighteen (Ontario Child Benefit) and under the age of seven (OCCS). For the next few years the two benefits will exist alongside each other, with the amount of the Ontario Child Benefit being subtracted from the OCCS payment. By 2018, the OCCS will be phased out. The rate of the two benefits depends on the family income amongst other factors. The higher the income, the lower the benefit payable (possibly down to zero).

The eligibility criteria for both benefits are, by and large, identical, if we disregard some differences which are irrelevant for this research: the parent must be eligible for the federal CCTB; the parent, and if applicable the cohabitating spouse or common-law partner, must have filed a federal income tax return; and the parent must reside in Ontario.[1355]

The explicit legal requirement to file a federal income tax return[1356] provides some difficulties for irregular migrant workers. We have already seen in our analysis of the federal CCTB how irregular migrant workers, who usually lack a SIN, cannot file an income tax return. [1357] This would mean that irregular migrant workers are not able to comply with the income tax statement requirement under Ontario's Income Tax Act. Hence they are usually ineligible for the Ontario Child Benefit and the OCCS under Ontario's Income Tax Act.

If, exceptionally, irregular migrant workers are in possession of a SIN, they may face a further obstacle to entitlement to the Ontario Child Benefit and the OCCS: the requirement to be eligible for the federal CCTB benefit.[1358] We have seen above that unlawfully resident irregular migrant workers and certain lawfully resident irregular migrant workers under a conditional or unenforceable removal order are not able to pass the citizenship/immigration status requirement in person. They are therefore ineligible for CCTB benefits if they are single parents or if they are cohabitating with a spouse or common-law partner who does not pass the citizenship/immigration status test either. Only if their cohabitating spouse or common-law partner has an eligible immigration status may such foreigners qualify for a benefit. By contrast, irregular migrant workers who are temporarily resident under Canadian immigration law and who have resided in Canada throughout an eighteen month period preceding the applicable time and irregular migrant workers who are protected persons are able to fulfil the citizenship/immigration status requirement in person.

For the sake of completeness, we shall see whether irregular migrant workers are able to comply with the 'residence in Ontario' requirement under the Ontario Income Tax Act. Subsection 8.6.2

[1354] The OCCS is Ontario's contribution to the National Child Benefit initiative. For the federal contribution to the National Child Benefit initiative, *viz* the National Child Benefit Supplement, see above, subchapter 12.2.1.
[1355] § 8.6.2 (for the Ontario Child Benefit) and § 8.5 (for the OCCS) Ontario Income Tax Act, R.S.O. 1990, c. I.2.
[1356] See § 8.6.2 (5) 3. and § 8.5 (4) (d) Ontario Income Tax Act.
[1357] See above, subchapter 12.2.1.
[1358] See § 8.6.2 (5) 1. in conjunction with § 8.6.2 (1) and § 8.5 (4) (a) in conjunction with § 8.5 (1) Ontario Income Tax Act.

(5) 2. and subsection 8.5 (4) (b) Ontario Income Tax Act stipulate that an individual must be resident in Ontario during the period of receipt of the Ontario Child Benefit or the OCCS. Within the Canadian income tax system, the term 'residence' is interpreted uniformly and consistently. Accordingly, residence in a province under a provincial income tax act is determined on the basis of the same criteria as residence in Canada under the federal Income Tax Act.[1359] An individual must therefore establish or maintain residential ties with a province – here Ontario. The question of residence in Canada and residential ties with Canada has already been discussed in subchapter 12.1.1. There we argued for both category A and category B immigrants that it may be possible to be considered as a resident of Canada for income tax purposes. An analogous conclusion can thus be drawn for residence in Ontario under the Ontario Income Tax Act.

To sum up, irregular migrant workers are usually ineligible for the Ontario Child Benefit and the OCCS. This is because they normally lack a SIN and are hence not in a position to file the required income tax return. If irregular migrant workers are in possession of a SIN, they may face a further obstacle: the requirement to have an eligible immigration status. Only if they have an eligible immigration status or their cohabiting spouse or common-law partner has such a status will they comply with this entitlement condition. Thus only in exceptional circumstances may an irregular migrant worker be in a position to meet all qualifying conditions for the Ontario Child Benefit and the OCCS.

For both the Ontario Child Benefit and the OCCS, an eligible dependant is defined in the same way as an eligible dependant for the Canada Child Tax Benefit – with the one exception that for the OCCS, the child must be under the age of seven. In the context of the CCTB, we have found that immigration status does not have an influence on the determination whether a child qualifies as an eligible dependant for CCTB purposes. Hence the same conclusion can be drawn for the Ontario Child Benefit and the OCCS. Since eligibility for both provincial programmes is linked to the CCTB, proof of the existence and age of the child does not have to be produced anymore. From this it follows that a child with an irregular migration status may be an eligible dependant for whom an eligible individual may receive Ontario Child Benefit or OCCS payments.

12.3.2. Nationals who engage in undeclared work

Canadians who perform undeclared work are, due to their Canadian citizenship and their residence in Canada, in a position to qualify for the CCTB,[1360] one of the three conditions for the Ontario Child Benefit and the OCCS.

The two other criteria formulated under the Ontario Income Tax Act – residence in Ontario and the filing of income tax returns – can also be fulfilled by a Canadian whose work is not declared to the social security authorities. As mentioned earlier, non-declaration of work to the social security authorities goes hand in hand with non-declaration of work to the tax authorities. But this does not prevent a national from filing an income tax return – if only for tax credit purposes.

As already mentioned in the context of the CCTB, due to the non-declaration of their income from work, undeclared workers may fraudulently receive (higher) Ontario Child Benefits or OCCS benefits.

[1359] See Canada Revenue Agency, "Determination of an Individual's Residence Status," § 1.
[1360] See subchapter 12.2.2.

13. The social risk of financial need

Section 92 (7) of the Constitution Act, 1867 assigns the establishment, maintenance and administration of social assistance to the provinces and territories (see also chapter 1). Based on this, provinces and territories have established, as a last resort for people in need, social assistance programmes to enable a decent standard of living and support (re)integration into society and the labour market. For its part, the federal government provides financial support for the provincial and territorial assistance programmes via the Canada Social Transfer funding mechanism. In addition, the federal government administers its own social assistance programme for government-assisted refugees, the so-called Resettlement Assistance Program.

Welfare schemes vary amongst the different federated States. The province of Ontario operates three main programmes: Ontario Works, a general social assistance scheme for people in temporary need; the Ontario Disability Support Program (ODSB), which provides social assistance for disabled people in need; and the Ontario Guaranteed Annual Income System (GAINS), which offers social assistance for seniors in need. The first two are federally supported by Canada Social Transfer.

In this chapter, Ontario's main social assistance programmes will be addressed. The federal Resettlement Assistance Program will not be investigated, since it is a very specific social security scheme with a limited personal scope of application. Irregular migrant workers and nationals who engage in undeclared work are excluded from this programme from the outset. The programme provides financial assistance and assistance in kind solely to refugees who have been identified and selected abroad. When they arrive in Canada they become permanent residents who do not need authorisation to work in Canada.[1361]

13.1. Ontario Works

13.1.1. Irregular migrant workers

Ontario Works provides, most notably, financial and employment assistance to people in temporary need.[1362] In order to be eligible for benefits, applicants must be resident in Ontario, must be in need,[1363] and must participate in employment assistance activities and accept and maintain employment.[1364] In principle, applicants must be at least eighteen years of age.[1365] In

[1361] Jones and Baglay, *Refugee Law*, p. 73. See also § 95 (1) (a) IRPA. temporary resident permits for protection reasons are only granted in very exceptional cases.

[1362] The financial assistance consists of money and benefits in kind for a decent living, while the employment assistance offers programmes and services to support the beneficiary to find work or become 'job ready'.

[1363] Need is assessed through a means test and takes income and assets into account.

[1364] If none of the entitlement criteria are met, the competent administrator may nevertheless provide emergency assistance to people who are not able to provide for their basic needs and where either there is a danger to the physical health of a member of the benefit unit, or one or more dependent children will be unable to continue to reside with their parents. Even so, such emergency assistance may *not be provided for more than sixteen days* and only once in a six months period. See § 11 Ontario Works Act and § 56 Ontario Regulation 134/98. See also Ontario Ministry of Community and Social Services, *Emergency assistance*, Ontario Works Policy Directive 2.3 (Toronto, Ministry of Community and Social Services, loose-leaf, 2008).

addition, employment assistance and benefits in kind (a component of financial assistance) are provided to persons eligible for other benefits, such as income support under the Ontario Disability Support Program Act.

Subsection 7 (3) (a) Ontario Works Act stipulates that "[n]o person is eligible for income assistance unless the person is resident in Ontario". Residence means the place of ordinary residence,[1366] such as the place where the person has his/her permanent address.[1367]

However, citizenship and immigration status are also relevant here, since foreigners with a weak or with no immigration status are not considered as residents under the Ontario Works Act and the regulations thereto and are explicitly exempted from eligibility. In more detail, subsection 6 (1) 1. ii. Ontario Regulation 134/98 declares that persons with respect to whom a removal order has become enforceable under the Immigration and Refugee Protection Act are not eligible for financial or employment assistance under the Ontario Works Act. An exception to this rule only applies if an Ontario Works administrator is satisfied that "for reasons wholly beyond the control of the person, the person is unable to leave the country" or "the person has made an application for status as a permanent resident on the basis of humanitarian or compassionate considerations".[1368] This means that unlawful residents whose unlawful residence has been officially determined by immigration authorities are, unless an exception applies, explicitly excluded from social assistance under the Ontario Works Act. The Ontario Works Act and the regulations thereto say nothing about foreigners who are staying in the country in breach of immigration law and who have not received an enforceable removal order; in other words, unlawfully resident migrants who have not come to the attention of the immigration authorities. The relevant policy directives, however, do address this issue. According to the directives, applicants must not be in violation of Canadian immigration law[1369] and must be legally entitled to reside in Canada.[1370] The question is whether legal security and transparency would not be increased if this lawful presence requirement were included in the law. According to the current wording of the law, unlawfully resident persons are entitled to benefits, as long as no removal order has been issued.[1371]

Thus unlawfully resident migrants are as a rule not entitled to social assistance under the Ontario Works programme. One of the two exceptions created by Ontario Regulation 134/98 is interesting. The Ontario Works administrator has the discretionary power to provide social assistance,

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[1365] Under special circumstances that justify assistance, Ontario Works assistance may however be granted to person between sixteen and eighteen years of age. Assistance to people below sixteen years of age is only granted if they are single parents.

[1366] § 4 (1) Ontario Regulation 134/98.

[1367] Ontario Ministry of Community and Social Services, *Residency requirements*, Ontario Works Policy Directive 3.1 (Toronto: Ministry of Community and Social Services, loose-leaf, 2008).

[1368] § 6 (2) Ontario Regulation 134/98.

[1369] Ontario Ministry of Community and Social Services, *Immigrants, refugees and deportees*, Ontario Works Policy Directive 25.0 (Toronto: Ministry of Community and Social Services, loose-leaf, 2001).

[1370] Ontario Ministry of Community and Social Services*, Residency requirements.*

[1371] In order to verify the eligible immigration status, all applicants who are not Canadian-born citizens must provide verification of their status in Canada. The information delivered by the applicant is checked by the Ontario Works administrator. This means that where information-sharing agreements are in place, the administrator must contact the nearest Citizenship and Immigration Canada office to confirm the applicant's statements. Ontario Works Policy Directive 25.0 explicitly mentions the necessity to contact the Citizenship and Immigration Canada office to reveal the status of "any non-citizen who may be in Canada legally or illegally". See Ontario Ministry of Community and Social Services, *Immigrants, refugees and deportees*, pp. 10-11.

whenever he or she is convinced that the applicant is unable to leave the country for reasons wholly beyond the applicant's control. This relates, for instance, to situations where travel documentation and arrangements are delayed or where the safety of the deportee cannot be assured in the home country due to political unrest.[1372] Concerning the latter possibility, it is important to mention that if Citizenship and Immigration Canada is of the opinion that the conditions in the home country have changed so that they pose a threat to the entire civilian population, Citizenship and Immigration Canada can temporarily stay the removal order.[1373] The effect of such a temporary stay of the removal order is that the removal order is not enforceable.[1374] If the removal order is not enforceable, the deportee might strictly speaking be eligible for Ontario Works assistance, pursuant to subsection 6 (1) 1. ii. Ontario Regulation 134/98. In other words, the discretion granted to the Ontario Works administrator goes beyond the judgment of Citizenship and Immigration Canada. It is also interesting to note that, according to the legal text, the above-mentioned exception only applies to unlawful residents who are subject to an enforceable removal order. This would mean that unlawfully present foreigners who have not come to the attention of immigration authorities cannot hope to enjoy relief if they are unable to leave the country for reasons wholly beyond their control.

We mentioned above that applicants may qualify for employment benefits and benefits in kind, simply because of the fact that they are eligible for other benefits. Persons eligible to receive income support under the Ontario Disability Support Program Act may qualify for both employment benefits and benefits in kind under Ontario Works. In addition, the following beneficiaries may be entitled to Ontario Works benefits in kind: beneficiaries of the financial assistance for children with severe disabilities under the Ontario Disability Support Program Act, persons receiving benefits under the Family Benefits Act[1375] and children on whose behalf temporary care assistance is provided under the Ontario Works Act.[1376] One can ask whether foreign applicants can avoid the immigration status requirement, which has been illustrated before, simply by being eligible for or a beneficiary of other social assistance benefits. The answer is, however, no. Section 6 Ontario Regulation 134/98 in conjunction with section 3 Ontario Works Act explicitly stipulates that the fulfilment of the immigration status requirement is crucial not only for income assistance, but also for benefits in kind assistance and employment assistance.

Let us have a look at category B workers. We have identified that foreigners can have the following residence statuses under Canadian immigration law in order to fall within category B: visitors for visit, study or work purposes; holders of a temporary resident permit; or persons staying in Canada under a conditional or non-enforceable removal order.

[1372] Ontario Ministry of Community and Social Services, *Residency requirement*. The policy guidelines talk about situations where Citizenship and Immigration Canada has determined that the safety of the deportee cannot be assured in the home country due to strife or political unrest. As we will show in the following this seems to be a contradiction. Had Citizenship and Immigration Canada officially determined that the safety of the deportee cannot be assured, it would have needed to temporarily stay the removal. This in turn would mean that the removal order is not enforceable and that eligibility for Ontario Works benefits would become possible without the applicability of § 6 (2) (a) Ontario Regulation 134/98, *i.e.* without the assessment of the inability to leave the country by the Ontario Works administrator.

[1373] § 230 IRPR.

[1374] § 45 (1) IRPA.

[1375] Family Benefits Act, R.S.O. 1990, c. F.2. Although still in force, this Act will be repealed by the Statutes of Ontario, 1997, on a day to be named by the Lieutenant Governor. Applications for benefits are no longer accepted under the Family Benefits Act.

[1376] See § 6 and § 8 Ontario Works Act in conjunction with § 59 (4) and (4.1) Ontario Regulation 134/98.

Visitors for visit, study or work purposes are, according to subsection 6 (2) Ontario Regulation 134/98, excluded from assistance under the Ontario Works programme. One exception is visitors who apply either for refugee protection or for permanent residence.[1377] Tourists are without any exception ineligible for social assistance.[1378] The Ministry considers tourists to be persons in Canada for a short period of time.[1379] A more precise definition of what 'a short period of time' means is not given.

The status of holder of a temporary resident permit is, by contrast, not an obstacle to qualifying for social assistance under the Ontario Works Act.[1380]

Finally, persons under a conditional or unenforceable removal order may also be granted benefits under the Ontario Works programme. This follows as an *argumentum e contrario* from subsection 6 (1) 1. ii. Ontario Works Act where we read that a person "with respect to whom a removal order has become enforceable under the Immigration and Refugee Protection Act" is not eligible for assistance. Further evidence for this conclusion can be found in the Ministry's policy. The Ontario Works Policy Directive 25.0 instructs that a deportee who has his or her removal order stayed may be eligible for financial assistance.[1381] Besides, specific reference is made to refugee claimants. This group usually stays in Canada under a conditional removal order.[1382] The Ministry's policy directive states that refugee claimants in Canada may be entitled to social assistance while awaiting the determination of their claim by the Immigration and Refugee Board.[1383]

To sum up, certain category B workers may qualify for assistance under the Ontario Works programme on the basis of their immigration status and their residence in Ontario. There are, however, two more entitlement criteria which may represent an obstacle for the irregular migrant worker: firstly, financial need, and secondly, participation in employment training and acceptance of employment.

Assistance under the Ontario Works Act is only granted to persons in financial need. To this end, the applicant's and his or her dependants' income and assets must not exceed prescribed limits.[1384] Irregular migrant workers by definition have income from work. Therefore, they are only eligible for benefits if their income and assets do not exceed the relevant threshold.

The Ontario Works programme aims, *inter alia*, to promote "self reliance through employment" and to provide "temporary financial assistance to those most in need while they satisfy obligations to become and stay employed".[1385] Accordingly, administrators may require beneficiaries and their dependants to "satisfy community participation requirements; participate in employment measures; accept and undertake basic education and job specific skills training and; accept and

[1377] See § 6 (1) 2. ii., iii. Ontario Works Act.
[1378] § 6 (1) 3. Ontario Works Act.
[1379] Ontario Ministry of Community and Social Services, *Immigrants, refugees and deportees*, p. 10.
[1380] *Ibid*., 22.
[1381] *Ibid*., 7.
[1382] See subchapter 2.1.
[1383] Ontario Ministry of Community and Social Services, *Immigrants, refugees and deportees*, p. 7
[1384] § 7 (3) (b) Ontario Works Act.
[1385] § 1 (a) and (b) Ontario Works Act.

maintain employment".[1386] Since irregular migrant workers do not possess an employment authorisation in Canada, one can ask if they are able to fulfil these conditions.

Ontario Works administrators and delivery agents have the discretionary power to defer or restrict employment participation requirements.[1387] According to the Ministry's policy, they can make use of this discretionary power in cases where the person concerned does not have valid employment authorisation. The Ontario Works Policy Directive 25.0 reads: "The Administrator may consider deferring the applicant's participation requirements if the applicant is unable to obtain a work permit or if there is a delay in obtaining a work permit".[1388] So it is up to the administrator of the Ontario Works programme to decide whether a person without the required work permit should be relieved from employment participation requirements. If no relief is granted and the applicant/beneficiary is not able to comply with the above-mentioned employment-related requirements, the administrator will either refuse/stop or reduce the benefit. To be more precise, an applicant who is a single person and who refuses to comply with the employment-related requirements will not be entitled to the benefit. If the person concerned already receives social assistance benefits, *i.e.* is a beneficiary, the benefit will be stopped for one month or, in case of recurrence, three months. The situation where there are dependants in the applicant's/beneficiary's benefit unit is different. In such a case the benefit will be reduced by the budgetary requirements of the person in the family unit who fails to comply with the employment-related requirements – once again, only temporarily in the case of beneficiaries. In other words, the other members of the family unit will not be affected by the failure of one member to comply with the requirement to accept and maintain work or to participate in employment-related activities. This means, amongst other things, that a dependent child is not held liable for the parents' failure to comply with back-to-work requirements.[1389]

It is worth mentioning that the benefit rate is determined according to the budgetary requirements of the family unit. It is assumed that the bigger the family unit, the higher the needs are.[1390] One can ask whether children or other family members who are unlawfully present would count as family members. The laws are silent on this issue, as are the policy guidelines. The relevant laws refer only to dependants. Since the identity of the family members is not confined to lawfully resident dependants, a textual interpretation would lead to the conclusion that unlawfully resident family members of qualifying individuals should also be taken into account for the determination of the assistance rate. A teleological interpretation would lead to the same result. The benefit relates to the actual needs of a family unit. The fact that a family member has no authorisation to be in the country does not reduce the budgetary requirements of this family unit. It should be recalled here that children born in Canada are Canadian citizens and hence regularly present in the country.

[1386] § 7 (4) Ontario Works Act. See also § 28 (1) Ontario Works Regulation 134/98. Dependent children who are of pre-school age or who are attending school must not be required to take part in such employment-related activities. See § 29 (1.1.) Ontario Works Regulations 134/98.

[1387] See Ontario Ministry of Community and Social Services, *Setting participation requirements*, Ontario Works Policy Directive 6.0 (Toronto: Ministry of Community and Social Services, loose-leaf, 2001), p. 15; and Ontario Ministry of Community and Social Services, *Immigrants, refugees and deportees*, p. 22.

[1388] Ontario Ministry of Community and Social Services, *Immigrants, refugees and deportees*, p. 22.

[1389] See § 33 and § 34 Ontario Works Regulation 134/98.

[1390] See § 16 (1) Ontario Works Act in conjunction with § 41 Ontario Regulation 134/98.

Another relevant point here is that income assistance comprises the so-called Transition Child Benefit for beneficiaries who have one or more dependent children for whom they do not receive the Ontario Child Benefit and the Ontario Child Care Supplement for Working Families, or for whom they receive less than the maximum amounts. This supports, amongst others, foreigners who lack an eligible immigration status for the federal and provincial child benefits, but have an eligible status for Ontario Works assistance. Law and policy guidelines do not pronounce on the immigration status of the child.[1391] From the absence of any requirement, one can deduce that a Transition Child Benefit can also be obtained for unlawfully resident children, as long as the parent qualifies for assistance under the Ontario Works Act.

13.1.2. Nationals who engage in undeclared work

Canadians working in the black economy, like irregular migrant workers, are not the target group of Ontario Works. This is because the two groups under investigation by definition have work and income from work. Only if the income is marginal and does not exceed the prescribed limits may entitlement to Ontario Works benefits arise. In practice, Canadians whose work is not declared for social insurance purposes in order to evade the payment of contributions will most likely hide their undeclared income from Ontario Works officials.[1392] If so, Canadian black economy workers may fraudulently receive Ontario Works assistance to which they are *de iure* not entitled. This is considered an offence and the perpetrator will be subject to fines or even imprisonment.[1393]

However, provided that the income is marginal and, together with the assets, does not exceed the relevant threshold, Canadian undeclared workers may qualify for assistance under the Ontario Work Act if they are resident in Ontario. Canadian citizenship paves the way for being considered as a resident.

13.2. The Ontario Disability Support Program (ODSP)

13.2.1. Irregular migrant workers

Ontario's Disability Support Program (ODSP) provides specific social assistance to disabled people in need. This assistance comprises, first and foremost, income support and employment support.[1394] Beneficiaries of employment support are not necessarily recipients of income support and *vice versa*. Accordingly, eligibility criteria differ.

Let us first deal with income support. According to subsection 5 (1) (b) Ontario Disability Support Program Act[1395], income support is only granted to residents in Ontario. As is the case under the

[1391] See § 58.3 Ontario Works Regulation 134/98.
[1392] The case handler is responsible for determining the income and the value of the assets. In doing so, the case handler relies on information provided by the applicant as well the case handler's own investigations, such as home visits or income tax assessments.
[1393] § 79 Ontario Works Act.
[1394] Income support assists in covering expenses related to basic needs, shelter or the disability by providing benefits in money or in kind; employment support assists disabled people who want to and can work with their employment ambitions.
[1395] Ontario Disability Support Program Act.

Ontario Works programme, certain foreigners are not considered as residents. This follows from section 8 Ontario Regulation 222/98[1396] to the Ontario Disability Support Program Act, which is absolutely identical to section 6 Ontario Regulation 134/98 to the Ontario Works Act. Essentially, foreigners with respect to whom a removal order has become enforceable are ineligible for income support under Ontario's Disability Support Program.[1397] Exceptions apply to foreigners who satisfy the Ontario Works administrator that they are unable to leave Canada for reasons wholly beyond their control or who make an application for permanent residence on the basis of humanitarian or compassionate considerations.[1398] Like the Ontario Works Act and the regulations thereto, ODSP laws are silent on the issue of unlawful residents who have not received an enforceable removal order. Here too, however, the policies of Ontario's Ministry of Community and Social Services provide some clarification. It is the explicit intent of policy to ensure that income support is only provided to persons whom Citizenship and Immigration Canada has allowed to stay in Canada.[1399] From this it follows that unlawful residents are not in the position to enjoy benefits, even if they are not subject to an enforceable removal order. However, as we have already seen, the law does not provide for this exclusion.

Certain category B workers may pass the immigration status requirement. Holders of a temporary resident permit or foreigners under a conditional or unenforceable removal order may qualify.[1400] Category B workers with the status of visitor in Canada may only be eligible if they have applied for refugee protection or permanent residence.[1401] Tourists, however, are in any case excluded.[1402]

Thus irregular migrant workers with a certain immigration status or in certain situations may pass the immigration status requirement and may be considered as resident in Ontario. However, the target group of the ODSP is not workers in general, but disabled people who are in need. So entitlement to ODSP income assistance can be established only if the irregular migrant worker meets the definition of disability under the ODSP Act[1403] and at the same time lacks sufficient income and assets to live on[1404].

The same goes for employment support under the ODSP. Again, workers are not the target group. Let me nevertheless investigate whether irregular migrant workers who pass the disability test are able to meet the other entitlement criteria for employment support.

In order to become eligible for employment support, the disabled person must either be eligible for income support or must have a physical or mental impairment that is expected to last at least one

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[1396] General, Ontario Regulation 222/98.
[1397] § 8 (1) 1. ii. Ontario Regulation 222/98. Applicants who are not Canadian-born citizens are obliged to provide evidence of their status in Canada. To verify the applicant's statements and evidence, Ontario Works officials may contact Citizenship and Immigration Canada. See Ontario Ministry of Community and Social Services, *Tourists, immigrants, refugees and deportees*, Ontario Disability Support Program Income Support Directive 2.5 (Toronto: Ministry of Community and Social Services, loose-leaf, 2009), p. 3.
[1398] § 8 (2) Ontario Regulation 222/98.
[1399] Ontario Ministry of Community and Social Services, *Tourists, immigrants, refugees and deportees*, p. 2.
[1400] *Argumentum e contrario* § 8 Ontario Regulation 222/98. See for the confirmation Ontario Ministry of Community and Social Services, *Tourists, immigrants, refugees and deportees*, pp. 3, 16, 17.
[1401] § 8 (1) 2. ii., iii Ontario Regulation 222/98.
[1402] § 8 (1) 3. Ontario Regulation 222/98.
[1403] Alternatively, the definition of disability under other programmes, such as the Canada Pension Plan, is to be met. See § 3 (1) Ontario Disability Support Program Act in conjunction with § 4 (1) Ontario Regulation 222/98.
[1404] § 5 (1) (c) Ontario Disability Support Program Act.

year and that presents a substantial barrier to competitive employment. In the latter case, residence in Ontario is required.[1405] But in contrast to income support, the law does not prescribe a certain immigration status in order to be considered as a resident. This would mean that foreigners with no immigration status or with a precarious immigration status could also qualify for employment support. The competent ministry, however, takes a different point of view. In the ODSP Employment Support Directive 2.1 we read that "[a]ll applicants must provide documentation that he/she [...] is a resident of Ontario (not including tourists, visitors or temporary residents)".[1406]

It is also worth mentioning that section 33 ODSP Act stipulates that "[n]o person is eligible for employment supports under this Act unless the person [...] is able to prepare for, accept or maintain competitive employment". Competitive employment is generally defined as "remunerative employment that can reasonably be expected to contribute to a person's economic well being".[1407] The law does not prescribe how foreigners without employment authorisation should be treated. From the Ministry's policy we learn that capacity for employment relates not only to the applicant's physical or mental conditions, but also to his or her legal situation. ODSP Employment Support Directive 2.1 requires the applicant to prove that he or she is legally entitled to work in Canada. This proof can take the form of a Canadian passport, Canadian birth certificate, permanent resident card, work permit or SIN card not beginning with the number nine. Irregular migrant workers are by definition not legally entitled to work in Canada and are not holders of any of these documents. Therefore, according to the Ministry's policy, they will not be able to enjoy employment support.

13.2.2. Nationals who engage in undeclared work

We have already pointed out that workers are not the target group of Ontario's social assistance for the disabled. Canadian black economy workers are therefore only eligible for assistance if they are disabled within the meaning of the ODSP programme and if they are in financial need. If undeclared Canadian workers meet these requirements, there should be no further obstacle to benefit entitlement. In more detail, they can be considered as residents and they are able to prepare for, accept and maintain competitive employment. Their Canadian citizenship paves the way for this.

13.3. The Ontario Guaranteed Annual Income System (GAINS)

13.3.1. Irregular migrant workers

The Ontario Guaranteed Annual Income System (GAINS) is a special social assistance scheme for needy seniors. It provides a monthly supplemental payment to Old Age Security (OAS) pensioners. Workers – whether they are irregular migrant workers or Canadian black economy

[1405] See § 33 (a) Ontario Disability Support Program Act.
[1406] Ontario Ministry of Community and Social Services, *Program eligibility*, Ontario Disability Support Program Employment Support Directive 2.1 (Toronto: Ministry of Community and Social Services, loose-leaf, 2006), pp. 1-2.
[1407] Ontario Ministry of Community and Social Services, *Introduction to ODSP employment supports*, Ontario Disability Support Program Employment Support Directive 1.1 (Toronto: Ministry of Community and Social Services, loose-leaf, 2006), p. 1.

workers – will *de iure* hardly qualify for this supplement. This is because the applicant[1408] must both be entitled to a partial OAS pension plus the GIS supplement for needy pensioners and demonstrate his/her indigence, *i.e.* must not have income above the prescribed GAINS threshold. This entails that the income of the applicant – if the applicant is a single person – must be below CAD (2010) 1,992 per year, which amounts to less than CAD (2010) 166 CAD per month. Here we are not talking about income from work only. Other income is also taken into account, such as certain income replacement benefits, investment income or rental income.[1409] This makes it clear that only if they are receiving a very marginal income from work is it possible for workers to qualify *de iure* for a GAINS supplement.

We will nevertheless investigate whether aged irregular migrant workers may qualify for a GAINS supplement and assume for the purpose of this investigation that their income from work is very marginal. Alternatively, we can ask whether former irregular migrant workers are able to benefit from a GAINS supplement once retired and in receipt of an OAS pension.

If there is no change in immigration status over time, irregular migrant workers who are unlawfully present in Canada are ineligible for a GAINS supplement. Subsection 2 (2) Ontario Guaranteed Annual Income Act (GAIN Act) and, in case of entitlement through a bilateral social security agreement, subsection 10 (1) 3. Regulation 874 under the GAIN Act[1410] requires either Canadian citizenship or legal residence. Subsection 2 (7) GAIN Act authorises the Lieutenant Governor in Council to make regulations defining the meaning of 'legal residence'. This has been done and the regulations[1411] have been incorporated in section 22 OAS Regulations. Section 22 OAS Regulations stipulates that a person is legally resident if the person is or was lawfully in Canada pursuant to the immigration law of Canada or, if the person is not resident in Canada, the person is deemed to be resident in Canada. In our analysis of the OAS programme (see subchapter 7.1.1.), we saw that unlawful residents, and therefore category A immigrant workers, do not fulfil the legal residence requirement. Thus former or current irregular migrant workers who have never had authorisation to stay in Canada are ineligible for a GAINS supplement.

Category B workers, by contrast, are able to meet the lawful presence condition under the GAIN Act. This too has already been analysed in the context of the OAS programme (see subchapter 7.1.1.).

However, category B workers, as well as former category A workers who are at the time of application lawfully present in Canada, may have difficulties in meeting those entitlement conditions for the receipt of a GAINS supplement which are related to residence in Ontario and Canada. In more detail, subsection 2 (1) GAIN Act requires for benefit entitlement

- actual residence in Ontario;
- residence in Ontario for one full year immediately prior to the approval of the application or residence in Ontario for an aggregated period of twenty years after the age of eighteen;
- residence in Canada for an aggregated period of ten years after the age of eighteen;

[1408] An application, incidentally, is not necessary. Benefit entitlement will usually be determined automatically on the basis of information on OAS receipt and on the basis of the income tax return.
[1409] See § 1 (1) Ontario Guaranteed Annual Income Act (GAIN Act), R.S.O. 1990, c. O.17 in conjunction with § 2 OAS Act.
[1410] Ontario Regulation 874, R.R.O. 1990, Enabling Statute: Ontario Guaranteed Annual Income Act (GAIN Act), R.S.O. 1990, c. O.17.
[1411] See SOR/78-699, s. 1; SOR/81-285, s. 6; SOR/89-269, s. 7; SOR/90-813, s. 11(1); SOR/96-521, s. 10.

- receipt of an OAS old age pension, which also requires residence in Canada for an aggregated period of at least ten years after the age of eighteen.

Ontario's laws and also case law are silent on the exact meaning of 'residence' in the GAIN Act. The fact that the GAINS payment is only a supplement to OAS benefits and thus requires entitlement to the old age pension and the GIS indicates that the term 'residence' might be interpreted in a similar way. If so, we can refer to our findings in subchapter 7.1.1. There we noted that former category A workers may have assumed that their periods of actual residence, even without status, would be taken into account as residence in terms of the OAS Act. However, an analysis of case law suggested that there would be difficulties, since the authorities often only consider periods in Canada after the formalisation of the intention to become a resident, *i.e.* after applying for permanent residence, as residence in Canada for OAS purposes. Category B workers may also have their periods of actual residence in Canada taken into account, even if they have only had a temporary or precarious immigration status. But here too, an analysis of case law revealed that the application for permanent residence often plays a crucial role, making it difficult – although not impossible – for people with a temporary or precarious residence status to be considered as residents.

13.3.2. Nationals who engage in undeclared work

We mentioned in the previous subchapter that OAS pensioners who still have income from work are unlikely to meet the entitlement criteria for a GAINS supplement for needy pensioners. However, here too we can assume a very marginal income from work and ask whether the undeclared aged worker will qualify for a GAINS supplement; we can also ask whether former undeclared workers may qualify for this supplement.

Both questions are to be answered in the affirmative. If the Canadian undeclared worker passes the income test, there are no further obstacles for entitlement to a GAINS supplement. Canadian citizenship enables the requirement of citizenship/legal presence at the time of application to be met. Canadian citizenship also at the very least does not constitute an obstacle when a Canadian who is engaging or has engaged in undeclared work wants to prove his/her actual and previous residence in Ontario and Canada.

It should be mentioned that neediness is assessed by an income test. The Ontario Ministry of Revenue, which administers the Guaranteed Annual Income System, automatically receives income data from the person's income tax return. Only if this is not possible does the person have to provide a statement of income.[1412] It was shown in subchapter 8.1.2. that in Canada, not declaring work to the social security authorities goes hand in hand with not declaring work to the tax authorities. As a consequence, the income tax return does not cover income from undeclared work. OAS pensioners who work in the black economy may therefore *de facto* collect a GAINS supplement to which they are *de iure* not entitled. Such behaviour constitutes an offence under the GAIN Act.[1413]

[1412] For this the Ontario Ministry of Revenue uses the statement of income made under the OAS Act for receiving a GIS. See § 4 (1) GAIN Act.
[1413] See § 16 GAIN Act.

14. Comparison

For the most part, Canadian citizens whose work is not declared to the social security authorities enjoy more protection under Canadian social security law than migrant workers who work, and possibly stay, in violation of Canadian immigration law. There are different reasons for this, depending on the social security programme.

Under social security schemes where entitlement to benefits depends on residence in Canada, foreigners with no status, and often also foreigners with a precarious or a temporary immigration status, are, in principle, expressly excluded by law from benefit eligibility. Even so, there are quite a few differences between these schemes. Under Canada's Old Age Security programme,[1414] lawful presence in Canada is required at the time that the application is approved or at the time that the person leaves the country. However, strictly speaking lawful presence is not required during the qualifying period, *i.e.* during the at least ten years of residence in Canada after turning eighteen. Ontario's Health Insurance Plan excludes foreigners with no status and, if they have no valid work authorisation, to a large extent also foreigners with a precarious status or a temporary status under Canadian immigration law. Nevertheless, a federal health insurance programme for foreigners, the IFH Program, expressly insures foreigners with a precarious immigration status who do not fall under OHIP coverage, such as refugee claimants. Under Canada's and Ontario's schemes for family benefits, foreign parents must have a certain status under immigration law. However, this requirement does not have to be fulfilled in person. Thus foreigners with no status or a precarious status under immigration law can pass this requirement, provided they have a cohabitating spouse or common law partner who has an eligible immigration status. However, foreigners with no authorisation to work in the country are usually not in the possession of a Social Insurance Number. This prevents them from filing an income tax return, which, in turn, is a legal precondition under most schemes for family benefits. Finally, Ontario's general social assistance programme, Ontario Works, and Ontario's assistance programme for disabled people, ODSP, also require a certain immigration status for benefit eligibility. However, there are exceptions. Most notably, foreigners unlawfully present and subject to an enforceable removal order may nevertheless receive social assistance if they are either unable to leave Canada for reasons wholly beyond their control or if they make an application for permanent residence on the basis of humanitarian or compassionate considerations. It is also worth mentioning that, in order to comply with back-to-work requirements under Ontario's social assistance schemes, the competent authorities require foreigners to be in possession of authorisation to work in Canada. However, Ontario Works agents may defer this requirement, at their discretion.

In contrast to irregular migrant workers, Canadian undeclared workers face no difficulties in qualifying for benefits under the above-mentioned social security schemes where entitlement to benefits depends on residence in Canada. In more detail, Canadians come within the scope *ratione personae* of these schemes, provided they are residents in Canada/Ontario. The fact that their work is not declared to the social security authorities has no impact on eligibility.

Under social security schemes where entitlement to benefits depends on employment in Canada, the gap in protection between Canadian undeclared workers and irregular migrant workers appears to be smaller than under the above-mentioned residence-based schemes. None of the social

[1414] Also under the Ontario Guaranteed Annual Income System for needy OAS recipients.

insurance laws where insurance is based on employment refers to a foreigner's immigration status as a criterion for insurance or receipt of benefits. Nor is a foreigner's permission to work in Canada mentioned in the laws governing the Canada Pension Plan, Employment Insurance and the Workers' Compensation scheme. However, for Employment Insurance, the Federal Court of Appeal held that employment contracts concluded with foreigners who lack authorisation to work in the country are basically invalid and hence do not constitute insurable employment under the Employment Insurance Act. Relief may only be granted if an irregular migrant worker acted in good faith when infringing Canadian immigration law. We argued that a similar conclusion might be drawn for the Canada Pension Plan, where insurance also depends on a valid contract of service. By contrast, the legality of employment contracts and its impact on social insurance has not been an issue with respect to Canadian undeclared workers. It is clear that the simple failure of the employer to declare the work and to withhold premiums is unlikely to raise questions about the validity of the employment contract – this was analysed in chapter 10 on unemployment. But contracts concluded with the explicit aim of evading the payment of premiums are more questionable. We argued, on the basis of case law and literature, that such evasion agreements may either render the whole employment contract null and void *ex tunc* or may only affect the validity of the evasion agreement itself, but not the rest of the employment contract. Both seem to be possible and case law has thus far not given an answer.

Provided the employment contract is legal, under the Canada Pension Plan both Canadian undeclared workers and irregular migrant workers may face a further obstacle: the explicit requirement to make contributions to the plan. Undeclared workers are by definition non-contributors and irregular migrant workers are usually unable to contribute, because they lack a Social Insurance Number. This disentitles them to benefits, as long as no retroactive regularisation of undeclared work takes place. Under Employment Insurance, foreigners with no authorisation to work in Canada may be confronted with another obstacle: the requirement to be available for work. Only exceptionally, administrations may temporarily consider foreigners with no work permit as being available for work in Canada. This obstacle does not exist for Canadians.

Under the third employment-based insurance, the Ontario's Workers' Compensation programme, Canadian undeclared workers and irregular migrant workers are in a rather similar position. The payment of premiums is not relevant to entitlement to benefits and the question of the validity of the employment contract has never been raised. Both competent courts and the administration grant survivor's, incapacity for work and health benefits to Canadian undeclared workers and irregular migrant workers, as well as to their survivors. Only when it comes to the enjoyment of reemployment services are foreigners without work authorisation disregarded.

Part IIc: The Netherlands

1. Social security in the Netherlands

This Part examines social security for irregular migrant workers and for nationals who perform undeclared work in the Netherlands. In doing so, we consider the situation of irregular migrant workers and undeclared Dutch workers who stay and work in the Netherlands and investigate their rights and duties under national social security legislation. Since the Netherlands is part of the European Union, relevant supranational legislation will be taken into consideration. The Netherlands is also part of the Kingdom of the Netherlands. However, this report only examines the European country known as 'the Netherlands', and disregards the other parts of the Kingdom of the Netherlands, *i.e.* the islands of Aruba, Curaçao and Sint Maarten.

The Constitution of the Netherlands[1415] is the supreme law of the country. Rights relating to social security were included in the Constitution in the course of the revision of 1983.[1416] Most of these rights are formulated as instructions: Articles 20 (1) and 22 (1) of the chapter on fundamental rights in the Dutch Constitution stipulate that the means of subsistence and the health of the population should be ensured by the authorities; and Article 20 (2) states that rules concerning entitlement to social security should be laid down by law.[1417] The right to social assistance is formulated differently. Article 20 (3) of the Constitution guarantees aid from the authorities for Dutch citizens who are in need. The form of this assistance should be regulated by statute. Besides social rights, the first Article of the Constitution of the Netherlands sets out the principle of equal treatment for all those present in the Netherlands.

The practical consequences of all these fundamental rights in the field of social security have been rather limited. Individuals cannot invoke the provisions of the Dutch Constitution to claim entitlement to social security benefits or to generally challenge adverse decisions of the social security authorities.[1418] In this context it is important to mention that Article 120 of the Constitution prohibits the judiciary from judging the constitutionality of laws and treaties, *i.e.* their accordance with the Constitution.

The right to enact laws is exclusively assigned to the Dutch government and the Dutch parliament.[1419] The twelve provinces are only allowed to regulate matters in their sphere as long as their regulations are not in conflict with Dutch legislation.[1420] In the field of statutory social security, the Dutch legislators have established a comprehensive protection system. Literature usually distinguishes between social insurance (*sociale verzekeringen*) and social assistance (*sociale voorzieningen*). The former can be subdivided into general insurance schemes (*volksverzekeringen*) and employee insurance schemes (*werknemersverzekeringen*). The schemes established by the following acts are usually considered as general social insurance schemes:

[1415] Grondwet voor het Koninkrijk der Nederlanden van 24 augustus 1815, Stb. 1815, no. 45.
[1416] Stb. 1983, no. 70.
[1417] The term 'social security' (*sociale zekerheid*) is used in a more limited sense in the Dutch Constitution than in this thesis.
[1418] See Saskia Klosse and Frits Noordam, *Socialezekerheidsrecht*. 10. ed. (Deventer: Kluwer, 2010), p. 11-12; Danny Pieters, *The social security systems of the member states of the European Union* (Antwerp/Oxford/New York: Intersentia, 2002), p. 248.
[1419] Article 81 of the Dutch Constitution.
[1420] See Article 124 of the Dutch Constitution. See also Aalt Willem Heringa and Tom Zwart, *De Nederlandse Grondwet*. 3. rev. ed. (Zwolle: Tjeenk Willink, 1991), p. 242.

- General Old Age Pension Act (*Algemene Ouderdomswet, AOW*)[1421];
- General Survivor's Benefits Act (*Algemene nabestaandenwet, Anw*)[1422];
- General Child Benefits Act (*Algemene Kinderbijslagwet, AKW*)[1423];
- General Exceptional Medical Expenses Act (*Algemene Wet Bijzondere Ziektekosten, AWBZ*)[1424].

Employee social insurance schemes comprise the schemes established by the following laws:
- Occupational Disability Insurance Act (*Wet op de Arbeidsongeschiktheidsverzekering, WAO*)[1425];
- Work and Income According to Labour Capacity Act (*Wet werk en inkomen naar arbeidsvermogen, Wet Wia*)[1426];
- Sickness Benefits Act (*Ziektewet, ZW*)[1427];
- Unemployment Insurance Act (*Werkloosheidswet, WW*)[1428].

The Work and Care Act (*Wet arbeid en zorg, WAZO*)[1429] is not always considered as a form of employee social insurance. However, *de facto* it is a form of employee social insurance.[1430]

In addition, there exist social insurance schemes which do not totally fit into this taxonomy of general insurance and employee insurance. The Health Care Insurance Act (*Zorgverzekeringswet, ZVW*)[1431] and the Occupational Disability Insurance Act for Self-Employed Persons (*Wet arbeidsongeschiktheidsverzekering zelfstandigen, WAZ*)[1432] are regarded as such schemes.

What is more, the Act on Incapacity Benefits for Disable Yound People (*Wet arbeidsongeschiktheidsvoorziening jonggehandicapten, Wajong*)[1433] is a protection scheme for young disabled people which is funded from general revenue, but where no means test is applied.

As for social assistance, the main schemes are as follows:
- Work and Social Assistance Act (*Wet Werk en Bijstand, WWB*)[1434];

[1421] Wet van 31 mei 1956, inzake een algemene ouderdomsverzekering, Stb. 1956, no. 281.
[1422] Wet van 21 december 1995, tot regeling van een verzekering voor nabestaanden, Stb. 1995, no. 690.
[1423] Wet van 26 april 1962, tot vaststelling van een algemene kinderbijslagverzekering, Stb. 1962, no. 160.
[1424] Wet van 14 december 1967, houdende algemene verzekering bijzondere ziektekosten, Stb. 1967, no. 617.
[1425] Wet van 18 februari 1966, inzake een arbeidsongeschiktheidsverzekering, Stb. 1966, no. 84.
[1426] Wet van 10 november 2005, houdende bevordering van het naar arbeidsvermogen verrichten van werk of van werkhervatting van verzekerden die gedeeltelijk arbeidsgeschikt zijn en tot het treffen van een regeling van inkomen voor deze personen alsmede voor verzekerden die volledig en duurzaam arbeidsongeschikt zijn, Stb. 2005, no. 572.
[1427] Wet van 5 juni 1913, tot regeling der arbeiders-ziekteverzekering, Stb. 1913, no. 204.
[1428] Wet van 6 november 1986, tot verzekering van werknemers tegen geldelijke gevolgen van werkloosheid, Stb. 1986, no. 566.
[1429] Wet van 16 november 2001, tot vaststelling van regels voor het tot stand brengen van een nieuw evenwicht tussen arbeid en zorg in de ruimste zin, Stb. 2001, no. 567.
[1430] See, for instance, Danny Pieters and Paul Schoukens, *Triptiek Sociale Zekerheid* (Leuven/Voorburg: Acco, 2006), p. 22.
[1431] Wet van 16 juni 2005, houdende regeling van een sociale verzekering voor geneeskundige zorg ten behoeve van de gehele bevolking, Stb. 2005, no. 358.
[1432] Wet van 24 april 1997, houdende verzekering tegen geldelijke gevolgen van langdurige arbeidsongeschiktheid en een uitkeringsregeling in verband met bevalling voor zelfstandigen, beroepsbeoefenaren en meewerkende echtgenoten, Stb. 1997, no. 176.
[1433] Wet van 24 april 1997, houdende voorziening tegen geldelijke gevolgen van langdurige arbeidsongeschiktheid voor jonggehandicapten, Stb. 1997, no. 177.
[1434] Wet van 9 oktober 2003, houdende vaststelling van een wet inzake ondersteuning bij arbeidsinschakeling en verlening van bijstand door gemeenten, Stb. 2003, no. 375.

- Act on Income Provisions for Older, Partially Disabled Unemployed Persons (*Inkomensvoorziening Oudere en gedeeltelijk Arbeidsongeschikte werkloze Werknemers, IOAW*)[1435];
- Act on Income Provisions for Older, Partially Disabled Formerly Self-Employed Persons (*Inkomensvoorziening Oudere en gedeeltelijk Arbeidsongeschikte gewezen Zelfstandigen, IOAZ*)[1436];
- Work and Income for Artists Act (*Wet Werk en Inkomen Kunstenaars, WWIK*)[1437];

Temporarily, *i.e.* for persons who became unemployed between 1 October 2006 and 1 July 2011, the Act on Income Provisions for Older Unemployed Persons (*Wet inkomensvoorziening oudere werklozen*) will be into force.[1438] This regime will cease to exist on 1 July 2016.

In addition, the Supplementary Benefits Act (*Toeslagenwet*)[1439] grants supplements to employee insurance schemes and the Act on the Child-Related Budget (*Wet op het kindgebonden budget*)[1440] offers a supplement to benefits under the General Child Benefits Act.

What is more, the payment of sickness benefits in the Netherlands is, in the first instance, a duty of the employer. Due to its mandatory character, this duty under private law is considered to be part of the Dutch statutory social security system.[1441]

For aliens, special social assistance schemes have been set up. Two are of particular relevance. First, there is a scheme for the reception of asylum-seekers and foreigners who are treated on a par with asylum-seekers (Regulation on Services for Asylum-Seekers and Other Categories of Aliens (*Regeling verstrekkingen asielzoekers en andere categorieën vreemdelingen 2005, Rva 2005*)[1442] in conjunction with the Act on the Central Agency for the Reception of Asylum-Seekers (*Wet Centraal Orgaan opvang asielzoekers, Wet COA*)[1443]. Second, there is a scheme which provides social assistance to certain categories of lawfully residing aliens who cannot fall back on the Work and Social Assistance Act (Regulation on Services for Certain Categories of Aliens (*Regeling*

[1435] Wet van 6 november 1986, houdende het treffen van een inkomensvoorziening voor oudere en gedeeltelijk arbeidsongeschikte werkloze werknemers van wie het recht op een uitkering op grond van de Werkloosheidswet is geëindigd, Stb. 1986, no. 565.
[1436] Wet van 11 juni 1987, houdende het treffen van een inkomensvoorziening voor oudere en gedeeltelijk arbeidsongeschikte gewezen zelfstandigen van wie het inkomen duurzaam minder bedraagt dan het sociaal minimum en die als gevolg daarvan het bedrijf of beroep hebben beëindigd, Stb. 1987, no. 281.
[1437] Wet van 23 december 2004 tot vaststelling van een nieuwe regeling inzake inkomensvoorziening voor kunstenaars, Stb. 2004, no. 717.
[1438] Wet van 19 juni 2008, houdende regels voor een inkomensvoorziening voor oudere werklozen, Stb. 2008, no. 340. The Act came into force on 1 December 2009 and will expire on 1 July 2016.
[1439] Wet van 6 november 1986, houdende verlening van toeslagen tot het relevante sociaal minimum aan uitkeringsgerechtigden op grond van de Werkloosheidswet, de Ziektewet, de Algemene Arbeidsongeschiktheidswet, de Wet op de arbeidsongeschiktheidsverzekering en de Wet arbeidsongeschiktheidsvoorziening militairen, Stb. 1986, no. 562.
[1440] Wet van 1 november 2007, houdende regels inzake de aanspraak op een inkomensafhankelijke financiële bijdrage in de kosten van kinderen, Stb. 2007, no. 418.
[1441] See, for instance, Centrale Raad van Beroep, 14 September 2005, LJN: AU3050.
[1442] Stcrt. 2005, no. 24.
[1443] Wet van 19 mei 1994, houdende regels betreffende de instelling van een zelfstandig bestuursorgaan, belast met de materiële en immateriële opvang van asielzoekers, Stb. 1994, no. 422.

verstrekkingen bepaalde categorieën vreemdelingen, Rvb))[1444] in conjunction with the Act on the Central Agency for the Reception of Asylum-Seekers.

Most of the above-mentioned social security schemes will be covered by this investigation. The Occupational Disability Insurance (WAO) will be excluded. This scheme will be phased out over the coming decades. It only continues to be applicable to persons who became incapacitated for work before 1 January 2004. In addition, the Act on Income Provisions for Older Unemployed Persons, which is only temporarily into force, will be excluded. Also not covered by this investigation are special social protection schemes for particular occupations, such as the Work and Income for Artists Act (WWIK) for artistic work, and schemes for self-employed persons, such as the Act on Income Provisions for Older, Partially Disabled Formerly Self-Employed Persons (IOAZ) and the Occupational Disability Insurance for Self-Employed Persons (WAZ).[1445] The Supplementary Benefits Act and the Act on the Child-Related Budget will not be further analysed, since a pre-investigation revealed that these top-up schemes are of little relevance for our research.

[1444] Stcrt. 2001, no. 63.
[1445] The WAZ, like the WAO, will be phased out over the coming years. It only continues to be applicable to self-employed persons who became incapacitated for work before 1 August 2004.

2. Irregular migrant workers in the Netherlands

2.1. Unlawful stay

2.1.1. Right to remain in the Netherlands

Article 2 (1) and (2) of the Dutch Constitution stipulates that both Dutch citizenship and the admission and expulsion of aliens are to be regulated by Act of Parliament. These Acts of Parliament are in particular the Nationality Act (*Rijkswet op het Nederlanderschap*[1446]) and the Aliens Act 2000 (*Vreemdelingenwet 2000*[1447]).[1448]

The right to remain in the Netherlands is granted to

1) Dutch citizens (by reverse implication from Article 2 of the Dutch Constitution and the Aliens Act 2000);
2) aliens with a permanent ordinary (b) or asylum (d) residence permit (section 8 (b) and (d) Aliens Act 2000);
3) aliens with a temporary ordinary (a) or asylum (c) residence permit (section 8 (a) and (c) Aliens Act 2000);
4) Community nationals, as long as their residence is based on an arrangement under the Treaty establishing the European Community (EC Treaty) or the Agreement on the European Economic Area (EEA Agreement) (section 8 (e) Aliens Act 2000);
5) aliens who are awaiting a decision on a temporary (f) or permanent (g) residence permit, on the extension of a temporary residence permit (g), or on a notice of objection or appeal (h), when by or pursuant to this Act or on the grounds of a judicial decision, expulsion of the applicant should not take place until the respective decision has been given (section 8 (f), (g) or (h) Aliens Act 2000);
6) aliens who, upon entry, have fulfilled the obligations to which a person is subject when crossing the border, and are entitled to remain in the Netherlands for a period to be specified by an Order in Council (Algemene maatregel van bestuur), but not more than six months (section 8 (i) Aliens Act 2000);
7) aliens who cannot be expelled from the Netherlands due to their or their family members' state of health (section 8 (j) Aliens Act 2000);
8) aliens who are given the opportunity to file a charge of trafficking in human beings, as defined under the Criminal Code (section 8 (k) Aliens Act 2000);
9) aliens who have a right to residence pursuant to Association Decision 1/80 of the EEC/Turkey Association Council (section 8 (l) Aliens Act 2000); and
10) aliens who are awaiting a filing of an application for a temporary asylum residence permit, when such aliens have indicated a desire to file an application for a temporary asylum residence permit and a time limit for it has been specified by an Order in Council (section 8 (m) Aliens Act 2000).

[1446] Rijkswet van 19 december 1984, houdende vaststelling van nieuwe, algemene bepalingen omtrent het Nederlanderschap ter vervanging van de Wet van 12 december 1892, Stb. 1892, no. 268, op het Nederlanderschap en het ingezetenschap, Stb. 1984, no. 629.
[1447] Wet van 23 november 2000 tot algehele herziening van de Vreemdelingenwet, Stb. 2000, no. 495.
[1448] Compliance with the Aliens Act 2000 is monitored, most notably, by the police and by the Royal Constabulary.

Regarding (1) above, Dutch citizenship is, in general, acquired by birth when either the mother or the father has Dutch nationality.[1449] However, in two exceptional cases the Netherlands applies the *ius soli* principle, *i.e.* grants citizenship to individuals born on the soil of the Kingdom of the Netherlands: first, in cases where the parents are unknown (foundlings); second, in cases where both parents and grandparents have or had their primary residence in the Kingdom of the Netherlands at the time of birth of the child and, concerning the grandparents, at the time of the birth of the parent.[1450] Dutch citizenship may also be granted to aliens after birth. Chapter 3 of the Nationality Act provides for citizenship by option, whereas Chapter 4 of the Nationality Act regulates the acquisition of Dutch citizenship through naturalisation.

Regarding (2), there are two kinds of permanent residence permits: ordinary residence permits and asylum residence permits. *Permanent ordinary residence permits* may be issued to aliens who have been lawfully resident in the Netherlands for at least five consecutive years immediately prior to the application, on the basis of a temporary residence permit. Additionally, further requirements need to be fulfilled.[1451] If the alien has been lawfully resident in the Netherlands for at least ten consecutive years, the application for permanent residence may not be denied.[1452] These provisions implement EC Council Directive 2003/109.[1453] *Permanent asylum residence permits* may be issued to aliens who, on the basis of a temporary asylum residence permit, have been lawfully residing in the Netherlands for five continuous years. Here too, additional requirements, such as passing the civic integration examination, need to be fulfilled.[1454]

Regarding (3), in the area of temporary residence permits the same distinction is made between ordinary residence permits and asylum residence permits. The issuance of *temporary ordinary residence permits* is conditional on the fulfilment of a number of requirements, which to a large extent depend on the purpose of stay. For instance, persons wishing to come to work in the Netherlands need to produce an employment contract; and individuals already staying in the Netherlands must not perform work for an employer in breach of the Aliens Employment Act.[1455] There are a number of recognised purposes of stay –more than twenty in total. Most of these purposes can be put in one of the following categories: family visit or reunification, work, study or medical treatment. *Temporary asylum residence permits* may be granted to aliens

- who are refugees under the Geneva Convention;
- who would run a real risk of being subjected to torture or to inhuman or degrading treatment or punishment if they were expelled;
- who cannot, for pressing reasons of a humanitarian nature connected with the reasons for their departure from the country of origin, reasonably be expected to return there; or
- for whom return to the country of origin would constitute an exceptional hardship in view of the overall situation there.

Husbands, wives, partners or children of such aliens may under certain circumstances also be issued with a temporary asylum residence permit.[1456]

[1449] § 3 (1) Nationality Act.
[1450] § 3 (2) and (3) Nationality Act.
[1451] See § 21 Aliens Act 2000.
[1452] § 21a (1) (a) Aliens Act 2000.
[1453] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 016, 23 January 2004, pp. 44-53.
[1454] § 34 (1) Aliens Act 2000.
[1455] See § 16 (1) (f) Aliens Act 2000.
[1456] See § 29 Aliens Act 2000.

Regarding (4), Community nationals refers to citizens of the Member States of the European Union and their third-country family members, citizens of the Member States of the European Economic Area and their third-country family members and citizens of Switzerland and their third-country family members. Their right to residence must be derived from international law. To be more precise, it must be based on the EC Treaty or on legislation under the EC Treaty, on the EEA Agreement, or on the EC-Switzerland Agreement on the Free Movement of Persons.[1457]

Regarding (5), in general, an objection against the rejection of an application for an ordinary residence permit and an appeal against the rejection of an application for an asylum residence permit have a suspensive effect. However, there are some exceptions, for instance, for aliens who are in detention.[1458]

Regarding (6), section 8 (i) Aliens Act 2000 refers to the so-called free period (*vrije termijn*). This is a period of time in which an alien, having fulfilled the obligations to which a person is subject when crossing the border, is entitled to stay in the Netherlands. This period of time is mostly three months, and in no case more than six months. The free period is usually used to visit family or take a holiday in the Netherlands.

Regarding (7), section 64 Aliens Act 2000 stipulates that the deportation procedure must be stopped when the state of health of the alien or one of his or her family members rules out deportation. The possibility of a stoppage can be invoked by the alien him- or herself, when the denial or withdrawal of a residence permit does not have or no longer has a suspensive effect; or it will be initiated *ex officio*, when medical treatment is requested or in cases of medical emergency. The deportation will be stopped due to medical reasons, if

- the medical advisor confirms that the state of health of the alien or one of his family members makes it inadvisable to travel; or
- the discontinuation of medical treatment would lead to a medical emergency and, first, the medical treatment cannot be provided in the country of origin or another country where the alien can go to and, second, the medical treatment is expected to last no more than one year.

The deportation can be stopped for no longer than one year or no longer than the medical treatment is expected to last.[1459] If medical treatment is expected to last longer than one year, a residence permit for the purpose of medical treatment can be provided.

Regarding (8), potential victims of trafficking in human beings can be given the opportunity by the chief of police (*korpschef*) to file charges about an act constituting an offence under section 273f of the Dutch Criminal Code. The chief of police may provide a form for filing charges which is valid for three months, if the potential victim needs time for consideration. During this period of time, the potential victim is lawfully present in the Netherlands, in accordance with section 8 (k) Aliens Act 2000. After filing charges, the potential victim may apply for a residence permit; if so, the alien is lawfully present in the Netherland pursuant to section 8 (f) Aliens Act 2000.[1460]

[1457] See § 1 (e) Aliens Act 2000.
[1458] See § 73 (4) and 82 (4) Aliens Act 2000.
[1459] See Aliens Act Implementation Guidelines 2000 (B) (*Vreemdelingencirculaire 2000 (B)*), Stcrt. Suppl. 2001, no. 64 rectificatie in Stcrt. Suppl. 2006, no. 143, part 8.11.
[1460] See Aliens Act Implementation Guidelines 2000 (B), part 9.

Regarding (9), Turkish citizens and their family members can derive the right to stay in the Netherlands directly from Association Decision 1/80 of the EEC/Turkey Association Council. However, this right is not applicable to initial admission to the Netherlands. Only Turkish workers and their family members who were already lawfully admitted to the Netherlands can rely on this Association Decision in order to renew their entitlement. A residence permit is then no longer necessary, since the right to residence is directly derived from Association Decision 1/80. The right to residence under this Association Decision is inevitably linked with the right to work.

Regarding (10), section 8 (m) Aliens Act 2000 has been introduced in the year 2010 in order to guarantee asylum-seekers a lawful stay during the so-called rest and preparation period. This is a period of at least six days,[1461] during which the alien is informed about the asylum procedure, medical diagnosis is offered and the identity of the alien may be determined. This period precedes the filing of an asylum application and hence lawful presence in accordance with section 8 (f) Aliens Act 2000.

What is more, the presence of aliens who cannot be expelled on grounds of EC Council Directive 2001/55 on temporary protection in the event of a mass influx of displaced persons[1462] is tantamount to lawful residence in terms of section 8 (f) Aliens Act 2000, *i.e.* aliens who are awaiting a decision on a temporary residence permit.[1463]

Aliens whose application for a permanent or temporary asylum residence permit has been rejected are, as a rule, no longer lawfully resident in the Netherlands. However, there is one exception. Pursuant to subsection 45 (4) in conjunction with subsection 45 (5) Aliens Act 2000, failed asylum-seekers who continue to receive benefits under the Act on the Central Agency for the Reception of Asylum-Seekers (*Wet Centraal Orgaan opvang asielzoekers, Wet COA*) or a similar programme may be deemed to be lawfully resident in the Netherlands in accordance with section 8 (j) Aliens Act 2000, *i.e.* aliens who cannot be expelled from the Netherlands due to their or their family members' state of health. In order to benefit from subsection 45 (4) Aliens Act 2000, the alien must be subject to a deportation moratorium (*vetrekmoratorium*). This is a decision of the competent Minister that certain categories of foreigners must temporarily not be deported, for instance when the security situation in a certain country of origin rules it out, and must temporarily be granted reception.

2.1.2. Routes into unlawful residence

Individuals can end up residing unlawfully in the Netherlands in three ways: first, by being born in the Netherlands as a non-citizen and staying without a residence permit; second, by entering the Netherlands unlawfully; and, third, by entering the Netherlands lawfully, but losing their legal status later on.

Any child who does not acquire Dutch citizenship through birth must have a regular residence status in accordance with section 8 Aliens Act 2000. Dutch citizenship is obtained at birth when

[1461] There is no time limit for the rest and preparation period.
[1462] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212, 7 August 2001, pp. 12-23.
[1463] § 45 (7) Aliens Act 2000.

either the father or the mother of the child possesses Dutch citizenship. It is also obtained at birth when the child is born in the Netherlands and is either a foundling or the child's parents and grandparents have or had their primary residence in the Kingdom of the Netherlands at the time of birth of the child and, concerning the grandparents, at the time of birth of the parent. From this it follows that when the mother is an alien, the child is an alien too, except when the mother is married with a Dutch citizen or when she is not married with him but he has recognised his paternity before the birth,[1464] and except when the above-mentioned *ius soli* principle applies. As a consequence, the child must comply with the Aliens Act 2000 in order to be lawfully resident in the Netherlands.

A residence permit is not granted automatically to the child. It has to be applied for by the parents. For children who are born in the Netherlands, but who are not Dutch citizens, an ordinary residence permit for the purpose of family reunification can be requested.[1465] The conditions to be fulfilled by the child and the parents for getting this application granted are rather minimal and the administrative procedure seems to be straightforward. However, one of the preconditions is that one of the parents is resident in the Netherlands in accordance with section 8 (a) - (e), (l) Aliens Act 2000.

This means that if a child who is not Dutch citizen by birth is not in possession of a residence permit, the child is present in the Netherlands in violation of immigration laws. For instance, this can be the case when the parents are lawfully residing in the Netherlands, but do not apply for a residence permit for their child; or when the parents are unlawfully residing in the Netherlands themselves, and a residence permit for the child therefore cannot be granted.

The second route into unlawful residence is through illegal entry. The conditions for legal entry are stipulated in Chapter II (sections 3 to 7) of the Aliens Act 2000. The conditions for legal presence have been outlined earlier. They are set out in sections 8 to 12 of Chapter III of the Aliens Act 2000.

The third way of being unlawfully present in the Netherlands is by losing one's regular residence status. The reasons for a loss of residence status are also stipulated in the Dutch immigration laws. They include the expiry of a temporary residence permit, the dismissal of an asylum application, the withdrawal of a residence permit which was issued only as a result of wrong or fraudulent information or the withdrawal of a residence permit because the alien poses a threat to national security. It is worth mentioning that a temporary ordinary residence permit can also be withdrawn in case the alien performs work for an employer in violation of the Aliens Employment Act or in case the alien or the person with whom the alien is residing no longer has the necessary means of subsistence.

[1464] Paternity can also be determined by court. In this case, however, Dutch citizenship is not granted for a period of at least three months after the final judgment.
[1465] § 14 Aliens Act 2000 in conjunction with § 3.13 and § 3.23 Aliens Decree 2000 (*Vreemdelingenbesluit 2000* – Besluit van 23 november 2000 tot uitvoering van de Vreemdelingenwet 2000), Stb. 2000, no. 497.

2.2. Unlawful work

The Aliens Employment Act (*Wet arbeid vreemdelingen*[1466]) stipulates that employers are prohibited from employing[1467] aliens without a work permit (*tewerkstellingsvergunning*).[1468,1469] Such a work permit can only be requested by an employer. After a successful request, a work permit is only valid for this particular employer in relation to a particular employee and a particular place and kind of work.[1470] Work permits are issued for a maximum period of three years.[1471] They may be extended, if this is not prohibited by law.[1472]

The general prohibition on employing aliens without a work permit is qualified by a great number of exceptions. First, holders of a permanent residence permit or a temporary asylum residence permit do not require a work permit in the Netherlands,[1473] for the simple reason that their residence permits do not include any restrictions as to work.[1474]

What is more, nationals of the Member States of the European Union and of the European Economic Area, as well as their family members who are entitled to take up employment according to Article 23 of the EC Directive 2004/38[1475], are also exempted from the work permit requirement.[1476] However, nationals of the EU Member States Bulgaria and Romania and their family members do need a work permit to be employed in the Netherlands.[1477] Nationals of Switzerland and their family members may also be employed in the Netherlands without a work permit.[1478] Turkish workers and their family members are likewise free to work in the Netherlands,

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[1466] Wet van 21 december 1994 tot vaststelling van de Wet arbeid vreemdelingen, Stb. 1994, no. 959.
[1467] Whether or not the employment is paid is not relevant. See Rechtbank 's-Gravenhage, 8 August 2008, LJN: BD9872.
[1468] § 2 (1) Aliens Employment Act.
[1469] The Labour Inspection within the Ministry of Social Affairs and Employment and the police are responsible for monitoring compliance with the Aliens Employment Act.
[1470] § 6 (1) and § 7 Aliens Employment Act.
[1471] § 11 Aliens Employment Act.
[1472] See § 11 (2), (3) and § 13 Aliens Employment Act.
[1473] § 4 (1) in conjunction with (2) (a) Aliens Employment Act and § 1c Aliens Employment Act Implementation Decree (*Besluit uitvoering Wet arbeid vreemdelingen* – Besluit van 23 augustus 1995 ter uitvoering van de Wet arbeid vreemdelingen), Stb. 1995, no. 406.
[1474] § 20 (2) Aliens Act 2000 and *argumentum e contrario* § 14 (2) Aliens Act 2000 in conjunction with § 3.4 (1) Aliens Decree 2000.
[1475] European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30 April 2004, pp. 77-123.
[1476] § 3 (1) (a) and (2) Aliens Employment Act in conjunction with § 1 and § 2 Annex: Notification pursuant to § 3 (2) Aliens Employment Act, on the Aliens Employment Act implementation guidelines, belonging to the Aliens Employment Act Delegation and Implementation Decree (Bijlage Mededeling als bedoeld in artikel 3, tweede lid, van de Wet arbeid vreemdelingen bij Uitvoeringsregels Wet arbeid vreemdelingen behorende bij het Delegatie- en uitvoeringsbesluit Wet arbeid vreemdelingen), Stcrt. 1995, no. 168.
[1477] In November 2008, the Dutch government decided that this restriction would be extended beyond 1 January 2009. See Minister van Sociale Zaken en Werkgelegenheid, "Brief over het kabinetsstandpunt werknemersverkeer Bulgarije en Roemenië," 28 November 2008. (AM/AKA/2008/30729). Available at: http://docs.minszw.nl/pdf/34/2008/34_2008_3_12528.pdf.
[1478] § 3 (1) (a) and (2) Aliens Employment Act in conjunction with § 39 Annex: Notification pursuant to § 3 (2) Aliens Employment Act, on the Aliens Employment Act implementation guidelines, belonging to the Aliens Employment Act Delegation and Implementation Decree.

if they derive this right directly from Association Decision 1/80 of the EEC/Turkey Association Council.

Concerning holders of temporary ordinary residence permits, the Aliens Employment Act and the Aliens Employment Act Implementation Decree (*Besluit uitvoering Wet arbeid vreemdelingen*) distinguish between those who are not allowed to work in the Netherlands, those who are only allowed to work in the Netherlands with a work permit, and those who are allowed to work in the country without a work permit. The last category, *i.e.* aliens who can work without a work permit, comprises, for instance,
- staff of diplomatic missions, international organisations or certain other institutions, and their family members;[1479]
- aliens who have a temporary ordinary residence permit for self-employed work, only when they carry out self-employed work;[1480]
- aliens who have a temporary ordinary residence permit as a highly skilled worker;[1481] and
- aliens who have a temporary ordinary residence permit for study purposes, only when they do an internship.[1482]

Aliens who are lawfully present in the Netherlands in accordance with section 8 (f) - (k), (m) Aliens Employment Act (see subchapter 2.1.1., nos. 5-8 and 10) are usually either not allowed to work in the country or need a permission to work. In some cases, however, they are allowed to work in the Netherlands without any further permission, for instance if, under certain circumstances, voluntary work or work in the context of vocational training is carried out,[1483] or in the case of certain highly skilled workers.[1484]

Section 8 Aliens Employment Act in conjunction with sections 2a and 3 Aliens Employment Act Implementation Decree names the situations when the application for a work permit *must* be denied. These include when the applicant does not possess a residence permit which in principle allows work; when the application for a residence permit has been denied; when a residence permit has been withdrawn; or when there is sufficient labour supply for the particular job. What is more, section 9 Aliens Employment Act stipulates when an application for a work permit *can* be denied. This is, for instance, the case when Dutch nationals or certain other aliens will be available for the job in question in the foreseeable future.

The term 'employer' in the Aliens Employment Act is interpreted very broadly. According to section 1 (b) Aliens Employment Act, employers are, first, those who arrange for another person to perform work in the exercise of a post, a profession or a business (*'... degene die in de uitoefening van een ambt, beroep of bedrijf een ander arbeid laat verrichten'*) and, second, natural persons who arrange for another person to perform domestic or personal services (*'... de natuurlijke persoon die een ander huishoudelijke of persoonlijke diensten laat verrichten'*). From the Explanatory Memorandum (*Memorie van Toelichting*) to the Aliens Employment Act it becomes

[1479] § 3 (1) (a) and (2) Aliens Employment Act in conjunction with §§ 3-35 Annex: Notification pursuant to § 3 (2) Aliens Employment Act, on the Aliens Employment Act implementation guidelines, belonging to the Aliens Employment Act Delegation and Implementation Decree.
[1480] § 3 (1) (b) Aliens Employment Act.
[1481] Under the conditions set out in § 1d Aliens Employment Act Implementation Decree.
[1482] § 1f Aliens Employment Act Implementation Decree.
[1483] See § 1a and § 1g Aliens Employment Act Implementation Decree.
[1484] See § 1d Aliens Employment Act Implementation Decree.

clear that it was the intention of the legislators to cover all situations where one person actually performs work for another person.[1485] Whether the alien works as a self-employed person, an employee or a civil servant is not relevant. This means that a person who commissions self-employed work (*opdrachtgever*) also falls under the definition of employer under the Aliens Employment Act.[1486]

Aliens who are not staying lawfully in the Netherlands are unable to work lawfully in the country. This is because aliens can only work lawfully if they are either in possession of a work permit or are exempted from the requirement to obtain a work permit.[1487] Both possession of a work permit and exemption from a work permit are impossible for unlawfully present aliens. Concerning the first, section 8 Aliens Employment Act stipulates that, amongst other persons, the following persons are denied a work permit: aliens who neither possess a residence permit which in principle allows work, nor have applied for such a permit; and aliens whose application for a residence permit has been denied or whose residence permit has been withdrawn. In addition, subsection 12 (1) (b) Aliens Employment Act states that a work permit must be withdrawn when it turns out that residence in the Netherlands has been refused. Consequently, aliens without regular residence status are not granted a work permit. Concerning the second possibility, the exemption from the requirement to obtain a work permit in order to work in the Netherlands only refers to situations where people have a regular residence status in the Netherlands.

To summarise, the following persons are allowed to work in the Netherlands without a work permit:
- Dutch citizens,
- citizens of the Member States of the European Economic Area and their family members, provided that the family members have the right to residence in the Netherlands and except for the countries Bulgaria and Romania,
- Swiss citizens and their family members,
- Turkish citizens and their family members, provided that they derive their right to work and stay directly from Association Decision 1/80 of the EEC/Turkey Association Council,
- holders of a permanent residence permit,
- holders of a temporary asylum residence permit,
- and certain other lawfully residing aliens.

All other aliens are either not allowed to work in the country at all or are only allowed to work in the country after obtaining a work permit. The latter could be aliens who do not apply for a work permit, who do not get a work permit or whose work permit has become invalid (expired or withdrawn)[1488]. They may be lawfully or unlawfully present in the Netherlands.

[1485] Explanatory Memorandum, Kamerstukken II 1993-94, 23 574, no. 3, p. 13.
[1486] See, for instance, Kamerstukken I, 2004-05, 29 523, no. E, p. 2.
[1487] See § 2 (1) Aliens Employment Act and all the exceptions enumerated in the Aliens Employment Act and the Aliens Employment Act Implementation Decree.
[1488] Since we exclude situations in which an alien possesses a work permit only for a particular (type of) work and is engaging in another activity for which he or she does not have a permission to work, this reason for the invalidity of a work permit will not be considered.

2.3. Categories of irregular migrant workers

Category A: unlawfully resident and working unlawfully

Aliens who are present in the Netherlands in contravention of the Dutch legislation on permission to stay are unlawfully present. In other words, non-citizens who do not fall within one of the categories listed in section 8 Aliens Act 2000 or do not fall within the scope of subsections 45 (5) and 45 (7) Aliens Act 2000 are residing unlawfully in the Netherlands. They may have come to the attention of immigration authorities and be subject to an enforceable removal order, or their presence may be clandestine. Such aliens do not have the right to work in the Netherlands.

Category B: lawfully resident and working unlawfully

Lawfully present aliens – other than citizens of the Member States of the European Economic Area and their family members (if the family members have the right to residence in the Netherlands and except for the countries Bulgaria and Romania), Swiss citizens and their family members, Turkish citizens and their family members who fall within the scope of the Association Decision 1/80 of the EEC/Turkey Association Council, holders of a permanent residence permit, holders of a temporary asylum residence permit and certain lawfully present aliens who are allowed to work in the Netherlands without a work permit – are either not allowed to participate in the Dutch labour market at all or need a work permit to do so. If such foreigners nonetheless take up work in the Netherlands, they fall into our category B, *i.e.* residing lawfully but working unlawfully.

3. Dutch nationals engaging in undeclared work

3.1. Nationals

For the concept of Dutch citizenship or nationality – terms which are used interchangeably throughout our research – see above, subchapter 2.1.1.

3.2. Undeclared work

This subsection investigates the obligations of employees and their employers regarding the declaration of work to the Dutch social security authorities. Work carried out without these obligations being met fulfils our definition of undeclared work in the Dutch context.

Undeclared work may be also relevant in the context of irregular work. In particular, as we will see in the following chapters, the omission to check a worker's identity may have consequences for contribution payment obligations with respect to irregular migrant workers.[1489] This subchapter will therefore also deal with obligations regarding the declaration of foreigners' work.

Employers who hire an employee are obliged to demand a proof of identity and a statement of personal data for the purpose of remitting income taxes and social security contributions on wages.[1490,1491] This information must be produced by the employee before the first working day. The statement of personal data must be provided in written form, be signed and dated and include the name, date of birth, address and Citizen Service Number (*Burgerservicenummer*) of the employee. The employee's identity must be proved by documents, such as passports, identity cards or residence documents. If the employee is a foreigner, the identity check has to include a check of the employee's residence and work permission in the Netherlands.[1492] The validity of the identity documents then has to be checked by the employer. For this purpose, the Dutch Tax Administration (*Belastingdienst*) – which is the competent authority for levying income tax and contributions for general and employee social insurance on wages[1493] – has published a checklist.[1494] Moreover, the Immigration and Naturalisation Service (*Immigratie- en Naturalisatiedienst*) runs a website, which also provides support in checking the authenticity of identity documents.[1495] If there are still doubts about the document's validity, employers are advised to contact the National Office for Documents of the Royal Constabulary (*Nationaal Bureau Document van de Koninklijke Marechaussee*). A copy of the proof of identity and the

[1489] See in particular chapter 5.
[1490] However, there are some exceptions, for example for certain children working in the business of their parents or for artists and sportsmen with short-term contracts.
[1491] See § 28 (a), (e) Wage Income Tax Act (*Wet op de loonbelasting* – Wet van 16 december 1964, houdende vervanging van het Besluit op de Loonbelasting 1940 door een nieuwe wettelijke regeling), Stb. 1990, no. 104 and § 65 and § 66 Implementation Regulation Wage Income Tax (*Uitvoeringsregeling loonbelasting 2001*), last adaptation Stcrt. 2010, no. 4089.
[1492] § 28 (e) Wage Income Tax Act.
[1493] On the competence of the Tax Administration to collect social insurance contributions see § 57 Social Insurance Financing Act (*Wet financiering sociale verzekeringen* – Wet van 16 december 2004, houdende regels betreffende de financiering van de sociale verzekeringen), Stb. 2005, no. 36.
[1494] See Belastingdienst, *Handboek Loonheffingen 2010*, p. 23. Available at: http://www.belastingdienst.nl/download/2344.html.
[1495] See http://www.identiteitsdocumenten.nl.

statement of personal data must be kept by the employer and the data must be included in the payroll accounting.[1496]

If the employee does not provide a statement of personal data, or if the employer does not check the employee's identity and keep a copy of the identity document in the payroll accounting, or if the employer knows or ought to know that the employee provided incorrect data in the statement or the identity document, then the so-called anonymous rate (*Anoniementarief*) must be applied. Since an amendment in 2008, which took effect retroactively from January 2006, the anonymous rate has been explicitly applicable when the employer does not check an alien worker's permission to stay and work in the Netherlands and does not include a copy of this permission in the payroll accounting.[1497] The same is true if the employer knows or ought to know that the employee produced an incorrect proof of the permission to stay and work in the Netherlands. The application of the anonymous rate means that wages are taxed at the highest rate, *i.e.* the common rate for income tax and general social insurance contributions on wages, which is 52 percent. Moreover, it means that there is no income ceiling for the calculation of employee social insurance contributions and the income-related contribution to the Health Care Insurance (*ZVW*). The anonymous rate is an instrument to fight tax and social security fraud. In practice, the anonymous rate is usually applied after detecting fraudulent activities during wage controls or fraud investigations and provides a simple, straightforward way of ensuring that taxes and contributions are paid back.[1498]

The personal data of the employee collected by the employer must also be submitted to the Dutch Tax Administration.[1499] This notification, which has to be done before the first working day, is called 'first day notification' (*Eerstedagsmelding*).[1500] Since January 2008, a rule known as the 'six months fiction' (*Zesmaandenfictie*) has existed. This means that if the Tax Administration observes that no first day notification has been made or that the employee concerned is not included in the payroll accounting, it is assumed that he or she has already been employed for six months.[1501] As a consequence, the employer is subject to a supplementary assessment (*Naheffingsaanslag*) on the basis of the anonymous rate for a period of six months.[1502] Only if the employer can prove that the employee has been employed for a shorter period of time will the retroactive tax and contribution payment at the anonymous rate be reduced correspondingly. If no exception applies, employers have to make this first day notification electronically.

After this initial registration with the Tax Administration, employers are required to regularly calculate the contribution for social insurance, to which the employer or the employee or both are liable, and remit them in time to the Tax Administration. For this purpose, employers receive a wage income tax declaration letter (*Aangiftebrief loonheffingen*) before the beginning of each calendar year, which indicates which taxes and contributions have to be paid and when they are due. In addition, the Tax Administration sends out a notice at the end of each tax declaration

[1496] § 28 (e) Wage Income Tax Act.
[1497] § 26b Wage Income Tax Act and § 19 Social Insurance Financing Act. See also § 29 (1) Wage Income Tax Act.
[1498] Els J. Kronenburg-Willems, "De Wet financiering sociale verzekeringen (Wfsv)," *PS-Special: Walvis en de Wet financiering SV*, no. 4 (2004), p. 69.
[1499] For certain employees, no notification to the Tax Administration has to be made. Examples include contract workers or certain children working in their parents' business.
[1500] § 28 (f) Wage Income Tax Act and § 66a Implementation Regulation Wage Income Tax.
[1501] § 30a Wage Income Tax Act.
[1502] Additionally, the employer may receive a fine. See § 28c (1) Wage Income Tax Act.

period concerning the declaration and payment of the tax (*Mededeling loonheffingen aangifte doen en betalen*). The tax declaration period is the period of time for which taxes have to be declared and remitted. It is normally one calendar month or four weeks. When the tax declaration has to be filed and the payment has to be made depends on the dates stipulated in the declaration letter and notice. In no case must the tax payment arrive at the Tax Administration later than one month after the end of the declaration period. The tax declaration must be done electronically, unless the employer is explicitly allowed to submit it on paper. The declaration itself comprises two sections, an individual and a collective one. The first provides information on the individual employees: personal data, contract details, wages and taxes and social security contributions. The second section contains collective information on the total amount of wages as well as the calculated taxes and social security contributions.[1503]

At the end of the calendar year, employers must give their employees the yearly tax statement (*Jaaropgaaf*). This statement must include, amongst other information, details about wages and the deduction of income tax and social security contributions.[1504]

Employers who do not declare and pay taxes and social security contributions are subject to supplementary claims. Additionally, they may be subject to administrative fines or criminal penalties.[1505]

Concerning employee social insurance, employees have a right and, even more interestingly, an obligation to verify the correctness of the contribution payments via the employer. According to the Implementation Act Social Insurance Financing Act, the Employee Insurance Administration Institution (*Uitvoeringsinstituut Werknemersverzekeringen*) must periodically provide an insurance report (*Verzekeringsbericht*) to the employee.[1506] In particular, the report must provide information about the status of insurance, the relevant employment history and the contributions paid during the last calendar year.[1507] The employee is required to contact the Employee Insurance Administration Institution if the data are incorrect or incomplete.[1508] The employee should contact the same body if he or she could reasonably expect to receive an insurance report, but has not done so.[1509] However, it should be noted that although employees are obliged to contact the competent authority, there are no sanctions should they fail to do so.

[1503] Belastingdienst, *Handboek Loonheffingen 2010*, p. 108.
[1504] § 74 (1) Implementation Regulation Wage Income Tax.
[1505] § 67a ff General Act Concerning State Taxes (*Algemene wet inzake rijksbelastingen* – Wet van 2 juli 1959, houdende regelen, welke aan een aantal rijksbelastingen gemeen zijn), Stb. 1959, no. 301.
[1506] § 5 Implementation Act Social Insurance Financing Act (*Invoeringswet Wet financiering sociale verzekeringen* – Wet van 16 december 2004 houdende invoering van de Wet financiering sociale verzekeringen), Stb. 2005, no. 37, introducing § 33c (1) into the Work and Income (Implementation Structure) Act (*Wet structuur uitvoeringsorganisatie werk en inkomen* – Wet van 29 november 2001, houdende regels tot vaststelling van een structuur voor de uitvoering van taken met betrekking tot de arbeidsvoorziening en socialeverzekeringswetten), Stb. 2001, no. 624.
[1507] § 5 Implementation Act Social Insurance Financing Act in conjunction with § 33 (2) (a), (b) Work and Income (Implementation Structure) Act.
[1508] § 5 Implementation Act Social Insurance Financing Act in conjunction with § 33c (3) Work and Income (Implementation Structure) Act.
[1509] § 5 Implementation Act Social Insurance Financing Act in conjunction with § 33c (4) Work and Income (Implementation Structure) Act.

4. The personal scope of application of social security arrangements

4.1. General remarks

In chapter 1 it has stated that the literature distinguishes between social insurance, comprising general social insurance and employee social insurance, and social assistance. Regarding the personal scope of application, general social insurance schemes are subject to the following logic: residents in the Netherlands are insured; if a person is not resident in the Netherlands, then the person is still insured if he or she works in the Netherlands and is subject to Dutch income tax. Employee insurance schemes, on the other hand, cover individuals who work under an employment contract in the Netherlands. The Health Care Insurance Act (*Zorgverzekeringswet, ZVW*) relates to residents of the Netherlands and individuals who work in the country and who are subject to Dutch income tax. However, it does not provide for their obligatory insurance: rather, it imposes an obligation on them to insure themselves. Social assistance schemes cover Dutch nationals and certain aliens.

In this chapter, the scope *ratione personae* of social insurance will be analysed with respect to irregular migrant workers and Dutch nationals who engage in undeclared work. The personal scope of application of social assistance schemes, by contrast, will be discussed in chapter 13, on the social risk of financial need. This is due to differences regarding the scope *ratione personae* amongst the social assistance schemes.

4.2. Legislation limiting personal scope with respect to aliens

In 1998, the Dutch legislators enacted the so-called Linkage Act (*Koppelingswet*)[1510] which amended the immigration law and social security laws. This Act introduced unified standards for Dutch social security schemes as to the coverage of individuals staying in the Netherlands without possessing Dutch nationality.

The Linkage Act implemented two provisions in the Dutch Aliens Act on the entitlement of aliens to social security benefits. Subsection 10 (1) Aliens Act 2000 stipulates that *unlawfully* present aliens are not entitled to social security benefits and other public services issued by administrative authorities. Subsection 10 (2) provides for certain exceptions, and stipulates that aliens who are unlawfully present in the Netherlands may only be entitled to benefits relating to education, medically necessary care, the prevention of situations that would jeopardise public health, or legal assistance.

The second relevant provision introduced in the Aliens Act relates to *lawfully* present aliens. Their entitlement to social security benefits depends, pursuant to section 11 Aliens Act 2000, on their type of lawful residence status in the Netherlands. Only aliens who are already fully admitted can claim social security benefits without further restrictions. These are aliens with a temporary or permanent residence permit as well as citizens (and their family members) of EEA countries,

[1510] Wet van 26 maart 1998 tot wijziging van de Vreemdelingenwet en enige andere wetten teneinde de aanspraak van vreemdelingen jegens bestuursorganen op verstrekkingen, voorzieningen, uitkeringen, ontheffingen en vergunningen te koppelen aan het rechtmatig verblijf van de vreemdeling in Nederland, Stb. 1998, no. 203.

Switzerland and, in case the Association Decision 1/80 of the EEC/Turkey Association Council applies, Turkey. In other words, they are foreigners who stay in accordance with section 8 (a) - (e), (l) Aliens Act 2000. Aliens who are still in the legal procedure for admission to the Netherlands are only entitled to benefits if they are eligible according to the Act on the Central Agency for the Reception of Asylum-Seekers (*Wet Centraal Orgaan opvang asielzoekers*) or pursuant to another legal provision. Thus eligibility is restricted to aliens who are awaiting a decision on a temporary or permanent residence permit or on a notice of objection or appeal, when by or pursuant to this Act or on the ground of a judicial decision, expulsion of the applicant should not take place until the respective decision has been given, *i.e.* individuals for whom section 8 (f), (g) or (h) Aliens Act 2000 is applicable. Finally, aliens who are staying in the Netherlands during the free period, aliens who cannot be expelled due to medical reasons or aliens who are victims of trafficking in human beings, *i.e.* situations enumerated in section 8 (i) - (k) Aliens Act 2000, can only claim social security benefits if entitlement is explicitly granted by social security laws.[1511]

The objective of the Linkage Act was twofold. First, it was to avoid enabling unlawfully present aliens to continue their unlawful stay. Second, it was to prevent aliens who have not (yet) been admitted to the Netherlands gaining a semblance of complete legality, which would make it more difficult to expel them.[1512]

The Central Appeals Tribunal (*Centrale Raad van Beroep*)[1513] has tested the differentiation on grounds of nationality included in the Linkage Act for its conformity with the principle of non-discrimination. In four decisions issued on 26 June 2001 and concerning the employee social insurance schemes, the general social insurance AKW and social assistance,[1514] the Central Appeals Tribunal found the distinction between Dutch nationals and lawfully resident aliens on the one hand and aliens staying unlawfully in the Netherlands on the other hand to be justified. In particular, the Tribunal held that the measure to exclude unlawfully present foreigners from social security pursues a legitimate aim, which is to avoid creating an incentive for continued unlawful presence and to avoid giving a semblance of legality to the presence of such people. In addition, the measure was found to be adequate to achieve this aim. What is more, the Tribunal also ruled that the distinction between aliens who have been fully admitted and aliens who are in the admission procedure for lawful residence in the Netherlands to be non-discriminatory. The Central Appeals Tribunal found that exclusion was not justified only in the case of aliens who were staying lawfully in the Netherlands and awaiting a decision in the admission procedure when the Linkage Act entered into force, and who received social assistance or were insured under the social insurance schemes at that time. The Tribunal tested the Linkage Act provisions against the non-discrimination provision laid down in Article 26 of the International Covenant on Civil and Political Rights (ICCPR). In two of the four decisions, the tribunal held that it would have reached the same conclusion using Article 14 of the European Convention on Human Rights (ECHR) in conjunction with Article 1 of the First Protocol to the Convention.

[1511] For an overview of the different immigration statuses see above, subchapter 2.1.1.
[1512] Explanatory Memorandum, Kamerstukken II 1994-95, 24 233, no. 3, pp. 1-2.
[1513] The Central Appeals Tribunal is the highest court in social security matters in the Netherlands.
[1514] Centrale Raad van Beroep, 26 June 2001, LJN: AB2276, *Rechtspraak Sociale Verzekering* 2001, 188, *Uitspraken Sociale Zekerheid* 2001, 183; Centrale Raad van Beroep, 26 June 2001, LJN: AB2277, *Administratiefrechtelijke Beslissingen* 2001, 277; Centrale Raad van Beroep, 26 June 2001, LJN: AB2323, *Administratiefrechtelijke Beslissingen* 2001, 276; and Centrale Raad van Beroep, 26 June 2001, LJN: AB2324, *Administratiefrechtelijke Beslissingen* 2001, 244, *Rechtspraak Sociale Verzekering* 2001, 216, *Uitspraken Sociale Zekerheid* 2001, 186.

As mentioned before, not only the Aliens Act but also the social security laws have been amended by the Linkage Act. The consequences of all these amendments for general social insurance and employee social insurance will be discussed below. The implications for all other social security schemes not falling under this taxonomy will be analysed in the relevant chapters on the different social risks.

4.3. Legislation limiting personal scope with respect to undeclared workers

Unlike for aliens, there is no law in the Netherlands which stipulates a general loss of entitlement to social security benefits based on employment for individuals who engage in undeclared work.

4.4. Personal scope with respect to aliens or undeclared workers

4.4.1. General social insurance schemes and Health Care Insurance

In the first instance, general social insurance schemes cover inhabitants of the Netherlands.[1515] If an individual is not an inhabitant, then the individual will also be included in the obligatory insurance if he or she works in the Netherlands under a contract of service and is subject to Dutch income tax on wages, or if he or she works as a self-employed person who draws taxed profit from the venture in the Netherlands.[1516]

The Health Care Insurance Act obliges every person who is required to be insured under the general social insurance AWBZ to contract health care insurance with a private health care insurer. Alternatively, a third party may contract health care insurance for the benefit of the obligatorily insured person under the AWBZ.[1517] Accordingly, the following investigation of general social insurance also applies to health care insurance.

The term 'inhabitant' is interpreted in the same way in all general social insurance schemes, *i.e.* AOW, Anw, AKW and AWBZ. Inhabitants (*ingezetene*) are, according to the relevant legislation, individuals who reside (*wonen*) in the Netherlands.[1518] The place of residence has to be determined according to the circumstances.[1519] Case law has elaborated the criterion of the 'centre of social life (*middelpunt van het maatschappelijke leven*)', which leads to a permanent bond with the Netherlands.[1520] Exactly what this criterion means has also been worked out by case law over the years, and found its way into the policy guidelines of the Social Insurance Agency (*Sociale Verzekeringsbank*).[1521] According to case law, three elements have to be taken into consideration

[1515] § 6 (1) (a) AOW, § 13 (1) (a) Anw, § 6 (1) (a) AKW and § 5 (1) (a) AWBZ.
[1516] See § 6 (1) (b) AOW, § 13 (1) (b) Anw, § 6 (1) (b) AKW, § 5 (1) (b) AWBZ and § 9 Decree on the Extension and Restriction of the Category of Insured Persons in Respect of General Social Insurance Schemes.
[1517] § 2 (1) ZVW.
[1518] See § 2 AOW, AKW, AWBZ and § 6 Anw.
[1519] See § 3 AOW, AKW, AWBZ and § 7 Anw.
[1520] See Centrale Raad van Beroep, 7 June 1989, *Rechtspraak Sociale Verzekering* 1990, 42; or Centrale Raad van Beroep, 29 April 1998, *Uitspraken Sociale Zekerheid* 1998, 175.
[1521] See Social Insurance Agency, *Beleidsregels 2010*, published in Besluit Beleidsregels SVB 2010, Stcrt. 2010, no. 9053.

when determining the centre of social life and thus inhabitancy: the legal bond, the economic bond and the social bond.

The *legal* bond test only looks at residence status under the Aliens Act 2000. The stronger the guarantee for continued stay, the stronger the legal bond with the Netherlands. Before the coming into force of the Linkage Act, persons who had no residence permit were able to be regarded as having a legal bond with the Netherlands. The Social Insurance Agency assumed a legal bond if they actually resided in the country for three years.[1522] The legal bond is only tested in the case of individuals who are not Dutch citizens or who do not have the right to residence on the basis of EC law.[1523] The second test, the *economic* bond test, looks, amongst other things, at whether the person concerned works in the Netherlands and at whether the person has rented or bought a home there. If the person works as an employee or as self-employed in the Netherlands, this is usually interpreted as a sign of a strong economic relationship with the Netherlands. The third factor, the *social* one, takes, *inter alia*, the following circumstances into consideration: the presence of the nuclear family in the Netherlands; the presence of a family member who has lived and/or worked in the Netherlands over a long period of time; the school attendance of the children; and affiliation with churches, associations and so on. The policy guidelines point out that the presence of one of these three bonds may be sufficient to constitute inhabitancy in the Netherlands, though only if it is strong enough.

In practice, the question of inhabitancy is usually assessed by looking at whether the person concerned is registered in the municipal database (*Gemeentelijke basisadministratie, GBA*). This is true for all general social insurance schemes – the AOW, Anw and AKW which are administered by the Social Insurance Agency and the AWBZ which is administered by private health insurance agencies. However, further investigations on the question of inhabitancy are conducted when the person concerned so requests or when there are indications that the actual situation is different from the one shown in the municipal database.[1524]

4.4.1.1. Irregular migrant workers

Before the entry into force of the Linkage Act in July 1998, unlawfully present aliens were able to be insured under general social insurance schemes on the basis of residence, provided they had a permanent and strong relationship with the Netherlands.[1525] However, this has changed with the Linkage Act. Since then, only inhabitants who have a certain immigration status have been insured. Even if a foreigner passed the inhabitancy test, including the legal bond test, he or she would not be insured. In other words, the general social insurance concept of inhabitancy has been overruled by immigration policy considerations.

Under the Linkage Act, the general rule is that aliens who are not staying in the Netherlands pursuant to section 8 (a) - (e), (l) Aliens Act 2000 are not insured.[1526] This means that anyone other than aliens with a residence permit and EEA, Swiss and – if the right to work and stay is derived from the Association Decision 1/80 of the EEC/Turkey Association Council – Turkish citizens and

[1522] Social Insurance Agency, *Beleidsregels 2010*, SB1023
[1523] *Ibid*.
[1524] *Ibid*., SB1029.
[1525] *Ibid*., SB1026.
[1526] See § 6 (2) AOW, § 13 (2) Anw, § 6 (2) AKW and § 5 (2) AWBZ.

their family members could not be insured for general social insurance. Yet the government has been authorised by the legislator to deviate from this rule with respect to two categories of aliens, which were specified in the Linkage Law.[1527] The government did so in the Decree on the Extension and Restriction of the Category of Insured Persons in Respect of General Social Insurance Schemes (*Besluit uitbreiding en beperking kring verzekerden volksverzekeringen*).[1528]

The first exception relates to aliens who reside ('*wonen'*) in the Netherlands and who, after having stayed ('*verblijf te hebben gehouden'*) in the Netherlands in accordance with section 8 (a) - (e), (l) Aliens Act 2000, have in time either asked for extension of such a residence permit or made an objection or appeal against the withdrawal of such a permission to stay.[1529] The latter condition, *i.e.* ask for extension or make an objection or appeal, means that the alien is staying in the Netherlands in accordance with section 8 (g) or (h) Aliens Act 2000. The first condition, *i.e.* reside in the Netherlands, entails that the alien must be an inhabitant of the Netherlands for general social insurance purposes.[1530] So, three conditions have to be fulfilled in order to fall within the scope of this exception and thus be insured for general social insurance purposes:

- first, to have asked for an extension of a residence permit or to have lodged an objection or an appeal against the withdrawal of a residence permit, and hence to be staying in the Netherlands in accordance with section 8 (g) or (h) Aliens Act 2000;
- second, to have stayed in the Netherlands in accordance with section 8 (a) - (e), (l) Aliens Act 2000; and
- finally, to be an inhabitant of the Netherlands for the purposes of general social insurance.

To give an example: a foreigner comes to the Netherlands under a temporary ordinary residence permit for work purposes (section 8 (a) Aliens Act 2000). Before the expiry of the permit, the foreigner asks for an extension. Since a decision is not taken before the expiry of the residence permit, the foreigner's immigration status changes and he or she continues to stay in the Netherlands as a person who is awaiting a decision for an extension of a residence permit (section 8 (g) Aliens Act 2000). If we assume that the foreigner has built up a strong bond with the Netherlands and has made the Netherlands the centre of his or her social life, the foreigner would be insured as an inhabitant during his or her stay in accordance with section 8 (g) Aliens Act 2000. However, such insurance would end as soon as an irrevocable decision has been made as to the extension application. The same goes for decisions with respect to an objection or an appeal. Moreover, such general insurance coverage would end as soon as the expulsion of the alien has been ordered, unless the expulsion has to be stopped according to the Aliens Act 2000 or a court order.[1531]

The second exception provides for insurance for aliens who are staying in the Netherlands in accordance with section 8 (f) - (k) Aliens Act 2000, if they are working in the Netherlands under an employment contract in compliance with the Aliens Employment Act, by which they are

[1527] § XIII (B) (3), XIV (B) (3), XV (B) (3) and XXI (B) (3) Linkage Act.
[1528] Besluit van 24 december 1998, tot vaststelling van een maatregel van bestuur als bedoeld in de artikelen 6, derde lid, van de Algemene Ouderdomswet, 13, derde lid, van de Algemene nabestaandenwet, 6, derde lid, van de Algemene Kinderbijslagwet en 5, derde en vierde lid, van de Algemene Wet Bijzondere Ziektekosten, Stb. 1998, no. 746.
[1529] See § 6 (3), (4) AOW, § 13 (3), (5) Anw, § 6 (3), (4) AKW and § 5 (3), (4) AWBZ and § 10 (1) Decree on the Extension and Restriction of the Category of Insured Persons in Respect of General Social Insurance Schemes.
[1530] This is because § 2 AOW, AKW and AWBZ as well as § 6 Anw determine that an inhabitant within the meaning of these laws is a person who resides ('*woont'*) in the Netherlands.
[1531] § 10 (2) Decree on the Extension and Restriction of the Category of Insured Persons in Respect of General Social Insurance Schemes.

subject to Dutch income tax on wages.[1532] Those aliens continue to be insured in periods when they receive wage continuation payments due to sickness, pregnancy or birth, when they receive payments on the basis of the Sickness Benefits Act, the Unemployment Insurance Act and the Occupational Disability Insurance Act, or when work is interrupted due to vacation, strike or lock-outs.[1533] This exception applies not to aliens who are inhabitants of the Netherlands, but to aliens who are insured under general social insurance schemes due to their taxed work.

Beside these two exceptions, the Decree on the Extension and Restriction of the Category of Insured Persons in Respect of General Social Insurance Schemes recognises a further kind of extension: section 9a of the decree stipulates that aliens who stay in the Netherlands in accordance with section 8 (c) Aliens Act 2000 are covered by general social insurance, whether they are regarded as inhabitants or not. This concerns aliens who stay in the Netherlands on the basis of a temporary asylum residence permit. We can see that the social security rationale, *i.e.* inhabitancy as criterion for insurance, has been overruled by immigration policy considerations not only to exclude foreigners, as is the case for unlawfully present foreigners, but also to include them.

In contrast to the extension of coverage, the decree limits coverage for aliens who stay in the Netherlands in accordance with section 8 (a) - (e), (l) Aliens Act 2000. Pursuant to section 23 of the decree, these aliens cannot be covered by general social insurance due to their work, if they work for an employer in violation of the Aliens Employment Act.[1534] However, since aliens staying in the Netherlands pursuant to section 8 (b) - (e) and (l) Aliens Act 2000 are exempted from the obligation to obtain a work permit and hence cannot work in contravention of the Aliens Employment Act, this provision is only applicable to aliens with a temporary ordinary residence permit, and the majority even of this group are exempted from the work permit obligations. Consequently, this provision which limits the obligatory insurance is only applicable to a very small group of aliens, such as students or family members under a temporary ordinary residence permit.[1535] Here too it should be noted that general social insurance distinguishes between insurance based on inhabitancy in the Netherlands and insurance based on work performed in the Netherlands and subject to Dutch income tax on wages. Section 23 of the decree only applies to the latter, *viz* aliens who are not insured by reason of their inhabitancy.

The decree also includes a hardship clause. Subsection 24 (1) authorises the Social Insurance Agency not to apply the decree's provisions when their application would lead to unfairness ('*onbillijkheden van overwegende aard*') – an unfairness which solely results from the application of a provision on obligatory insurance or its refusal. The Social Insurance Agency has formulated general criteria in its policy guidelines to indicate whether or not the hardship clause should be applied in a particular case. With regard to the refusal of obligatory insurance, the guidelines state that an individual should be insured and hence the provisions of the decree should not be applied, when a person is in a situation where he or she has no adequate insurance and has no financial

[1532] See § 6 (3), (4) AOW, § 13 (3), (5) Anw, § 6 (3), (4) AKW and § 5 (3), (4) AWBZ and § 11 (1) Decree on the Extension and Restriction of the Category of Insured Persons in Respect of General Social Insurance Schemes.
[1533] § 11 (2) Decree on the Extension and Restriction of the Category of Insured Persons in Respect of General Social Insurance Schemes.
[1534] See also the policy of the Social Insurance Agency (*Sociale Verzekeringsbank*), according to which a foreigner can only be insured based on his or her work in the Netherlands if there is compliance with the Aliens Employment Act. See Social Insurance Agency, *Beleidsregels 2010*, SB1030.
[1535] See also § 23 Explanatory Note to the Decree on the Extension and Restriction of the Category of Insured Persons in Respect of General Social Insurance Schemes.

means to acquire adequate insurance on the private market, and where the government has particular responsibilities. This might theoretically apply to lawfully present aliens who are working in violation of the Aliens Employment Act. However, thus far the Social Insurance Agency has never applied the hardship clause in such a situation.[1536]

To sum up, aliens who are unlawfully present in the Netherlands, as it is the case for category A workers, are not covered by general social insurance – neither as residents, nor as workers in the Netherlands. As a consequence of subsection 2 (1) Health Care Insurance Act, which links coverage under the Health Insurance Act to coverage under general social insurance AWBZ, this conclusion also applies to health care insurance. Unlawfully present irregular migrant workers are therefore unable to contract health care insurance with a private insurer under the Health Care Insurance Act.

In a next step we can ask whether category B workers may be insured under the Dutch general social insurance schemes. Category B workers are defined as foreign workers who are lawfully present, but who work without work authorisation in the Netherlands. We will answer this question by bringing together the results from chapter 2, where we analysed the right to stay and work in the country, with the information presented in the previous paragraphs.

From the previous paragraphs we know that aliens who are lawfully present in the Netherlands are covered by the general social insurance schemes if they fall under one of the following categories:
- aliens who are staying in accordance with section 8 (a), (b), (d), (e) and (l) Aliens Act 2000 and are inhabitants;
- aliens staying in accordance with section 8 (c) Aliens Act 2000; or
- aliens who are staying in accordance with section 8 (g) or (h) and have asked for an extension of a residence permit or have lodged an objection or an appeal against the withdrawal of a residence permit which was issued in accordance with section 8 (a) - (e), (l) Aliens Act 2000, and who are inhabitants.

Aliens who fall into one of these categories are insured – regardless of whether they are working in contravention of the Aliens Employment Act, working in compliance with this Act or not working at all. By contrast, aliens staying in the Netherlands pursuant to section 8 (f) - (k) Aliens Act 2000 are covered by general social insurance if they work in the Netherlands as an employee in compliance with the Aliens Employment Act and are subject to income tax on wages. What is more, aliens who are staying in the Netherlands pursuant to section 8 (a) - (e) and (l) Aliens Act 2000 and are not inhabitants of the Netherlands can only be covered by general insurance on the basis of their work under an employment contract if they perform their work in compliance with the Aliens Employment Act.

In subchapter 2.3., category B workers were identified as aliens staying in the Netherlands in accordance with section 8 (f) - (k), (m) Aliens Act 2000 and certain aliens described in section 8 (a) Aliens Act 2000, who work in the Netherlands without having permission to do so.

Let us bring these two sets of information together now.

[1536] See Lieneke Slingenberg, "Questionnaire: Illegal migration and social security." Unpublished. For case law which confirmed the refusal to apply the hardship clause by the Social Insurance Agency, see for instance Centrale Raad van Beroep, 23 July 2010, LJN: BN2492.

Aliens who are inhabitants of the Netherlands and who stay in the country on the basis of a temporary ordinary residence permit (section 8 (a) Aliens Act 2000) which, in conjunction with the Aliens Employment Act, prohibits them from working in the Netherlands or requires them to obtain a work permit if they want to work in the Netherlands, are insured for general social insurance purposes, even if they work in the country in contravention of the Aliens Employment Act.

Aliens who are *not* inhabitants of the Netherlands but who stay in the country on the basis of a temporary ordinary residence permit (section 8 (a) Aliens Act 2000) which, in conjunction with the Aliens Employment Act, prohibits them from working in the Netherlands or requires them to obtain a work permit if they want to work in the Netherlands, are not insured for general social insurance purposes if they work under an employment contract without complying with the Aliens Employment Act.

Aliens who are inhabitants of the Netherlands and who have stayed in the country in accordance with section 8 (a) - (e), (l) Aliens Act 2000 are insured for general social insurance purposes if they have asked for an extension of their residence permit or have lodged an objection or an appeal against the withdrawal of their residence permit – as a result of which they are staying in the country pursuant to section 8 (g) or (h) –, even if they work in the country in contravention of the Aliens Employment Act

Aliens who are inhabitants of the Netherlands and who stay in the country on the basis of section 8 (f) - (k) Aliens Act 2000 – *i.e.* who are awaiting a decision on a residence permit, on an extension of a residence permit, or on a notice of objection or appeal, during which time expulsion should not take place; who are entitled to stay in the Netherlands during the free period; who cannot be expelled from the Netherlands due to their or their family members' state of health; or who are victims of trafficking in human beings and have been given the opportunity to file charges – can only be insured for general social insurance purposes if they perform work under an employment contract in compliance with the Aliens Employment Act.[1537]

From this analysis it follows that out of category B, the only insured aliens for general social insurance purposes are those who are inhabitants of the Netherlands *and* who are staying in the country

- in accordance with section 8 (a) Aliens Act 2000, in the situation where they are prohibited from working or not in possession of the required work permit; or
- in accordance with section 8 (g) or (h) Aliens Act 2000, in the situation where they have applied for an extension of their residence permit or filed an objection or an appeal against the withdrawal of their residence permit and previously used to stay in the country in accordance with section 8 (a) - (e), (l) Aliens Act 2000.

Due to the link between the general social insurance AWBZ and the Health Care Insurance Act, the same conclusion with respect to category B workers applies to health care insurance with private insurers under the Health Care Insurance Act.

[1537] Aliens staying in the Netherlands under section 8 (m) Aliens Act 2000 have no authorisation to work. By definition they therefore cannot work in compliance with the Aliens Employment Act.

What is more, the Linkage Act also links the disbursement of social security benefits to a regular residence status. The General Old Age Pension Act and the General Survivor's Benefits Act stipulate that the payment of benefits is suspended as long as the person concerned is not staying in the Netherlands in accordance with section 8 Aliens Act 2000.[1538] So aliens who are granted benefits based on their periods of insured residence or work in the Netherlands are unable to receive their benefits, as long as they are unlawfully present in the country. The payment of the benefits will be resumed once the alien has filed an application and it turns out that he or she is actually residing or staying outside the Netherlands.[1539,1540] Moreover, the payment will, of course, be restarted once the alien resumes lawful residence in the Netherlands.[1541] The Central Appeals Tribunal has interpreted the term 'suspension' ('*opschorting'*) as a temporary postponement of benefit payments and not as a refusal.[1542] In other words, once benefit payments are restarted they will be retroactively paid out for the periods of suspension.[1543]

These provisions on benefit suspension may not be particularly easy to handle in practice. The Social Insurance Agency has therefore issued a number of rules to ensure correct application. To verify whether individuals are actually staying or residing outside the Netherlands, the Social Insurance Agency may ask the individual to either send a certified proof of being alive or to appear in person in an authorised office abroad and provide the requested proof.[1544] Regarding lawful residence in the Netherlands, the Social Insurance Agency may look up the alien's residence status in the municipal database (*Gemeentelijke basisadministratie, GBA*). However, if the result of this search is negative, the Social Insurance Agency gives the alien the opportunity to show that the Immigration and Naturalisation Service confirms the lawfulness of his or her stay.[1545] Usually, if an eligible alien enters the Netherlands, the Social Insurance Agency assumes lawful residence during the first three months, based on section 8 (i) Aliens Act 2000. After three months, the Agency assumes unlawful residence and stops benefits payments, unless lawful residence in the Netherlands or principal residence outside the Netherlands is proven. However,

[1538] See § 19a (1) AOW and § 46a (1) Anw.
[1539] See § 19a (2) AOW and § 46a (2) Anw.
[1540] Since the year 2000, the Benefit Restrictions for Foreign Residents Act has been in force (*Wet beperking export uitkeringen* – Wet van 27 mei 1999 tot wijziging van de Ziektewet, de Wet op de arbeidsongeschiktheidsverzekering en enkele andere wetten in verband met de beperking van het exporteren van uitkeringen), Stb. 1999, no. 250. According to this Act, general social insurance benefits are only exported to EU and EEA countries, as well as to countries with which agreements have been concluded. However, there are four exceptions to this rule with respect to general social insurance. First, AOW basic benefits (50 percent of the minimum income) are exported everywhere. Second, persons who carry out work of general interest, such as development aid, can receive benefits under the General Survivor's Benefits Act (Anw) and under the General Child Benefits Act (AKW), as well as the supplement under the General Old Age Pension Act (AOW), while they are abroad. Third, Anw, AKW and AOW benefits are exported to the islands of Aruba, Curaçao and Sint Maarten. Fourth, beneficiaries who already resided abroad and received Anw and AOW benefits before the year 2000 continue to receive them.
[1541] See Centrale Raad van Beroep, 4 July 2003, LJN: AI0178. Although the laws only explicitly provide for a resumption of benefit payments if the alien is residing or staying abroad, the Central Appeals Tribunal has made it clear that the laws implicitly also provide the basis for resumption when the alien resumes lawful residence in the Netherlands.
[1542] See Centrale Raad van Beroep, 4 July 2003, LJN: AI0178 and Centrale Raad van Beroep, 4 July 2003, LJN: AI0184.
[1543] This case law of the Central Appeals Tribunal has also found its way into the policy of the Social Insurance Agency. See Social Insurance Agency, *Beleidsregels 2010*, SB1094.
[1544] See – based on § 15 AOW and § 36 Anw – § 5 (3) and § 6 (2) Controlevoorschriften AOW, and § 6 (3) and § 7 (2) Controllevoorschriften Anw.
[1545] Social Insurance Agency, *Beleidsregels 2010*, SB1029. See also subchapter 6.2.1.

after nine months of continuous presence in the Netherlands, the Agency acts on the assumption that the beneficiary has given up principal residence abroad.[1546]

4.4.1.2. Nationals who engage in undeclared work

Inhabitants of the Netherlands and individuals who work in the Netherlands and are subject to Dutch income tax fall within the scope of application *ratione personae* of the general social insurance schemes and of mandatory health care insurance. They fall within their scope *ipso jure*. This means that when the requirement to be an inhabitant of the Netherlands or to be working in the Netherlands plus subject to Dutch income tax is met, the person concerned is insured. The payment or non-payment of contributions to these insurance schemes, in general,[1547] does not affect the person's insurance status and entitlement to benefits.[1548]

We have limited the scope of our research to workers who are living and working in the country under investigation.[1549] Situations where Dutch citizens are residing outside the Netherlands but working in the black economy in the Netherlands will therefore not be investigated.[1550] This means that the question whether Dutch black-economy workers can be insured for general social insurance due to their employment is disregarded in this research.

If we assume that the undeclared Dutch workers in our investigation are based in the Netherlands, the consequence of this is that they are considered as inhabitants for general social insurance purposes. Their Dutch citizenship paves the way for this.[1551] In practice, as we have heard before, inhabitancy for general social insurance purposes is usually assessed by the person's registrations status in the municipal database GBA. Here too, citizenship paves the way for registration.[1552] This means that Dutch citizens whose work is not declared to the social security authorities are subject to general social insurance due to their inhabitancy.

One may also ask if the fact that work is not declared may prevent such workers from exercising their rights. In other words, does the application for benefits necessarily lead to the disclosure of undeclared work, with the possible consequence of sanctions or obligations to make retroactive payments? The answer is no. General social insurance is a people's insurance; it is not based on professional activity. People are, in the first instance, insured if they reside in the Netherlands. Therefore it does not attract attention if an undeclared worker, who is not affiliated with the social security authorities and who officially appears to be economically inactive, applies for benefits under general social insurance schemes.

[1546] *Ibid.*, SB1094.

[1547] An exception to this rule exists for the General Old Age Pension (AOW). This exception will be discussed in chapter 7.

[1548] Except for the exception just mentioned, social security laws, as we will see in the following chapters, do not link insurance and entitlement to benefits to the payment of contributions. Officials of the competent administration have confirmed that they do not link the payment of benefits to the payment of contributions in practice, either. This confirmation is unfortunately not based on publicly available sources. I obtained it from an e-mail from Marjolein van Everdingen, Department of Law & Policy, Social Insurance Agency (*Sociale Verzekeringsbank*), 4 June 2009.

[1549] See the introduction to Part II of this thesis.

[1550] This includes phenomena such as posting or frontier work.

[1551] Due to their Dutch citizenship, the legal bond test is waived. See above, subchapter 4.4.1.

[1552] See below, subchapter 6.2.1.

4.4.2. Employee social insurance schemes

Employee social insurance schemes basically cover individuals who work in the Netherlands under an employment contract.[1553] This includes both employees and civil servants. Work outside the Netherlands is only relevant if both the employee or civil servant and their employer are residing or based in the Netherlands.

The notion of employee (*werknemer*), *i.e.* a person who works under an employment contract, is largely the same in all employee insurance schemes, *i.e.* Wet Wia, ZW, WW and WAZO. An employment contract is assumed if the relationship between employee and employer bears the following characteristics:
- the employee is obliged to personally perform the work;
- the employer is obliged to compensate the work by paying wages;
- there must be a relationship of subordination between the employee and the employer.[1554]

The question whether or not an employment contract exists is solely assessed according to the above criteria. It is irrelevant how the parties themselves describe their relationship.[1555]

Yet the legislators have on the one hand extended insurance to certain persons who do not (clearly) work under an employment contract, and on the other hand excluded certain persons from insurance who do work under a contract of service. For instance, under certain conditions small entrepreneurs, travelling salesmen, home workers, artists or sportsmen, none of whom work for an employer, are considered to be insured.[1556] On the other hand, in certain circumstances domestic workers or aliens are excluded, even if they work under an employment contract.[1557] The situation for aliens will be analysed in this chapter.

4.4.2.1. Irregular migrant workers

Employee social insurance does not regard aliens who are not lawfully present in the Netherlands pursuant to section 8 (a) - (e), (l) Aliens Act 2000 as employees.[1558] As is the case for general social insurance, there are exceptions to this rule. The Sickness Benefits Act (ZW), the Unemployment Insurance Act (WW) and, indirectly, the Work and Income According to Labour Capacity Act (Wet Wia) and the Work and Care Act (WAZO) authorise exceptions with regard to, first, aliens who are or were lawfully working in the Netherlands and, second, aliens who are staying in the Netherlands in accordance with section 8 (g) or (h) Aliens Act 2000 and have previously stayed in the Netherlands in accordance with section 8 (a) - (e), (l) Aliens Act 2000.[1559] Thus far the government has extended the personal scope of application with regard to the first category only. Section 4c of the Decree on the Extension and Restriction of the Category of

[1553] See § 7 and § 8 Wet Wia, § 3 and § 20 ZW and § 3 and § 15 WW. See also § 1:1 (b) WAZO.
[1554] These criteria are based on the definition of an employment contract under the Dutch Civil Code. See § 7:610 Civil Code (*Burgerlijk Wetboek*).
[1555] See Klosse and Noordam, *Socialezekerheidsrecht*, p. 37.
[1556] See in particular § 9 Wet Wia, § 4 and § 5 ZW, § 4 and § 5 WW, § 3:6 (1) (a) WAZO and § 2 and § 3 Decree on the Extension and Restriction of the Category of Insured Persons in Respect of Employee Social Insurance Schemes.
[1557] See in particular § 3 (3) and § 6 ZW, § 3 (3) and § 6 WW, § 3:6 (1) (a) WAZO and §§ 6-16a Decree on the Extension and Restriction of the Category of Insured Persons in Respect of Employee Social Insurance Schemes.
[1558] See § 3 (3) ZW and WW and § 8 Wet Wia. See also § 3:6 (1) (a) WAZO, which *inter alia* refers to § 3 (3) ZW.
[1559] § 3 (6) ZW and WW and § 8 Wet Wia. See also § 3:6 (1) (a) WAZO, which *inter alia* refers to § 3 (6) ZW.

Insured Persons in Respect of Employee Social Insurance Schemes (*Besluit uitbreiding en beperking kring verzekerden werknemersverzekeringen*)[1560] stipulates that aliens who are staying in the Netherlands pursuant to section 8 (f) - (k) Aliens Act 2000 and performing work in compliance with the Aliens Employment Act are also regarded as employees.

By contrast, the decree restricts the coverage for those aliens who are staying in the Netherlands in accordance with section 8 (a) - (e), (l) Aliens Act 2000. They do not fall within the scope of the employee social insurance if they work under an employment contract without complying with the Aliens Employment Act.[1561] However, this restriction only applies to a small group of aliens. Aliens staying in accordance with section 8 (b) - (e), (l) Aliens Act 2000 do not need a work permit and therefore cannot violate the Aliens Employment Act. This is also true for many workers with a temporary ordinary residence permit (section 8 (a) Aliens Act 2000). Consequently, this rule is only directed at some groups of workers with a temporary ordinary residence permit.

This means that category A migrants, *i.e.* alien workers who stay and work in contravention of immigration laws, are excluded from employee social insurance. They do not have access to benefits provided by these social insurance schemes.

We have mentioned before[1562] that category B workers perform work in contravention of the Aliens Employment Act and are staying in the Netherlands under either section 8 (a) or section 8 (f) - (k), (m) Aliens Act 2000. As a consequence, they are not covered by employee social insurance and are thus ineligible for the associated benefits. To be more precise, according to section 4c of the decree, aliens of category (f) - (k) can only be insured if they work in compliance with the Aliens Employment Act. And pursuant to 16a of the decree, aliens of category (a) are not insured if they perform work under an employment contract in violation of the Aliens Employment Act. Since irregular migrant workers by definition perform work in contravention of the immigration laws, they are not insured for employee social insurance purposes.

Like General Old Age Pension insurance and General Survivor's Benefits insurance, employee social insurance schemes pay out their benefits on condition that the beneficiary stays in the Netherlands in compliance with the Aliens Act 2000.[1563] Without lawful residence, aliens who are basically eligible for benefits are not entitled to receive them. Payment will be resumed once the beneficiary is lawfully present in the Netherlands or – with the exception of unemployment benefits – once the beneficiary is resident abroad.[1564] If the suspension is lifted, the suspended payments will be paid out retroactively.[1565]

[1560] Besluit van 23 augustus 1989, tot vaststelling van een algemene maatregel van bestuur als bedoeld in artikel 3, derde en vierde lid, van de Wet op de arbeidsongeschiktheidsverzekering, artikel 3, derde en vierde lid, van de Ziektewet en artikel 3, derde en vierde lid, van de Werkloosheidswet, Stb. 1989, no. 402.

[1561] § 16a Decree on the Extension and Restriction of the Category of Insured Persons in Respect of Employee Social Insurance Schemes.

[1562] See subchapter 2.3.

[1563] See § 69 (1) Wet Wia, § 41 (1) ZW and § 19 (1) (f) WW. See also § 3:14 (3) WAZO, which *inter alia* refers to § 41 (1) ZW.

[1564] See § 69 (2) Wet Wia and § 41 (2) ZW. See also § 3:14 (3) WAZO, which *inter alia* refers to § 41 (2) ZW. We have already mentioned that since the year 2000, the Benefit Restrictions for Foreign Residents Act has been in force. According to this Act, employee social insurance benefits are only exported to EU and EEA countries, as well as to countries with which agreements have been concluded. However, there are two exceptions to this rule with respect to employee social insurance. First, persons who carry out work of general interest, such as development aid, can receive

4.4.2.2. Nationals who engage in undeclared work

Employee social insurance schemes insure employees who work under an employment contract in the Netherlands. It has been shown before[1566] that an employment contract exists if certain principles characterise the employer-employee relationship: the obligation to personally perform the work, the obligation to compensate the work by paying wages and the existence of a relationship of subordination.

A citizen is insured if he or she is an employee pursuant to section 3 Occupational Disability Insurance Act (WAO), section 8 Work and Income According to Labour Capacity Act (Wet Wia), section 3 Sickness Benefits Act (ZW), section 3 Unemployment Insurance Act (WW) and section 1:1 (b) in conjunction with subsection 3:6 (1) (a) Work and Care Act (WAZO). Meeting this legal definition of employee is decisive. In principle, citizens who engage in undeclared work are therefore insured under employee social insurance schemes.

Nevertheless, one can ask whether the fact that work is not declared to the social security authorities and no social security contributions are paid[1567] – and thus legal obligations are violated – has any implications for the validity of the employment contract.[1568] Two situations have to be distinguished: first, the situation where employee and employer conclude an employment contract and the employer subsequently fails to declare the work and pay contributions; second, the situation where employee and employer conclude a contract in which they agree not to declare the work in order to avoid the payment of contributions. Employees are not in a position to avoid declaring work and paying contributions. This is the responsibility of the employers alone. As reported in subchapter 3.2., employees should be regularly informed about the payment of their social security contributions by their employers and by the Employee Insurance Administration Institution (*Uitvoeringsinstituut Werknemersverzekeringen*). However, employees cannot under any circumstances be responsible for the failure to declare work and pay contributions.

In the first situation mentioned above, *i.e.* employee and employer conclude an employment contract and the employer subsequently omits to declare the work and pay contributions, no issues

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benefits under the Sickness Benefits Act (ZW) and the Work and Income According to Labour Capacity Act (Wet Wia), while they are abroad. Second, ZW and Wet Wia benefits are exported to the islands of Aruba, Curaçao and Sint Maarten.

[1565] See Centrale Raad van Beroep, 4 July 2003, LJN: AI0178 and Centrale Raad van Beroep, 4 July 2003, LJN: AI0184.

[1566] See subchapter 4.4.2.

[1567] Here we confine our discussion to the situation where work and wages are completely hidden from the social security authorities. Other situations of black-economy work and social fraud, which may also impact the validity of the employment contract, are not taken into consideration, since they fall outside the scope of this research. These include the situation where work is basically declared to the social security authorities, but part of the wages are hidden and so lower contributions are paid; and the situation where the employment relationship is accidentally misclassified and the employee is therefore not registered with the authorities for employee social insurance (and is instead registered with other social security authorities, such as the one for self-employed); or the situation where work and wages are basically declared, but they are intentionally disguised through legal means so that no or lower contributions have to be paid – for instance bogus self-employment, declaration of wages as professional expenses etc.

[1568] Concerning irregular migrant workers, the question of validity of the employment contract is not relevant with respect to employee social insurance. This is because irregular migrant workers are by law not considered to be employees for insurance purposes, and are hence excluded from the scope *ratione personae*.

of contractual invalidity arise. The employment contract itself does not contain any illegal provisions. The employer simply fails to comply with the legal obligations arising from the employment contract.

In the second situation, employee and employer agree to hide their work from the social security authorities. Under Dutch civil law, all juridical acts, including employment contracts, which are contrary to public order or 'good morals' are null and void.[1569] What is more, juridical acts contrary to imperative law may also be invalid, unless the law does not have the scope to affect the validity of the contract.[1570] There have not been many legal cases in the Netherlands where invalidity of an employment contract has been invoked.[1571] We have found two cases before courts of lower instance in which a contract was alleged to be invalid due to black-economy work.[1572] In both decisions, the judges held that due to the parties' agreement to hide (part of) their work and corresponding income from tax authorities – which in the judges' view was an essential part of the employment contract – the whole employment contract was against good morals and hence had an unlawful cause. The consequence was that the employment contract was null and void *ab initio* and no tax obligations arose. These judgments have been strongly criticised in the legal literature,[1573] and the General Public Prosecutor also expressed the opinion that the decisions were simply wrong, in a legal case before the Supreme Court in 2002. The General Public Prosecutor convincingly argued that the secrecy agreement , *i.e.* the deal to elude the application of tax laws, might be invalid – but not the rest of the employment contract.[1574] He regarded this as a classical example of partial invalidity as defined in section 3:41 Civil Code.

However, even if one followed the point of view of the above-mentioned courts of lower instance and assumed the invalidity of the employment contract, this would not necessarily mean that coverage under employee social insurance schemes could not be established. The counter-argument runs as follows. The concept of employment under both employee social insurance laws and tax laws is linked to the concept of employment under civil law. Nevertheless, with respect to tax laws, the Supreme Court, while acknowledging this link, held that even an employment contract which is invalid pursuant to section 3:40 Civil Code may have consequences for tax laws. To be more precise, the Supreme Court found that if an invalid employment contract is exercised by the parties as if it were a valid contract, then the underlying intention of the the tax law mean that this contract also has the usual consequences with respect to the tax authorities.[1575] The case in question related to an invalid employment contract between a non-tolerated 'coffee shop' owner, *i.e.* the owner of a store where soft drugs were sold, and his employee. However, one could also assume that if work is undeclared, both employer and employee are complying with their employment contract, which would then have legal consequences under Dutch tax laws. This rationale could also be applied to employee social insurance laws. Taco van Peijpe, for instance, advocated such an approach under employee social insurance laws.[1576]

[1569] § 3:40 (1) Civil Code.
[1570] § 3:40 (2) and (3) Civil Code.
[1571] For this statement see General Public Prosecutor in Hoge Raad, 6 December 2002, LJN: AE4473, *Beslissingen in belastingzaken* 2003, 67; *Weekblad Fiscaal Recht* 2002, 1873.
[1572] See Rechtbank Roermond, 18 November 1976 and Rechtbank Breda, 23 December 1986, both cited in the above-cited decision by the Hoge Raad, 6 December 2002, LJN: AE4473.
[1573] See for instance Wim van der Grinten, *Arbeidsovereenkomstenrecht*, 22nd ed. (Deventer: Kluwer, 2008), p. 17.
[1574] See General Public Prosecutor the above-cited decision by the Hoge Raad, 6 December 2002, LJN: AE4473.
[1575] Above-cited decision of Hoge Raad, 6 December 2002, LJN: AE4473.
[1576] Taco van Peijpe, "De nietige arbeidsovereenkomst," *Sociaal Maandblad Arbeid*, vol. 58, no. 3 (2003), pp. 100-101.

Even so, in order to gain legal certainty, courts of higher instance have to make a pronouncement, first, as to whether employment contracts in which employee and employer agree to hide their work from the Employee Insurance Administration Institution are completely invalid and, second, as to whether this invalidity also has consequences under employee social insurance laws.

What we know for sure is that the mere non-payment of contributions is not relevant for insurance. Social insurance laws, as we will see in the following chapters, do not link insurance and entitlement to benefits to the payment of contributions. This has also been confirmed by case law[1577] and officials of the Employee Insurance Administration Institution[1578]. Consequently, citizens who engage in undeclared work are insured and are eligible for benefits, provided the employment contract is not declared null and void and hence without any consequences for employee social insurance laws.

However, exercising the right to benefits means declaring the previously undeclared work. The Employee Insurance Administration Institution keeps track of every insured person. The Tax Administration informs the Employee Insurance Administration Institution, most notably, about a 'first day notification' (*Eerstedagsmelding*)[1579] and the payment of employee insurance contributions. If an applicant does not appear in the administration's records, the Employee Insurance Administration Institution will start investigations and will communicate the suspicion of black-economy work to the Tax Administration.[1580] As mentioned before, none of this prevents the undeclared worker from being awarded benefits. However, to this end the Employee Insurance Administration Institution must establish that there was employment within the meaning of employee social insurance legislation. Once this is established and all other eligibility criteria are fulfilled, the undeclared worker will be eligible for benefits. At the same time, the employer will be subject to sanctions and the retroactive payment of social insurance contributions. Consequently, the right to benefits can only be exercised at the price of retroactively declaring the work.

[1577] See Centrale Raad van Beroep, 23 February 2005, LJN: AT2676; Centrale Raad van Beroep, 5 January 2006, LJN: AU9489; or Centrale Raad van Beroep, 3 April 2008, LJN: BC9353.

[1578] Officials of the competent administration confirmed that also in practice they do not link the payment of benefits to the payment of contributions in practice, either. This confirmation is unfortunately not based on publicly available sources. I obtained it from an e-mail from Francis Keunen, International Law, Employee Insurance Administration Institution (*Uitvoeringsinstituut Werknemersverzekeringen*), 10 June 2009.

[1579] See subchapter 3.2.

[1580] I obtained this information from an e-mail from Francis Keunen, International Law, Employee Insurance Administration Institution (*Uitvoeringsinstituut Werknemersverzekeringen*), 10 June 2009.

5. The financing of social security arrangements

5.1. General remarks

The distinction between social insurance schemes and social assistance schemes in Dutch social security is also reflected in its sources of financing. While social insurance, except for the General Child Benefits scheme (AKW), is primarily funded from contributions, social assistance is financed from general revenue. Nevertheless, social insurance also relies on government subsidies. Further sources of income for social security are investment income or, in the field of health care, co-payments.

The general social insurance schemes, the General Old Age Pension Act (AOW), General Survivor's Benefits Act (Anw) and General Exceptional Medical Expenses Act (AWBZ), require every insured person to pay contributions.[1581] Employers are liable for contributions to the employee social insurance schemes, the Occupational Disability Insurance Act (WAO) and Work and Income According to Labour Capacity Act (Wet Wia).[1582] Both employer and employees are subject to contributions to Unemployment Insurance (WW).[1583] Sickness benefits are usually paid directly by the employer. If sickness benefits pursuant to the Sickness Benefits Act (ZW) are paid by the Employee Insurance Administration Institution (*Uitvoeringsinstituut Werknemersverzekeringen*), then they are financed from contributions to Unemployment Insurance. Benefits paid out under the Work and Care Act (WAZO) are also funded from contributions to Unemployment Insurance.[1584] The contribution for insurance under the Health Care Insurance Act (ZVW) consists of two parts: a premium at a fixed rate and an income-related contribution. The first has to be paid by the policyholder to the private health insurance company. The latter must be paid by the person who is required to arrange coverage under the Health Insurance Act. This part of the contribution must be remitted by the employer or the social security authority, if benefits are paid out, to the Dutch Tax Administration.

Dutch social assistance is funded from general revenue. This is true for all social assistance schemes analysed in this report, *i.e.* social assistance under the Work and Social Assistance Act (WWB), Act on Income Provisions for Older, Partially Disabled Unemployed Persons (IOAW), the Regulation on Services for Asylum-Seekers and Other Categories of Aliens (Rva 2005) and the Regulation on Services for Certain Categories of Aliens (Rvb). What is more, the Act on Incapacity Benefits for Disabled Young People (Wajong) is also financed from general revenue. Individuals may indirectly contribute to the financing of these schemes by paying taxes, but there is no direct obligation to contribute which it would be necessary to investigate.

[1581] § 6 Social Insurance Financing Act.
[1582] § 34 Social Insurance Financing Act.
[1583] § 25 Social Insurance Financing Act.
[1584] If the Dutch government is the employer, slightly different rules apply to the financing of the ZW and the WAZO benefits.

5.2. Financial duties with respect to aliens or undeclared workers

5.2.1. General social insurance schemes and Health Care Insurance

Anyone insured under the general social insurance schemes AOW, Anw and AWBZ is liable for contributions. The question of insurance has been discussed above, in subchapter 4.4.1. To summarise, individuals are insured either due to their inhabitancy in the Netherlands or due to their work in Netherlands; in the latter case on condition that they are subject to Dutch income taxation. Inhabitancy is determined by looking at the person's legal, economic and social bonds with the Netherlands. However, in practice the person's residence status in the municipal database is looked up.

There are two ways to levy the contributions for general social insurance. If the insured person is an employee, the contributions are paid through the employer. The employer is obliged to deduct the contributions from the employee's wages and remit them in time to the Dutch Tax Administration.[1585] For the levy of general social insurance contributions through the employer, the same rules as for the levy of income tax on wages apply.[1586] If the person concerned is not an employee and is also not receiving social security benefits, then the contributions are levied by assessment of the Tax Administration. In this case, the same legal rules apply as for the levy of personal income tax.[1587] If the insured person is an employee, the employer is therefore responsible for the correct payment of general social insurance contributions. Otherwise – and if no social security administration is paying out benefits – the insured person him- or herself is accountable.

The *income-related contribution* to mandatory insurance under the Health Care Insurance Act (ZVW) must be paid by the person who is obliged to contract insurance. As illustrated in subchapter 4.4.1., this is the person who is mandatory insured under the general social insurance AWBZ. And this in turn is either an inhabitant of the Netherlands or an individual who works in the Netherlands and is subject to Dutch income taxation. If the insured is an employee, income-related contributions must be collected by the employer. The employer is accountable for the correct remittance of the contribution to the Dutch Tax Administration. For the levy, the same rules apply as for the income tax on wages.[1588] If the insured is not working under an employment contract, income-related contributions to the ZVW are levied together with the personal income tax. The premium at a *fixed rate* for health care insurance under the ZVW must be paid by the policyholder. Usually policyholder and mandatorily insured person are one and the same. However, it might be possible for a third party – such as a partner or parent – to contract health insurance for the benefit of the person to be insured. In this case, this third party will be the policyholder and hence obliged to pay the premium at a fixed rate.

[1585] § 27 Wage Income Tax Act and § 57 Social Insurance Financing Act.
[1586] § 58 (2) Social Insurance Financing Act.
[1587] § 58 (1) Social Insurance Financing Act.
[1588] § 59 (1) Social Insurance Financing Act.

5.2.1.1. Irregular migrant workers

From the analysis in subchapter 4.4.1.1. it follows that irregular migrant workers who are staying unlawfully in the Netherlands (category A) are not insured under general social insurance. The same is true for most category B irregular migrant workers. Only the following category B workers are insured by way of their inhabitancy, even when they perform work in contravention of the Aliens Employment Act: aliens who are inhabitants of the Netherlands and who are staying in the country

- in accordance with section 8 (a) Aliens Act 2000, if they are prohibited from working or required to obtain a work permit; or
- in accordance with section 8 (g) or (h) Aliens Act 2000, if they have applied for an extension of their residence permit or filed an objection or an appeal against the withdrawal of their residence permit, and used to stay in the country in accordance with section 8 (a) - (e), (l) Aliens Act 2000.

Under the Social Insurance Financing Act, only insured persons are liable for contributions to the general social insurance schemes AOW, Anw and AWBZ. Since category A and most category B irregular migrant workers are not insured, there is no legal obligation to pay contributions.

The Health Care Insurance Act links the obligation to contract health care insurance to mandatory insurance under the general social insurance AWBZ. Consequently, category A workers are neither required nor able to take out cover under the Health Care Insurance Act. The same is true of category B workers, unless they fall under one of the above-mentioned exceptions. Since most irregular migrant workers are not obliged to contract insurance, they are not required to pay contributions. For a category A irregular migrant worker, in practice it is also not possible to conclude health care insurance for the benefit of an individual who is obliged to be insured, because private health insurance providers are required to verify the residence status of the applicant. As an insurance policy cannot be concluded, no obligation to pay contributions arises. Category B workers with a lawful residence status, on the other hand, may contract insurance for the benefit of an insured third person. In such a case, there is an obligation to pay contributions.

This poses some questions as to the competitive advantage for irregular migrant workers and their employers. The Dutch government was aware of this issue from the very beginning. When proposing the Linkage Act, it investigated the possibility of levying a contribution replacement for illegal work. However, the government came to the conclusion that such a measure could in practice only be applied if a person is caught working illegally, in which case there are a number of serious administrative and criminal sanctions for the employers of irregular immigrants which would eliminate any competitive advantage.[1589] Several years after the introduction of the Linkage Act, the government once more contemplated the possibility of contribution replacements, but abandoned the idea again. In particular, it argued that a contribution replacement would in fact represent a sanction, and that a further sanction in addition to the penalty under the Aliens Employment Act could infringe the *ne bis in idem* principle.[1590]

Nevertheless, a legal obligation does exist which might lead to the payment of contributions in the event of non-compliance, even in a situation of illegal employment. As illustrated in subchapter 3.2., when hiring new personnel, employees and employers must comply with identification

[1589] Kamerstukken II 1994-95, 24 233, no. 3, p. 43 ff.
[1590] Kamerstukken II 2004-05, 17 050, no. 300, p. 4.

formalities. In particular, employees must provide their name, date of birth, address and Citizen Service Number. Employers, in turn, are required to prove the identity of the new employee and archive the respective documents. Since 2008, and with effect from January 2006, employers have also been asked to check and keep a copy of an alien's permission to stay and work in the Netherlands. In case of infringement, the anonymous rate (*Anoniementarief*) must be applied. This means that, according to section 26b Wage Income Tax Act, the income tax and contributions for general social insurance are raised at the highest rate of 52 percent. And section 43 Health Care Insurance Act stipulates that if section 26b Wage Income Tax Act or section 19 Social Insurance Financing Act are applied, the income-related contribution must be calculated without taking the assessment ceiling into account.

Let us turn first to general social insurance. Subsection 6 (2) Social Insurance Financing Act stipulates that if section 26b Wage Income Tax Act applies, the employee concerned will be considered to be liable for general social insurance contributions. So if employee or employer or both fail to comply with the identification obligations of section 26b, the employee is liable for general social insurance contributions and the employer is required to deduct and remit them. In 2006, the Supreme Court of the Netherlands (*Hoge Raad der Nederlanden*)[1591] was confronted with the question whether individuals who are not insured for Dutch general social insurance can be subject to the combined anonymous rate of 52 percent for both income tax and general social insurance contributions. The Supreme Court ruled that section 26b clearly indicates that the rate of 52 percent applies in both cases: levy of income tax only and combined levy of income tax and general social insurance contributions. It is therefore, according to the Supreme Court, of no relevance to determine whether a particular anonymous employee is insured for general social insurance purposes or not.[1592]

In his conclusion to this case, the General Public Prosecutor (*Procureur-Generaal*) enlarged upon the applicability of the anonymous rate concerning general social insurance in cases of employment of illegal immigrants. The Prosecutor was of the opinion that from a legal point of view there could be no such applicability, since irregular migrant workers are excluded from social insurance. The prosecutor based this conclusion, as I understand it, on three grounds. First, *lex posterior derogat legi priori*: when the Linkage Act was introduced in 1998, subsection 10 (7) of the General Social Insurance Financing Act[1593] of 1989 no longer had any effect on illegal immigrants. Subsection 10 (7) of the outdated General Social Insurance Financing Act was identical to subsection 6 (2) of the new Social Insurance Financing Act. It stated that if the anonymous rate applies with respect to taxes and general social insurance contributions, the employee concerned will be considered to be liable for general social insurance contributions. The Prosecutor therefore held that because of the exclusion of illegal immigrants from general social insurance under the Linkage Act, the 'older' provision which gives rise to a contribution payment obligation in the event of non-compliance with the requirements of section 26b Wage Income Tax Act is not applicable to illegal immigrants.[1594] Second, the Prosecutor points out that while the 'normal' liability to pay contributions, *i.e.* the obligation for insured persons, is formulated in

[1591] The Supreme Court is the last instance in, *inter alia*, tax matters. With regard to social security, the Supreme Court has jurisdiction only to a limited extent.
[1592] Hoge Raad, 8 December 2006, LJN: AW2181, § 5.2, *Nederlandse Belastingrechtspraak* 2007, 82, *Nederlands Juristenblad* 2007, 389, *Fiscaal Tijdschrift* 2008, 17.
[1593] Wet van 27 april 1989, houdende financiering van de volksverzekeringen, Stb. 1989, no. 129.
[1594] Conclusions of the General Public Prosecutor, 6 March 2006, on the decision of the Hoge Raad, 8 December 2006, LJN: AW2181, § 2.10.

section 6 General Social Insurance Financing Act under the heading 'liability for contributions' (*Premieplicht*), the 'fictitious' liability for anonymous employees is integrated in section 10 under the heading 'rate' (*Tarief*).[1595] Third, the Prosecutor refers to the Dutch government's Explanatory Memorandum on the Linkage Act. To put it briefly, the cited section states that if it is discovered that an employer has not checked the identity of an alien who is unlawfully residing in the Netherlands, the employer will be subject to a supplementary assessment (*Naheffingsaanslag*) on the basis of the anonymous rate. The Prosecutor links this statement to the previous paragraph in the Explanatory Memorandum, which states that there are enough other fiscal measures in place to eliminate any competitive advantage for illegal workers.[1596] The General Public Prosecutor considered this statement to be evidence that the anonymous rate is, in the case of irregular employment, a fiscal measure only.

However, the Supreme Court did not address this issue raised by the General Public Prosecutor. In the meantime, the legal framework has changed. As a consequence, the objections of the General Public Prosecutor are, to a large extent, no longer valid. The Social Insurance Financing Act replaced the General Social Insurance Financing Act in January 2006. The old rule has been reaffirmed that individuals who are subject to the anonymous rate are as a consequence considered to be liable for general social insurance contributions. In addition, the provision has been placed under the heading 'liability for contributions', next to the 'normal' liability to pay contributions. All this could indicate that from a legal point of view, an irregular migrant worker is also liable for contributions – based on subsection 6 (2) Social Insurance Financing Act – when the obligations under section 26b Wage Income Tax Act are violated. The payment of these contributions is an obligation of the employer.

In practice one's view on this legal issue makes no difference. Whenever verification and payroll accounting obligations under section 26b Wage Income Tax Act are violated – as they generally will in case of illegal employment – the Tax Administration collects a levy from employers at the rate of 52 percent of the taxable income of the employee concerned.

However, this does not create a corresponding right. In other words, although there is the obligation to pay income tax, or both income tax and contributions, retroactively, the irregular migrant worker has no right to benefits under the employee social insurance schemes. Mandatory insurance starts *ipso jure*, regardless of whether contributions have been paid. The obligation to pay taxes and contributions at the anonymous rate is a sanction, since contributions must be paid at the highest rate. The Supreme Court has confirmed this view. Nevertheless, it has held that the anonymous rate, though a sanction, is neither castigatory nor exemplary in nature.[1597] From this it follows, *inter alia*, that for one and the same offence, both the anonymous rate and an administrative fine can be applied.[1598]

The situation for health care insurance under the Health Care Insurance Act (ZVW) is different. Here, there is no fiction that individuals who are subject to the anonymous rate are legally obliged to pay contributions. Consequently, the anonymous rate, *i.e.* calculation of the income-related contribution without taking the assessment ceiling into account, cannot be applied to individuals who are uninsured and thus not required to pay contributions. Under the Health Care Insurance

[1595] *Ibid*., § 2.9.
[1596] *Ibid*., § 2.9.
[1597] Hoge Raad, 28 January 1998, LJN: AA2391.
[1598] See Gerechtshof Arnhem, 2 June 1999, *Vakstudie Nieuws* 1999, 39.5.

Act this sanction therefore only applies to certain aliens who are staying lawfully but working unlawfully in the Netherlands. A more detailed analysis of the meaning and consequences of the anonymous rate for social insurance without the fiction of a payment obligation can be found in the subchapter on employee social insurance.[1599]

5.2.1.2. Nationals who engage in undeclared work

As we have seen, the obligation to pay contributions refers to insured individuals only. Insured individuals are, first and foremost, inhabitants of the Netherlands. Consequently, inhabitants of the Netherlands are required to contribute to general social insurance and insurance under the Health Care Insurance Act. The fact that a person is not declaring work does not have any influence on his or her status as an inhabitant. Citizens who engage in undeclared work are therefore legally obliged to pay contributions for general social insurance schemes, as long as they are inhabitants of the Netherlands.

Despite this duty, citizens who do not declare their work to the social security authorities do not pay contributions on this work for general social insurance purposes. In practice, the situation is as follows: the Dutch Tax Administration is, in addition to the collection of taxes, responsible for collecting social insurance contributions. This means that it carries out tasks relating to the administration of social security and is therefore, in functional terms, considered as the social security authority.[1600] General social insurance contributions may be levied in two ways: through the employer together with the income tax on wages or directly from the insured person together with personal income tax. The first alternative is not applicable when an employer has not informed the tax administration about this particular employee.[1601] Consequently, in the context of undeclared work, general social insurance contributions are calculated through assessment by the Tax Administration. The calculation base is income from work, periodically paid benefits and rental income.[1602] Nationals who perform undeclared work by definition do not declare their work to the Dutch Tax Administration, which means that the calculation base does not include wages received from employment. As a consequence, no contributions or – if there is income from social security benefits or rental income – lower contributions are paid.

From this it also follows that black-economy workers do not pay any income-related contributions on their undeclared work to mandatory health care insurance. Accordingly, they only pay income-related contributions to mandatory health care insurance if they have income from social security benefits or rental income. With respect to the fixed-rate premium for health care insurance, there is nothing to prevent black-economy workers from complying with the legal obligation and hence from paying it. This payment has to be made directly to the health care insurer.

If an employer, amongst other things, does not include an employee in his or her payroll accounting or does not make the first day notification to the Tax Administration, which is tantamount to undeclared work, the anonymous rate must be applied. In contrast to the previous subchapter, where the application of the anonymous rate to irregular migrant workers was

[1599] See subchapter 5.2.2.1.
[1600] See chapter 3.
[1601] The possibility that black-economy work is performed in addition to white work, *i.e.* underreported work, is disregarded for the purpose of this research. See the introduction to this doctoral thesis.
[1602] See § 8 (1) Social Insurance Financing Act in conjunction with § 3.1 Personal Income Tax Act.

discussed in detail, this instrument does not raise any particular questions in the context of undeclared work by nationals. Unlike irregular migrant workers, nationals who engage in undeclared work are insured and are obliged to pay contributions. The failure to report employment gives rise to a liability for income tax and general social insurance contributions at the highest rate. Once undeclared work is discovered, income tax and general social insurance contributions are therefore levied at the highest rate.

5.2.2. Employee social insurance schemes

Under the employee social insurance schemes WAO and Wet Wia, employers are liable to contribution payments; under the WW both employers and employees are subject to this obligation. Employer and employee are characterised by their relationship to each other, *i.e.* by the employment contract concluded – see above, subchapter 4.4.2.

Contributions to the employee social insurance schemes must be collected by the employer. The employer is accountable for the correct remittance of the contributions to the Dutch Tax Administration. For the levy, the same rules apply as for the income tax on wages.[1603]

5.2.2.1. Irregular migrant workers

Our investigations have shown that neither category A nor category B workers are considered as employees under employee social insurance. Since they are not employees for the purposes of employee social insurance, no obligations to pay contributions under the WAO, Wet Wia and WW arise. The question of a possible competitive advantage for irregular migrant workers and their employers has already been addressed in the context of general social insurance.[1604]

Like the regimes for the income tax on wages and general social insurance, employee social insurance applies the anonymous rate as a sanction for non-compliance with identification formalities. Unlike in these other regimes, however, there is no fiction under the employee social insurance schemes that individuals who are subject to the anonymous rate are legally obliged to pay contributions. Section 19 Social Insurance Financing Act merely states that if employee or employer or both fail to comply with identification, verification or payroll accounting obligations, no income ceiling for the calculation of employee social insurance contributions and no allowable deduction (*Franchise*) with respect to the Unemployment Insurance must be taken into consideration.

Against this background, it may seem a little bit curious, on first sight, that employers are required to verify an alien worker's identity by means of documents providing information about his or her identity, nationality and residence status[1605] or, since January 2008, must check an alien's permission to stay and work in the Netherlands. What sanction could the employee social

[1603] § 59 (1) Social Insurance Financing Act.
[1604] See subchapter 5.2.1.1.
[1605] See § 1 (1) Compulsory Identification Act (*Wet op identificatieplicht* – Wet van 9 december 1993 tot aanwijzing van documenten dienende ter vaststelling van de identiteit van personen alsmede aanwijzing van enige gevallen waarin de identiteit van personen aan de hand van deze documenten kan worden vastgesteld), Stb. 1993, no. 660.

insurance schemes apply in case of infringement? Contributions will be calculated on the full income, but this would be a toothless measure, when dealing with an uninsured person. The true significance of the anonymous rate in this context is that it puts the burden of proof on employers. Employers have to prove that that the alien worker is an uninsured person for whom no contributions must be levied and hence no anonymous rate must be applied. Primarily, this proof can be provided by including information on the identity and work authorisation of the alien worker concerned in the payroll accounting. This makes the life of the competent authorities much easier, especially in situations where there is a strong indication but no conclusive evidence of illegal work. For instance, this is the case when the authorities catch workers working illegally and off the books, but the relationship between the size of the company's estimated manpower requirements and its payroll accounting suggests that many more persons must have worked in this company.[1606] In such cases employers often argue that there is no obligation to pay contributions, at whatever rate, since the rest of their workers were also illegal. However, the burden of proof is put on the employers. If they can show by means of their payroll accounting that the alien workers are illegal, the anonymous rate cannot be applied. But this is something employers usually cannot do, since they keep no record of undeclared and illegal work. Nevertheless, the fact that this is not completely impossible is illustrated by a case which was brought before the Central Appeals Tribunal.[1607] In this case, the employer was able to provide proof of illegal employment due to his compliance with the legal obligations. The employer checked the identity of the alien workers concerned and kept copies of their passports. From this check, the employer concluded that they were illegal workers. The employer then employed the workers and included them in his payroll accounting. Each month, when declaring the wages to the social security administration, the employer reported the wages, but not the social insurance contributions. Moreover, the employer put the following remark on the respective forms: "illegal worker -> no Social Fiscal Number -> no social contributions". According to the Central Appeals Tribunal, the employer had fulfilled his obligations and concluded that there was no mandatory insurance. It was thus up to the administration to launch an investigation before demanding contributions at the anonymous rate.

In the context of employee social insurance, uninsured individuals, such as irregular migrant workers, cannot be made subject to contribution payment – either at the normal or at the anonymous rate. If employer or employee or both have violated identification, verification and payroll obligations, contributions are levied from *insured* persons at the anonymous rate. Practice has shown that this instrument has also been applied in cases of *de facto* illegal employment, where not enough evidence for the existence of illegal employment could have been provided. However, this does not change the fact that contribution payment can be only demanded in case of insured and therefore legal employment.

If employers have already paid social insurance contributions for irregular migrant workers who are not insured, the payments will be refunded. This is the official policy of the government.[1608] In practice, the identification and verification obligations of section 26b Wage Income Tax Act and section 19 Social Insurance Financing Act sometimes make it difficult for employers to actually get the contributions reimbursed. As illustrated before, it is primarily up to the employer to check whether an alien is allowed to stay and work in the Netherlands. The competent authorities can therefore assume that contributions are remitted for legal migrant workers only. If an employer

[1606] See, for instance, Centrale Raad van Beroep, 20 October 2005, LJN: AU5603.
[1607] Centrale Raad van Beroep, 22 September 2005, LJN: AU3212, *Uitspraken Sociale Zekerheid* 2005, 418.
[1608] Kamerstukken II 1995-96, 24 233, no. 6, p. 71; Kamerstukken II 2003-04, 29 537, no. 2, p. 17; Kamerstukken II 2003-04, 17 050, no. 261, p. 5; Kamerstukken II 2004-05, 17 050, no. 300, p. 4.

claims that contributions were paid for irregular migrant workers, he or she must provide evidence for the assertion. Such claims have often been made in the context of identity fraud: employers employed alien workers on the basis of forged identity documents, included them in the payroll accounting, and remitted wage income taxes and social insurance contributions.[1609] Case law has ruled that employers are required to verify the documents. To this end, there exist a number of authentication tools, which the employer can consult.[1610] Hence the employer cannot blame someone else for having employed an irregular migrant worker. It is up to the employer to verify the alien employee's permission to stay and work in the Netherlands, or to prove that the employee concerned is not allowed to do so. If the employer does not submit evidence, no reimbursement will take place. In one legal case about the refunding of employee social insurance contributions, the Regional Court noted that the employer could prove that the employees concerned were unlawfully residing in the Netherlands by using the testimony of the Labour Inspectorate. However, the employer would then run the risk of receiving an administrative fine. According to the court, this is a risk the employer has to calculate.[1611]

5.2.2.2. Nationals who engage in undeclared work

Nationals who engage in undeclared work are defined as citizens who perform work without informing the social security authorities about it, although obliged to do so. In the context of employee social insurance, employers are legally obliged to inform the Dutch Tax Administration, which serves in functional terms as the social security authority, about their employees, and to periodically remit contributions. This is exactly what employers of black-economy workers are by definition not doing. Black-economy workers and their employers are thus subject to employee social insurance contributions, but the employers are not paying such contributions.

As mentioned before, black-economy work is penalised *inter alia* by retroactively levying employee social insurance contributions at the anonymous rate. Since undeclared workers are subject to contributions, the problems discussed in the context of uninsured irregular migrant workers do not arise.

[1609] See, for instance, Rechtbank 's-Hertogenbosch, 18 August 2008, LJN: BE9401.
[1610] See also subchapter 3.2.
[1611] See Rechtbank 's-Hertogenbosch, 18 August 2008, LJN: BE9401.

6. The administration of social security arrangements

6.1. General remarks

Concerning the administration of social security in the Netherlands, a distinction must be made between political responsibility and supervision on the one hand, and implementation on the other hand. The first of these is carried out by the Dutch government. To be more precise, the Ministry of Social Affairs and Employment (*Ministerie van Sociale Zaken en Werkgelegenheid*) is responsible for all social security programmes apart from the Health Care Insurance (ZVW), the General Exceptional Medical Expenses Insurance (AWBZ), parts of the disabled policy, and special social assistance programmes for aliens. Within this Ministry, a particular unit has been set up to inspect the implementation of policies. This unit is called the Inspection Service for Work and Income (*Inspectie Werk en Inkomen*). For the ZVW, the AWBZ and parts of the disabled programmes, the Ministry of Health, Welfare and Sport (*Ministerie van Volksgezondheid, Welzijn en Sport*) assumes political responsibility and exercises supervision. A further governmental department involved in social security affairs is the Ministry of Finance (*Ministerie van Financiën*). The Tax Administration (*Belastingdienst*), which is part of this Ministry, is responsible for levying contributions to general social insurance, employee social insurance, the income-related contribution to Health Care Insurance and income taxes. Finally, the Ministry of Security and Justice (*Ministerie van Veiligheid en Justitie*) is in charge of the special social assistance programmes for aliens – *i.e.* reception and assistance under the Regulation on Services for Asylum-Seekers and Other Categories of Aliens (Rva 2005) and the Regulation on Services for Certain Categories of Aliens (Rvb).

Under the supervision of the Ministry of Social Affairs and Employment, a couple of agencies implement the respective policies. These agencies are legal persons under public law. The Social Insurance Agency (*Sociale Verzekeringsbank*) implements the general social insurance schemes General Old Age Pension Insurance (AOW), General Survivor's Benefits Insurance (Anw) and General Child Benefits Act (AKW). The Employee Insurance Administration Institution (*Uitvoeringsinstituut Werknemersverzekeringen*) runs employee social insurance, including Work and Care Insurance (WAZO), as well as the Disablement Assistance for Disabled Young Persons (Wajong). What is more, the Employee Insurance Administration Institution is also responsible for handling applications for benefits under the Work and Social Assistance Act (WWB) and the Act on Income Provisions for Older, Partially Disabled Unemployed Persons (IOAW).

The municipalities, in particular the local executives (*Colleges van Burgemeesters en Wethouders*), are in charge of the implementation of the Ministry's social assistance programmes WWB and IOAW. The social assistance programmes for aliens – Rva 2005 and Rvb – are administered by the Central Agency for the Reception of Asylum-Seekers (*Centraal Orgaan opvang asielzoekers, COA*).

The Health Care Insurance (ZVW) and the General Exceptional Medical Expenses Insurance (AWBZ) are carried out by a number of private health insurance providers. They are supervised by the Dutch Healthcare Authority (*Nederlandse Zorgautoriteit*), which is a legal person under public law. In addition, the Health Care Insurance Board (*College voor Zorgverzekeringen*) coordinates the implementation and the funding of the ZVW and AWBZ.

6.2. Administration with respect to the rights of aliens or undeclared workers

6.2.1. General social insurance schemes and Health Care Insurance

In subchapter 4.4.1. I mentioned that in practice, the question as to whether a person resides in the Netherlands for general social insurance and Health Care Insurance purposes and is thus insured, is primarily answered by looking up the person's residence status in the municipal database (*Gemeentelijke basisadministratie, GBA*). With regard to aliens, information on the right to stay and work in the Netherlands for the determination of insurance status or a decision on the disbursement of benefits is also retrieved from the municipal database.[1612] Both the Social Insurance Agency, which administers the general social insurance schemes AOW, Anw and AKW, and the private health insurers, which implement the AWBZ and health insurance under the Health Care Insurance Act, are directly linked to the municipal database.[1613]

Subsection 65 (1) Municipal Database (Personal Files) Act (*Wet gemeentelijke basisadministratie persoonsgegevens*[1614]) requires everyone who expects to stay at least two-thirds of a half-year in the Netherlands to contact the local executives of the municipality where he or she lives at an address (*woonadres of briefadres heeft*). This must be done in writing, and must include information and proof of address, family status, nationality, previous residence and prospective residence. Based on this notice of stay, the individual will be registered with the respective municipal database if three requirements are fulfilled. First, if it can be expected that the individual will stay in the Netherlands for at least two-thirds of a half-year; second, if the individual is not already registered with a municipal database; and, third, if the individual is a Dutch citizen, is treated as a Dutch citizen by law, or is an alien who is staying lawfully in the Netherlands in accordance with section 8 Aliens Act 2000.[1615] The Minister of Security and Justice is responsible for delivering relevant information on a foreigner's status of stay to the competent local executives.[1616] To guarantee the up-to-dateness of the relevant data, the information is supplied automatically by the Immigration and Naturalisation Service, which is part of the Ministry of Security and Justice.[1617]

6.2.1.1. Irregular migrant workers

Category A workers, *i.e.* aliens who are neither lawfully present nor lawfully working in the Netherlands, are not able to register with a municipal database. This is because they are not lawfully present in the country in accordance with section 8 Aliens Act 2000.[1618] However, being

[1612] For the legal basis see § 107 (1) Aliens Act 2000. See also Explanatory Memorandum, Kamerstukken II 1994-95, 24 233, no. 3, p. 46.
[1613] The legal basis for the systematic provision of data to private health insurers can be found in § 99 (1) (c) Municipal Database (Personal Files) Act.
[1614] Wet van 9 juni 1994, houdende regels ter zake van de gemeentelijke basisadministratie van persoonsgegevens, Stb. 1994, no. 494.
[1615] § 26 (1) Municipal Database (Personal Files) Act.
[1616] § 58 Municipal Database (Personal Files) Act. See also § 34 (1) (a) 5. Municipal Database (Personal Files) Act for the legal basis for the inclusion of the residence status in the municipal database.
[1617] See also § 40 Municipal Database (Personal Files) Decree (*Besluit gemeentelijke basisadministratie persoonsgegevens* – Besluit van 8 september 1994, houdende regels ter uitvoering van de Wet gemeentelijke basisadministratie persoonsgegevens), Stb. 1994, no. 690.
[1618] § 26 (1) Municipal Database (Personal Files) Act.

unable to register does not preclude unlawfully residing aliens from being included in a municipal database. For example, if a formerly lawfully residing alien loses his or her right to stay in the Netherlands, he or she will still be included in the respective municipal database, but with a note that there is no right to stay (GBA code 98).

Category B workers, by contrast, are able to register with a municipal database, due to their lawful presence in the Netherlands. The alien database of the Immigration and Naturalisation Service provides all the necessary information as to the residence status of the foreigner who wants to register with the municipal database. Details of his or her specific residence status will be submitted, as well as information as to whether he or she is allowed to take up work in the Netherlands. The combination of residence status and work status under immigration laws is expressed in a municipal database by different codes, the so-called GBA codes. For instance, aliens with a temporary ordinary residence permit in accordance with section 8 (a) Aliens Act 2000 might be listed under four different GBA codes: GBA code 21, if they are allowed to work in the Netherlands without a work permit; GBA code 22, if they are only allowed to work when the employer possesses a corresponding work permit; GBA code 23, if work is only allowed in connection with a work permit, but further restrictions apply, for instance if students are only allowed to work for a short period of time; or GBA code 24, if they are not allowed to work in the country.[1619]

6.2.1.2. Nationals who engage in undeclared work

Dutch citizens who engage in undeclared work are able to register with a municipal database. There are no obstacles to registration.

6.2.2. Employee social insurance schemes

The Employee Insurance Administration Institution, which primarily administers employee social insurance, largely bases decisions about a person's insurance status on information provided by the Tax Administration, which is in charge of collecting, *inter alia*, employee social insurance contributions. The Tax Administration basically becomes aware of an employee through the 'first day notification' submitted by the employer.[1620] This first day notification is subsequently communicated to the Employee Insurance Administration Institution. In addition, other information, such as the declaration of taxes and social insurance contributions, is transferred on an occasional or regular basis to the Employee Insurance Administration Institution. Moreover, municipal databases are consulted for the retrieval of personal data in general and data on the residence and work status of aliens in particular.[1621]

[1619] See Code list in the Decree on the Permission to Stay Test Policy (*Besluit beleid toetsing verblijfstitel*), Stcrt. 2001, no. 62.
[1620] See subchapter 3.2.
[1621] See § 1 Decree on the Permission to Stay Test Policy.

6.2.2.1. Irregular migrant workers

In subchapter 6.2.1.1. it was indicated that irregular migrant workers may be registered in a municipal database. However, a note will be included with reference to a category A worker that there is no right to stay anymore, and with reference to a category B worker that there is no right to work in the Netherlands. Since unlawfully present or unlawfully working aliens are not insured, the Employee Insurance Administration Institution is required to test the residence and work status of an alien before registration for employee insurance purposes and during the period of insurance.[1622] In addition, because aliens who stay unlawfully in the Netherlands are not allowed to collect benefits, residence status is checked in the course of disbursement too.[1623]

6.2.2.2. Nationals who engage in undeclared work

As illustrated in subchapter 5.2.2.2., black-economy work is by definition not declared to the Dutch Tax Administration, and no employee social insurance contributions are paid. The Tax Administration and hence the Employee Insurance Administration Institution are therefore not informed about such work. As a consequence, employees who engage in undeclared work do not appear in the records of the Employee Insurance Administration Institution.[1624]

6.2.3. The Citizen Service Number

The Citizen Service Number (*Burgerservicenummer, BSN*) is a nine-digit number that is used, first and foremost, by governmental authorities to facilitate the exchange, collection and storage of personal data. The BSN was introduced in November 2007 and generally replaces the Social Fiscal Number (*Sociaal-fiscaal nummer*), better known under the Dutch abbreviation '*sofi-nummer*'. However, Social Fiscal Numbers are still accepted and issued to certain individuals who cannot get a BSN. This is most notably the case for individuals who are staying abroad, but are required to pay taxes in the Netherlands.

The Citizen Service Number may be used by both governmental and non-governmental entities, provided there is a legal basis for doing so.[1625] Individuals need the Citizen Service Number when they take up work in the Netherlands. As indicated earlier, new employees must provide this number to their employers. This correct registration paves the way for the proper payment of social insurance contributions. With regard to applications for benefits, the Citizen Service Number is used by social security administrations to facilitate the application processing. In particular, to gain access to the Dutch Digital Identity system, which is used by all social security authorities for the handling of benefit applications, the inhabitant has to provide his or her Citizen Service Number. However, the Citizen Service Number is not linked to any personal information

[1622] § 3 Annex to the Decree on the Permission to Stay Test Policy.
[1623] § 4 Annex to the Decree on the Permission to Stay Test Policy.
[1624] See also subchapter 4.4.2.2.
[1625] For the legal basis for governmental authorities' use of the BSN see § 10 Act on General Provisions to the Citizen Service Number (*Wet algemene bepalingen Burgerservicenummer* – Wet van 21 juli 2007, houdende algemene bepalingen betreffende de toekenning, het beheer en het gebruik van het burgerservicenummer (Wet algemene bepalingen burgerservicenummer), Stb. 2007, no. 288. The legal basis for the use of the BSN by non-governmental entities can be found in the relevant laws. For instance, § 65 Implementation Regulation Wage Income Tax obliges employers to demand the BSN when they hire a new employee.

about the individual concerned.[1626] It simply links the name with the number. The Citizen Service Number, moreover, does not expire.

The BSN is displayed on a couple of official documents, such as the passport, the identity card and the driver's licence.

The assignment of a BSN is linked to registration in the municipal database (*Gemeentelijke basisadministratie voor persoonsgegevens, GBA*). Persons who were already registered with a GBA before 26 November 2007 are automatically transferred into the new BSN system. This means that they can use their Social Fiscal Number as a BSN. Anyone who registers with a GBA after 26 November 2007 and has not yet received a BSN receives it automatically. The local executives (*Colleges van Burgemeesters en Wethouders*) assign the number immediately after registration with the GBA.[1627] The person concerned will be notified about his or her BSN within four weeks. If the person who registers with the GBA is younger than sixteen years of age, the notification will be sent to the parents.[1628]

6.2.3.1. Irregular migrant workers

It was indicated earlier that category A workers cannot register with the municipal database.[1629] Consequently they are unable to receive a BSN. Nevertheless, since BSNs do not expire, aliens who are unlawfully present in the Netherlands may be in possession of a BSN, based on a prior lawful residence and registration with a municipal database. Category B workers, by contrast, are issued with a BSN as soon as they register with the municipal database.

6.2.3.2. Nationals who engage in undeclared work

Dutch citizens who engage in undeclared work do not face any obstacles to the issuance of a Citizens Service Number. Their registration with the municipal database is sufficient.

6.2.4. Duty to report

Dutch social security administrations do not have a duty to report an irregular migrant worker. To be more precise, the Dutch social insurance and social assistance authorities are under no obligation to communicate an irregular residence or irregular work status of which they become aware to the Dutch immigration authorities or the police.[1630] On the other hand, the social security authorities are able to report violations of the Aliens Act 2000 or the Aliens Employment Act of their own accord and are obliged to do so when requested by the immigration authorities.[1631] For

[1626] § 2 Act on General Provisions to the Citizen Service Number. See also Ministerie van Binnenlandse Zaken en Koninkrijksrelaties. *Handleiding voor de gebruiker van het burgerservicenummer: Aanbevelingen voor een goed gebruik van het burgerservicenummer* (Den Haag: Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, November 2007), p. 12.
[1627] § 8 (1) Act on General Provisions to the Citizen Service Number.
[1628] § 9 (1), (2) Act on General Provisions to the Citizen Service Number.
[1629] See subchapter 6.2.1.1.
[1630] See § 8.2 Aliens Decree 2000
[1631] For the legal basis see § 107 Aliens Act 2000 and § 16 Aliens Employment Act.

the sake of completeness it should be mentioned that neither unlawful residence nor unlawful work is a criminal act (*strafbaar feit*) in the Netherlands.[1632]

[1632] See § 108 (3) Aliens Act 2000 and § 18 Aliens Employment Act.

7. The social risk of old age

As in many other countries, the risk of getting old and no longer being able to work for a living is addressed on a multiple-pillar basis in the Netherlands: first, by the general social insurance General Old Age Pension (AOW); second, by occupational pension schemes (*aanvullende pensioenregelingen*) for employees, civil servants and self-employed persons; and third, by individual pension arrangements, such as pension savings at banking institutions or pension plans with insurance companies. This chapter will analyse access to the statutory pension scheme AOW.

7.1. General Old Age Pension (AOW)

7.1.1. Irregular migrant workers

An old age pension under the AOW scheme is granted at the age of sixty-five to individuals who have been insured for at least one calendar year between their fifteenth birthday and the day before their sixty-fifth birthday. As under every form of general social insurance, insured status is in the first instance established by inhabitancy in the Netherlands. Since the introduction of the Linkage Act in 1998, irregular migrant workers are in principle no longer insured under general social insurance.[1633] Our research has identified only very exceptional situations where this is still possible. These situations relate to lawfully present irregular migrant workers (category B) who, due to their regular migration status, are able to be insured based on inhabitancy. To recall, this possibility concerns two categories: first, foreigners with a temporary ordinary residence permit[1634] who are prohibited from working or who have not obtained the required work permit, and second, foreigners who, after staying in the Netherlands with a residence permit or under EC or EEA law,[1635] have either asked in a timely manner for an extension of such a residence permit or made in a timely manner an objection or appeal against the withdrawal of such an authorisation to stay.[1636] However, in order to be insured under general social insurance such foreigners must additionally be based in the Netherlands, *i.e.* must have sufficiently strong ties with the country. The above-mentioned general principle and the two identified exceptions also apply to the general social insurance AOW.[1637] The statutory pension scheme AOW therefore excludes category A workers and most category B worker from its coverage.

It has already been mentioned that one calendar year of insurance is sufficient for a person to be eligible for an old age pension – albeit a very small one.[1638] As a consequence, foreigners who are irregular migrant workers at the time of application for an old age pension are entitled to benefits if they have accumulated at least one year of insurance after their fifteenth birthday.[1639] This could

[1633] See subchapter 4.4.1.1.
[1634] This is a lawful stay under § 8 (a) Aliens Act 2000.
[1635] This is a lawful stay under § 8 (a) - (e), (l) Aliens Act 2000.
[1636] This is a lawful stay under § 8 (g) or (h) Aliens Act 2000.
[1637] § 6 (2) General Old Age Pension Act in conjunction with the Decree on the Extension and Restriction of the Category of Insured Persons in Respect of General Social Insurance Schemes.
[1638] Although a minimum period of one year is not explicitly mentioned, it is the consequence of the pension calculation method, according to which a full pension is paid for a residence or work history of fifty years, and is reduced by 2 percent for every year the applicant did not reside or work in the country. See Klosse and Noordam, *Socialezekerheidsrecht*, p. 338.
[1639] § 7 (b) General Old Age Pension Act only demands insurance between age fifteen and age sixty-five. At the time of application, insured status is not required.

include insurance periods before the coming into force of the Linkage Act[1640], or insurance periods when the person was present under another immigration status in the Netherlands. Yet the payment of these benefits is blocked, as long as the alien concerned is not lawfully present in the country.[1641] It will only be resumed when the alien begins to stay lawfully in the Netherlands or leaves the country. Once the disbursement has started again, the blocked payments will be paid out retroactively.[1642] Category B workers, *i.e.* aliens who are lawfully present but unlawfully working, are not subject to any restriction with respect to the payment of benefits.

7.1.2. Nationals who engage in undeclared work

Dutch citizens who work in the black economy are insured for General Old Age Pension purposes, provided they are inhabitants. Insurance is primarily linked to inhabitancy, and not to the payment of contributions. There are no obstacles to prevent citizens in general, and citizens who perform undeclared work in particular, from being considered as inhabitants.[1643]

However, it should be mentioned that the gross rate of the old age pension will be reduced by 2 percent for every year that an insured person has not paid contributions out of culpable negligence (*schuldige nalatigheid*).[1644] Culpable negligence means that a person does not comply with the duty to pay contributions and that the person cannot demonstrate that he or she cannot be blamed for the non-payment of contributions.[1645] This clause applies to insured persons for whom a certain contribution payment figure has been established, but who fail to pay. Undeclared workers may therefore only be affected if their income from work becomes known to the authorities. Otherwise, they are perfectly able to have their periods of residence taken into consideration for the calculation of the benefit rate, without any reductions.

However, for the sake of completeness let us assume that an undeclared worker's income becomes known to the authorities. The worker then still has the chance to pay the contributions in arrears. To this end, the Tax Administration sends a reminder (*aanmaning*) and a distress warrant (*dwangbevel*). Only if the Tax Administration's efforts are unsuccessful will the Social Insurance Agency be informed of a possible case of culpable negligence in the non-payment of general social insurance contributions. Eventually it is up to the Social Insurance Agency to make a decision on whether or not there has been culpable negligence. However, even if behaviour of culpable negligence has been established, there are still remedies. Besides the opportunity to file an appeal, the individual concerned may simply pay the contribution debts entirely or in part. If he

[1640] In the course of the entry into force of the Linkage Act, the Dutch government explicitly noted that pension rights accumulated during unlawful presence and/or unlawful work in the Netherlands, but before the entry into force of the Linkage Act, are to be taken into consideration for determining eligibility for and amount of AOW pensions. See Kamerstukken II, 1995-96, 24 233, no. 6, p. 71.
[1641] § 19a (1) General Old Age Pension Act.
[1642] The AOW basic pension (50 percent of the minimum income) is exported everywhere. Higher AOW pensions are only exported to EU and EEA countries, to countries with which agreements have been concluded, to the islands of Aruba, Curaçao and Sint Maarten, and everywhere in the case of beneficiaries who either already resided abroad and received an AOW pension before the year 2000 or of beneficiaries who carry out work of general interest. See subchapter 4.4.1.1.
[1643] *Ibid.*
[1644] See § 13 (1) (b) General Old Age Pension Act.
[1645] § 61 Social Insurance Financing Act.

or she pays the contribution debt within five years of the assessment, the decision on culpable negligence has to be changed or revoked.[1646]

[1646] See § 61 Social Insurance Financing Act.

8. The social risk of death

The General Survivor's Benefits Act (Anw) covers the risk of losing one's source of income due to death of another person. Beside this statutory social insurance, occupational pension schemes (*aanvullende pensioenregelingen*) and individual private arrangements may address this social risk too. In the following, access to the statutory social insurance Anw will be investigated.

8.1. General Survivor's Benefits (Anw)

8.1.1. Irregular migrant workers

The General Survivor's Benefits Act distinguishes, most notably, between three different kinds of benefits: the survivor's pension for the surviving spouse, the half-orphan's pension for parents or for people caring for half-orphans, and the orphan's pension for a surviving child. All these benefits are only available for survivors of an insured deceased. To be more precise, the deceased person must have been insured at the time of death.[1647] As is the case for all general social insurance schemes, irregular migrant workers are in principle not insured.[1648] Exceptions to this rule only apply in very exceptional circumstances to lawfully present irregular migrant workers (category B), who due to their regular migration status are able to be insured based on inhabitancy.[1649]

Subsection 13 (4) General Survivor's Benefits Act extends insurance coverage for a further six weeks after the insured person ceases to be an inhabitant of the Netherlands.[1650] This provision has been introduced to protect survivors of migrants, who die during their return journey from the Netherlands to the country of origin.[1651] This extension provision basically does not have any effect on the legal situation of irregular migrant workers, since they are usually not insured under the Anw insurance.[1652]

Survivors who are themselves irregular migrant workers may in principle qualify for benefits. Their immigration status is of no relevance to their eligibility for benefits. With respect to the survivor's pension for the surviving spouse, it should be mentioned that an income test is applied.[1653] This means that an irregular migrant worker, who by definition has income from work, will only qualify if his or her income does not exceed the relevant threshold.

[1647] § 1 (d), (e), (f) General Survivor's Benefits Act.

[1648] See subchapter 4.4.1.1. For the Anw insurance in particular, see § 13 General Survivor's Benefits Act in conjunction with the Decree on the Extension and Restriction of the Category of Insured Persons in Respect of General Social Insurance Schemes.

[1649] For the exceptions, see subchapter 4.4.1.1.

[1650] If the person concerned falls under a social security arrangement of another country or an international organisation, this extension provision will not be applicable. There is no liability to pay contributions during these six weeks.

[1651] See Klosse and Noordam, *Socialezekerheidsrecht*, p. 358.

[1652] The prolongation provision under the Anw is different from certain prolongation provisions under employee social insurance laws, such as the ZW or the WAZO. See subchapters 9.2. or 9.3. Under those schemes, individuals are eligible for benefits if social risks occur shortly after insurance *ends*. In the present case, however, under the General Survivor's Benefits Act, the period of insurance coverage is prolonged.

[1653] § 18 General Survivor's Benefits Act.

The issue of entitlement to benefits has to be distinguished from the issue of disbursement of benefits. Concerning the latter, benefits are only paid out in the Netherlands if the survivor is lawfully present in the country.[1654] As is the case for all general social insurance schemes, the payment will be resumed once the beneficiary is staying lawfully in the Netherlands or leaves the country. Once benefit payments are restarted they will be retroactively paid out for the periods of suspension.[1655]

8.1.2. Nationals who engage in undeclared work

The General Survivor's Benefits Act requires the deceased to be insured at the time of death. Insurance is primarily constituted through inhabitancy in the Netherlands. Citizens who work in the black economy are insured if they are inhabitants of the Netherlands. The fact that their work is not declared to the social security authorities is irrelevant.[1656] There is no link whatsoever to the former employment and the former income of the deceased. Survivors of Dutch inhabitants who engaged in undeclared work are therefore eligible for benefits under the Anw insurance.

Surviving spouses who themselves perform undeclared work are from a legal point of view only eligible for benefits if their income from work and income related to work[1657] does not exceed the relevant threshold.[1658] However, in practice the social security authorities will not be aware of income from undeclared work. This may enable surviving spouses in this position to fraudulently collect a survivor's pension to which they are not entitled, if they earn more than the allowed income.

[1654] § 46a (1) General Survivor's Benefits Act.
[1655] Benefits under the Anw scheme are only exported to EU and EEA countries, to countries with which agreements have been concluded, to the islands of Aruba, Curaçao and Sint Maarten, and everywhere in the case of beneficiaries who either already resided abroad and received an Anw benefit before the year 2000 or of beneficiaries who carry out work of general interest. See subchapter 4.4.1.1.
[1656] See subchapter 4.4.1.1.
[1657] See § 10 General Survivor's Benefits Act.
[1658] See § 18 General Survivor's Benefits Act.

9. The social risk of incapacity for work

With regard to coverage of the risk of becoming incapacitated for work and consequently losing one's source of income, Dutch social security legislation distinguishes between short-term incapacity (sickness and maternity) and long-term incapacity (invalidity). The payment of sickness benefits is, in the first instance, a private law duty of the employer in the Netherlands. Sickness Benefits insurance (ZW) serves as a safety net: only when employees do not have a right to wage continuation payments under the Dutch Civil Code can they rely on the Sickness Benefits Act.[1659] This only happens in a minority of cases, such as employees whose working contract ends during a period of sickness or insured individuals who receive an unemployment benefit. As opposed to other areas of Dutch civil law liability, such as in connection with labour accidents, the civil law obligation to wage continuation payments is considered as part of the Dutch statutory social security system, due to its mandatory character.[1660]

Income replacement benefits during periods of pregnancy and maternity are provided under the Work and Care Act (WAZO). Invalidity, *i.e.* incapacity for work for more than two years, is covered by the Work and Income According to Labour Capacity Act (Wet Wia) and, for young persons, the Act on Incapacity Benefits for Disabled Young People (Wajong).

In contrast to most other Western countries, there is no specific statutory social insurance for labour accidents and occupational diseases. However, there is a governmental decree which extends Wet Wia insurance in case of occupational diseases.

In the absence of a particular form of social insurance for labour accidents and occupational diseases, the risk of no longer being able to earn income due to a labour accident or occupational diseases is covered by the above-mentioned general incapacity for work schemes. Additionally, there may be a liability on the part of the employer under private law. Subsection 658 (2) of the Seventh Book of the Dutch Civil Code establishes this liability if the employer has not fulfilled his or her obligations with regard to workplace safety. Although this civil law liability is basically outside the scope of our research, it is worth mentioning that irregular migrant workers and Dutch citizens engaging in undeclared work may claim compensation on the basis of this civil law provision. This is because, first, there is no explicit exclusion of these two groups of workers and, second, an employment contract, which would raise questions of validity, is not necessary. According to subsection 7:658 (2) in conjunction with (4) Civil Code, it is sufficient for a person, in the exercise of a profession or a business, to have another person perform some work, even if there is no employment contract between them. Case law has confirmed that irregular workers and undeclared workers are entitled to compensation for damages based on section 7:658 Civil Code.[1661]

[1659] § 29 (1) Sickness Benefits Act.
[1660] See, for instance, Centrale Raad van Beroep, 14 September 2005, LJN: AU3050.
[1661] See, for instance, Rechtbank Haarlem, 9 January 2008, LJN: BC1794.

9.1. Wage continuation payments under the Dutch Civil Code

According to section 629 of the Seventh Book of the Dutch Civil Code, employers are obliged to continue to pay at least 70 percent of the wages, up to a certain maximum amount, for a period of 104 weeks, in cases of incapacity for work due to sickness.[1662] Neither the Civil Code nor other Dutch laws specifically address the right of irregular migrant workers or undeclared Dutch workers to wage continuation payments. To be entitled to employers' payments, a person working under an employment contract [1663] is basically required to be sick and hence unable to work. For our consideration of foreigners who violate alien employment laws and Dutch citizens who fail to declare their work to the social security authorities, specific attention needs to be paid to the requirement to work under an employment contract.

9.1.1. Irregular migrant workers

A definition of an employment contract is given in section 7:610 Civil Code. According to subsection 7:610 (1), a contract of employment is a contract whereby one party, *i.e.* the employee, undertakes to perform work in the service of the other party, *i.e.* the employer, for remuneration during a given period. Even so, not all employment contracts are valid and have legal consequences. Employment contracts which are against public order or against good morals are invalid.[1664] What is more, contracts which are in violation of the law are null and void, but only if the legal provision which has been violated has the scope to affect the validity of the contract.[1665] This raises the question as to whether employment contracts which violate subsection 2 (1) Aliens Employment Act – *i.e.* the prohibition on employers employing a foreigner without a work permit – are valid. Since the 1980s, Dutch case law has given a clear answer: employment contracts concluded with unlawfully working or unlawfully present foreigners are valid and thus have legal consequences.[1666] The landmark decision in this respect is a judgment of the Supreme Court of the Kingdom of the Netherlands. The Supreme Court found an obligation on the part of the employer to continue the payment of wages, after the employer had stopped the employment of an irregular foreign employee due to the lack of a work permit without correctly terminating the employment contract. The Court's decision was motivated by the fact that the lack of a work permit is the fault of the employer, not the employee – even if the foreign employee is not in possession of an authorisation to stay in the country.[1667] From this decision and all subsequent ones, it is clear that employment contracts concluded in violation of the alien employment laws are also valid.[1668] In

[1662] If the 70 percent rate represents less than the minimum wage applicable to the incapacitated person, the employee is entitled to the minimum wage, at least during the first fifty-two weeks.
[1663] § 7:610a Civil Code assumes the existence of an employment contract where paid work is performed for at least three continuous months, either on a weekly basis or for at least twenty hours per month. However, this is a refutable assumption.
[1664] § 3:40 (1) Civil Code.
[1665] § 3:40 (2) and (3) Civil Code.
[1666] See Hoge Raad, 27 March 1981, LJN: AG4172, *Nederlandse Jurisprudentie* 1981, 492; Gerechtshof Amsterdam, 11 March 2004, *Jurisprudentie Arbeidsrecht* 2004, 95; Rechtbank Amsterdam, 9 August 1995, *Jurisprudentie Arbeidsrecht* 1995, 178; Kantonrechter 's Gravenhage, 12 October 1994, *Jurisprudentie Arbeidsrecht* 1995, 155.
[1667] Hoge Raad, 27 March 1981, LJN: AG4172, *Nederlandse Jurisprudentie* 1981, 492.
[1668] See the comment on the Supreme Court decision by Kees Groenendijk in "Noot bij Hoge Raad (27 maart 1981)," *Sociaal Maandblad Arbeid*, vol. 37 (1982), p. 835. See also Machteld Inge van Dooren, "De rechter en ontslag van witte illegalen," *Sociaal Maandblad Arbeid*, vol. 54, no. 11/12 (1999), p. 504; or Irene Asscher-Vonk, Willem Bouwens and F.B. Bakels, *Schets van het Nederlandse arbeidsrecht*, 20. rev. ed. (Deventer: Kluwer, 2009), p. 319.

case law, validity has been assumed in all possible situations, such as when both parties intend to act in violation of alien employment laws[1669], or when the employee misleads the employer about his or her authorisation to work in the country.[1670]

The validity of the employment contract paves the way for an obligation on the part of the employer to continue the payment of wages during periods of sickness. Case law has confirmed that such an obligation also exists with respect to irregular migrant workers.[1671]

What is more, section 629 of the Seventh Book of the Dutch Civil Code, which sets out the conditions for wage continuation payments in case of sickness, obliges employees not to refuse suitable work, defined as any work suited to the capabilities of the employee, without well-founded reason.[1672] If such work is refused without good reason, the right to wage continuation payments is lost. This obligation on the part of the employee is closely interlinked with the employer's obligation to continue to pay wages until the sick employee has fully recovered so that the agreed work can be resumed. If the employee is only able to fulfil his or her work obligations partly, sickness payments continue. But this also means that the employee must accept suitable work during periods of sickness, when so requested by the employer. The question is whether not possessing a work authorisation prevents foreigners from accepting suitable work. Unfortunately, this question has thus far not been addressed by the legislators, by case law or by the administrations.

From this it follows that irregular migrant workers are basically eligible for wage continuation payments. Only at times when they are capable of performing some kind of work during a period of sickness might the lack of a work authorisation pose difficulties. Nevertheless, foreigners who are not allowed to work in the Netherlands may often be reluctant to actually file a claim. What is more, providing evidence of an employment contract may in practice not always be that easy.

Since, by contrast with the situation with most other social security benefits, unlawfully present migrant workers (category A) may qualify for sickness payments, one can ask whether, if they exercise their right by taking legal action, they can collect benefits abroad, if they need to leave the Netherlands as a consequence of becoming visible. The laws do not address the issue of payments abroad. According to case law, an obligation to continue payment abroad depends on whether the sick employee is still able to comply with his or her obligations under section 7:660a Civil Code.[1673] This relates, most notably, to the employee's obligation to cooperate in measures aimed at reintegration into the labour market and to accept suitable work, during periods in which the employee is (partly) capable of working.[1674] It seems that longer absences for purposes other than rehabilitation are not tolerated. This would make it virtually impossible for a foreigner who has to leave the country to still receive benefits from sickness payments. However, in this context it should be recalled that a deportation will not be conducted when the alien's state of health rules it out (see subchapter 2.1.1).

[1669] For an overview of this case law see van der Grinten, *Arbeidsovereenkomstenrecht*, p. 30.
[1670] See for instance Kantonrechter Heerlen, 29 January 2005, LJN: AT3099, *Rechtspraak Arbeidsrecht* 2005, 70. There the employer claimed that the employee misled him about his immigration status. As a consequence, the employer thought that there was no need for a work authorisation.
[1671] See Kantonrechter Heerlen, 29 January 2005, LJN: AT3099, *Rechtspraak Arbeidsrecht* 2005, 70.
[1672] See § 7:629 (3) (c) Civil Code.
[1673] See, for instance, Rechtbank Utrecht, 28 January 2009, LJN: BH5196.
[1674] See in particular § 7:658a and § 7:660a Civil Code.

9.1.2. Nationals who engage in undeclared work

As is the case for irregular migrant workers, it is crucial to determine that undeclared Dutch workers were working under an employment contract when they became incapacitated for work. Concerning undeclared workers, the question of employment contract validity has already been addressed in subchapter 4.4.2.2. To summarise, employment contracts in connection with which the employer simply fails to declare work and pay contributions do not raise any problems with respect to validity. The situation in which employer and employee agree in their employment contract to hide the work from the social security authorities is different. In the context of fiscal case law, we found two decisions of courts of lower instance where such a 'secrecy agreement' was considered to be essential for the employment contract and led to the invalidity of the whole contract. These decisions were strongly criticised in legal literature and by the General Public Prosecutor at the Supreme Court, who considered only the secrecy agreement to be null and void. Courts of higher instance have thus far not resolved this issue. A clear answer would affect whether an employer is obliged to make sickness payments under the Civil Code in connection with undeclared work on the basis of secrecy agreements.

Similarly to what we pointed out with respect to irregular migrant workers, we can add that undeclared workers may often be reluctant to actually start court proceedings. What is more, and leaving aside the question of validity, providing evidence of an employment contract may not always be that easy in the case of undeclared work.

9.2. Sickness Benefits Act (ZW)

9.2.1. Irregular migrant workers

We heard before that Sickness Benefits insurance (ZW) is a safety net for all those who have no right to wage continuation payments under the Dutch Civil Code in case of incapacity for work due to sickness.[1675] Irregular migrant workers cannot fall back on this safety net. As under all employee social insurance schemes, irregular migrant workers are not considered as employees, which is crucial for the application of these laws.

There may be one, admittedly very small, exception to this rule. While in general a person is required to be insured at the moment he or she becomes incapacitated for work, section 46 Sickness Benefits Act stipulates that under certain conditions a person is still eligible for benefits, if he or she becomes incapacitated shortly, but in any case not more than one month, after insurance ends. Thus insured migrant workers, whose sickness insurance ended just before the residence or work permit expired and who became incapacitated shortly after these two events occur, could be entitled to benefits.

[1675] A person is incapable for work if he or she cannot or must not perform the relevant work for medical reasons. See Centrale Raad van Beroep, 23 February 1973, *Rechtspraak Sociale Verzekering* 1973, 229 or Centrale Raad van Beroep, 4 June 1997, *Rechtsspraak Sociale Verzekering* 1998, 46.

However, in such a case irregular migrant worker may face difficulties in complying with back-to-work requirements. As is the case for wage continuation payments, sick employees who are able to do suitable work must try to find such work and to accept it.[1676] Non-compliance could lead to a reduction or even a cessation of benefit payment.[1677] For urgent reasons, the Employee Insurance Administration Institution has the possibility of refraining from imposing a sanction.[1678] It is therefore up to the authority whether not being in possession of an authorisation to work in the country is considered as a reason for not imposing a sanction. Case law has thus far not addressed this issue.

As under all employee social insurance schemes, the disbursement of benefits is linked to a regular residence status in the Netherlands. Accordingly, the benefit payment for entitled alien workers is suspended for periods of unlawful stay in the Netherlands. It is only resumed when the alien worker regularises his or her residence status or leaves the country.[1679]

9.2.2. Nationals who engage in undeclared work

Nationals who do not declare their work for social security purposes are insured under employee social insurance, and thus under Sickness Benefits insurance. By definition, they meet the legal definition of employee, which is decisive for insurance.[1680] The non-declaration of work does not change this fact. Consequently, Dutch black-economy workers are able to fulfil the requirements for being entitled to benefits under the Sickness Benefits Act.

However, an application for benefits is tantamount to a declaration of work. The undeclared worker and his or her employment will not be on record at the Employee Insurance Administration Institution. As a consequence, further investigations have to be started in order to process the application. In the course of such investigations it is inevitable that the undeclared work will be discovered. When it can be established that the applicant is an employee within the meaning of the Sickness Benefits Act, the previously undeclared worker will be eligible for benefits. This is the case even if the Dutch Tax Administration does not succeed in recovering the outstanding contributions.[1681]

9.3. Work and Care Act (WAZO)

9.3.1. Irregular migrant workers

Pregnancy and maternity benefits under the Work and Care Act (WAZO) are not accessible to female irregular migrant workers. Foreigners who violate the Aliens Act and the Aliens

[1676] § 30 (1) Sickness Benefits Act.
[1677] § 30a (1) (a) and § 45 (1) (k) Sickness Benefits Act.
[1678] § 30a (2) and § 45 (4) Sickness Benefits Act.
[1679] Benefits under the Sickness Benefits Act are only exported to EU and EEA countries, to countries with which agreements have been concluded, to the islands of Aruba, Curaçao and Sint Maarten, and everywhere in the case of beneficiaries who carry out work of general interest. See § 41 (1) Sickness Benefits Act and subchapter 4.4.2.1.
[1680] § 3 and § 20 Sickness Benefits Act. For the question of validity of the employment contract, see subchapter 4.4.2.2.
[1681] See also subchapter 4.4.2.2.

Employment Act are explicitly excluded from the scope *ratione personae* of this social insurance.[1682]

An exception would apply to formerly insured women whose childbirth is due to take place or actually takes place within ten weeks after the end of insurance.[1683] They would be eligible for benefits, even if they are not insured anymore. This opens up the possibility for female irregular migrant workers to qualify for benefits, in case of a change of immigration status.

However, being eligible for benefits does not automatically mean that the benefits will be paid out. As is the case for all social insurance schemes, benefits are only disbursed if the beneficiary stays in the Netherlands in compliance with the Aliens Act or stays in an EU or an EEA country, or in a country with which the Netherlands has concluded an agreement.[1684]

The provisions on maternity benefit do not impose any specific requirements with respect to the newborn child, so mothers may qualify for such a benefit even if their children do not have a regular residence status in the Netherlands. This could be the case if the child does not possess Dutch citizenship and hence must comply with the requirements set out in the Aliens Act 2000 for lawful presence in the Netherlands. If the child does not do so because the parents have not applied for a residence permit for him or her, the child is unlawfully present in the Netherlands.[1685] However, non-compliance and thus unlawful residence on the part of the child does not prevent insured mothers from being eligible for maternity benefit.

9.3.2. Nationals who engage in undeclared work

Female citizens who work in the black economy are eligible for pregnancy and maternity benefits under the Work and Care Act despite the fact that they are not declaring their work to the social security authorities. They are employees, as defined under the Work and Care Act. Therefore they are insured. The non-payment of contributions is not relevant for this determination.[1686]

However, like under all employee social insurance schemes, in order to exercise the right to WAZO benefits, the Employee Insurance Administration Institution must first establish that the woman has worked as an employee. If this can be done, the former undeclared worker may qualify for benefits. Independently from the payment of benefits, the Dutch Tax Administration will retroactively demand social security contributions from the employer and, if applicable, impose fines.[1687]

[1682] See § 3:6 (1) (a) WAZO in conjunction with § 3 (3) ZW and the Decree on the Extension and Restriction of the Category of Insured Persons in Respect of Employee Social Insurance Schemes. See also subchapter 4.4.2.1.
[1683] § 3:10 (1) Work and Care Act.
[1684] For the general prohibition on payment of benefits to unlawfully present foreigners, see subchapter 4.4.2.1. For the WAZO insurance in particular, see § 3:14 (3) Work and Care Act in conjunction with § 41 (1) Sickness Benefits Act.
[1685] For more information on the residence status of a newborn child, see subchapter 2.1.2.
[1686] For this and the question of validity of the employment contract, see subchapter 4.4.2.2.
[1687] See also subchapter 3.2.

9.4. Work and Income According to Labour Capacity Act (Wet Wia)

9.4.1. Irregular migrant workers

The Work and Income According to Labour Capacity Act provides for income replacement benefits for insured persons who are only able to earn a fraction of the wages of a comparable healthy person due to sickness, ailment, pregnancy or childbirth.[1688] Only employees are obligatorily insured.[1689] For the definition of the term 'employee', section 8 Wet Wia refers to the Sickness Benefits Act. As has been shown earlier, irregular migrant workers are not considered as employees under the Sickness Benefits Act.[1690] As a consequence, irregular migrant workers are also excluded from insurance under the Wet Wia.

Nevertheless, if irregular migrant workers were insured during periods of lawful residence and lawful work in the Netherlands and before becoming incapacitated, they would under certain circumstances qualify for invalidity benefits. Two possibilities exist. First, if the alien becomes incapacitated shortly, but in any case no longer than one month, after insurance ends.[1691] Second, if the alien suffers from an occupational disease which results from work for which the alien was previously insured.[1692] In these exceptional cases, an alien who is staying or working in the Netherlands in violation of the Aliens Act or the Aliens Employment Act at the moment when incapacity for work begins can become entitled to benefits.

Nevertheless, even if, due to a change in their status under the Aliens Act and the Aliens Employment Act, incapacitated irregular migrant workers are exceptionally eligible for benefits, there are obstacles with respect to the collection of benefits. First, benefits may only be paid out to aliens who are lawfully present in the Netherlands.[1693] Second, benefit payment is stopped or reduced when there is no compliance with obligatory back-to-work measures. The latter possible obstacle only relates to people who are temporarily fully or partially disabled.[1694] They are under

[1688] § 4 ff Work and Income According to Labour Capacity Act.
[1689] § 7 Work and Income According to Labour Capacity Act.
[1690] The exclusion of irregular migrant workers is based on § 3 (3) and (6) Sickness Benefits Act in conjunction with the Decree on the Extension and Restriction of the Category of Insured Persons in Respect of Employee Social Insurance Schemes. For more information see subchapter 9.2.1.
[1691] Like the Sickness Benefits Act, the Work and Income According to Labour Capacity Act covers invalidity, even if it occurred after the period of insurance. See § 10 Work and Income According to Labour Capacity Act.
[1692] Based on § 10 Work and Income According to Labour Capacity Act, the Decree on Claims for Occupational Diseases by Individuals who are not Insured under the WAO or the Wet Wia (*Besluit aanspraken bij beroepsziekten van niet ingevolge de WAO of de Wet Wia verzekerden* – Besluit van 7 juli 1967, houdende vaststelling van een algemene maatregel van bestuur als bedoeld in artikel 17, vierde lid, en artikel 66, vierde lid, van de Wet op de arbeidsongeschiktheidsverzekering) has been enacted, Stb. 1967, no. 380. § 1 (2) of the decree stipulates that uninsured persons who become incapacitated for work due to an occupational disease which is listed in the annex to the decree are treated as if they were insured, provided the disease is caused by one of the occupational activities which are also listed in the annex and the person was insured for this activity. Nothing in the decree requires a specific status under immigration laws. As a consequence, aliens who are irregular migrant workers at the time they become incapacitated are eligible for Wet Wia benefits, provided they were insured before and they fulfil the requirements set out in the above-mentioned decree.
[1693] See § 69 (1) Work and Income According to Labour Capacity Act and subchapter 4.4.2.1. Benefits under the Work and Income According to Labour Capacity Act are only exported to EU and EEA countries, to countries with which agreements have been concluded, to the islands of Aruba, Curaçao and Sint Maarten, and everywhere in the case of beneficiaries who carry out work of general interest.
[1694] Temporarily disabled people fall within the scope of the Resumption of Work for Partially Disabled Employees Scheme (*Werkhervattingsregeling Gedeeltelijk Arbeidsongeschikten – WGA*) under the Wet Wia. Permanently

an obligation to try to find suitable work and to accept it, and to participate in labour market reintegration activities.[1695] By law, foreigners without employment authorisation may not accept work or participate in most kinds of reintegration activities, such as voluntary work, internships or subsidised work. Our research has not revealed any form of guidance on how to deal with foreigners without work authorisation who, due to a change in status, exceptionally qualify for invalidity benefits. What we know is that the competent authorities have a certain margin of appreciation when it comes to back-to-work measures.[1696] This means that it is eventually up to the Employee Insurance Administration Institution whether benefits are reduced or not paid out to aliens without permission to work in the country.

9.4.2. Nationals who engage in undeclared work

Citizens who do not declare their work to the social security authorities are nevertheless insured under the Work and Income According to Labour Capacity Act. What counts is that this group meets the legal definition of 'employee'.[1697] The non-declaration of work may pose some difficulties – such as the provision of proof that the person is an employee within the meaning of employee social insurance laws, the determination of his or her income[1698] and the determination of his or her employment history[1699]. Still, from a legal point of view it does not prevent the black-economy worker from being insured.[1700]

However, an application for benefits under the Wet Wia is tantamount to a declaration of work. Since the Employee Insurance Administration Institution and the Tax Administration do not have any records on such employment, investigations will need to be conducted. Once it is established that the employee concerned was insured under the Wet Wia, contributions must be paid by the employer. In addition, administrative fines and even criminal sanctions may be imposed on the employer.

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disabled people, on the other hand, fall within the scope of the Benefit for Permanently and Fully Disabled Employees Scheme (*Inkomensvoorziening Volledig Arbeidsongeschikten – IVA*).

[1695] § 29 and § 30 Work and Income According to Labour Capacity Act.

[1696] Concerning the obligation to try to find suitable work and to accept it, the authority may refrain from imposing a sanction for urgent reasons. See § 88 (5) Wet Wia. Regarding the obligation to participate in labour market reintegration activities, the margin of appreciation for the Employee Insurance Administration Institution is wider. Only those measures which are necessary in the concrete case must be taken. See § 34 (1) Work and Income According to Labour Capacity Act.

[1697] For the question of validity of the employment contract, see subchapter 4.4.2.2.

[1698] The amount of IVA and most WGA benefits is related to the employee's previous wages. See § 51 ff. and § 61 ff. Work and Income According to Labour Capacity Act. The Employee Insurance Administration Institution receives information on the wages from the Tax Administration. For work that is not declared, no information will be available. As a consequence, the Employee Insurance Administration Institution has to open an investigation of the employee's wages.

[1699] The employment history is relevant, because for each additional year of employment, the period for benefit payment will be extended. See § 59 Work and Income According to Labour Capacity Act. From the case law on unemployment insurance it is clear that the employment history is determined according to facts. See, for example, Centrale Raad van Beroep, 4 May 2005, LJN: AT8133. The only relevant point is whether wages were actually received and not whether wages were also declared for tax and social security purposes. So if the employee can demonstrate that wages were received, *e.g.* through an employment contract or bank statements, periods of black-economy work will also be considered in the calculation of the employment history.

[1700] See subchapter 4.4.2.2.

9.5. Act on Incapacity Benefits for Disabled Young People (Wajong)

9.5.1. Irregular migrant workers

The Act on Incapacity Benefits for Disabled Young People (Wajong) provides assistance for persons who became incapacitated for work at a relatively young age. Incapacity for work means no longer being able, due to sickness, ailment, pregnancy or childbirth, to earn the same income as a healthy reference person. The benefit rate is linked to the legal minimum wage and the degree of incapacity. Contributions are not levied and an income or means test is not applied.

The assistance is basically only granted to inhabitants of the Netherlands.[1701] Unlawfully present aliens are expressly excluded from the right to benefits. The Act states that aliens who are not lawfully present in the Netherlands in accordance with section 8 (a) - (e), (l) Aliens Act 2000 do not have a right to disability benefits and employment assistance.[1702] Foreigners residing unlawfully, such as category A workers, therefore cannot qualify. Among lawfully residing irregular migrant workers (category B), only those foreign inhabitants may qualify who stay in the country with a temporary ordinary residence permit in accordance with section 8 (a) Aliens Act 2000 and who do not have permission to work under the Aliens Employment Act. This is because category B workers have been identified as foreigners who are lawfully present in the Netherlands in accordance with section 8 (a) and (f) - (k), (m) Aliens Act 2000.

Thus irregular migrant workers who are staying under a temporary ordinary residence permit in the country may fall within the personal scope of application of the Wajong programme, on the basis of their immigration status and their inhabitancy in the Netherlands. However, it should be recalled that the Wajong scheme is intended to provide support to disabled people who are not or hardly able to work. People currently working, including irregular migrant workers, are not the main target group of the scheme, and will therefore have difficulties in meeting the disability requirement under the Wajong scheme. Former workers are also not the target group of the Wajong programme, which requires the disability to have existed before the person's seventeenth birthday.[1703]

Let us nevertheless assume the rather theoretical situation where a foreign inhabitant stays in the country under a temporary ordinary residence permit, has no permission to work, and is disabled but still able to perform some kind of irregular work, and does actually do so. Even then there might be a further obstacle to the enjoyment of cash or labour market reintegration benefits: the lack of a work authorisation. Concerning cash benefits, compliance with labour market reintegration measures is not a qualifying condition. But non-compliance might provide a reason

[1701] A governmental decree extends eligibility to those who reside outside the Netherlands, but who are mandatorily insured under general social insurance. See § 2 Decree on the Extension and Restriction of the Category of Inhabitants in Respect of the Wajong (*Besluit uitbreiding en beperking kring ingezetenen Wajong* – Besluit van 24 december 1997 tot vaststelling van een algemene maatregel van bestuur als bedoeld in artikel 3, tweede lid, van de Wet arbeidsongeschiktheidsvoorziening jonggehandicapten, houdende regels met betrekking tot uitbreiding en beperking van de kring van ingezetenen voor de toepassing van de Wet arbeidsongeschiktheidsvoorziening jonggehandicapten), Stb. 1997, no. 798.

[1702] § 3:4 (1) and § 2:11 Disablement Assistance Act for Disabled Young Persons. A provision which suspends the payment of benefits during periods of unlawful stay in the Netherlands – as is included in many Dutch social insurance laws – does not exist under the Wajong scheme. This is not necessary, because § 3:4 (1) Wajong denies the right to benefits anyway in case of unlawful stay.

[1703] Before the thirtieth birthday, if the person studied before.

for the Employee Insurance Administration Institution to reduce or stop benefit payment.[1704] Thus in our rather theoretical situation the foreigner might be confronted with sanctions for not taking part in reintegration activities.[1705]

9.5.2. Nationals who engage in undeclared work

The Act on Incapacity Benefits for Disabled Young People requires, in general, inhabitancy for benefit eligibility. Dutch citizens who work in the black economy are able to meet this requirement, and therefore fall within the scope *ratione personae* if they are inhabitants. However, once more we have to recall that assistance for young disabled persons is not intended to support current or of former workers. Undeclared workers will therefore have difficulties in meeting other entitlement criteria, in particular the age criterion, the disability criterion and the back-to-work criterion. Nevertheless, the possibility cannot be excluded that disabled people who are to a certain extent capable of work might meet the disability requirement under the Wajong scheme and at the same time be engaging in undeclared work. The question is whether they would then have the time to participate in back-to-work requirements.

[1704] See § 3:38 (1) Disablement Assistance Act for Disabled Young Persons.

[1705] Despite the fact that holders of a temporary residence permit who are working unlawfully in the country may have a right to Wajong benefits, they may be reluctant to exercise it. This is because holders of a temporary residence permit must be – autonomously and permanently – in funds. Running out of funds may provide a reason for the Immigration and Naturalisation Service to withdraw the residence permit or deny an extension of it. See § 18 (1) (d) Aliens Act 2000 and § 19 in conjunction with § 18 (1) (d) Aliens Act 2000. 'Autonomously' means without recourse to public funds. See Aliens Act Implementation Guidelines 2000 B1/4.3. Since Wajong benefits are funded from general revenue, benefit payment may provide, amongst other reasons, a reason for the immigration authorities to reconsider the right to residence. See also subchapter 13.1.1.

10. The social risk of unemployment

The risk of becoming unemployed is primarily addressed by the Unemployment Insurance Act (WW). This form of employee social insurance will be analysed in this chapter. Additionally, after receiving benefits under the WW, older individuals have the possibility to qualify for benefits under the income-tested IOAW regime (Act on Income Provisions for Older, Partially Disabled Unemployed Persons). This scheme will be discussed in chapter 13 on the social risk of financial need.

10.1. Unemployment Insurance Act (WW)

10.1.1. Irregular migrant workers

As under all employee social insurance schemes, due to their unlawful residence or unlawful work in the Netherlands, irregular migrant workers are not considered to be employees and hence not insured under the Dutch unemployment insurance.[1706] Irregular migrant workers who become unemployed are therefore ineligible for benefits.[1707]

What is more, foreign beneficiaries of unemployment benefits who lose their authorisation to stay or work in the Netherlands may also lose entitlement to benefits. In more detail, beneficiaries who lose permission to stay in the Netherlands are no longer eligible for benefits.[1708] If a foreign beneficiary loses permission to work in the Netherlands but is still allowed to be in the country, he or she may be confronted with a reduction or loss of benefits. The Employee Insurance Administration Institution can reduce, suspend or cease benefit payment if, for instance, the beneficiary does not register as a job-seeker, does not participate in labour market reintegration measures or remains unemployed because he or she refuses suitable work.[1709] Foreigners without work authorisation are only exceptionally able to comply with these obligations.[1710] Whether such foreign beneficiaries are granted relief from these obligations or relief from the sanctions is up to the Employee Insurance Administration Institution.

[1706] See subchapter 4.4.2.1. For the exclusion under unemployment insurance, see § 3 (3), (6) Unemployment Insurance Act in conjunction with § 4c Decree on the Extension and Restriction of the Category of Insured Persons in Respect of Employee Social Insurance Schemes

[1707] Insurance is not only required at the moment when the employee becomes unemployed: the applicant must also have been insured during the period before this event. § 17 Unemployment Insurance Act requires the applicant to have worked as an employee for at least twenty-six out of the last thirty-six weeks. Again, this condition cannot be fulfilled by irregular migrant workers. They are not regarded as employees and accordingly cannot perform work as an employee as defined for unemployment insurance purposes.

[1708] § 19 (1) (f) Unemployment Insurance Act stipulates that a person who is unlawfully present in the Netherlands, *i.e.* staying in violation of § 8 Aliens Act 2000, does not have a right to unemployment benefits.

[1709] § 22a, § 27 and § 30 in conjunction with § 24 and § 26 Unemployment Insurance Act.

[1710] Pursuant to § 30b (1) Work and Income (Implementation Structure) Act in conjunction with § 3.1 (1) Work and Income (Implementation Structure) Decree, only Dutch citizens and foreigners with a certain immigration status are able to register or prolong registration as unemployed persons. See Work and Income (Implementation Structure) Decree: *Besluit structuur uitvoeringsorganisatie werk en inkomen* – Besluit van 20 december 2001 tot vaststelling van een algemene maatregel van bestuur ter uitvoering van de Wet structuur uitvoeringsorganisatie werk en inkomen, en in verband daarmee van enige andere socialezekerheidswetten, Stb. 2001, no. 688.

A further entitlement criterion for unemployment benefits is availability for work.[1711] Here, one might expect difficulties for a beneficiary who loses permission to take up employment in the Netherlands. However, before the entry into force of the Linkage Act, case law ruled that the lack of a work permit does not necessarily prevent a foreigner from being available for work. This is because availability on not only the formal, but also the informal labour market must be taken into consideration.[1712] Thus it is possible for beneficiaries of unemployment benefits to continue to be regarded as available for work after losing their permission to work in the Netherlands.

10.1.2. Nationals who engage in undeclared work

It was noted in subchapter 4.4.2.2. that citizens who work in the black economy are insured under employee social insurance.[1713] By definition, they meet the requirement to be an employee for employee social insurance purposes. In the context of unemployment insurance, this means that undeclared workers are employees within the meaning of sections 3 to 8a Unemployment Insurance Act, and qualify for unemployment benefits according to section 15 Unemployment Insurance Act. The non-declaration of work, which also implies non-payment of employee social insurance contributions, does not affect the status of an insured person.

All other requirements for benefit eligibility can also be met by citizens who do not declare their work to the social insurance authorities. However, in practice the non-declaration of work means that evidence of work,[1714] of wages,[1715] of loss of working hours[1716] and of employment history[1717] must be provided in retrospect.

[1711] According to § 20 (1) (b) in conjunction with § 16 (1) (b) Unemployment Insurance Act, the right to benefits ends when the beneficiary is not available for work anymore.
[1712] See Centrale Raad van Beroep, 12 March 2003, LJN: AH9609.
[1713] For the question of validity of the employment contract, see subchapter 4.4.2.2.
[1714] § 15 WW.
[1715] The benefit rate is calculated on the basis of the last wages of the unemployed person. See § 44 ff. WW.
[1716] Unemployment is defined as a loss of at least five working hours per week – or half the working hours per week if the person was employed for less than ten hours a week. See § 16 WW.
[1717] Having worked for twenty-six of the last thirty-six weeks entitles the applicant to receive unemployment benefit for three months. Longer payment of benefits is only possible if the employee has a longer employment history. See § 17 WW.

11. The social risk of health care

This chapter addresses two basic questions: do the groups with which we are concerned have access to health care? And are they covered under statutory health care insurance? Accordingly, the chapter will be divided into two main subchapters.

There are two statutory health insurance schemes in the Netherlands: the Health Care Insurance Act (ZVW) and the General Exceptional Medical Expenses Act (AWBZ). The AWBZ is a general social insurance scheme which essentially covers long-term and expensive medical care. The ZVW, by contrast, obliges all persons insured under the AWBZ to contract private health insurance. Private health insurers, in return, are required to offer at least a basic health care package. Solidarity under the ZVW is supposed be guaranteed by the obligation for health insurers to contract insurance and by the payment of a contribution which is related to a person's income. What is more, insured persons who have difficulties in paying the contribution have the chance to obtain a health care supplement (*zorgtoeslag*), funded from general revenue.

Certain aliens who, as a result of the Linkage Act, can no longer fall back on social assistance under the WWB and asylum-seekers receive assistance under two special schemes. These schemes have been set up under the Act on the Central Agency for the Reception of Asylum-Seekers. As well as certain forms of social assistance, these schemes also provide sickness insurance cover which more or less matches the basic ZVW package and the AWBZ package. These schemes will be analysed in subchapters 13.3 and 13.4.

It should be mentioned that individuals who do not fall within the personal scope of application of the AWBZ and the ZVW may also contract insurance with a private health insurer. Such insurance contracts are governed by private law. However, it seems that private health insurers are reluctant to contract insurance with foreigners not residing lawfully in the Netherlands.[1718]

11.1. Access to health care

Health professionals in the Netherlands have a duty to provide medically necessary care to anyone. This duty can be derived, most notably, from criminal and disciplinary law.

Concerning criminal law, section 450 Criminal Code stipulates a penalty for anyone who witnesses a life-threatening situation of another person – which eventually ends fatally – and does not provide the necessary help. This provision would also be applicable to doctors and other medical personnel, for example in the case of badly injured or ill persons who turn to general practitioners or hospitals for help.[1719] Pursuant to sections 308 to 309 Criminal Code, anyone who deliberately or through gross negligence causes death or serious bodily injury to another person is to be punished. The sentence may be higher if the criminal act took place during the exercise of an office or profession. These provisions of the Criminal Code provide the broad framework for

[1718] See European Commission, *Quality in and Equality of Access to Healthcare Services*, March 2008, p. 91. Available at: http://www.euro.centre.org/data/1237457784_41597.pdf. See also Kamerstukken II 2007-08, 31 249, no. 7, p. 8.

[1719] See also Explanatory Memorandum to the Linkage Act. Explanatory Memorandum, Kamerstukken II 1994-95, 24 233, no.3, p. 18.

medical assistance that should be provided by anyone, including doctors and other medical personnel.

As for disciplinary law, subsection 47 (1) (a) 2. Individual Health Care Professions Act (*Wet op de beroepen in de individuele gezondheidszorg, Wet BIG*)[1720] rules that disciplinary proceedings apply to health care personnel whose actions or failure to act violate the duty of care that they have towards anyone who is in need of medical attention and requires medical assistance. The term health care personnel comprises, *inter alia*, doctors, dentists, pharmacists, therapists and nurses. Professional codes have specified this legal provision. For doctors, the Dutch Professional Code for Doctors (*Gedragsregels voor artsen*) provides the relevant guidelines.[1721] It applies to general practitioners as well as medical specialists in private practice, hospitals, detention centres and other institutions. Section II.6 of Guideline II.01 of the code stipulates that doctors must always provide first aid in cases of emergency. Moreover, section I.2 of Guideline II.01 rules that in his or her capacity as a doctor, he or she must provide necessary treatment to anyone who turns to him or her. The code also includes a non-discrimination provision, stating that a doctor must treat patients in equal situations equally – see section II.2 of Guideline II.01.

To summarise, criminal law stipulates an obligation for health care providers to provide medical assistance in case of emergency, while an obligation can be deduced from disciplinary law to provide medically necessary treatment to anyone.

11.2. Health cost coverage

11.2.1. Reimbursement mechanism for health care providers with respect to irregular migrants

We mentioned in subchapter 4.2 that since the introduction of the Linkage Act, the Dutch Aliens Act has stipulated that unlawfully present aliens are no longer entitled to social security benefits and other public services. However, an exception applies to medically necessary care (*verlening van medisch noodzakelijke zorg*) and the prevention of situations that would jeopardise public health (*voorkoming van inbreuken op de volksgezondheid*).[1722] This exception allows health care providers not to violate the Aliens Act when meeting their disciplinary obligation to provide medically necessary care to foreigners unlawfully present in the Netherlands. In addition, it allows the government to reimburse the costs of the medically necessary treatment of foreigners unlawfully present in the country to health care providers.

It was the explicit intention of the legislators that the Linkage Act should not affect the access of aliens to public health care in the Netherlands.[1723] However, an obligation to provide health care only exists where this is medically necessary.[1724] In all other situations, health care providers are free to decide whether or not to provide care. This means that if care is not medically necessary,

[1720] Wet van 11 november 1993, houdende regelen inzake beroepen op het gebied van de individuele gezondheidszorg, Stb. 1993, no. 655.
[1721] Koninklijke Nederlandsche Maatschappij tot bevordering der Geneeskunst, *Gedragsregels voor artsen*. Available at: http://knmg.artsennet.nl/Diensten/knmgpublicaties/KNMGpublicatie/Gedragsregels-voor-artsen-2002.htm.
[1722] See § 10 Aliens Act 2000.
[1723] Kamerstukken II 1994-95, 24 233, no. 3, p. 49.
[1724] *Ibid*., p. 17. See also our previous subchapter.

providers can deny medical treatment. Incidentally, this is not only true for aliens, but also for citizens.[1725]

In order to guarantee the medically necessary treatment of unlawfully present foreigners who cannot pay the health care bill, the legislators introduced a reimbursement mechanism for health care providers.

The decision to cover the costs of medically necessary care to unlawfully present foreigners was justified by the Dutch government with the argument that the aliens themselves should not be the only ones to pay the costs of the new immigration policy implemented through the Linkage Act; Dutch society, which benefits from this new immigration policy, should also make its contribution.[1726] Moreover, the government defended the guarantee of health care and its funding by referring to the benefit for public health. Untreated diseases might pose a threat to the health of others. Therefore, the general public should bear the cost.[1727] The argument that it is unjustifiable to create the possibility for health care cost recovery only for unlawfully present migrants was also rejected by the government. According to the government, Dutch citizens and lawfully residing aliens generally fall within the personal scope of application of social insurance – now the AWBZ and the ZVW; and in the exceptional cases where they do not, they can fall back on social assistance. By contrast, aliens who are unlawfully present in the Netherlands do not have this possibility.[1728]

For coverage of the costs of medically necessary care for unlawfully present aliens who are not able to pay for it, the government initially established a separate fund (*Koppelingsfonds*). The fund was financed by the Ministry of Health, Welfare and Sport and reimbursed costs of primary care. Medically necessary care which fell under secondary care had to be paid for by hospitals and insurance companies. This situation was particularly unsatisfactory for hospitals, which had to bear the brunt. With effect from 1 January 2009, section 122a was introduced into the Health Care Insurance Act (ZVW).[1729] The intention was to finance out of the budget of the Ministry of Health, Welfare and Sport all medically necessary care which is provided to unlawfully present aliens who cannot pay for it themselves. The government made it clear that this is not a form of insurance or semi-insurance for aliens. It is a financial contribution to health care providers.[1730]

In subchapter 6.1. we wrote that the Health Care Insurance Board (*College voor Zorgverzekeringen, CVZ*) coordinates the implementation and funding of the ZVW and AWBZ.

[1725] See previous subchapter. See also, for instance, the guidelines manual of the Association of Mental Health Care Facilities and Facilities for Care of Addicts, in which it is stated that if care is not medically necessary, it should nevertheless be provided to uninsured citizens or non-citizens, if they pay for it or if they could be insured. See GGZ Nederland, *Handreiking Onverzekerden in de GZZ*, April 2010, pp. 17-18. Available at: http://www.ggznederland.nl/financiering-ggz/handreiking-onverzekerden-versie-100416.doc.

[1726] Kamerstukken II 1994-95, 24 233, no. 3, p. 19.

[1727] *Ibid*., p. 23.

[1728] *Ibid*., p. 19.

[1729] See Act for the Amendment of the ZVW and AWBZ as to Care for Aliens (*Wet Wijziging ZVW en AWBZ inzake zorg aan vreemdelingen* – Wet van 30 oktober 2008, houdende wijziging van de Zorgverzekeringswet in verband met de verstrekking van bijdragen aan zorgaanbieders die inkomsten derven ten gevolge van het verlenen van medisch noodzakelijke zorg aan bepaalde groepen vreemdelingen en van de Algemene Wet Bijzondere Ziektekosten met het oog op verzekering van bepaalde groepen minderjarige vreemdelingen), Stb. 2008, no. 526.

[1730] Explanatory Memorandum, Kamerstukken II 2007-08, 31 249, no. 3, p. 2f. Similarly, the provision of medically necessary care is a duty of health care providers, but an unlawfully present alien does not have any subjective right to the provision of such care. See Kamerstukken II 1999-2000, 19 637, no. 518, p.1.

Since 2009, the CVZ has also been in charge of administering the reimbursement of medically necessary care under section 122a ZVW. Pursuant to subsection 122a (1) ZVW, reimbursement takes place, first, for aliens who are unlawfully present in the Netherlands (section 10 Aliens Act 2000) and second, for aliens staying in accordance with section 8 (f) or (h) Aliens Act 2000, if they are awaiting a decision on the issuance of a temporary ordinary residence permit or on a notice of objection or appeal and if they are allowed to await the outcome of the procedure in the Netherlands. The latter target group has been included, since they do not fall within the scope of any statutory arrangement for health care cost coverage – neither the AWBZ and ZVW, nor the Rva 2000 and Rvb. Reimbursement of (part of) the health care costs only takes place if the care was medically necessary. 'Medically necessary care' is defined in subsection 122a (2) ZVW as care and other services as understood under the AWBZ and the ZVW – with a few exceptions – ,[1731] but only if the health care provider considers it medically necessary.[1732] For the determination of what is medically necessary, the provider must take into account the expected duration of stay.[1733] Further guidance for doctors on the interpretation of the notion 'medically necessary' has been elaborated by the doctors themselves.[1734] No reimbursement takes place when the costs can be covered by the alien him- or herself, by an insurance company, or on the basis of a statutory provision, or when the costs are higher than what can be considered to be reasonable in the context of the Dutch health care market. Institutional health care providers, such as hospitals, have to report to the Health Care Insurance Board what measures they have taken in order to get the costs paid by patient him- or herself or by insurance.

Section 122a ZVW distinguishes between directly accessible care and non-directly accessible care. Non-directly accessible means that access is only possible through medical referral. In such cases, costs can only be reimbursed to contracted partners. The CVZ is in charge of concluding contracts with hospitals and pharmacies for this purpose. A list of these contracted partners is available on the website of the CVZ.[1735] For psychiatric facilities, mental health care facilities, facilities for the care of addicts, care facilities or AWBZ institutions, contracts are to be concluded on a case by case basis. For directly accessible care, no contracts are necessary. Health care providers can declare their costs to the CVZ and ask for reimbursement. The normal reimbursement rate is 80

[1731] See also Kamerstukken II 2006-07, 29 689, no. 116, p.2. The care which has to be provided, once it is established that it is necessary, is almost identical with the care covered by the social insurance schemes AWBZ and ZVW.

[1732] Medically necessary care includes preventive care and care in situations where there is a danger for third persons. This refers, for instance, to communicable diseases, mental defects, pregnancy and childbirth, and preventive youth care. See, most notably, Kamerstukken II 1995-96, 24 233, no. 6, pp. 59, 63; Kamerstukken II 1999-2000, 19 637, no. 518, p. 2; Kamerstukken II 1999-2000, 19 637, no. 521; Kamerstukken II 2005-06, 29 689, no. 83; Kamerstukken II 2006-07, 29 689, no. 116, p.2.

[1733] § 122a (2) ZVW. See also Kamerstukken II 2006-07, 29 689, no. 116, p.2.

[1734] From the very beginning, it has been the intention of the government that doctors themselves should further elaborate the understanding of the term, since they are the ones who have to determine eventually what is medically necessary and what is not. The medical sector has done so – particularly in the past few years. Worthy of mention here is the report of the Commission on Medical Care for Asylum-Seekers who have (Potentially) Exhausted All Legal Procedures and for Illegal Aliens. See Commissie Medische zorg voor (dreigend) uitgeprocedeerde asielzoekers en illegale vreemdelingen, *Arts en vreemdeling* (Utrecht: A-D Druk, 2007), p. 17. What is more, paediatricians have been the only group of medical specialists who have specially adapted the Dutch Professional Code for Doctors with respect to unlawfully present children – see the *Professional code on minor patients not staying legally in the Netherlands* (*Gedragscode voor kinderartsen betreffende zieke kinderen zonder verblijfspapieren*). See Nederlandse Vereniging voor Kindergeneeskunde, *Gedragscode voor kinderartsen betreffende zieke kinderen zonder verblijfspapieren*, adopted on 22 June 2006. Available at: http://www.nvk.pedianet.nl/pdfs/gedragscode_kinderarts_illegaal.pdf.

[1735] See College voor Zorgverzekeringen at http://www.cvz.nl.

percent, although midwifery care and postnatal care are completely refunded. Health care providers which have a contract with the CVZ for non-directly accessible care and which also provide directly accessible care may negotiate a different reimbursement rate for directly accessible care from the one laid down in subsection 122a (4) ZVW.

This new funding procedure for unpaid bills may also help to overcome problems with access to health care. More specifically, research has identified the reluctance of providers to provide secondary health care since costs were not refundable as the major factor preventing irregular migrants from receiving medically necessary care.[1736] From 2009 on, all types of medically necessary care have been partly reimbursed by the CVZ. This relieves hospitals and other providers of secondary health care from the associated financial burden. However, part of the costs must still be paid by the providers themselves. The somewhat unclear definition of the term 'medically necessary care' has been claimed to be a further barrier to access to health care.[1737] Health care providers have not always been sure how the term should be interpreted and have therefore sometimes been disinclined to provide assistance. The situation may also have become easier since the publication of a report by the Commission on Medical Care for Asylum-Seekers who have (Potentially) Exhausted All Legal Procedures and for Illegal Aliens in 2007.[1738] The commission, which was set up by Dutch medical associations, defined the term 'medically necessary care' in more detail and provided guidelines for practice. However, initial evaluations of the new 2009 health care regime for irregular migrants have identified other critical areas, such as a lack of clarity concerning the precise activities health care providers have to carry out in order to fulfil their duty to check the patient's ability to pay the cost, and the administrative burden in this regard.[1739]

Since 1 January 2006, insured patients have had an obligation to identify themselves to health care providers and, in return, health care providers must identify insured patients.[1740] This obligation exists, in the first phase, only for hospitals and specialist medical care facilities.[1741] However, as indicated, the identification obligation is not general: it only relates to insured persons. It was introduced to fight identity fraud in the context of health insurance, since uninsured individuals were using the health insurance card of another person. Consequently, health care insurers were having to pay the costs of medical care for uninsured people.[1742] To avoid this, anyone wishing to receive hospital care covered by a health insurance company has to prove his or her identity. This obligation does not affect access to medically necessary care. The Minister of Health, Welfare and Sport has confirmed that medically necessary care must always be provided and is not subject to

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[1736] See B&A Groep Onderzoek en Advies, *Evaluatie van de Koppelingswet. Een onderzoek naar de effectiviteit, efficiëntie en legitimiteit van de Koppelingswet* (Den Haag: B&A Groep Onderzoek en Advies, 2001), p. 65. See also Inspectie voor de gezondheidszorg, *Staat van de gezondheidszorg 2005* (Den Haag: Albani, 2005), p. 88 ff.

[1737] B&A Groep Onderzoek en Advies, *Evaluatie van de Koppelingswet*, p. 66. See also Inspectie voor de gezondheidszorg, "Beperking toegankelijkheid ziekenhuizen," internal note no. IGZ-AL-08-25123, 27 June 2006.

[1738] See Commissie Medische zorg, *Arts en vreemdeling*.

[1739] See Breed Medisch Overleg, *Toegankelijkheid van de gezondheidszorg voor mensen zonder wettelijke verblijfsstatus: Eerste inventarisatie van knelpunten* (Utrecht: Stichting LOS, 2009), pp. 8, 9, 14, 20. See also Truus Veenema, Trees Wiegers and Walter Devillé, *Toegankelijkheid van gezondheidszorg voor 'illegalen' in Nederland: een update* (Utrecht: Nivel, 2009), p. 136 ff.

[1740] See § 118 ZVW and § 10a AWBZ.

[1741] See § 8.2. Regulation Health Care Insurance (*Regeling Zorgverzekering* – Regeling van de Minister van Volksgezondheid, Welzijn en Sport van 1 september 2005, nr. Z/VV-2611957, houdende regels ter zake van de uitvoering van de Zorgverzekeringswet), Stcrt. 2005, nos. 171, 203, 246 and 249, and § 8.2 Explanation to Regulation Health Care Insurance.

[1742] See Explanatory Memorandum, Kamerstukken II 2003-04, 29 763, no. 3, p. 193.

the identification obligation.[1743] Evaluative research has not identified any particular problems for the uninsured in accessing medically necessary care since the introduction of the identification obligation .[1744] What is more, health care providers seeking reimbursement of the cost of providing medically necessary care to unlawfully present aliens only have to indicate the initials, sex, (estimated) year of birth and nationality of the patient. The full name and further personal data of the patient are not required.[1745] For the sake of completeness, it should be mentioned that there is no obligation for health care providers to report unlawfully present aliens to the immigration authorities.[1746] In addition, doctors and health care personnel are under a legal duty to maintain professional secrecy.[1747] That is to say, they must not disclose any information which they have obtained in the course of their professional practice and which has a confidential character.

11.2.2. Access to juvenile care

The Act on Juvenile Care (*Wet op de jeugdzorg*)[1748] provides for treatment and support for children and adolescents with psychosocial, psychological and behavioural problems.[1749] Care is provided at home, in care facilities or at the home of foster parents.

Pursuant to subsection 3 (1) in conjunction with section 1 (b), (d) Act on Juvenile Care, juvenile care is available for children and adolescents up to the age of eighteen or, under certain circumstances, up to the age of twenty-three, as well as their parents, stepparents or guardians. However, subsection 3 (1) excludes foreigners who are unlawfully present in the Netherlands. Yet according to subsection 3 (9), the government is authorised to deviate from both subsection 3 (1), but also section 10 Aliens Act 2000. In other words, the government has been granted the power to depart from the principle stipulated in immigration law that unlawfully present aliens are not entitled to social security benefits and other public services. It has done precisely that. Under section 7 Implementation Decree on the Act on Juvenile Care, children up to the age of eighteen residing unlawfully in the Netherlands are included in the personal scope of application of the Act on Juvenile Care. From this it follows that children who are residing unlawfully in the Netherlands are eligible for support and treatment under the Act on Juvenile Care. This could concern unlawfully present children of irregular migrant workers.

It is worth mentioning that subsection 3 (9) of the Act on Juvenile Care explicitly stipulates that the entitlement of an unlawfully present child to juvenile care does not affect the child's immigration status. A right to juvenile care does not entitle the child to a lawful residential status in the Netherlands.

[1743] Aanhangsel van de Handelingen II 2005-06, no. 1690.
[1744] See Commissie Medische zorg, *Arts en vreemdeling*, p. 74 in conjunction with Inspectie voor de gezondheidszorg, "Beperking toegankelijkheid ziekenhuizen."
[1745] See College voor zorgverzekeringen, "declaratieformulier zorgverleners." Available at: http://www.cvz.nl/.
[1746] See, for instance, Kamerstukken II 1999-2000, 19 637, no. 521, p. 3.
[1747] See § 88 Individual Health Care Professions Act and § 12 Act on the Protection of Personal Data (*Wet bescherming persoonsgegevens* – Wet van 6 juli 2000, houdende regels inzake de bescherming van persoonsgegevens), Stb. 2000, no. 302.
[1748] Wet van 22 april 2004, houdende regeling van de aanspraak op, de toegang tot en de bekostiging van jeugdzorg, Stb. 2004, no. 306.
[1749] See also Implementation Decree on the Act on Juvenile Care (*Uitvoeringsbesluit Wet op de Jeugdzorg* – Besluit van 16 december 2004, houdende regels ter uitvoering van de Wet op de jeugdzorg), Stb. 2004, no. 703.

On the whole, children unlawfully present in the country are entitled to the same benefits as other children. The only exception relates to placement with foster parents. Unlawfully present children can only be attached to foster parents if this is necessary for their development. In such a case, the juvenile care office must explain why foster parents were preferred to placement in a care facility.[1750]

Regarding the duration of juvenile care, special provisions exist for aliens. Usually care is provided for no more than one year. By contrast, aliens who are unlawfully resident in the Netherlands may receive juvenile care for a maximum of half a year.[1751]

11.2.3. Health Care Insurance Act (ZVW) and General Exceptional Medical Expenses Act (AWBZ)

11.2.3.1. Irregular migrant workers

The AWBZ, as a form of general social insurance, covers, in the first instance, inhabitants of the Netherlands. As under all general social insurance schemes, aliens are required to have a certain immigration status. The only categories covered are those who stay in the country in accordance with section 8 (a) - (e), (l) Aliens Act 2000 or who have a residence and work status as required under the Decree on the Extension and Restriction of the Category of Insured Persons in Respect of General Social Insurance Schemes (*Besluit uitbreiding en beperking kring verzekerden volksverzekeringen*).[1752] In subchapter 4.4.1.1, we argued that due to these restrictions, irregular migrant workers without authorisation to be in the Netherlands (category A) do not fall within the personal scope of application of the AWBZ. In category B, only a few groups are able to qualify due their immigration status. These are foreign inhabitants who stay in the country under a temporary ordinary residence permit which does not permit work, and foreigners who were previously admitted to the country, *i.e.* who were staying in accordance with section 8 (a) - (e), (l) Aliens Act 2000, but are now applying for an extension of their residence permit or appealing against or objecting to the withdrawal of their residence permit.

Subsection 2 (1) ZVW stipulates that those who are insured under the AWBZ are obliged to contract basic health care insurance under the ZVW. In return, health insurers are required to contract insurance with or for the benefit of them. The ZVW makes no provision for voluntary insurance. As a result, unlawfully resident irregular migrant workers (category A) are also not able to contract insurance with a private insurer under the ZVW; and in category B only the above-mentioned groups of foreign inhabitants would fall within the scope of the ZVW.

Foreigners with a precarious residence status or no status at all who have been rejected by private health insurers for registration under the AWBZ have sometimes taken legal action. They have usually claimed a violation of the right to health and related rights as guaranteed under international law. Courts of lower instance have usually rejected these claims because international

[1750] § 8 (2) Implementation Decree on the Act on Juvenile Care.
[1751] § 23 Implementation Decree on the Act on Juvenile Care.
[1752] See § 5 (2), (3) AWBZ.

provisions are considered either to be not directly applicable or not to have been violated.[1753] In late 2010 the Central Appeals Tribunal, *i.e.* the last judicial instance in social security matters in the Netherlands, pronounced on two of these legal cases. It confirmed the case law of lower instance. In more detail, the Tribunal reiterated that the relevant provisions of the European Social Charter (ESC), the UN International Covenant on Economic, Cultural and Social Rights (ICESCR) and the UN Convention on the Rights of the Child (CRC) are not directly applicable within the meaning of Article 94 of the Dutch Constitution. Concerning the non-discrimination provisions of Article 14 European Convention on Human Rights (ECHR) and Article 26 UN International Covenant on Civil and Political Rights (ICCPR), the Tribunal referred to well-established case law[1754] about the compliance of the Dutch Linkage Act with international non-discrimination provisions. However, a possible violation of Article 8 ECHR, the right to respect for private and family life, was decided on differently in the two cases. The first case related to an adult with psychological problems, who was residing unlawfully in the Netherlands. The Central Appeals Tribunal found no violation of Article 8 ECHR. The refusal of the health insurer to provide AWBZ insurance was not regarded as preventing the appellant from leading a normal private and family life.[1755] The second case related to a child who was suffering from autism and who was residing lawfully in the Netherlands.[1756] Here the Central Appeals Tribunal found a violation of Article 8 ECHR, due to the young age of the appellant and thus his particular vulnerability. The Tribunal assumed that his personal development would be made impossible without medical support. As a consequence, the appellant's human dignity, *i.e.* the very essence of the right under Article 8 ECHR, would be in danger. Therefore, the Central Appeals Tribunal decided that subsection 5 (2) AWBZ must not be applied in this case, because of a violation of Article 8 ECHR.[1757]

If foreigners want to register or to contract insurance with a health insurance company, the insurer is always required to ask for immigration documents.[1758] This is necessary since the insurer may only register (AWBZ) or insure (ZVW) persons who fall within the personal scope of application of the AWBZ.

Continued insurance after a loss of the required immigration status is not possible. As soon as a person is no longer insured under the AWBZ, AWBZ insurance and also the insurance contract under the ZVW ends by law.[1759]

Children up to the age of eighteen are not required to pay a fixed-rate premium. This contribution is paid by the Health Care Insurance Fund. This fund, in turn, is financed from income-related contributions and from general revenue. But this does not mean that children are insured through their parents, *i.e.* that children only have a derived right. On the contrary, children are themselves

[1753] See Rechtbank Amsterdam, 19 June 2008, LJN: BD8476; Rechtbank Amsterdam, 3 December 2008, LJN: BG7017; or Rechtbank Amsterdam, 3 December 2008, LJN: BG6965. In one case, however, the Regional Court of Amsterdam decided in favour of the foreign appellant. See Rechtbank Amsterdam, 3 December 2008, LJN: BG6962.
[1754] For this case law, see above, subchapter 4.2.
[1755] Centrale Raad van Beroep, 20 October 2010, LJN: BO3580.
[1756] The appellant was staying in the country according to Article 8 (f), (g) or (h) Aliens Act 2000. This immigration status does not entitle a foreigner to AWBZ and ZVW insurance, unless the foreigner has previously been admitted to the country and certain other conditions have been fulfilled. See this subchapter in conjunction with subchapter 4.4.1.1. However, this was not the case for the appellant.
[1757] Centrale Raad van Beroep, 20 October 2010, LJN: BO3581.
[1758] See § 9bis (5) AWBZ and § 4 (5) ZVW.
[1759] § 6 (1) (d) ZVW.

insured and must thus meet all the necessary requirements. In late 2008 the Dutch parliament amended the AWBZ and included certain groups of children, who were formerly excluded due to their immigration status. These were children who were born in the Netherlands and at least one of whose parents had been lawfully admitted[1760] to the Netherlands, children who were born outside the Netherlands and both of whose parents had been lawfully admitted to the Netherlands and children who were adopted by Dutch citizens or by lawfully admitted foreign citizens.[1761] Which immigration status the children must have is not clear: the law leaves this open,[1762] as do the parliamentary documents. However, from the latter we can see that this amendment was necessary because certain foreign children were falling into an insurance gap during their application procedure for a residence permit. This created a particularly precarious situation when medical care was needed at birth, for instance for premature infants, or for newly adopted children after their entry into the Netherlands.[1763] Anyway, this intention of the government is not reflected in law, and the scope of application of this provision may be larger than was originally intended.[1764]

It is worth mentioning that the Dutch government, in the course of this amendment, explained why there is no such extension in the other three general social insurance laws. It argued that children are not directly affected by the other general social insurance schemes: under the General Old Age Pension Act rights are gradually accumulated, beginning with the fifteenth birthday; under the General Survivor's Benefits Act, benefits will be paid to survivors, but children are at an age where they cannot have survivors within the meaning of the Act; and under the General Child Benefits Act, parents are entitled to benefits for their children, but children themselves do not have any entitlements.[1765]

For the sake of completeness, I should mention that children possessing Dutch citizenship, one of whose parents works as an irregular migrant worker, are insured under the AWBZ, provided they fulfil the residence requirement. There are usually also no practical obstacles to contacting the authorities and contracting insurance, since one parent is a Dutch citizen.[1766]

11.2.3.2. Nationals who engage in undeclared work

Dutch citizens residing in the Netherlands and engaging in undeclared work are covered by the AWBZ and are obliged/entitled to contract insurance under the ZVW.[1767] This is because the AWBZ is a form of general social insurance for which, primarily, inhabitancy in the Netherlands

[1760] I use the term 'lawfully admitted' here to mean residence in compliance with § 8 (a) - (e), (l) Aliens Act 2000.
[1761] § 5 (3) AWBZ.
[1762] The AWBZ simply refers to children. It does not specify their age or residence status or the requirement that they must be in an immigration procedure.
[1763] Explanatory Memorandum, Kamerstukken II 2007-08, 31 249, no. 3, pp. 19, 20, 26.
[1764] However, it should be pointed out that even if unlawfully present children were eligible under this provision, the field of application would be extremely limited. This is because, first, when one parent resides under a 'relatively stable' immigration status in the Netherlands, the child is eligible for a residence permit for family formation or reunification purposes – see subchapter 2.1.2. So the provision would only apply to children in an immigration procedure or to children whose parents did not make use of their right to apply for a residence permit for the child. Second, at least when the child is born abroad, both parents need a 'relatively stable' residence status – something which irregular migrant workers, with the exception of holders of a temporary ordinary residence permit, do not have.
[1765] Explanatory Memorandum, Kamerstukken II 2007-08, 31 249, no.3, p. 19.
[1766] I am ignoring special cases of foundlings or third-generation foreigners here.
[1767] It should be mentioned here that, unlike in Belgium, insured individuals who do not affiliate with a health insurer are, as *ultimum remedium*, *ex officio* affiliated. See Kamerstukken II 2009-10, 32 150, no. 4.

is decisive. The non-declaration of work presents neither a legal nor a practical obstacle for insurance.

At first sight, one may assume that subsection 3 (4) (b) ZVW may pose some difficulties for undeclared workers. It stipulates that no obligation to contract insurance under the ZVW exists for a private health insurer, when the health insurer previously terminated the contract due to non-payment of the premium at a fixed rate. This health insurer may refuse to contract insurance with such an individual for five years. However, in subchapter 5.2.1 we found that citizens who do not declare their work, and hence do not pay any or all of the income-related contributions that they should pay have no reason not to pay the premium at a fixed rate. Their undeclared work is not related to this contribution payment. Thus the exception of the contracting obligation under subsection 3 (4) (b) ZVW is of no particular relevance for black-economy workers.

12. The social risk of family

The financial burden of having and raising children is addressed in two ways in the Netherlands. First, the Sickness Benefits Act and the Work and Care Act provide for income replacement benefits during absence from work due to pregnancy or childbirth. Second, there are social security schemes which intend to compensate part of the cost of raising children. The most important one is the General Child Benefits Act.

The income replacement benefits for (expectant) mothers have already been analysed in the chapter on incapacity for work (chapter 9). This chapter therefore focuses on the General Child Benefits Act.

12.1. General Child Benefits Act (AKW)

12.1.1. Irregular migrant workers

The right to a child allowance is granted to insured persons.[1768] Insurance is required not only at the time of application, but also during the period of benefit receipt.[1769]

As under all general social insurance, those insured are, in the first instance, inhabitants of the Netherlands, and aliens are only regarded as insured if they have a certain status under Dutch immigration laws. As has been analysed in the context of general social insurance, aliens who are unlawfully present in the Netherlands are not insured.[1770, 1771] Irregular migrant workers lawfully residing in the Netherlands (category B), are only insured based on their inhabitancy in the following cases:

- presence in accordance with section 8 (a) Aliens Act 2000; or
- presence in accordance with section 8 (g) or (h) Aliens Act 2000, if they have applied for an extension of their residence permit or filed an objection or an appeal against the withdrawal of their residence permit, and used to stay in the country in accordance with section 8 (a) - (e), (l) Aliens Act 2000.[1772]

[1768] § 7 General Child Benefits Act.

[1769] The allowance is paid out per calendar quarter. § 11 (1) General Child Benefits Act stipulates that only those persons have a right to benefits for a calendar quarter who are insured on the first day of a calendar quarter

[1770] See subchapter 4.4.1.1. For the exclusion under the AKW scheme see § 6 (2), (3) and (4) General Child Benefits Act in conjunction with § 10, § 11 and § 24 Decree on the Extension and Restriction of the Category of Insured Persons in Respect of General Social Insurance Schemes.

[1771] The above-mentioned provision, which requires insurance during the period of benefit receipt, makes it superfluous to suspend benefit payment during periods of unlawful residence in the Netherlands – as is the case under the general social insurance schemes AOW and Anw. See § 19a (1) General Old Age Pension Act and § 46a (1) General Survivor's Benefits Act. Beneficiaries have to be insured on the first day of every calendar quarter for which benefits are received. Thus beneficiaries who lose their regular residence status do not qualify for a child allowance anymore after the end of the calendar quarter in which the residence status is lost. The difference between the AKW scheme and the AOW and the Anw schemes is, however, that under the first there is no right during periods of unlawful residence, whereas under the latter two schemes the right is only suspended. Suspension means that as soon as the foreigner regains lawful residence status or moves abroad, he or she gets the suspended benefit payments paid out retroactively. This is not the case under the AKW scheme.

[1772] See subchapter 4.4.1.1.

A few times, the Central Appeals Tribunal, which is the last judicial instance in social security matters in the Netherlands, has been confronted with the question as to whether the denial of child allowance due to the parents' immigration status is in compliance with international law. Thus far, the high court has not found any violation of international laws by which the Netherlands is bound. One case, in 2008, related to a parent who was staying lawfully in the Netherlands (section 8 (i) Aliens Act 2000 – short-term permission to stay during the free period for, usually, family visits or taking a holiday in the Netherlands), but not admitted to the country.[1773] The Central Appeals Tribunal found that there was no discrimination, as prohibited under the European Convention on Human Rights (ECHR). The Tribunal referred to its earlier findings that discrimination on the basis of nationality is justified in the context of the Linkage Act.[1774, 1775] In another case before the Central Appeals Tribunal in 2008, the applicant parent and his child were also residing lawfully in the Netherlands, but not admitted to the country.[1776] The interesting fact about this case was that the applicant invoked another Central Appeals Tribunal decision, where hardship allowance under the Work and Social Assistance Act (WWB) was granted to children with a precarious status of residence, on the basis that the relevant provision of the WWB was in contravention of the Convention on the Rights of the Child (CRC). This decision will be discussed below in subchapter 13.1.1. Here it is important to mention that the Central Appeals Tribunal held that the reference to the other decision was invalid, since the WWB provides social assistance as a last resort, while the AKB scheme, as a form of social insurance, is of a completely different nature. Moreover it found that under the WWB regime children may, exceptionally, be entitled to benefits themselves, while this is not the case under the AKB.

Concerning the child for whom the child allowance is granted, we can see that there is no requirement as to his or her immigration status. What is more, there are no eligibility conditions which could not be fulfilled by an unlawfully present child.[1777] Child allowance could therefore also be received for a child without status under Dutch immigration laws. It has already been outlined that there are situations where the parents are legal aliens and the child is unlawfully present in the Netherlands.[1778]

[1773] Centrale Raad van Beroep, 10 July 2008, LJN: BD8630.

[1774] See subchapter 4.2. and Centrale Raad van Beroep, 26 June 2001, LJN: AB2324, Administratiefrechtelijke Beslissingen 2001, 244, *Rechtspraak Sociale Verzekering* 2001, 216, *Uitspraken Sociale Zekerheid* 2001, 186.

[1775] In this case, the Central Appeals Tribunal also addressed the applicability of § 26 CRC (child's right to benefit from social security) and § 27 CRC (right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development). The Tribunal found that, in the light of the reservations made by the Dutch government regarding this provision, § 26 cannot provide the basis to confer an individual right to child allowance to the child. With regard to § 27, the Tribunal recalled that it had already held earlier that this provision does not have direct effect.

[1776] Centrale Raad van Beroep, 7 April 2008, LJN: BD0221.

[1777] § 7 (1) (a) General Child Benefits Act, basically, requires the child and the insured parent to be members of the same household. The question can be asked whether a child who is unlawfully present in the Netherlands can in legal terms be considered to be residing together with another person. Case law regards a joint household as a social-economic unit of cohabitating individuals. The decisive point is whether the individuals are actually cohabitating (*'feitelijke situatie van gezamenlijk wonen'*). See Centrale Raad van Beroep, 16 September 2005, LJN: AU3598. Consequently, the legal residence status does not affect a person's ability to be regarded as cohabitating in terms of the General Child Benefits Act.

[1778] See subchapter 2.1.2.

12.1.2. Nationals who engage in undeclared work

Insured status is required at the beginning and throughout the benefit period. Citizens who perform undeclared work are able to fulfil this condition, since insured status is not linked to work, but to inhabitancy. Also in practical terms, the non-declaration of work does not present an obstacle for insurance – as it is the case for employee social insurance, where the work first has to be proven. From this it follows that Dutch citizens who are inhabitants of the Netherlands and whose work is not declared may qualify for child allowances with respect to their children.

13. The social risk of financial need

The risk of not or no longer having the means necessary to live a decent life is addressed in this chapter. The Work and Social Assistance Act (WWB) is the general welfare act in the Netherlands. In addition, there are social assistance schemes which provide protection for particular groups of individuals. For us, the Act on Income Provisions for Older, Partially Disabled Unemployed Persons (IOAW) is relevant.[1779]

What is more, certain categories of foreigners receive assistance from the Dutch government under some special schemes. The reception of asylum-seekers and foreigners who are treated on a par with asylum-seekers is regulated in the Regulation on Services for Asylum-Seekers and Other Categories of Aliens (Rva 2005) in conjunction with the Act on the Central Agency for the Reception of Asylum-Seekers (Wet COA). Certain other lawfully present aliens who cannot make their living can fall back on the Regulation on Services for Certain Categories of Aliens (Rvb) in conjunction with the Wet COA.

Aliens who seek to voluntarily return to their country of origin may receive assistance under the Remigration Act[1780] and on the basis of the Return and Emigration of Aliens from the Netherlands Regulation[1781]. These remigration schemes will not be covered by this investigation, since, basically, only benefits during the return journey or after returning, *i.e.* in the country of destination, are provided.

13.1. Work and Social Assistance Act (WWB)

13.1.1. Irregular migrant workers

The right to assistance[1782] under the Work and Social Assistance Act is granted to indigent Dutch residents or indigent foreign residents who are treated on a par with Dutch citizens. Aliens are only treated on a par with Dutch citizens if they have a certain residence status under immigration law.[1783] Unlawfully present foreigners are thus excluded from the scheme's personal scope of

[1779] See chapter 1.
[1780] *Remigratiewet* – Wet van 22 april 1999, houdende regels inzake het treffen van voorzieningen ten behoeve van remigratie, Stb. 1999, no. 232.
[1781] *REAN-uitvoeringsregeling*, Stcrt. 2006, no. 84.
[1782] The WWB social assistance scheme basically consists of two types of benefits. First, general assistance (*algemene bijstand*), which is usually paid out as a cash benefit and only exceptionally takes the form of benefits in kind, such as accommodation (see Chapter 3 WWB). The cash benefit is paid out as a net amount. Social insurance contributions, including health insurance, are directly paid by the competent social assistance authority. See § 19 Explanatory Note to the WWB. Second, exceptional assistance (*bijzondere bijstand*), which is intended to cover necessary costs resulting from exceptional circumstances such as medical conditions (see Chapter 4 WWB). Extra costs resulting from medical conditions relate for instance to health insurance co-payments, medical devices or medical transportation. The eligibility criteria for general assistance are also applicable to exceptional assistance – see § 35 (1) WWB ('*onverminderd paragraaf 2.2.*'). What is more, municipalities are responsible for providing measures for (re)integration into the labour market. These include vocational training, subsidised work and internships. Taking part in these activities is a requirement for beneficiaries of WWB assistance. On the other hand it is also their right to do so – see § 10 WWB.
[1783] § 11 (2), (3) WWB and § 35 (1) WWB in conjunction with the Decree on the Equal Footing of Aliens in the WWB, IOAW, IOAZ and WWIK (*Besluit gelijkstelling vreemdelingen WWB, IOAW, IOAZ en WWIK* – Besluit van

application. Irregular migrant workers lawfully residing in the country (category B), by contrast, may possess an immigration status which allows them to fall within the scheme's scope *ratione personae*. This relates to category B workers who

- reside[1784] in the country with a temporary ordinary residence permit;[1785]
- reside in the country and are awaiting a decision on the extension of a temporary residence permit[1786], and had previously been admitted to the Netherlands;[1787] and
- reside in the country and are awaiting a decision on their objection or appeal against the withdrawal of their permission to stay in the Netherlands[1788], and had previously been admitted to the Netherlands.[1789]

Pursuant to subsection 16 (1) Work and Social Assistance Act, the local executives may grant assistance to persons who have no right to social assistance under the Act, but where there are compelling reasons to assist them. The competent authorities are basically free to decide how much assistance they provide, and to whom. The only legal requirement is that assistance must not be provided to aliens other than those who are treated on a par with Dutch citizens – see subsection 16 (2) Work and Social Assistance Act. In other words, foreigners residing unlawfully and foreigners with a precarious residence status are ineligible for assistance under subsection 16 (1).

In recent years, court of lower instance have ruled on a few occasions that subsection 16 (2) Work and Social Assistance Act is unlawful and have paved the way for social assistance pursuant to subsection 16 (1) Work and Social Assistance Act for foreigners with a precarious immigration status.[1790] However, the Central Appeals Tribunal, which is the appeal court, has not considered subsection 16 (2) to be against international law – at least not when dealing with *adult* foreigners without immigration status or with a precarious immigration status. Let me illustrate this with two relevant decisions of the Central Appeals Tribunal, issued in 2010. The first decision related to an adult foreigner, with a precarious residence status in the Netherlands, who suffered from a mental health problem. The Central Court of Appeal acknowledged that the medical situation of the appellant was such that he belonged to the category of vulnerable persons, who in particular have a

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27 april 1998, tot het voor de toepassing van de Wet werk en bijstand, de Wet inkomensvoorziening oudere en gedeeltelijk arbeidsongeschikte werkloze werknemers, de Wet inkomensvoorziening oudere en gedeeltelijk arbeidsongeschikte gewezen zelfstandigen en de Wet werk en inkomen kunstenaars gelijkstellen van vreemdelingen met Nederlanders), Stb. 1998, no. 308.

[1784] Beneficiaries must reside in the Netherlands. The assistance is only continued during stays abroad which are temporary, but in any case no longer than four weeks per calendar year. § 11 (1), § 13 (1) (e) and § 13 (4) WWB.

[1785] Their lawful presence is based on § 8 (a) Aliens Act 2000.

[1786] Their lawful presence is based on § 8 (g) Aliens Act 2000.

[1787] Admittance means the issuance of a residence permit or residence as an EU citizen under EU law or as a Turkish citizen under Association Decision 1/80. See § 8 (a) - (e), (l) Aliens Act 2000.

[1788] Their lawful presence is based on § 8 (h) Aliens Act 2000.

[1789] Foreigners with these immigration statuses are eligible for benefits according to § 11 (2) WWB and § 1 Decree on the Equal Footing of Aliens in the WWB, IOAW, IOAZ and WWIK.

[1790] See Rechtbank Rotterdam, 30 November 2009, LJN: BK4787 and Rechtbank Amsterdam, 15 July 2010, LJN: BN2949. In the first case the court regarded § 16 (2) WWB as in violation of Article 8 of the ECHR, which sets out the right to respect for private in family life. The case related to a foreigner who was in a poor state of health and who had permission to await a decision on his appeal against an immigration decision (lawful stay pursuant to section 8 (h) Aliens Act 2000). In the second case, a foreign mother received a letter from the Secretary of State of Justice telling her that she would receive a residence permit, which she eventually did three months later. The court considered this promise of the Secretary of State to be sufficient to rule out any violation of the rationale of the Linkage Act.

right to protection of their private and family life pursuant to Article 8 ECHR.[1791] In this legal case, the municipality, at its discretion, provided the appellant with accommodation in a dormitory and pocket money (EUR 15 per week) – outside the legal framework of the WWB. The Central Appeals Tribunal found that, given his mental disorder, accommodation in a dormitory was bad for his health and prevented the appellant from leading a normal private and family life. Even so, the Tribunal did not find a violation of Article 8 ECHR because, first, States enjoy a certain margin of appreciation under Article 8 ECHR and, second, it is up to the legislators to find a solution which suits the needs of the appellant. The Tribunal followed the reasoning of the Dutch legislators and held that, given its objectives, the WWB is not the right legal framework to provide assistance to foreigners with a precarious immigration status. However, the Central Appeals Tribunal stated clearly that in order to meet the obligation under Article 8 ECHR, assistance under other legal frameworks must be provided to the applicant. The Tribunal referred to the Regulation on Services for Certain Categories of Aliens (*Rvb*) and the Act on Social Support (*Wet maatschappelijke ondersteuning, WMO*).[1792, 1793] The second decision of the Central Appeals Tribunal related to an adult foreigner who was staying lawfully in the Netherlands, since his deportation order had been stayed for medical reasons. The appellant was wheelchair-bound and completely dependent on care. In this case too, the Tribunal found that the appellant belonged to the category of vulnerable persons, who in particular have a right to protection of their private and family life pursuant to Article 8 ECHR. However, the Central Appeals Tribunal did not find the appellant to be in a situation which prevented him from leading a normal private and family life, not least because his mother was caring for him and supporting him financially. Therefore no violation of Article 8 ECHR was found.[1794] The case law illustrates that the Central Appeals Tribunal is not inclined to provide assistance under the Work and Social Assistance Act to foreigners with ineligible immigration status. If the situation of an ineligible foreigner is found to be in contravention of international human rights law, the Central Appeal Tribunal instead recommend assistance under other legal regimes.[1795]

A different situation arises for *children* – which might be interesting in the context of our research with respect to children of irregular migrant workers. Here, the Central Appeals Tribunal has found subsection 16 (2) WWB to be in violation of international law in certain circumstances. It should be noted that, apart from a few exceptions, the minimum age for social assistance under the WWB scheme is eighteen years.[1796] Still, since subsection 16 (1) WWB provides for the possibility to grant social assistance completely at the discretion of the local executives (except for the requirement of a certain immigration status), there is no such minimum age when subsection 16 (1) WWB applies. In other words, when there are compelling reasons, children too may be entitled to social assistance. In 2006, the Central Appeals Tribunal had to rule whether subsection 16 (2) WWB is in contravention of the non-discrimination provision (Article 2 (1)) under the UN

[1791] For the interpretation of Article 8 ECHR, the Central Appeals Tribunal regularly refers to the European Court of Human Rights decision Domenech Pardo v. Spain. See European Court of Human Rights, Decision of 3 May 2001, *Domenech Pardo v. Spain*, Application No. 55996/00.
[1792] Wet van 29 juni 2006, houdende nieuwe regels betreffende maatschappelijke ondersteuning, Stb. 2006, no. 351.
[1793] Centrale Raad van Beroep, 19 April 2010, LJN: BM1992.
[1794] Centrale Raad van Beroep, 21 September 2010, LJN: BN8725.
[1795] For further case law see Centrale Raad van Beroep, 22 July 2008, LJN: BD8381; Centrale Raad van Beroep, 11 June 2009, LJN: BI9325; Centrale Raad van Beroep, 13 April 2010, LJN: BM1658; Centrale Raad van Beroep, 11 May 2010, LJN: BM6748; Centrale Raad van Beroep, 22 June 2010, LJN: BN0258; Centrale Raad van Beroep, 14 July 2010, LJN: BN1274; and Centrale Raad van Beroep, 28 September 2010, LJN: BN9571.
[1796] § 13 WWB.

Convention on the Rights of Children (CRC),[1797] in that children with a precarious residence status are excluded from assistance under subsection 16 (1) WWB.[1798] This case related to a foreign family who, after staying unlawfully in the Netherlands for many years, applied for a residence permit. During this application procedure they were staying lawfully in the Netherlands, but did not fall into one of the eligible categories of aliens according to subsections 11 (2) and (3) WWB. The Tribunal found, at first, that there was difference of treatment on grounds of nationality. Moreover, it held that the situation was distinct from that of unlawfully present aliens. The Netherlands, although it had not yet admitted this family, had at least accepted that they were staying on Dutch soil. It therefore had a duty to care for the children, derived from the CRC. Thereafter the Tribunal investigated whether this difference of treatment could be justified, by looking at the objectives of the Linkage Act. Finally it concluded that, due to the fact that the children were not unlawfully present in the country and were, because of their young age, unable to choose their place of stay, exclusion from assistance was disporportional to the aims of the Linkage Act. It consequently concluded that there had been a violation of Article 2 (1) CRC.[1799]

As indicated before, in this legal case, the Central Appeals Tribunal also addressed the issue of unlawfully residing children and their right to assistance. It held that their situation must be distinguished from the situation of children who have not been admitted to the Netherlands, but who are staying lawfully in the country. According to the Tribunal, the exclusion from assistance of unlawfully present children – even if they are not accompanied by parents – was proportional to the aims of the Linkage Act; and this is even true against the background of the CRC. The right to assistance could provide an incentive for a continued unlawful stay of the child and of his or her parents too. In the opinion of the Tribunal, this would thwart Dutch immigration policy. The

[1797] The non-discrimination provision was read against the background of § 2 (2), 3 and § 27 CRC. *Gijsbert Vonk* criticised this, arguing that § 27 CRC had not been tested independently from the non-discrimination provision. He argued that an independent investigation would have led to another result, namely that every child – irrespective of his or her immigration status – should be entitled to assistance pursuant to § 16 (1) WWB. See Gijsbert Vonk, "Ongewenste kinderen: Opmerkingen naar aanleiding van CRvB 24 januari 2006," *Sociaal Maandblad Arbeid*, vol. 61, no. 4 (2006), pp. 131-34. For the direct effect of § 27 CRC, but also for the opinion that § 16 (2) WWB is contrary to § 2 (1) CRC, see Lieneke Slingenberg, "Illegale kinderen en recht op bijstand in het licht van het IVRK," *Migrantenrecht*, vol. 21, no. 2 (2006), pp. 56-57.

[1798] Centrale Raad van Beroep, 24 January 2006, LJN: AV0197, *Uitspraken Sociale Zekerheid* 2006, 85.

[1799] The Ministry of Social Affairs and Employment had to react to this judgment. However, it felt it would be in appropriate to include foreign children who were lawfully resident, but had not (yet) been admitted in the scope of the Work and Social Assistance Act. Its reason for arguing this was that the WWB aims to get beneficiaries back to work; but foreign children in these categories do not have permission to work in the Netherlands. See Explanatory Notes to the amendment of the Decree on Benefits for Certain Categories of Aliens in the Decree of the Minister of Justice, 22 December 2006, Stcrt. 2006, no. 253. As a consequence, the Minister of Justice amended the Regulation on Services for Certain Categories of Aliens (*Rvb*). By this amendment, foreign minors who live with at least one parent or guardian and who are staying in the Netherlands according to § 8 (f), (g) or (h) Aliens Act 2000 are entitled to a financial allowance (*financiële toelage*) under this regulation, provided they are not entitled to any other governmental benefits. See below, subchapter 13.4. and see § 2 (1) (e) in conjunction with § 3 (2) Decree on Benefits for Certain Categories of Aliens. Following this amendment, there was the question as to whether entitlement to a financial allowance under the Rvb now excluded the young beneficiaries from entitlement to assistance under § 16 WWB. § 15 (1) WWB revokes the right to WWB assistance if the person can rely on other social services, which are considered to be suitable and sufficient for the person concerned. Thus the question was whether a financial allowance under the Rvb is suitable and sufficient for children in such a situation. The Central Appeals Tribunal answered this question in 2010. According to the Tribunal, children in such situations are not entitled to assistance under § 16 (1) WWB. They are only entitled to a financial allowance under the Rvb. It is up to the Central Agency for the Reception of Asylum-Seekers (COA) to decide whether the financial allowance under Rvb is sufficient in the light of Article 3 (1), (2) and Article 27 (3) CRC. See Centrale Raad van Beroep, 20 July 2010, LJN: BN3318.

Central Appeals Tribunal confirmed this point of view in subsequent cases.[1800] But it also pointed out that there might be circumstances where the exclusion of unlawfully present children could not be accepted anymore. In late 2008, the Tribunal identified the impossibility of returning to the country of origin as a situation in which even unlawfully present children could rely on assistance.[1801] However, thus far, no such exceptional situation has been found by case law.

Thus weak immigration status or the complete lack of such status prevents most irregular migrant workers from gaining access to WWB benefits. The only groups who are eligible due to their immigration status are category B workers who are, first, former regular residents who are awaiting their decision for an extension of their residence permit or their final decision in an appeal procedure, and, second, foreigners with a temporary ordinary residence permit which does not allow them to work in the Netherlands, such as au pairs or participants in a cultural or youth exchange programme.[1802] However, by definition irregular migrant workers have income from work. This may present an obstacle for meeting the means test.[1803] Only if their income from work is below the relevant threshold can they qualify for benefits. If their income is not declared and the local executives are misled about the real financial position of the applicant, the same rules apply as for Dutch citizens who work in the black economy.

The fact that irregular migrant workers are not allowed to work in the Netherlands does not influence the eligibility decision – but it might affect the amount of the benefit. Beneficiaries who do not comply with back-to-work obligations may have their benefits reduced.[1804] Since category B workers who exceptionally qualify for benefits do not have permission to lawfully take up employment in the Netherlands, they might be subject to this sanction. However, whether or not and to what extent this sanction is applied is at the discretion of Dutch municipalities. Case law or policy guidance on how to deal with foreign beneficiaries without work permission has to our knowledge not been provided.

The fact that a beneficiary has to care for children also has a bearing on eligibility and the benefit rate – but only for childless single people. Eligibility depends, *inter alia*, on the family income, which must be lower than the social assistance standard. The social assistance standard for single parents is higher than the one for childless single people.[1805] Consequently, single parents can qualify more easily, because their allowed income is higher. In addition, they receive a higher benefit, since the benefit rate is equal to the difference between the social assistance standard and the applicant's income. In order to fall under the single parent's standard, the parent must, most

[1800] See Centrale Raad van Beroep, 9 October 2006, LJN: AY9940; Centrale Raad van Beroep, 18 March 2008, LJN: BC7455; Centrale Raad van Beroep, 22 December 2008, LJN: BG8776; Centrale Raad van Beroep, 22 December 2008, LJN: BG8789; and Centrale Raad van Beroep, 30 March 2010, LJN: BM1922.
[1801] Centrale Raad van Beroep, 22 December 2008, LJN: BG8776.
[1802] For an explicit confirmation of the eligibility of foreigners with these immigration statuses, see a letter from the Secretary of State of Affairs and Employment: Staatssecretaris van Sociale Zaken en Werkgelegenheid, "Verzamelbrief mei 2006," (INTERCOM/2006/44364). Available at: http://docs.minszw.nl/pdf/190/2006/190_2006_3_9172.pdf.
[1803] For the requirement of indigence see § 19 WWB.
[1804] § 18 (2) WWB. Back-to-work obligations apply to beneficiaries between eighteen and sixty-five years of age. See § 9 (1) WWB. Back-to-work obligations comprise the duty to try to find and to accept suitable work – including registration with the Employee Insurance Administration Institution as a job-seeker – and the duty to participate in measures aimed at labour market (re)integration. However, for compelling reasons beneficiaries can be released from these obligations. Single parents with children below twelve years of age may only be required to comply with back-to-work obligations under certain conditions. See § 9 (4) WWB.
[1805] See § 20 ff. WWB.

notably, receive child allowance under the General Child Benefits Act. We have already seen that parents can also qualify for child allowance if their children are unlawfully present in the country. The social assistance standard for single parents must therefore be applied to parents who care for their unlawfully present children. This view has been confirmed by the Central Appeals Tribunal. It is worth mentioning that the Tribunal noted that the restrictions in the Linkage Act address illegal aliens who apply for public benefits. But such cases relate not to illegal aliens, but to Dutch citizens or legal aliens who have to care for their unlawfully present children. Therefore, according to the Tribunal, it is not the social assistance standard for childless single people, but the one for single parents that must be applied.[1806]

Incidentally, foreigners staying in the Netherlands with a temporary ordinary residence permit run the risk of losing this permit, if they are no longer – autonomously and permanently – in funds.[1807] Receipt of social assistance under the WWB, as under the IOAW and the WAJONG, serves as an indication that this financial requirement for residence in the Netherlands is not being fulfilled.[1808] Therefore, those category B workers who are eligible for social assistance under the Work and Social Assistance Act may be reluctant to apply for it.

13.1.2. Nationals who engage in undeclared work

Dutch black-economy workers are basically eligible for WWB benefits due to their Dutch citizenship – provided they reside in the Netherlands. It is worth mentioning that the term 'resident' (*woonachtig*) under section 11 WWB has a different meaning from the concept of residence under general social insurance. The notion of residence under the WWB coincides with the notion of residence under the Dutch Civil Code.[1809] This means that a person is resident at the place where the person has his or her domicile (*woonstede*).[1810] If the person has no domicile, then he or she is resident where he or she is actually staying (*werkelijk verblijft*).[1811] This concept of residence is much broader than the concept of residence under general social insurance. The latter, as outlined in subchapter 4.1.1., requires the existence of a strong bond with the Netherlands, expressed by social and economic ties with the country. This can take years to acquire.[1812]

The interesting question with respect to Dutch nationals who engage in undeclared work is whether the fact that work is not declared to the Dutch Tax Administration, which is competent for levying social insurance contributions, has consequences for the black-economy worker's status under the Work and Social Assistance Act. The income of the applicant is decisive for both the eligibility and amount of general social assistance. Black-economy workers will be disinclined to declare their black income for WWB purposes, and may therefore be able to fraudulently collect benefits to which they are legally not entitled. This non-declaration of income infringes

[1806] See Centrale Raad van Beroep, 31 August 2004, LJN: AQ8801 and Centrale Raad van Beroep, 15 March 2005, LJN: AT3352.
[1807] See § 19 in conjunction with § 18 (1) (d) Aliens Act 2000.
[1808] Incidentally, income from work in violation of the Aliens Employment Act or income from work for which no taxes or social insurance contributions are paid is also not considered as autonomous income.
[1809] See Klosse and Noordam, *Socialezekerheidsrecht*, p. 459.
[1810] § 1:10 (1) Civil Code.
[1811] *Ibid*.
[1812] See Klosse and Noordam, *Socialezekerheidsrecht*, p. 459.

information obligations under the Work and Social Assistance Act[1813] and can, if it is disclosed, be punished by withdrawal of assistance[1814] and by the obligation to refund assistance already provided[1815].

However, if black-economy workers correctly declare their income from black-economy work to the municipality when applying for WWB assistance, it is very likely that the municipality will find out that the income has not been declared for tax and social security purposes. This is because municipalities must check information on the applicant's income with the Tax Administration.[1816] Although this has no consequences under the Work and Social Assistance Act, it will have consequences under social insurance and tax laws. The municipalities are obliged to notify the tax authorities and the social security authorities in such cases.[1817]

13.2. Act on Income Provisions for Older, Partially Disabled Unemployed Persons (IOAW)

13.2.1. Irregular migrant workers

The Act on Income Provisions for Older, Partially Disabled Unemployed Persons together with the Decree on the Equal Footing Aliens in the WWB, IOAW, IOAZ and WWIK excludes most aliens who have not been admitted to the Netherlands from social assistance.[1818] This means that unlawfully present irregular migrant workers (category A) are ineligible for benefits. Among category B workers, the only foreigners to meet the immigration status requirements are those who reside in the Netherlands under a temporary ordinary residence permit (section 8 (a) Aliens Act 2000), or who used to stay in accordance with section 8 (a) - (e), (l) Aliens Act 2000 and who are now residing in the country and applying for an extension of their temporary residence permit (section 8 (g) Aliens Act 2000), or who are now residing in the country and objecting to or appealing against the withdrawal of their right to reside in the Netherlands (section 8 (h) Aliens Act 2000). In other words, the same categories of foreigners are included under the IOAW as under the Work and Social Assistance Act (WWB).[1819]

The purpose of the IOAW scheme is to provide assistance to people who have a weak position on the labour market. It therefore targets older unemployed people who have exhausted their right to unemployment benefits or who are no longer entitled to incapacity for work benefits because their state of health has improved. Thus IOAW eligibility is linked to a former eligibility under the

[1813] See § 17 (1) WWB.
[1814] § 54 (3) (a) Work and Social Assistance Act.
[1815] § 58 (1) (a) Work and Social Assistance Act.
[1816] Information on an applicant's income is, in the first instance, provided by the applicant him- or herself. The applicant has to declare the income and support his or her statements by documents, such as bank statements. This information must be submitted to the Employee Insurance Administration Institution, which is in charge of handling applications. This authority then transmits the application to the municipalities. In order to avoid fraud, municipalities must check the information provided with the Tax Administration. See for instance Gemeente Graft-De Rijp, "Nota Misbruik & Oneigenlijk gebruik," February 2007, § I.1; or Gemeente Rijswijk, "Nota misbruik en oneigenlijk gebruik van gemeentelijke regelingen gemeente Rijswijk," May 2008, p.11. See also § 64 Work and Social Assistance Act for the legal basis of the data exchange.
[1817] See § 66 WWB.
[1818] § 6 (1) (b) and § 6 (3) IOAW in conjunction with § 1 of the Decree on the Equal Footing of Aliens in the WWB, IOAW, IOAZ and WWIK.
[1819] See subchapter 13.1.1.

Unemployment Insurance Act or the Work and Income According to Labour Capacity Act.[1820] This is a requirement irregular immigrant workers cannot fulfil, as they are not insured under those employee social insurance schemes.[1821]

The only way irregular migrant workers, and then only a very specific group of irregular migrant workers, may qualify for IOAW benefits, is if their immigration status has changed over time: from a regular to an irregular one. In more detail, the possible qualifying situation relates to aliens who were insured under employee social insurance due to a regular status of stay and work, amongst other things. Subsequently, these aliens must have become unemployed or incapacitated for work and must have qualified for respective benefits. While receiving benefits or thereafter their immigration status must have changed.[1822] To be more precise, they must have lost their right to stay in accordance with section 8 (a) - (e), (l) Aliens Act 2000 and must now be objecting to or appealing against the withdrawal of their right to stay or be applying for an extension of their right; or they must now be in possession of a temporary ordinary residence permit which does not allow them to work. In these exceptional cases, they will pass the immigration status requirement and the requirement of former eligibility under the Unemployment Insurance Act or the Work and Income According to Labour Capacity Act. Yet they may still face some obstacle, such as meeting the income test,[1823] taking part in labour market reintegration programmes, registering as job-seekers and trying to find suitable work and accepting it.[1824] What is more, since under Dutch immigration laws temporary ordinary residence permits may be withdrawn or not extended if the alien is no longer in funds, foreigners with this immigration status will not be inclined to apply for IOAW assistance.[1825]

Applicants must meet an income test, *i.e.* their and their partner's income from work and related to work must be lower than a certain basic amount. What is more, the IOAW cash benefit is equal to the difference between the income and the basic amount. The basic amount depends, like the standard for national social assistance for the WWB, on the family situation amongst other things. The basic value for singles with children is higher than the one for childless single people.[1826] This means that their extra financial burden caused by the upbringing of children is taken into consideration. The term 'child' is defined in section 4 (c) IOAW. It basically corresponds to the definition under the WWB. Reference to the immigration status of the child is not made. Hence single parents who care for unlawfully present children or children with a weak immigration status are to be assessed at the basic amount for single parents, and not at the one for childless single people.

[1820] § 2 IOAW.
[1821] See subchapters 9.4. and 10.1.
[1822] The IOAW does not require the IOAW application to be submitted immediately after the receipt of WW or Wet Wia benefits ends. See Klosse and Noordam, *Socialezekerheidsrecht*, p. 448-49.
[1823] § 5 IOAW.
[1824] See § 37 (1) IOAW. The IOAW and corresponding decrees of municipalities do not give an answer as to whether persons without work authorisation could comply with these obligations. It is therefore up to the municipalities to decide whether an alien without permission to work in the Netherlands is relieved from back-to-work requirements or from sanctions.
[1825] See § 18 (1) (d) Aliens Act 2000 and § 19 in conjunction with § 18 (1) (d) Aliens Act 2000.
[1826] See § 5 IOAW.

13.2.2. Nationals who engage in undeclared work

Nationals who work on the black are considered for IOAW benefits due to their Dutch citizenship – provided they are residents of the Netherlands. The fact that work is performed without informing the social security authorities has the same consequences under the IOAW as under the Work and Social Assistance Act – see subchapter 13.1.2. Municipalities are also required under the IOAW to check the information on income provided by the applicant with the Tax Administration.[1827] If there are any discrepancies, municipalities must inform the tax and social security administrations about possible fraud.[1828]

Thus black-economy workers who do not declare their income for IOAW purposes may, by misleading the authorities, collect (higher) benefits to which they are not actually entitled. This is in violation of the law. Subsection 13 (1) IOAW requires applicants and beneficiaries to notify the authorities of all facts and circumstances which may be of relevance for the right to or the amount of the benefit. Non-compliance will be punished by an administrative fine.[1829]

If black-economy workers correctly declare their income to the Employee Insurance Administration Institution and the municipalities, they act in accordance with the IOAW. But then it is very likely that the municipality will detect the mismatch between the income reported by the applicant and the income information provided by the Tax Administration. In such cases, the municipality is obliged to inform the tax and social security authorities about possible fraud.

13.3. Regulation on Services for Asylum-Seekers and Other Categories of Aliens (Rva 2005)

13.3.1. Irregular migrant workers

The Rva 2005 in conjunction with the Wet COA, in the first instance, provides for the reception of asylum-seekers during their application procedure. In addition, certain other foreigners, mostly foreigners closely connected with the asylum procedure, enjoy assistance under this legislation.[1830]

Asylum-seekers as well as the foreigners who are treated on a par with asylum-seekers under the Rva 2005 are foreigners who are lawfully present in the Netherlands. Their immigration status is rather weak, but they are staying in the country in compliance with the Aliens Act.[1831] Unlawfully

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[1827] See, for instance, Gemeente Graft-De Rijp, "Nota Misbruik & Oneigenlijk gebruik," 13 February 2007, § I.1. See also § 45 (a) (c) IOAW for the legal basis of the data exchange.
[1828] § 47 IOAW.
[1829] § 20a (1) IOAW.
[1830] The Central Agency for the Reception of Asylum-Seekers (COA) provides housing for asylum-seekers and foreigners treated on a par with asylum-seekers under the Rva 2005, through a network of special reception centres. In addition, education, sickness insurance coverage and a small amount of pocket money for food and clothing is provided. The sickness insurance matches, more or less, the basic package under the Health Care Insurance Act (ZVW) and the General Exceptional Medical Expenses Act (AWBZ). The amount of the pocket money depends on whether or not food is provided at the centre as well as on the age and family situation.
[1831] § 3 (3) Rva 2005 lists the eligible categories. They include aliens who, based on section 64 Aliens Act 2000, cannot be expelled from the Netherlands due to their or their family members' state of health (f); aliens who are staying in the Netherlands according to section 8 (f) or (h) Aliens Act 2000, but who are factually in the same situation as the previous category, *i.e.* they cannot be expelled from the Netherlands due to their or their family members' state of health (g); aliens whose application for a temporary or permanent asylum residence permit has been denied, but for

present irregular migrant workers (category A) are thus excluded from the scheme's personal scope of application simply because of their irregular immigration status. However, exceptions exist for certain foreigners who lose their lawful immigration status while benefiting from the Rva 2005 regime. This concerns rejected asylum-seekers and foreigners who are no longer considered to be unable to leave the country due to their or their family members' state of health. According to subsection 7 (1) (b) Rva 2005, the right to reception for asylum-seekers ends if the application for asylum is denied and the foreigner can be deported ('*rechtmatig verwijderbaar*'). Because foreigners can only be deported if they have no lawful residence status and if they do not leave the Netherlands voluntarily within, in general, four weeks,[1832] rejected asylum-seekers may continue to receive reception for up to four weeks after losing their regular residence status.[1833] The situation is similar for aliens who are no longer protected from expulsion due to their or their family members' state of health and who are no longer present in the country in accordance with section 8 (j) Aliens Act. Subsection 7 (1) (d) Rva 2005 rules that reception continues to be provided for a further four weeks after the loss of the status in accordance with section 8 (j) Aliens Act.[1834]

Category B workers, by contrast, have been identified as foreigners with a weak immigration status, which does not give them the authorisation to work in the Netherlands.[1835] Amongst the eligible categories of foreigners under subsection 3 (3) Rva 2005, most of them either must obtain an authorisation in order to work in the country or are excluded from such an authorisation from the outset. In other words, these foreigners may take up work in violation of the Aliens Employment Act and hence fall under our category B.

Still, foreigners who have income from work, such as irregular migrant workers, are not the target group of the Rva 2005 assistance scheme. This is expressed by the rule that asylum-seekers and other qualifying aliens who stay in a reception centre must reimburse the centre for expenses related to the benefits received, if those aliens have means above a certain threshold[1836] or have income other than child allowance under the AKW.[1837] Staying in a reception centre, in turn, is a

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whom the Minister of Justice has decided to continue reception (h); aliens whose application for a temporary or permanent asylum residence permit has been denied, but who cannot be expelled due to EC Council Directive 2001/55 on temporary protection in the event of a mass influx of displaced persons (i); and asylum-seekers during their rest and preparation period according to section 8 (m) Aliens Act 2000 (o). The only category of aliens which is not necessarily staying in compliance with the Aliens Act 2000 is unaccompanied minors whose application for asylum has been rejected in the application centre procedure (which is the initial assessment that is made within eight days). Such a rejection may lead to an unlawful stay. However, if the minor appeals against this decision and applies for a stay of execution of the decision, the minor has a lawful residence status in the country from the moment that the judge grants suspensive effect. Yet if there is no appeal or during the period until suspensive effect is granted, such unaccompanied minors have a right to reception, although their stay is in contravention of Dutch immigration laws. However, unaccompanied minors are outside the scope of our research. See introduction to Part II of this thesis.

[1832] See § 62 (1) and § 63 (1) Aliens Act 2000.

[1833] The same is true, pursuant to § 7 (1) (f) Rva 2005, for rejected asylum-seekers who are no longer deemed to be lawfully in the Netherlands on the basis of § 45 (4) Aliens Act. For this immigration category see above, subchapter 2.1.1.

[1834] For these borderline cases where unlawfully present persons are granted reception under the Rva 2005, see also the excellent article of Lieneke Slingenberg, "Koppeling mislukt: Over onrechtmatig verblijf als basis voor uitsluiting van voorzieningen," *Migrantenrecht*, Vol 24, no. 6 (2009), pp. 234-36.

[1835] See subchapter 2.3.

[1836] For the threshold, see § 34 WWB.

[1837] See § 20 (2) Rva 2005. See also § 10 (b) Rva 2005 and Regulation on the contribution payable by asylum-seekers with income and means (*Regeling eigen bijdrage asielzoekers met inkomen en vermogen 2008* – Regeling van de

precondition for the reception of most benefits, such as pocket money, sickness insurance and the one-off payment for clothing.[1838] This combination – *i.e.* on the one hand benefits only when staying in a reception centre and on the other hand repayment of benefits if one has income when staying in a reception centre – makes it difficult for irregular migrant workers with an eligible immigration status to actually benefit from the Rva 2005 scheme. Living in a reception centre implies a certain degree of supervision and control. This may present an obstacle to performing unlawful and undeclared work – not least because reception centres may have an incentive to take a closer look at the income of their beneficiaries. Or, conversely, this combination may make it more likely that qualifying aliens who perform unlawful work are not living in a reception centre, and thus do not receive reception benefits.

13.3.2. Nationals who engage in undeclared work

The COA programme is a special assistance scheme for asylum-seekers and certain other aliens. Dutch citizens are excluded from this programme – see section 3 Wet COA in conjunction with section 12 Wet COA and section 3 Rva 2005. They can, however, rely on social assistance under the WWB.

13.4. Regulation on Services for Certain Categories of Aliens (Rvb)

13.4.1. Irregular migrant workers

The Rvb scheme was introduced in 1998, to assist certain groups of aliens who are lawfully residing in the Netherlands, but who, as a result of the introduction of the Linkage Act, cannot fall back on social assistance.[1839] Subsection 2 (1) Rvb lists seven classes of aliens who fall within the scheme's personal scope of application. These are, under certain circumstances:

- victims of human trafficking who stay in the Netherlands in accordance with section 8 (f) or (h) Aliens Act 2000 and who cooperate in criminal proceedings against trafficking in human beings, or victims of human trafficking who stay in accordance with section 8 (k) Aliens Act 2000;
- witnesses of trafficking in human beings whose presence in the Netherlands is necessary for the criminal proceedings and who stay in the country in accordance with section 8 (f) or (h) Aliens Act 2000;
- aliens who have applied for a temporary ordinary residence permit on the basis of family reunification and who comply with the requirements for a visa for immigration purposes (*machtiging tot voorlopig verblijf*);
- aliens who – after or in addition to an application for asylum – applied for a residence permit before 1 July 1998, on which the Immigration and Naturalisation Service still has not reached a decision. The alien must be lawfully present in the Netherlands, but not in accordance with section 8 (a) - (e) Aliens Act 2000;

Staatssecretaris van Justitie van 12 november 2008, nr. 5557004/08, houdende bepalingen met betrekking tot eigen bijdrage asielzoekers met inkomen en vermogen), Stcrt. 2008, no. 228.

[1838] § 13 (1) Rva 2005. Only in exceptional cases can the reception centre deviate from this rule. See § 13 (2) Rva 2005.

[1839] The Minister of Justice issued the Regulation on Services for Certain Categories of Aliens (Rvb) on the basis of § 3 (2) Wet COA.

- accompanied minors, *i.e.* aliens up to the age of eighteen who are staying with at least one parent or person who cares for them, provided they neither fall into the third category nor can rely on any other statutory social services. The minor must be lawfully present in the Netherlands in accordance with section 8 (f), (g) or (h) Aliens Act 2000;[1840]
- aliens who in the context of honour-related violence, of domestic violence or of being a victim of trafficking in human beings are present in accordance with section 8 (f), (g) or (h) Aliens Act 2000, provided they stay at a shelter for battered women; and
- aliens who in the context of honour-related violence, of domestic violence or of trafficking in human beings are present under a privileged status or as a Community national in accordance with section 8 (e) Aliens Act 2000, provided they stay at a shelter for battered women.

All but one of these categories of foreigners are eligible for both a financial allowance (*financiële toelage*)[1841] and sickness insurance[1842]. Only accompanied minors are only eligible for financial allowance.[1843]

All qualifying categories concern foreigners staying lawfully in the country. As a consequence, category A workers cannot fall back on this scheme. Category B workers, by contrast, can belong to the scheme's personal scope of application. All six categories concern aliens with a precarious residence status, who are usually not allowed to work in the Netherlands.[1844] If such aliens, despite the prohibition on doing so, take up employment, they correspond with our category B workers. Hence, based on their immigration status and their specific situation, they fall within the Rvb scheme's personal scope of application. The fact that they do not have permission to work in the Netherlands does not influence their eligibility in any way. However, in order to qualify for Rvb

[1840] For case law of courts of lower instance which has granted accompanied minors assistance under the Rvb under exceptional circumstances even when they were unlawfully present in the country, see Rechtbank 's-Gravenhage, 7 December 2007, LJN: BC2933. These decisions related to minors who were awaiting a decision in a 2007 amnesty procedure, which was intended to put a stop to asylum application procedures which had been pending for many years. See Regulation on the Clearance of the Backlog of Cases under the Former Aliens Act – *Regeling afwikkeling nalatenschap oude Vreemdelingenwet*, Stcrt. 2007, 111 (this regulation has been incorporated into the Aliens Act Implementation Guidelines 2000 B14/5). The decision of the court of lower instance was quashed in appeal by the Council of State. However, the Council of State unfortunately did not address the question as to whether these accompanied minors fall within the personal scope of application of Rvb. See Raad van State, 29 April 2008, LJN: BD1538.

[1841] Basically, the financial allowance amounts to a percentage of the social assistance standard under the Work and Social Assistance Act. For the social assistance standard, see subchapter 13.1.1. The percentage depends on the alien's category, the family situation and/or the age of the applicant. Only accompanied minors under subsection 2 (1) (e) Rvb receive an allowance equal to the full social assistance standard under the Work and Social Assistance Act (for single people between eighteen and twenty years of age), reduced by any income.

[1842] The sickness insurance has to be contracted by the COA. Like asylum-seekers and foreigners treated on par with asylum-seekers under the Rva 2005, qualifying aliens under the Rvb receive health care insurance which resembles the package under the Health Care Insurance Act (ZVW) and the General Exceptional Medical Expenses Act (AWBZ).

[1843] As indicated in subchapter 13.1.1., accompanied minors have been included in the Rvb in response to the Central Appeals Tribunal judgment of 24 January 2006, which granted the right to social assistance to this group. Health care insurance was not awarded, so accompanied minors were not also granted the right to health care insurance under the Rvb.

[1844] Exceptions may exist for some types of work, such as voluntary work or work in the context of vocational training. See § 1a and § 1g Aliens Employment Act Implementation Decree. Exceptions may also exist for specific kinds of foreigners. For instance, under certain circumstances highly skilled workers are allowed to work in the country without a work permit, even if they have a precarious residence status. See § 1d Aliens Employment Act Implementation Decree.

benefits, indigence is required.[1845] For irregular migrant workers, who by definition have income from work, this may present an obstacle. Only if the income from work is below the relevant threshold may they qualify for benefits. If income is not declared and the authorities are misled about the real financial situation of the foreigner, the foreigner may succeed in fraudulently collecting benefits to which he or she is not entitled.

13.4.2. Nationals who engage in undeclared work

The Rvb is a special assistance scheme for aliens. Citizens are not part of its personal scope of application.[1846] This is because citizens can fall back on social assistance under the WWB. Consequently, national black-economy workers are excluded by virtue of their citizenship.

[1845] Indigence is assessed in exactly the same way as under the Work and Social Assistance Act (WWB).
[1846] See § 3 Wet COA in conjunction with § 2 Rvb.

14. Comparison

The investigation has shown that in the Netherlands, the social security situation of irregular migrant workers is fundamentally different from that of Dutch citizens who engage in undeclared work. Whereas irregular migrant workers are almost completely excluded from social security, Dutch citizens whose work is not declared are eligible for benefits.

Irregular migrant workers have no authorisation to work and either no authorisation to stay or a weak immigration status in the Netherlands. The lack of work authorisation means that they are not insured on the basis of their employment under employee social insurance and general social insurance. The lack of residence authorisation means that they are not insured on the basis of their residence under general social insurance. Only irregular migrant worker with a certain immigration status may fall within the scope *ratione personae* of general social insurance laws. More specifically, irregular migrant workers who are inhabitants of the Netherlands *and* who

- either reside under a temporary ordinary residence permit in the Netherlands, or who
- after staying in the Netherlands with a residence permit or under EC or EEA law have in time either asked for an extension of such a residence permit or made an objection or appeal against the withdrawal of such an authorisation to stay

are insured under general social insurance schemes.

In contrast to this, Dutch citizens who engage in undeclared work are socially insured either on the basis of their employment or on the basis of their inhabitancy. The fact that work is not declared and social insurance contributions are not paid does not affect their insured status. Neither employee social insurance nor general social insurance is dependent on the deduction of contributions. Nevertheless, it should be noted that under employee social insurance, insurable employment must be established before insurance can be made effective. In other words, undeclared work must be declared. Only then can the administration rule that there is insurance on the basis of employment. The question as to whether the administration can recover the outstanding social insurance contributions from the employer is irrelevant to entitlement to benefits. As soon as insurable employment is established and all other eligibility criteria are met, the Dutch citizen who previously engaged in undeclared work is entitled to benefits under employee social insurance laws.

Concerning general social insurance laws, Dutch citizens who engage in undeclared work are insured on the basis of their inhabitancy in the Netherlands. However, we have also seen that Dutch citizenship exerts a certain influence. Foreigners need to prove that they have a legal bond with the country, before they can be regarded as inhabitants. By contrast, Dutch citizens do not have to produce this proof. Thus Dutch citizenship makes it easier to prove inhabitancy and hence facilitates insurance under general social insurance laws.

The situation with respect to social assistance is similar. Irregular migrant workers unlawfully residing in the Netherlands are excluded from social assistance. Irregular migrant workers residing under a precarious immigration status in the Netherlands, such as foreigners who cannot be expelled from the Netherlands due to their or their family members' state of health, may qualify for special social assistance, *i.e.* Rva 2005 or Rvb assistance. Irregular migrant workers residing in the country under a temporary ordinary residence permit and irregular migrant workers who have been admitted to the country and are now asking for an extension of their residence permit or are

making an objection or appeal against the withdrawal of their residence permit may qualify for benefits under the Dutch general social assistance scheme. Undeclared Dutch workers in financial need may also be entitled to benefits under this general social assistance scheme. This is because they possess Dutch citizenship and they reside in the country. Thus only a very small group of irregular migrant workers is in the same legal position as undeclared Dutch workers when it comes to social assistance.

PART III: Law comparison

Introduction

In the previous Part of this thesis, the social security status has been analysed of irregular migrant workers and nationals whose work is not declared to the social security authorities in the European Union countries of Belgium and the Netherlands and in the Canadian province of Ontario. The starting-point of our national investigations was a factual problem: what happens when an irregular migrant worker or a national working in the black economy is confronted with the occurrence of a recognised social risk, such as incapacity for work or unemployment? We wanted to know what protection is offered to such an individual by law. In other words, we investigated whether there is access to benefits under the relevant national social insurance schemes, social assistance schemes and other legal arrangements which fulfil the same function. In doing so, we always kept in mind any financial duties which might have to be complied with by the two groups under investigation or by their employers.

In this Part, the results of the national investigations are now related to one another.[1847] This means that we will compare the investigated groups' legal status under those national legal arrangements which fulfil the same function, *i.e.* which provide mandatory protection in the event of the realisation of a recognised social risk. As recognised social risks, we identified in the introduction to this thesis old age, death, incapacity for work, unemployment, health care, family, and need.[1848]

By comparing those national schemes which fulfil the same function we intend to ensure maximum comparability for the legal protection of two groups of workers between different countries. The idea behind this is as follows. In order to compare legal arrangements between countries we identify a point of reference, a *tertium comparationis*. This is to make sure that only what is comparable is being compared. In international legal comparisons, function has become an often used *tertium comparationis*. Some authors even claim that "in law the only things which are comparable are those which fulfil the same function".[1849] Without going into this discussion, we can hold that for the purpose of *our* research, a comparison of legal arrangements which fulfil the same function seems to be most suitable. This is because we are interested in comparing the legal means to address a practical problem. The legal means, as we have seen in our national investigations, can be rather different. For instance, the protection of income in case of sickness can be provided by public law, as in Belgium and Canada, or civil law, as in the Netherlands. It is

[1847] Methodological guidance in our social security law comparison will be drawn from the work of Pieters and Zacher. See Danny Pieters, *Sociale-zekerheidsrechtsvergelijking ten dienste van Europa. Preadvies voor de Nederlandse Vereniging voor Rechtsvergelijking*. Reeks geschriften van de Nederlandse vereniging voor rechtsvergelijking, vol. 45 (Deventer: Kluwer, 1992); and Danny Pieters, *Reflections on the methodology of social security law comparison*. Syllabus of the Research Master in Law of the KULeuven et al, academic year 2007/2008. See also Hans Zacher, *Methodische Probleme des Sozialrechtsvergleichs: Colloquium der Projektgruppe für Internationales und Vergleichendes Sozialrecht der Max-Planck-Gesellschaft in Tutzing 1976*. Schriftenreihe für Internationales und Vergleichendes Sozialrecht, vol. 1 (Berlin: Duncker und Humblot, 1977); and Hans Zacher, *Sozialrechtsvergleich im Bezugsrahmen internationalen und supranationalen Rechts: Colloquium der Projektgruppe für Internationales und Vergleichendes Sozialrecht der Max-Planck-Gesellschaft in Tutzing 1977*. Schriftenreihe für Internationales und Vergleichendes Sozialrecht, vol. 2 (Berlin: Duncker und Humblot, 1978).

[1848] For guidance in this regard see Danny Pieters, *Social Security: An introduction to the basic principles*. 2. ed. (Alphen aan den Rijn: Kluwer Law International, 2006).

[1849] Konrad Zweigert and Hein Kötz, *Introduction to comparative law*, 3. ed., trans. Tony Weir (Oxford: Clarendon Press, 1998), p. 34.

therefore useful to start from the factual problem and compare those legal arrangements which address the same problem.

When we put the national results in this Part together we will compare, basically, two relationships: first, we will examine how the legal position of irregular migrant workers in national statutory social security[1850] compares between the different countries; and second, we will analyse how the national differences and similarities between the legal status of irregular migrant workers and of nationals who engage in undeclared work compares internationally. However, it is not only legal positions and differences and similarities in legal positions which are compared. A matter of particular interest in this comparison is the reasons for the *status quo* – why things are the way they are. This should help us to understand the situation in a country, when contrasting it with other countries.

All these different comparisons will be conducted for each individual social risk with which an irregular migrant worker or a national who engages in undeclared work may be confronted. For the sake of clarity we can sum up the workflow as follows:

1) overview comparison: for each social risk we will initially provide a short, simplified international comparison of the legal status of the workers under investigation. This includes

- a comparison of the status of irregular migrant workers, split up into category A and category B irregular migrant workers;
- key reasons for differences and similarities with respect to the status of irregular migrant workers;
- comparison of the status of nationals who perform undeclared work;
- key reasons for differences and similarities with respect to the status of nationals who perform undeclared work.

The overview comparison should allow the reader to immediately grasp the main differences or main similarities between the national statutory protections in case of the realisation of a social risk. In order to keep things simple, the overview comparison disregards any exceptional circumstances. This relates most notably to retroactive declaration of work and contribution payment in arrears, and to changes with respect to immigration status or work authorisation.

2) further comparison: here, in a first step, the international comparison of the social security position of each group of workers under investigation will be dealt with in greater detail. This could mean, for instance, that the reasons for similarities or differences are examined more closely, or that additional, interesting aspects are compared, such as the legal status of children of workers or the loss of work authorisation during the receipt of benefits. In a second step, the results of the group–by-group comparison will be brought together. That is to say, the social security position of irregular migrant workers will be compared with that of nationals who engage in undeclared work.

Our national investigations have revealed that the laws themselves are often silent on the status of irregular migrant workers and nationals whose employment is not made known to the social security authorities. In these cases, we analysed whether the courts, the social security authorities or legal science had pronounced on the social security status of one of the two groups of workers

[1850] National statutory social security is to be understood as national legal arrangements which provide mandatory protection in event of the realisation of a recognised social risk.

under investigation. When this still failed to produce a satisfactory answer, we tried to interpret legal provisions ourselves, on the basis of statutes, case law, policy guidelines and legal literature. In our law comparison we will, once more, clearly indicate the sources on which our national conclusions are based. This is an absolute necessity. When comparing the countries, it puts our national results into the right perspective. In general, a status attributed by statute is of a different legal value from, for instance, a status assumed by legal literature – let alone a status deduced by our own interpretations. In addition, a clear indication of the source of our national findings is necessary, since the source itself might be revealing. For instance, the absence of an explicit legal rule with respect to one of the two groups of workers in a particular field of social security in one or more countries may itself allow certain conclusions to be drawn.

The structure of this comparative Part will largely follow the structure of our national investigations. Its focus – like the focus of our national investigations – is the statutory social security protection granted in case of the realisation of a recognised social risk. Accordingly, we will compare our national results on social security protection risk by risk. However, financial obligations for the two groups under investigation have also been analysed in our national Part, in order to put the rights or lack of rights into perspective. A comparison of these results will take place at the end of this Part, after discussing the protection.

The realisation of a social risk usually affects more than just one person. For instance, there may be family members who are economically affected by a person's unemployment. However, there are particular social risks where more than one actor is necessary in order to talk about a risk at all. These are death, parental leave and family burden. In our national investigations, the legal position of the second actor was also analysed. The comparative Part continues with this approach and compares the national legal position of the second actor.

What is more, the need for health care and neediness are the only social risks which children may realistically be confronted with. For all the other risks – getting old, dying and having economically dependent survivors, becoming incapacitated for work, becoming unemployed or facing costs for raising children[1851] – children are usually simply too young. I refer here to persons who have not attained maturity or the age of legal majority. Therefore we will specifically address the situation of the children of irregular migrant workers or of citizens who do not declare their work in the comparisons on the social risks health care and need.

A few words need to be said about the terminology used in this Part. In the national Part we tried to stick as closely as possible to the national terminology – either by working directly with the national terms or by using (official) translations. In this Part we will use more general terms, in order to cover all the different national notions and hence facilitate the comparison. For instance, in this Part we will simply refer to 'social security number', instead of Social Security Number (Belgium), Social Insurance Number (Canada) or Citizen Service Number (Netherlands), which all serve a similar purpose in social security. Sometimes, the use of a common terminology might call for a higher level of abstraction from the national situation. For example, in Canada the authorisation for foreigners to stay and work in the country is laid down in the Immigration and Refugee Protection Act, whereas in Belgium and the Netherlands the authorisation to stay is

[1851] In some countries child benefits are considered as benefits for the children themselves, rather than benefits for their parents. Accordingly, it is the child who is legally entitled to the benefits. In these cases one could talk about a social risk faced by the child. This is however not the case in Belgium, Canada and the Netherlands – the three countries under investigation.

regulated in immigration law and the authorisation to work in a separate category of law, so-called alien employment law. For the sake of clarity of our comparison, we will also refer to alien employment law in the Canadian context here, whenever the regulation of the authorisation to work in the country is addressed.

1. The social risk of old age

All three countries run social security schemes which provide qualifying individuals with an income after the attainment of a certain age, irrespective of the individual's need.[1852] However, the design of the schemes, that is to say the personal scope of application, fundamentally differs. In order to allow for more clarity and for comparing particular aspects of the schemes, we will split this subchapter – after the overview comparison – according to the type of scheme.

1.1. Overview comparison

An irregular migrant worker who, after having lived and worked for some time unlawfully in the country, attains the pensionable age, while still residing unlawfully in the country, in general does not qualify for an old age or a retirement pension in any of the investigated countries. However, the reasons for this exclusion strongly differ among the national pension schemes. In the Netherlands, such irregular migrant workers are by law not insured under the old age insurance, where insurance based on residence is only possible for foreigners lawfully present and insurance based on work is only possible for foreigners being authorised to work in the country. Under the Canadian old age insurance based on residence, foreigners who are unlawfully present at the time of the pension's application decision are by law not entitled to a pension. Under the Canadian retirement insurance based on employment, foreigners without authorisation to work in the country cannot be in possession of a valid social security number and hence cannot make assignable contributions to the retirement insurance, which is a legal precondition for entitlement to pension benefits. In addition, questions about the validity of the employment contract would arise. In Belgium, irregular migrant workers are ineligible for a retirement pension not because of their irregular employment but because of their undeclared employment. Foreigners who never have been lawfully residing or lawfully working in the country are not in possession of a social security number and hence attract the attention of the authorities when their employer wants to register them for social insurance purposes. This usually prevents such irregular migrant workers in Belgium from building up rights under the retirement insurance based on employment.

Whether an irregular migrant worker who has worked for some time unlawfully in the country, but who during this time and also when attaining the pensionable age has been residing lawfully in the country, qualifies for an old age or a retirement pension depends on the investigated national scheme and on the migrant's immigration status. In the Netherlands, such a migrant worker would be insured under the old age insurance and entitled to an old age pension, provided that he/she has no precarious immigration status, enabling him/her to be considered as an inhabitant. Under the Canadian old age pension scheme, this irregular migrant worker could hardly qualify for an old age pension. Sure, this person would meet the requirement of lawful presence at the time of benefit application. For the proof of sufficient insurance years (aggregated period of at least ten years of residence in the country) it is however usually necessary that this foreigner had either a permanent resident status or applied for permanent residence. Under the Canadian retirement insurance, a foreigner without authorisation to work in the country cannot be in possession of a valid social

[1852] These retirement pensions may be topped up in case of indigence. However, in order to be eligible for this top up, the eligibility criteria for the basic pension must be fulfilled. Therefore the top ups will not particularly addressed here. Different is the situation for social assistance schemes for the needy elderly. These schemes will be analysed below, when discussing the social risk financial need.

security number and hence cannot make assignable contributions to the retirement insurance, which is a legal precondition for entitlement to pension benefits. In addition, questions of validity of the employment contract may arise. Finally, in Belgium irregular migrant workers and their employer will not be inclined to declare the work to the social security authorities and hence will not build up pension rights. However, if they exceptionally want to declare the work, there is a chance that they will succeed, since the competent social security authority performs no systematic control of an employee's permission to work. Pension rights could then be built up.

Nationals whose work is not declared to the social security authorities are able to qualify for an old age pension in the Netherlands and in Canada on the basis of their residence in the country.[1853] In contrast to this, they do not qualify for a retirement pension in Belgium and Canada. To be more precise, periods of undeclared work are not taken into account for the calculation of the retirement pension. Both schemes explicitly require the deduction of retirement insurance contributions from the employee's wages in order to take periods of employment into consideration.

1.2. Further comparison: old age pension schemes primarily based on residence

Under the Canadian and the Dutch old age pension laws, pension rights are primarily built up during periods of residence in the country. Only in the Netherlands, non-residents alternatively may build up right during periods of work in the country. We can see that both old age schemes directly address the issue of irregular presence or irregular employment of foreigners. In the Netherlands, unlawfully residing foreigners are expressly excluded from insurance based on residence and unlawfully working foreigners are explicitly excluded from insurance based on work. Excluded means that periods of unlawful residence and unlawful work do not count for both for entitlement to benefits and for the calculation of the benefit rate. Moreover, pension payments are suspended as long as foreigners, who are entitled to benefits due to previous lawful residence in the Netherlands, are not lawfully present in the country. In Canada, the old age pension law expressly excludes foreigners who are unlawfully staying in the country on the day preceding the day on which that person's pension application is approved or, if the person resides abroad, preceding the day that person ceased to reside in Canada. Previous periods of unlawful residence, by contrast, can basically be taken into consideration for reaching the required minimum period of residence in Canada and for the assessment of the pension rate. However, as we will illustrate later, it might not be that easy to have periods of unlawful presence actually taken into account.

It is interesting to observe that the old age pension systems of Canada and the Netherlands deal with previous periods of unlawful residence, unlawful presence during the application procedure and unlawful presence during the receipt of pension payments in an almost contrary way.[1854] Whereas in the Netherlands previous periods of irregular residence are not taken into account for the purposes of the old age pension, in Canada they basically can be regarded. Unlawful presence on the day preceding the day the application if approved or the day the person ceased to reside in Canada leads to ineligibility for a Canadian old age pension. In the Netherlands, by contrast, unlawful presence during the application procedure does not affect eligibility, neither has it an

[1853] One could also add that their citizenship paves the way for eligibility, since their citizenship prevents them from being excluded on the basis of an unlawful, a too weak or a temporary immigration status.

[1854] I will now focus for the sake of comparison on the insurance based on residence in the Netherlands. The backup, *i.e.* insurance based on work in the Netherlands if the non-resident is subject to Dutch income tax, will be again taken onboard later on.

influence on the pension rate. When we then look at the period of receipt of the old age pension, we can see that unlawful stay in the Netherlands is subject to a sanction in that pension payments are suspended. That is to say, the payments are temporarily postponed, until the person regains a lawful immigration status or leaves the Netherlands. Once pension payments are restarted, they will be retroactively paid out for the periods of suspension. However, in Canada unlawful presence of a beneficiary does not impact on his or her enjoyment of a retirement pension.

How come that there are these differences in the treatment of unlawful presence between Canada and the Netherlands? To my mind these differences can be explained by differences in the design of the two old age pension schemes. The Canadian scheme could best be labelled as a demogrant scheme. It is a tax-financed programme, where at the age of sixty-five individuals can apply for an old age pension. They qualify for the pension if it is established that they have resided for an aggregated period of at least ten years in the country. The Dutch scheme is a contribution-financed social insurance, where individuals who reside in the country are insured and are subject to the obligation to pay contributions. At the age of sixty-five, they qualify for an old age pension if insurance of at least one calendar year can be established. This means that the first contact with the old age pension scheme is in Canada when applying for benefits and in the Netherlands when fulfilling the requirements for insurance. This might explain why in Canada legal presence is required at the time of the approval of the application, whereas in the Netherlands it is required throughout the insurance period. Of course, there is no compelling link. The Canadian legislator, for instance, could have also required lawful presence throughout the whole relevant residence history. But this difference makes it at least comprehensible why the lawful presence requirement was implemented as it was. This is an interesting example of how the rationale and the design of social security schemes seem to have played a role when foreigners without regular immigration status were excluded from protection.

Let us now have a closer look at the requirement of a minimum period of residence. We mentioned before that the Dutch scheme requires lawful presence during the qualifying period, whereas the Canadian scheme does not do so. The question we can ask now is whether not explicitly excluding unlawfully staying persons in Canada is tantamount to including them. In other words, how big is the actual difference in this respect between the two national schemes? Under both national schemes periods of presence are only taken into account if the person concerned has established sufficient residential ties to the country. Residential ties are measured by the existence of legal, economic, social and other ties. Legal ties relate to the immigration status. The difference is that in the Netherlands, due to immigration policy considerations,[1855] foreigners without authorisation to be in the country and foreigners with a precarious immigration status are from the outset not insured. In Canada, this is not the case. There, no immigration status at all or only a temporary one is a strong indicator that the foreigner has not made the decision to regularly reside in Canada. Only permanent resident status or the application for permanent residence is considered as expression of the decision to ordinarily reside in Canada. However, exceptionally also periods before the application for permanent residence are considered as residence for old age insurance purposes. This is the case when there are weighty reasons for a delay in the application for permanent residence, when the competent authorities are convinced that the intention for residence

[1855] The requirement of a certain immigration status for insurance was introduced in the late 1990s for all social security laws. The exclusion of unlawfully staying foreigners was justified with the wish, on the one hand, to prevent unlawfully staying aliens from continuing their unlawful stay and, on the other hand, to prevent aliens who are not (yet) admitted to the Netherlands from getting a semblance of complete legality, which would make expulsion more difficult.

in Canada existed already before such an application and when in addition there are other ties to Canada. In such a situation even residence under no immigration status at all would be considered as residence for the Canadian old age insurance.

So, whereas in the Netherlands the lack of an immigration status plays the decisive role, in Canada it plays a very central role, but not the deciding one. This means that in practice there will not be much difference with respect to unlawfully residing foreigners. But in very extraordinary circumstances, where an unlawfully present foreigner can produce evidence that he/she made the decision to reside in the country even before applying for permanent residence, he/she will have the opportunity to be granted an old age pension. In the Netherlands, the concept of insurance for foreigners under general social insurance schemes, including the old age insurance, is purely driven by immigration policy considerations. This becomes clear by the statements of the legislator and by the fact that residence under no immigration status or a precarious immigration status is never considered as residence for insurance purposes, irrespective of the actual residence situation. In Canada, we rather can talk about the application of a social security logic, which makes use of immigration law. The old age pension scheme strongly relies for the determination of residence on immigration law. However, it is less the immigration status which counts more the formal expression of the will to become resident of the country through individual actions taken in the framework of the immigration system. And even if no formal actions are taken, the old age pension system provides for relief in case the foreigner can show credibly that he/she made the decision to become resident before taking the respective action under immigration law.

A bigger difference between the Canadian and the Dutch approach becomes obvious when we look at the treatment of foreigners lawfully present in the two countries. The social security rationale of the Canadian scheme brings about that periods of residence under a temporary immigration status, such as under a temporary residence status for work, study or family purposes, are in general not counted as periods of residence under the Canadian old age scheme. These statuses are usually not considered as an expression that a foreigner makes his home and ordinarily lives in Canada. However, as mentioned before exceptions are possible when the foreigner can produce evidence that he/she made the decision to reside in the country even when possessing a temporary residence status. In the Netherlands, by contrast, the immigration rationale implemented in the Dutch old age scheme entails that foreigners with a correct immigration status, even if it is a temporary one, can be insured.[1856] Foreigners under a temporary residence permit for work, study or family purposes can be insured. So, for the Canadian scheme, in the first instance, permanent residence in Canada is important. Temporary residence statuses are no expression of residence. In the Netherlands, by contrast, having a correct immigration status is important.

All above discussed exclusions with respect to unlawful presence directly affect irregular migrant workers who are unlawfully present in the country of work – this is what we call category A workers. With respect to category B workers, *i.e.* lawfully residing foreigners who are not authorised to work in the country, we have to differentiate according to statuses under immigration law. A lawful, but precarious immigration status (the Netherlands) or no formal manifestation of (the will of) permanent residence (Canada), make it difficult (Canada) or even impossible (the Netherlands) to meet the residential ties test and hence to get periods of residence to be taken into

[1856] Foreigners with a stable, such as permanent residents, or somewhat stable, such as temporary residents, can be insured based on their residence in the country. Foreigner with a rather precarious but still lawful immigration status can be insured based on their work in the country, provided that the work is in compliance with alien employment laws.

account for old age insurance purposes. Also the alternative path in the Netherlands is not possible: foreigners with a precarious immigration status can only qualify for insurance based on work in the Netherlands if the work is not in violation of alien employment laws. On the other hand, category B workers with a non-precarious immigration status (the Netherlands) or a formal manifestation of (the will of) permanent residence (Canada) may qualify for an old age pension. This relates for instance in the Netherlands to migrants with a temporary residence permit, which does not give permission to work, or in Canada to migrants who applied for permanent residence. In contrast to this, Canadian and Dutch citizens whose work is not declared to the social security authorities may qualify for an old age pension, provided that they are residents. The fact that the work is not declared has no consequences for the eligibility for the pension or the calculation of the pension rate. Even in the Netherlands, where residents are subject to the obligations to pay contributions for the old age insurance, non-compliance does not at all affect eligibility or the amount of the pension. The laws, and also the implementing authorities, make no link between contribution payment and benefits. So, nationals who perform undeclared work qualify through their residence.

From the previous paragraph it becomes apparent that the dividing line between protection and non-protection for irregular migrant workers in old age schemes primarily based on residence is neither citizenship nor lawful presence, but rather a non-precarious immigration status (the Netherlands) or the formal manifestation of (the will of) permanent residence (Canada).[1857]

1.3. Further comparison: retirement pension schemes based on work

Besides the old age pension scheme, which covers residents, Canada operates a retirement pension programme, which addresses employees. Also Belgium knows a statutory retirement pension where insurance is based on employment. The retirement insurance laws of both countries do not address the issue of irregular stay or irregular work of foreigners. Neither has case law to date done so. What both retirement insurance laws however require is deducting social insurance contributions from the wages in order to take periods of employment into consideration for retirement insurance purposes. In general, this condition is not fulfilled by the two groups of workers under investigation. For Belgian and Canadian citizens whose work is not declared at all to the social security authorities no contributions are withheld. Irregular migrant worker and their employers are also not inclined to declare work and withheld contributions: irregular migrant workers normally want to avoid the contact with public authorities due to their violation of laws governing the residence and/or employment of aliens. Employers, in turn, also have no great affinity for declaring work of employees which they are not allowed to employ. Even if employers wanted to declare the work of irregular migrant workers, this is either not possible (Canada) or hardly possible (Belgium). More on that below. When no contributions are withheld from wages, no entitlement to retirement pensions arises under Belgian and Canadian pension laws. In this respect irregular migrant workers are in the same legal position as Belgian or Canadian citizens who work on the black market. Nevertheless, in some respects citizens whose work is not declared seem to be better off. This concerns most notably (1) the possibility to affiliate with the retirement insurance and (2) the possibility to actually get the benefits paid out.

[1857] However, as we have seen above in Canada even without formal manifestation, residence may be assumed under very exceptional circumstances.

(1) Belgian or Canadian citizens who are insured under the statutory retirement insurance can be affiliated with the social security authorities in order to make insurance effective. There are no practical or legal obstacles. The fact that their work is not declared can only be traced back to the fact that the employer, for whatever reason, did not do so. Irregular migrant workers, by contrast, either cannot be correctly affiliated with the pension insurance or can only be affiliated at the risk of being detected. Here we see a difference between Canada and Belgium. In both countries, by law, the social security number is used as the crucial identifier for a person's contributions. But whereas in Belgium, as a kind of backup, everyone who comes in contact with the social security authorities is automatically assigned this number, in Canada one must apply for it and, if one is no Canadian citizen or permanent resident, must demonstrate his/her authorisation to work in the country. Since also the period of validity of the Canadian social security number for foreigners who are no permanent residents is linked to a correct immigration status, and indirectly to the authorisation to work, irregular migrant workers can usually also not be in possession of a valid number. This entails that in Canada irregular migrant workers cannot correctly affiliate with the retirement insurance in that they cannot make assignable contributions. In Belgium not providing a social security number for the payment of contributions is no barrier for affiliation, since they are as a backup assigned automatically. But it attracts the attention of the authority entrusted with the collection of the contributions. This is in particular true for category A workers and category B workers with a precarious immigration status, such as tourists, who usually lack a normal[1858] social security number. Once the lack of a work authorisation for Belgium is revealed, the social security authority entrusted with the collection of contributions, which is also entrusted to monitor compliance with alien employment laws, will prevent the migrant from taking up employment in the country and hence building up pension rights. In contrast to this, category B workers with a somewhat more stable immigration status, such as for instance admitted students, usually possess a normal social security number. Since the provision of a social security number does not attract the attention of the authorities and since there is no systematic control of the permission to work, they can affiliate with social security. Shortly summarised, for affiliation with the pension insurance, in Canada there is a systematic check of a person's authorisation to stay and to work in the country, whereas in Belgium there is not, but there is the chance that foreigners without immigration status or with a precarious immigration status will be detected and will be prevented from performing work by which they possibly could build up pension rights.

(2) Suppose that an irregular migrant worker or a national who works in the black economy is entitled to benefits – be it because of contribution payments of arrears or because of correctly declared work – can he/she actually receives them? For Belgian and Canadian citizens there are no reasons why not. For irregular migrant workers the regularisation of undeclared work procedure and the application for benefits procedure are likely to reveal the migrants' irregular status under immigration laws and/or alien employment laws. For migrants unlawfully present, this could mean that they have to leave the country. In Canada, this would not affect the payment of the benefit, since this retirement pension is exported without any restrictions. In Belgium, export can only take place on the basis of bilateral agreements or if the foreigner belongs to a qualified category, such as a refugee or a stateless person.

A further interesting aspect in the context of undeclared work – either by citizens or by irregular migrant workers – is the retroactive regularisation of work, *i.e.* the ex post declaration of work and

[1858] With normal social security number I mean the National Register Number, as opposed to the backup social security number which is the Crossroads Bank Number.

the contribution payment in arrears. When undeclared work is discovered, the competent authorities try to establish whether it was employment within the meaning of the retirement insurance schemes. Once this is established, the employer is, in addition to all sorts of fines, required to pay the outstanding social security contributions, amongst other sectors, for the sector pension. As a result of this, the employee will get the contributions credited on his/her account. This may allow nationals and foreigners whose work was previously not declared, to retroactively build up rights in the retirement insurance upon the payment of contributions.

However, employment within the meaning of the retirement insurance can only be established if there is employment under an employment contract which bears legal consequences. Concerning irregular migrant workers, one can ask the question whether the fact that a contract was concluded in violation of the alien employment laws may affect its validity. In Belgium, our analysis based on case law and legal literature suggests that an employment contract concluded with an alien who has no authorisation to work under alien employment laws is basically invalid due to an unlawful cause, but bears legal consequences for social insurance purposes, since this invalidity cannot be invoked to the disadvantage of the protected employee. As a consequence, periods of irregular employment of foreigners are to be taken into consideration for retirement insurance purposes in Belgium, if undeclared work is retroactively regularised. From this it follows that the fact that irregular migrant workers, by and large, are not entitled to benefits, is simply the result of undeclared work, and not of irregular work. In Canada, our analysis based on case law suggests that an employment contract in violation of alien employment laws is invalid and void *ab initio*. Relief might only be possible when the foreigner acted in good faith when violating alien employment laws. However, that may be rather difficult to demonstrate in case of black-economy work. The question of the validity of the employment contract is not only to be asked in the context of irregular work of foreigners. Also for nationals who work in the black economy, the validity of the contract might be affected by an unlawful agreement between employer and employee to evade the payment of contributions and hence violate statutes. In Belgium, legal literature suggests that such an agreement to secrecy is null and void, but does not affect the validity of the rest of the employment contract. In addition, we know from case law that even an invalid employment contract is not invalid *ab initio*, meaning that insurance for the past would not be excluded. In Canada, the doctrine of illegality of contracts in general and the situation for undeclared workers in particular is far from being clear. Our analysis based on case law shows that decisions in two directions may be possible: either that the evasion-agreement renders the whole employment contract null and void *ex tunc* or that the illegality of the evasion-agreement does not affect the validity of the rest of the employment contract. For the sake of completeness it should be mentioned that in Belgium and Canada no question of illegality of the employment contract arises when employee and employer conclude an employment contract and the employer subsequently fails to declare the work and pay contributions.

1.4. Common observations

It is interesting to observe that despite fundamental differences in the design of the pension schemes, in general under none of the schemes protection against the old age risk is provided to irregular migrant workers who are unlawfully present. When it comes to irregular migrant workers without precarious immigration status (the Netherlands)/with the intention or manifestation of permanent residence (Canada) and citizens working on the black market, differences become obvious between those schemes where the scope *ratione personae* is confined primarily to

residents and those schemes where it is confined to workers. Whereas, by and large, irregular migrant workers with a somewhat more stable immigration status/with (the will for) permanent residence and citizens working on the black market are protected in schemes based on residence, they are not protected, due to their undeclared work, in schemes based on employment.

One can also observe that the legal status of irregular migrant workers and undeclared workers is more similar in the retirement schemes where insurance is based on employment, than it is under the old age schemes where insurance is primarily based on residence. This has mainly to do with the fact under the schemes based on employment a person's citizenship or a person's immigration status play a less dominant role than under the schemes based on residence.

2. The social risk of death

The risk of losing the source of income due to the death of the breadwinner is covered in the investigated countries by a number of social security schemes: mostly by old age and retirement pension schemes, but also by worker's compensation schemes which provide protection in case of work-related deaths. It is therefore appropriate to divide our comparison into the protection granted for non-work-related deaths and for work-related deaths. This division is done according to the factual situation, and not the legal one. That is to a say, we look what social security protection is provided to the survivors in the one or the other situation – even if the laws do not distinguish between the cause of the death.

What is more, the social security protection for survivors includes two actors: the deceased and the survivor. Since the legal requirements are different for the two actors under all social security schemes, this subchapter will accordingly be divided. In other words, we will on the one hand compare the legal protection provided if the deceased was an irregular migrant worker or a citizen working in the black economy; on the other hand we will compare the protection provided if the survivor is working irregularly or engages in undeclared work.

2.1. Decease of an irregular or undeclared worker

2.1.1. Death unrelated to work

2.1.1.1. Overview comparison

The survivor of an irregular migrant worker who dies after having lived and worked for some time unlawfully in the country only qualifies for a survivor's pension under the old age scheme in Canada. Under all other investigated national schemes, the survivor of such an irregular migrant worker is not entitled to survivor's benefits. The protection for the survivor under the Canadian old age scheme can be explained by the fact that this scheme does not make any demands with respect to the deceased person, except for having been the spouse or common law partner of the survivor. Whereas under the Canadian retirement insurance, the Belgian retirement insurance and the Dutch old age insurance, survivors can only qualify for survivor's pensions if the deceased has been insured. Insurance, as we have seen in the previous chapter on the social risk of old age, is under these schemes basically not possible for unlawfully staying irregular migrant workers.

Whether the survivor of an irregular migrant worker who has worked for some time unlawfully in the country, but who during this time has been residing lawfully in the country qualifies for a survivor's pension depends on the investigated national scheme and on the migrant's immigration status. Under the Canadian old age pension scheme, the survivor is entitled to a survivor's pension, since there are no relevant requirements as for the deceased person. Under the other three national schemes, the survivor qualifies for a pension if the deceased irregular migrant worker has been insured. In the Netherlands, the deceased worker could have been insured, provided that he/she had a rather stable immigration status, enabling him/her to have been considered as an inhabitant. In Canada, such a deceased irregular migrant worker usually would not have been insured: either because a foreigner without work authorisation cannot make assignable contributions to the retirement insurance, which is a legal precondition for insurance, or because the work contract

would be illegal. Similar in Belgium, the deceased irregular migrant worker would not have been insured, because unlawful employment usually takes place in the black economy, where no contributions are deducted and hence no insurance is established. Only if the employment of the irregular migrant worker was correctly declared and contributions have correctly been withheld, insurance is conceivable. This however only occurs exceptionally.

Survivors of nationals who worked in the black economy are able to qualify for a survivor's pension in the Netherlands and in Canada: under the Canadian old age pension scheme, because there are no relevant requirements as for the deceased person; and under the Dutch old age pension scheme, because of the deceased residence in the country. In contrast to this, such survivors do not qualify for a pension in Belgium and under the Canadian retirement pension scheme. Both schemes explicitly require for insurance the deduction of retirement insurance contributions from the employee's wages.

2.1.1.2. Further comparison

In Belgium and Canada the social risks of old age and of non-industrial death are covered by one and the same social security scheme. In the Netherlands, the risk of non-industrial death is addressed by another insurance, which however has almost the same requirements with respect to deceased persons, as the old age insurance has with respect to the old person. This explains the large similarities in the comparisons between the legal status of (survivors of) irregular migrant workers and nationals who engage in undeclared work.

The main difference with respect to the comparison under the social risk of old age is that under the Canadian old age insurance based on residence, the residence or work situation of the deceased person is completely irrelevant. That is to say, the deceased person only must be the spouse or common law partner of the survivor. There are no other requirements.

It can be noticed that from a bird's eye view there is to a large extent equal treatment between deceased irregular migrant workers and deceased nationals who were engaged in undeclared work. Under the Canadian old age programme, the death of both triggers eligibility to survivor's benefits, since there are no particular legal requirements as for the deceased; and under the Canadian and the Belgian retirement insurance, the death of both does basically not open up rights to survivor's benefits, since the work was not declared. Differences in the legal position only exist under the Dutch old age insurance – between category A workers and category B workers with a precarious immigration status on the one hand, and category B workers with a somewhat stronger immigration status and nationals performing undeclared work on the other – and under the Belgian retirement insurance, when category B workers exceptionally declare their work and when it is during the affiliation procedure not revealed that work is performed in violation of the alien employment laws. This might be surprising, but can be explained by two facts. First, by the fact that insurance schemes based on employment require the making of contributions, which undeclared workers do not make and irregular migrant workers usually either cannot make or do not make. Second, by the fact that one insurance based on residence requires the survivor to fulfil certain eligibility criteria, amongst which are residence criteria, but not the deceased.

2.1.2. Work-related death

2.1.2.1. Overview comparison

The survivor of an irregular migrant worker who dies in a labour accident or as the consequence of an occupational disease while staying and working unlawfully in the country is eligible for a survivor's pension in Belgium and in the Canadian province Ontario. The worker's compensation laws of both jurisdictions treat all workers alike and do not exclude workers unlawfully working or unlawfully present. The social security authorities and courts in both jurisdictions have confirmed the eligibility of survivors of category A workers. In contrast to this, survivors of category A workers are ineligible for benefits in the Netherlands. This is because insurance of the deceased, which is a precondition for entitlement to a survivor's pension, is not possible for foreigners unlawfully present or unlawfully working in the country.

The survivor of a lawfully staying irregular migrant worker who dies in an industrial accident or an occupational disease is eligible for a pension in Belgium and Ontario. As mentioned already in the previous paragraph, this is because the worker's compensation laws do not exclude foreign workers without work authorisation. In the Netherlands, only survivors of irregular migrant workers with a somewhat stable immigration status – such as for instance holders of a temporary residence permit which does not give permission to work in the country – are eligible for a pension. Survivors of workers with a precarious immigration status – such as foreigners who are allowed to await the decision on a first residence permit in the Netherlands – do not qualify for a survivor's pension. The reason for this is that irregular migrant workers with a precarious residence status are by law excluded from insurance based on residence. Also the alternative path, *i.e.* insurance based on employment in the Netherlands, is not possible since the deceased irregular migrant worker violated the alien employment laws.

Survivors of Belgian, Canadian or Dutch undeclared workers are protected under all investigated jurisdictions. They qualify for a survivor's pension in Belgium and Ontario because the worker's compensation laws do not make entitlement to benefits dependent on the payment of contributions or the correct declaration of work. This has been confirmed by practice, *i.e.* by decisions of the competent social security authorities and of the competent courts. In the Netherlands, these survivors qualify because the deceased undeclared worker has been insured on the basis of his/her residence.

2.1.2.2. Further comparison

As already indicated before, Belgium and the Canadian province Ontario know special social security schemes protecting survivors against the loss of income due to a death caused by an industrial accident or an occupational disease. These worker's compensation laws of both Belgium and Ontario do not expressly address the situation of persons who violate immigration laws and alien employment laws or who do not pay the required social security contributions. Pursuant to the laws, protected are the survivors of workers who worked under an employment contract for a covered employer. The Belgian worker's compensation law, in addition, explicitly stipulates that a possible invalidity of an employment contract cannot be invoked for the application of the Labour Accident Act. Such a provision cannot be found in Ontario's worker's compensation law. However, it is not only practice of the social security authorities of both jurisdictions, but has also

been confirmed by case law, that irregular and undeclared workers are being covered by worker's compensation laws. That is to say that their survivors have been declared eligible for benefits. We can observe that in both jurisdictions the social security authorities and courts, when being confronted with irregular or undeclared work, have not paid much attention to the fact that immigration or alien employment laws have been violated or that no contributions have been paid. To cite a Belgian court of appeal, which without further investigations stated: it is irrelevant whether the work violated alien employment laws or whether the work was not registered; it is only decisive that the legal requirements under worker's compensation laws are met.[1859] Similar has been the position of Ontario's authorities and courts.

In the Netherlands there are no worker's compensation laws. Accordingly, survivors of a worker who died due to a work-related accident or work-related decease enjoy protection under the general survivors' insurance, like survivors of a deceased whose death was not related to work.[1860]

This different approach by Belgium and Canada on the one hand and the Netherlands on the other explains the differences in the legal position of survivors of a deceased worker who was either unlawfully present in the country or had a precarious immigration status. The Dutch survivors' scheme insures a resident (or as a backup a worker) against the risk of dying and having economically dependent survivors who lose their source of income. Belgian and Canadian worker's compensation laws insure the employer, against the payment of contributions, from not being confronted with civil law suits by survivors after a work-related death. The survivor's pension and other benefits paid under worker's compensation laws are to be seen as compensation – compensation not only for the loss of income, but also for the mere loss of a family member. This compensation rationale flows from civil law. The Dutch survivor's insurance does not comprise such compensation rationale. The Dutch survivor's pension is to be considered as an insurance benefit. And out of immigration policy consideration, this social insurance is not available for unlawfully staying foreigner or foreigners with a precarious immigration status (or, in the backup version, for foreigners working in violation of alien employment laws).

2.2. Irregular or undeclared worker as the survivor

2.2.1. Death unrelated to work

2.2.1.1. Overview comparison

Irregular migrant workers unlawfully present and unlawfully working who survive a family member[1861] are entitled to a survivor's pension under all but the Canadian old age pension scheme. The Canadian old age pension laws expressly require the survivor to be lawfully resident in Canada on the day preceding the day on which the application is approved. Moreover, survivors

[1859] In the original language it reads: "*De discussie of deze tewerkstelling illegaal was en of het slachtoffer was ingeschreven op een loonlijst, is hierbij irrelevant. De illegale tewerkstelling is, voor wat betreft de toepassing van de Arbeidsongevallenwet, zonder enige invloed voor de aanvaarding van het ongeval, voorzover aan de in deze wet gestelde voorwaarden is voldaan.*" Arbeidshof Antwerpen, 14 March 2005, *Soc. Kron.* 2005, p. 384.

[1860] In addition, in case of negligence of the employer, the survivor may be entitled to financial compensation under private law. See § 6:108 Dutch Civil Code.

[1861] We are assuming here that the deceased fulfils all legal requirements for the survivor's entitlement to benefits. This relates in particular to the requirement of having been insured at the time of death, as established by the Belgian retirement insurance, the Canadian retirement insurance and the Dutch old age insurance.

must have resided in the country for at least ten years. For the fulfilment of this residence history, a correct immigration status is not necessarily required. However, unlawfully residing foreigners will have huge difficulties to demonstrate sufficient residential ties to Canada. Only very exceptionally – as it has already been illustrated in the chapter on the social risk of old age – they may be able to meet this condition. Under all the other investigated national old age and retirement schemes, the survivor's immigration status or status of work are of no relevance for entitlement to benefits. Accordingly, surviving category A workers are eligible for a survivor's pension.

Irregular migrant workers lawfully present in the country and citizens of the country whose work is not declared to the social security authorities are eligible for a survivor's pension under all investigated schemes. This is because work in general, let alone authorised work or declared work, is no entitlement criteria. The same is true for the immigration status. The Canadian old age pension scheme, as the only scheme, excludes unlawfully present foreigners, but includes all other foreigners lawfully present during the application procedure, irrespective of the concrete immigration status.[1862]

2.2.1.2. Further comparison

We mentioned in the overview comparison that under all but the Canadian old age pension scheme unlawfully staying survivors may qualify for benefits. However, a closer comparison reveals that unlawfully staying foreigners may face legal or practical obstacles for getting paid out the survivor's pension to which they are entitled to. In the Netherlands, the laws explicitly rule that the payment of the pension will be suspended as long as the foreigner is staying unlawfully in the country. In Belgium, there is a chance that authorities discover the unlawful presence and that the foreigner has to leave the country. Export of the survivor's pension is only possible under certain circumstances, such as for instance the existence of bilateral agreements. Under the Canadian retirement pension scheme there is a good chance that survivor's pensions will actually be paid out to unlawfully staying foreigners, since no check of the immigration status is carried out and it is the policy of the competent federal ministry to not insist on the provision of a social insurance number.[1863]

It is not surprising that surviving category B workers and surviving Belgian, Canadian and Dutch citizens whose work is not declared may qualify for benefits. The relevant social security schemes usually focus on the insurance status of the deceased and, if at all, have rather minimal requirements to be fulfilled by the survivor. The only exception is the Canadian old age pension scheme, where it is exactly the other way around. Nevertheless, since this scheme requires residence and not work in the country, category B irregular migrants[1864] and undeclared workers are able to qualify for benefits. On the other hand, this one exception, *i.e.* the Canadian old age pension scheme, also explains why it is the only scheme where category A irregular migrants are

[1862] However, foreigners with a temporary immigration status may have difficulties in demonstrating sufficient residential ties to Canada.

[1863] For the sake of completeness it shall be mentioned that the fact that children born to irregular migrants in Canada are Canadian citizens does not impact on our comparison. This is because orphan's pensions are only provided under the Canadian retirement pension scheme and there foreign children without immigration status are also protected. In other words, it does not matter whether the child is Canadian citizens or a foreign child unlawfully present in Canada.

[1864] However, foreigners with a temporary immigration status may have difficulties in demonstrating sufficient residential ties to Canada.

not qualified. The legislator demanded lawful presence in the country on the day before the application is approved. Under all other national schemes where the deceased and not the survivors must have been insured, there are no such requirements and hence category A workers basically qualify for benefits. Even under the Dutch scheme, where insurance is linked to a correct immigration status, the survivor, for whom no insurance is required, may qualify for benefits, irrespective of his or her immigration status. Only the disbursement of benefits is suspended as long as the person is not lawfully present in the country.

Once more, this is an interesting example of how the rationale and the design of social security schemes seem to have played a role when foreigners without regular immigration status were excluded from protection.

2.2.2. Work-related death

Under the Belgian and Ontario's worker's compensation schemes, irregular migrant workers and nationals performing undeclared work are eligible for survivor's benefits. This is because there are no entitlement criteria, which would prevent them from qualifying. If we now extend our comparison to the Netherlands, where no worker's compensation scheme is in place, we see a similar situation. All groups of workers under investigation may be entitled to survivor's benefits. The only difference is that in the Netherlands the disbursement of benefits is suspended for the time a foreigner is not lawfully present on Dutch soil. From the moment on this foreigner stays in compliance with Dutch immigration laws in the country or this foreigner leaves the country and falls under an export rule, the survivor's pension will be paid out retroactively for the periods of suspension.

3. The social risk of incapacity for work

3.1. Sickness

3.1.1. Overview comparison

Irregular migrant workers who stayed and worked for a certain period of time in a country are treated rather differently in the countries under investigation when being confronted with sickness, *i.e.* short-term incapacity for work. An entitlement to income replacement benefits may arise in the Netherlands. There it is primarily a duty of the employer to continue the payment of wages in times of sickness for up to two years.[1865] This duty is set out in Dutch civil law. It is required that the employee works under an employment contract for the employer, but there is no requirement as for the employee's status under immigration or alien employment laws. Dutch case law, from the Supreme Court downwards, has ruled that employment contracts concluded in violation of alien employment laws are valid. What is more, Dutch case law of lower instance has confirmed that the employer's duty to continue the payment of wages in times of sickness also applies to irregular migrant workers. In Belgium and Canada, by contrast, income replacement benefits in case of incapacity for work due to sickness are in general not available for unlawfully staying irregular migrant workers – for different reasons. In Canada, entitlement to benefits depends, amongst other factors, on work under an employment contract. According to well-established federal case law, migrants without employment authorisation are only considered to be working under a valid employment contract, if they acted in good faith when violating alien employment laws. Up to now, good faith was only assumed in exceptional circumstances and only with respect to irregular migrant workers who were *lawfully* residing in Canada. In Belgium, entitlement to benefits is linked, amongst other conditions, to the conditions that the work has been performed under an employment contract and that contributions have been deducted from wages. According to our analysis based on case law and legal literature, employment contracts concluded with foreigners who have no authorisation to work in the country are basically invalid, but the invalidity cannot be invoked to the disadvantage of the employee. The obstacle for irregular migrant workers is here the second legal requirement, *i.e.* payment of contributions. Foreigners who never have been lawfully residing or lawfully working in the country are not in possession of a social security number and hence attract the attention of the authorities when their employer wants to register them for social insurance purposes. This usually prevents such irregular migrant workers in Belgium from paying sickness insurance contributions and thus from building up rights.

Lawfully residing irregular migrant workers are in a similar position as unlawfully residing irregular migrant workers. In the Netherlands they are entitled to sickness benefits from their employer. For the reasons see the previous paragraph. In Belgium and Canada they are like unlawfully staying irregular migrant workers in general not able to qualify for sickness benefits. However, in contrast to unlawfully staying foreigners, there is some more chance that due to exceptional circumstances they become entitled to benefits. To be more precise, in Canada they may be eligible for benefits in case the acted *bona fides* when they violated alien employment laws. This is for instance the case when actions of the immigration authorities mislead the foreigner about his/her right to take up employment or where the change to a more stable residence

[1865] As a backup, workers who are not covered by the wage continuation obligation under Dutch civil law may fall back on statutory sickness insurance. However, this backup is of little relevance for irregular migrant workers – see Part IIc of this research on the Netherlands.

status is misinterpreted by the foreigner as to have the right to work. In Belgium, their lawful presence, in most cases, brings about the possession of a social security number. Employers who want to correctly affiliate such irregular migrant workers with social security have therefore a bigger chance to succeed – not least because there is no systematic check of a foreigner's authorisation to work for the purpose of affiliation with social security. However, whether employers really register irregular migrant workers and enable the building up of right in the sickness insurance is another question.

The legal position of nationals who are undeclared workers in the countries under investigation is as follows. In the Netherlands, undeclared workers are basically entitled to wage continuation payments by their employer in times of sickness. Only in situations where employer and employee agree in their employment contract to hide their work from the social security authorities, our analysis suggests that there is a chance that the validity of the whole employment contract may be affected and no obligation to wage continuation payments arises. This issue still has to be clarified by case law. Also in Canada, the right to sickness benefits arises out of a valid contract of employment and independent of the making of social insurance contributions. Undeclared workers are basically entitled to benefits. For the exercise of this right is necessary that the authorities can establish the existence of the employment. However, where an agreement to hide the work from the social security authorities is part of the employment contract, the validity of the employment contract may be affected. Also here, this issue is to be clarified by case law. In Belgium, undeclared workers are in general not eligible for sickness benefits. This is because the Belgian sickness insurance explicitly requires the making of contributions in order to become entitled to benefits.

3.1.2. Further comparison

The fact that income replacement payments in case of sickness are usually made directly by the employer in the Netherlands, leads to different comparative result as under the other social risks. In the Netherlands, relief against the occurrence of a social risk is for all risks but incapacity for work due to sickness provided through public benefits. In order to prevent unlawfully present foreigners to continue their stay in the Netherlands, unlawfully staying and, to a large extent, unlawfully working aliens have been banned from the enjoyment of almost all public benefits. Since sickness benefits are no public benefits, this ban out of immigration policy considerations does not affect them. For our comparison this leads to the unique result that in the Netherlands irregular migrant workers are entitled to short-term incapacity to work benefits,[1866] whereas in Belgium and Canada they are basically not.

The peculiarity of the Dutch wage continuation obligation for employers also leads to the situation that the legal position of irregular migrant workers and nationals who perform undeclared work is roughly similar in a country internal perspective. Most similarities exist in Belgium. There both groups of workers are ineligible for benefits, simply because no contributions to the sickness insurance are paid. In case undeclared work is regularised in retrospect, *i.e.* work within the meaning of the sickness insurance is established and contributions are paid afterwards, they both

[1866] In times when sick employees are fit enough to fulfil their work obligations partly, they must do so. Otherwise they lose their right to sickness payment by the employer. The question whether foreigners without work authorisation would then lose their entitlement to benefits has to date not been addressed by case law or policy guidelines.

may be entitled to benefits. In practice, differences exist between these two groups in Belgium with respect to the possibility to correctly affiliate with the sickness insurance scheme from the very beginning and the possibility to actually get the benefits paid out, since unlawfully staying foreigners face the risk of deportation and benefits are not exported. In the Netherlands, irregular migrant workers and undeclared workers entitled to sickness payment by their employer. However, for undeclared workers the situation in case of secrecy agreements, *i.e.* employer and employee agree in their employment contract to hide their work from the social security authorities, is not clear. Lower instance case law, which was harshly criticised, held that this renders the whole employment contract invalid. In practice, unlawfully staying foreigners turning to authorities to enforce their right face the risk of having to leave the country, which goes practically hand in hand with a loss of the right to sickness payments. In Canada, entitlement to sickness benefits for irregular migrant workers and Canadian undeclared workers depends on the assessment of their employment contract. An employment contract with foreigners who have no authorisation to work in the country bears only legal consequences for the sickness insurance if the foreigner acted in good faith when violating alien employment laws. For employment contracts concluded with undeclared workers there is no precedence for the sickness insurance. Our analysis based on case law and legal literature suggests that there is a chance that employment contracts are declared invalid and void *ab initio* in case of an explicit agreement between employer and employee to evade the payment of contributions.

3.2. Invalidity

3.2.1. Overview comparison

An unlawfully present irregular migrant worker who becomes invalid and is hence confronted with a long-term or permanent incapacity for work does by and large not qualify for income replacement benefits in the three investigated countries.[1867] The reasons for this exclusion however differ. In the Netherlands, foreigners without residence or work authorisation in the country are by law excluded from insurance. In Belgium and Canada no explicit exclusion can be found. There unlawfully staying irregular migrant workers are primarily not entitled to benefits because of their undeclared work. Both insurance schemes explicitly require the making of social insurance contributions in order to qualify for benefits. In Canada, foreigners without authorisation to work in the country usually cannot be in possession of a valid social security number and hence cannot make assignable contributions to the retirement insurance. Even if they contributed to the scheme, questions of validity of the employment contract would arise. In Belgium, it is purely the undeclared work which disentitles them from benefits. Foreigners who never have been lawfully residing or lawfully working in the country are not in possession of a social security number and hence attract the attention of the authorities when their employer wants to register them for social insurance purposes. This usually prevents such irregular migrant workers in Belgium from building up rights under the disability insurance.

Lawfully present irregular migrant workers are in a similar position as unlawfully present irregular migrant workers. Due to their unlawful work, they are excluded from insurance in the Netherlands.

[1867] One has to remark that the Netherlands knows an assistance scheme, not based on need, for the support of people who become disabled before they started to work (Wajong scheme). With these characteristics, this scheme is less relevant for our comparison and will not be separately addressed in this subchapter.

In Canada, the lack of a work authorisation makes a correct affiliation with social security and thus the making of assignable contributions usually impossible. Therefore, they usually can only engage in undeclared work, by which no rights under the disability insurance are built up. In Belgium, the lack of a work authorisation makes it also difficult to correctly register with social security. However, lawfully staying irregular migrant workers may be in possession of a social security number. Employers who want to correctly affiliate such irregular migrant workers with social security have therefore a bigger chance to succeed – not least because there is no systematic check of a foreigner's authorisation to work for the purpose of affiliation with social security. Still, whether employers really register irregular migrant workers and enable the building up of right in the sickness insurance is another question.

Nationals of the country of work whose employment is not declared to the social security authorities do not qualify for long-term incapacity for work benefits in Belgium and Canada. This is because both regimes explicitly require the making of contributions in order to become entitled to benefits. In the Netherlands, the relevant laws do not link entitlement to disability benefits to the making of contributions. The social security authorities have confirmed that this link is also not made in practice. However, in order to exercise the legal right to disability benefits, the competent authorities must establish that employment within the meaning of the disability insurance laws took place. One has to remark that our analysis revealed that there is a chance that in situations where employer and employee agree in their employment contract to hide their work from the social security authorities, the validity of the whole employment contract may be affected and no right to benefit arises.[1868]

3.2.2. Further comparison

The legal position of irregular migrant workers and nationals who are undeclared workers is rather similar in Belgium and Canada. They are all ineligible for benefits due to the non-payment of contributions. The difference is, and that has already been mentioned before, that employers in principle could have declared the work of Belgian and Canadian citizens, whereas this is mostly not the case for the work of irregular migrant workers. In the Netherlands, the legal position of the two groups under investigation is diametrically opposed. Dutch citizens whose work has not been declared are entitled to benefits if it can be established that they performed work under a contract of service. The payment of contributions is not relevant. Irregular migrant workers, by contrast, are excluded from insurance.

We can see that the risk of losing the source of income due to disability is addressed in all three countries by social insurance based on employment. One country, *i.e.* the Netherlands, expressly excludes irregular migrant workers from insurance against this risk, whereas the other countries do not do so and treat irregular migrant workers similarly to nationals whose work is not declared.

[1868] For our whole law comparison, the fact that the making of contributions is required for entitlement to benefits leads us to assume that undeclared workers are ineligible for benefits. By contrast, when entitlement to benefits is not linked to making contributions, but to employment within the meaning of the social security laws, we assume eligibility. It is clear that in practice in both cases the undeclared work must come to the attention of the social security authorities in order to exercise possible rights. However, in the first case a right can only be established if contributions are then paid – mostly by the employer. In the later case the undeclared workers always had a right to benefits when performing employment in within the meaning of social security laws. It only must be established by the authorities in order to exercise the right.

The explanation why irregular migrant workers in the Netherlands are treated differently than, first, irregular migrant workers in other countries and, second, Dutch undeclared workers can be found in an explicit choice of the Dutch legislator to exclude irregular migrant workers, made out of immigration policy motives. What is more, one country, once more the Netherlands, does not make entitlement to disability benefits dependent on the payment of social security contributions, whereas the others do so. This has simply been differing choices of the legislators when designing the social security system.

For the purpose of our research it is interesting to observe that despite the fact that only one country explicitly excludes irregular migrant workers from insurance, irregular migrant workers are basically also ineligible in the other two countries under investigation. That is so because irregular migrant workers are usually not able to pay social insurance contributions (Canada and, to a large extent, Belgium) and are usually not able to conclude a valid employment contract (Canada) – which both is crucial for entitlement to benefits. Different may be the legal position only in case undeclared work is regularised in retrospect in Belgium. Upon the establishment of employment within the meaning of the disability insurance and upon the payment of contribution in arrears, irregular migrant worker may establish a right to benefits.

3.3. Maternity and paternity

Concerning maternity and parental benefits, we can refer to our comparison of sickness benefits. This is because in Belgium and Canada maternity and parental benefits are part of the same social insurance as sickness benefits. In the Netherlands, maternity benefits are provided under a different social insurance law. However, there is no difference to the sickness insurance law with respect to irregular migrant workers and Dutch citizens whose work is not declared.

For the sake of completeness it should be mentioned that under none of the investigated national schemes the immigration status of the child is of relevance. In other words, if employees qualify for maternity or parental benefits, they can do so also for children who have no immigration status in the country.

3.4. Work-related accidents and diseases

3.4.1. Overview comparison

Unlawfully present irregular migrant workers who get incapacitated for work due to a labour accident or an occupational disease are eligible for short-term and long-term incapacity for work benefits in Belgium and in the Canadian province Ontario. The worker's compensation laws of both jurisdictions treat all workers alike and do not exclude workers unlawfully working or unlawfully present. The social security authorities and courts in both jurisdictions have confirmed the eligibility of category A workers. In the Netherlands, one has to distinguish between short-term and long-term incapacity for work – the latter relates to incapacity for work of more than two years. Unlawfully present irregular migrant workers who become sick are entitled to wage

continuation payments under Dutch civil law.[1869] The civil law provision does not differentiate according to a person's immigration status. Dutch case law has confirmed the eligibility of unlawfully staying irregular migrant workers to wage continuation payments. In case of long-term invalidity, category A workers are not protected in the Netherlands. The relevant social insurance expressly excludes foreigners unlawfully working or unlawfully staying in the country.

Lawfully present irregular migrant workers who get incapacitated for work due to an industrial accident or an occupational disease qualify for income replacement benefits in Belgium and Ontario. As mentioned already in the previous paragraph, this is because the worker's compensation laws do not exclude foreign workers without work authorisation. In the Netherlands, category B workers qualify for short-term sickness benefits, whereas they are excluded from long-term invalidity benefits – for the reasons see the previous paragraph.

Belgian, Canadian and Dutch undeclared workers are entitled to income replacement benefits in case of incapacity for work on the grounds of an industrial accident or an occupational disease in all the countries under investigation. Neither the worker compensation laws of Belgium and Ontario, nor the social insurance law of the Netherlands make entitlement to benefits dependent on the payment of contributions or the correct declaration of work. Eligibility of undeclared workers has been confirmed by the competent social security authorities and the competent courts.

3.4.2. Further comparison

From the overview comparison it becomes apparent that amongst the investigated countries there are only differences in the entitlement to invalidity benefits for irregular migrant workers. With respect to undeclared workers and with respect to the access of irregular migrant workers to sickness benefits there are basically no differences: they all are eligible for incapacity for work benefits.

We already mentioned it above, the worker's compensation schemes of Belgium and Canada know special protection for social risks materialised due to work-related accidents or work-related diseases. In addition to the risks death and health care, also incapacity for work is addressed by these schemes. In case of short-term sickness or long-term disability financial compensation for the loss of earnings, and sometimes also for non-economic loss, may be provided.

In the Netherlands, no special scheme for incapacity for work due to work-related accidents or diseases exists. Workers in the Netherlands enjoy in case of incapacity for work due to an industrial accident or an occupational disease the same protection as for incapacity for work due to any other cause: wage continuation payments by the employer and disability benefits under a social insurance.[1870]

This different approach by Belgium and Canada on the one hand and the Netherlands on the other explains differences in the entitlement to invalidity benefits for irregular migrant workers. The

[1869] As a backup, workers who are not covered by the wage continuation obligation under Dutch civil law may fall back on statutory sickness insurance. However, this backup is of little relevance for irregular migrant workers – see Part IIc of this thesis on the Netherlands.

[1870] In addition, in case of negligence of the employer, the incapacitated worker may be entitled to financial compensation under private law. See § 6:108 Dutch Civil Code.

Dutch disability insurance insures the worker against the risk of being invalid and hence no longer being able to earn the living. Belgian and Canadian worker's compensation laws insure the employer, against the payment of contributions, from not being confronted with civil law suits by injured or sick workers. We already mentioned above in the context of the social risk of death that the benefits under worker's compensation laws are to be seen as compensation – compensation not only for the loss of income, but also for the mere health damage. This compensation rationale flows from civil law and cannot be found in the Dutch disability insurance. The Dutch disability benefit is to be considered as an insurance benefit. And out of immigration policy consideration, this social insurance is not available for unlawfully working or unlawfully staying foreigner.

In all investigated jurisdiction, incapacity for work benefits may be reduced (Belgium, Ontario and the Netherlands), suspended (Ontario) or even stopped (Ontario, the Netherlands) in times when the incapacitated worker is capable of performing some kind of work, but does not cooperate in finding and accepting work consistent with his/her functional abilities. Foreigners without permission to work must by law not accept work. However, in Ontario we have seen that when being confronted with foreigners who had no authorisation to work in the country, the competent authorities, although holding that a participation in measures to find suitable work is excluded without work permit, did not impose any sanctions. In Belgium and the Netherlands, we found no guidance for how authorities should deal with cases of foreigners who have no work authorisation.

4. The social risk of unemployment

4.1. Overview comparison

Irregular migrant workers who are unlawfully present in the country of work enjoy no protection in case of unemployment in the countries under investigation. That is to say they are ineligible for unemployment benefits. In Belgium and the Netherlands, this exclusion from insurance is expressly set out by law. In Canada, this exclusion has been established by case law of higher instance. According to this case law, employment contracts concluded with foreigners who lack the authorisation to work in the country are illegal and null and void *ab initio*. Relief is only granted in cases of good faith – which has thus far only been assumed exceptionally and with respect to lawfully staying foreigners.

Lawfully staying irregular migrant workers are in the same legal position as unlawfully staying ones. Because of the violation of alien employment laws, they are uninsured in Belgium and in the Netherlands. In Canada, their employment contracts are usually invalid. However, relief is in Canada possible, when the foreigner acted *bona fides* when violating alien employment laws.

Canadian and Dutch citizens whose work is not declared to the social security authorities are eligible for benefits. Entitlement to unemployment benefits is not linked to the making of social insurance contributions. Nevertheless, in order to exercise the right to unemployment benefits, the competent social security authorities must established that employment, which constitutes insurance, actually took place. What is more, in both countries there is a chance that agreements to hide the work from the social security authorities and evade the payment of contribution render the whole employment contract invalid – with possible consequences for the unemployment insurance. This still has to be clarified by case law. In Belgium, there is a direct link between the making of contributions and the entitlement to benefits. This basically disentitles Belgian undeclared workers from benefits. However, in contrast to other Belgian social insurance schemes, the Belgian unemployment insurance facilitates the access to benefits for undeclared workers who contribute to the discovery of black-economy work. In more detail, if the employee reports the employer's failure make contributions to social inspectors or to unions, it is assumed that a deduction for social security has been made and that the entitlement criterion has been fulfilled.

4.2. Further comparison

In all three countries irregular migrant workers are basically excluded from insurance against the risk of unemployment. This exclusion is motivated in the Netherlands with the objectives of the Linkage Act: on the one hand the wish to prevent unlawfully staying aliens from continuing their unlawful stay and, on the other hand, the wish to prevent aliens who are not (yet) admitted to the Netherlands from getting a semblance of complete legality, which would make expulsion more difficult. In Belgium, reasons for the exclusion have never been given. This has to do with the fact that the disqualification was originally based on a Royal Decree, which did not go through parliament, and has only later been incorporated in a federal act, then however without further motivation. In Canada, the exclusion is the result of the application of the common law doctrine of illegality of contracts, according to which the making of a contract explicitly or implicitly prohibited by statute is illegal and void *ab initio*, unless relief can be obtained.

In Belgium and the Netherlands, the statutes are clear and leave no room for exceptions: foreigners are ineligible for unemployment benefits based on work performed in violation of the alien employment laws or on work while being present in the country in violation of immigration laws. Different is the situation in Canada, where under certain conditions an exception from the general exclusion is made. According to well-established federal case law, relief for irregular migrant workers is granted as to the invalidity of the employment contract, where it would not be contrary to public policy. The Federal Court of Appeal assumed compliance with public policy, where the foreigner acted in good faith, *bona fides*, when he/she worked in violation of Canadian alien employment laws. Canadian courts assumed good faith, for instance, in situations where actions of the immigration authorities misled the foreigner about his/her right to take up employment or where the change to a more stable residence status was misinterpreted by the foreigner as to have the right to work. The federal courts only dealt with cases where the irregular migrant worker had a lawful stay in the country. However, some statements of the involved judges indicate that it would be almost impossible for category A workers to prove to have acted in good faith. The Belgian and the Dutch approach, *i.e.* the exclusion of irregular migrant workers from insurance, certainly provides for more legal certainty. In Canada, claims of irregular migrant workers for unemployment benefits have to be assessed on a case-by-case basis and the outcome is not clear in advance. On the other hand, the Canadian approach allows avoiding undue rigidity. The specific situation of foreigner who were not aware and cannot be blamed for not being aware of violating alien employment laws can be taken into consideration in Canada, whereas this is not possible in Belgium and the Netherlands.

So, we can see that by and large the legal position of irregular migrant worker is the same in all investigated countries: they are excluded from unemployment insurance. But when it comes to exceptional circumstances where an exclusion from insurance could be argued to result in undue hardship, there is no flexibility where social security laws have been penetrated by the immigration policy considerations – like in the Netherlands.

When we compare the situation of irregular migrant workers with the situation of citizens working in the informal economy, we can see that citizens are far better off in unemployment insurance law:

- in the Netherlands, irregular migrant workers are not protected against the risk of becoming unemployed, whereas citizens working in the black economy are protected;[1871]
- in Canada, irregular migrant workers are basically also not protected, unless they can prove to have acted *bona fides* when working in violation of alien employment laws, whereas citizens are protected without needing to prove their good faith;[1872] and
- in Belgium, both irregular migrant workers and citizens are not protected; but in contrast to irregular migrant workers, citizens have the possibility to obtain relief by cooperating with the social security authorities or unions.

It is interesting to observe that for nationals who engage in undeclared work, in particular in Canada and in the Netherlands, considerations of protection seem to outweigh considerations of sanctions. For irregular migrant worker it seems to be right the other way around.

[1871] In case agreements to undeclared work are part of the employment contract, there is the risk that such agreements render the whole employment contract invalid and impact on the status of insurance under unemployment insurance laws. However, this has to date not been clarified by case law.
[1872] See the previous footnote.

Thus far we have looked at insurance and eligibility for benefits in case the social risk of unemployment materialises. But what if a foreign beneficiary loses his/her authorisation to stay or to work or both during the period of receipt of unemployment benefits? According to Belgian and Dutch laws, the *loss of the permission to stay* in the country leads to disentitlement. In Canada, this issue has not been dealt with. We argued, on the basis of case law concerning foreigners who lack permission to work, that the loss of a legal residence status could affect a foreigner's availability for work that much that the forfeiture of benefits would be the result.

Regarding the *loss of the authorisation to work*, the legal situation is as follows. In Belgium, the unemployment insurance law stipulates that, as a rule, the right to benefits is forfeited. However, the law knows two exceptions. First, a foreign beneficiary continues to be entitled to benefits for sixty more days, after a work permit becomes invalid. Second, the forfeiture does not apply to foreigners to whom a work permit must not be denied.

In the Netherlands, the laws do not address the issue of losing the permission to work. We know from the highest Dutch court in social security matters that the lack of a work authorisation does not *per se* result in unavailability for work. Pursuant to the high court, foreigners without work permit may be available for the informal labour market and hence able to meet the criteria of being available for work, which has to be fulfilled throughout the period of receipt of benefits.

In Canada, the loss of the permission to work in the country has only been dealt with by judges of lower instance. We observed that benefits were continued to be granted if the beneficiary could prove that he/she sought employment for which he/she could reasonably expect to obtain a work permit. Against the background of Canadian alien employment laws, this was translated into the requirement that the foreigner's job search must establish that the foreigner is seeking work which, first, will not adversely affect employment opportunities for Canadian citizens and permanent residents and which, second, stands some chance of obtaining it. Benefits should then continue to be provided for a reasonable period of time which allows the migrant to obtain such employment.

This gives a mixed picture of the legal consequences of losing the permission to stay or to work in a country, while receiving unemployment benefits. Probably the only similarity which can be observed is the following one: there is a tendency to rather disentitle foreign beneficiaries after the loss of the permission to stay, than after the loss of the permission to work. On the other hand, the most relevant difference amongst the countries under investigation seems to be the different treatment of the loss of the employment authorisation. While there are slight similarities between Belgium and Canada – work permit must not be denied on the one hand, and there must be a reasonable chance to obtain work permit on the other – the Dutch situation is diametrically opposed, by not linking the availability for work requirement to the formal labour market.

5. The social risk of health care

5.1. Health care insurance: irregular and undeclared workers

5.1.1. Overview comparison

Irregular migrant workers who lack a correct immigration status and who are confronted with health care costs are, in general, in none of the investigated jurisdictions able to recover them from social insurance. In other words, they are not insured. In Canada and the Netherlands the non-insurance is a direct result of their lack of immigration status. In Belgium it is a consequence of their undeclared work. In more detail, in Canada both the federal framework legislation and Ontario's implementation legislation make sure that only persons lawfully entitled to be in the country are considered as residents. Similar is the situation in the Netherlands. Only foreigners lawfully residing in the country are insured on the basis of their residency and only foreigners lawfully working in the country are insured based on their employment. In Belgium, the situation is different. The irregularity of a foreigner's work or residence status is not addressed in health insurance laws and the corresponding policies. Still, in order to make insurance effective persons must affiliate with a sickness insurance fund and must prove to have sufficiently contributed to social security in a reference period. Both is only possible if the work is declared to the social security authorities – something which usually is not done in the context of irregular employment of foreigners. However, if they want to correctly declare the work, the social security authorities – if we are talking about category A workers – will very likely recognise the irregularities, since foreigners unlawfully present in Belgium usually do not possess a social security number. As a consequence, the authorities will make an end to the employment, before it already started, and therefore foreclose insurance under the sickness insurance.

For irregular migrant workers lawfully residing in the country of work, it depends – at least in Canada and the Netherlands – on their immigration status whether they are socially insured against health care costs or not. For instance foreigners who enter the countries with the permission for a short term visit and then take up work in violation of alien employment laws are not insured. By contrast, foreigners who stay in the Netherlands with a temporary residence permit for family reunification purposes and take up employment without authorisation are insured due to their residency – irrespective of irregular or undeclared work; or in Canada, holders of a temporary resident permit issued to persons who are inadmissible for temporary or permanent residence status, for instance due to health or security reasons, are insured on the basis of their residency in Ontario – also irrespective of irregular and undeclared work. In Belgium, the immigration status indirectly affects a category B worker's possibilities to access statutory health insurance. As long as category B workers possess a social security number, which is usually the case, they may theoretically affiliate with the social security authorities and make their insurance effective. Whether this is done and work of irregular migrants is declared is another question. For the rare cases that category B workers are not in possession of a social security number, for instance when they are granted a short stay in Belgium for tourism or family visit, they face the same risk as category A workers of being detected to work without being allowed to do so.

Let us now turn to the position of citizens of the countries under investigation whose work is not known to the social security authorities. In Canadian province Ontario such citizens are insured against health care costs, because of their residence in the province and because of their

citizenship. In the Netherlands they are also insured – insured because of their residence. Dutch citizenship is no criterion for being insured. The non-declaration of work presents neither a legal nor a practical obstacle for insurance. In Belgium, citizens who do not declare their work fall within the personal scope of application of the statutory health insurance. In order to make insurance complete, the laws call for affiliation with a sickness insurance fund, which requires a declaration that contributions are paid or will be paid, and for the payment of sufficient contributions in a reference period. This is not happening in the context of undeclared work. Consequently they are not insured. For possibilities to nevertheless enjoy insurance see below the further comparison.

5.1.2. Further comparison

The scope *ratione personae* of the statutory health care insurance of the investigated countries is as follows. Canada and the Netherlands primarily insure residents of the country. The Netherlands, in addition, insures persons who are not resident in the country, but who are as employees subject to the Dutch wage income tax. Belgium opted for the other way around: insured against health care costs is primarily the economically active population in Belgium. If a person is not economically active, then the person may be covered on the basis of other characteristics, amongst which residency in the country.[1873]

Two interesting observations can be made with respect to the investigated statutory health care insurance schemes and irregular migrant workers. First, in Belgium, where insurance is primarily based on employment, the status under immigration laws seems in practice to be more relevant than the fact that alien employment laws are violated.[1874] *De iure* neither the status under immigration laws, nor the status under alien employment laws is relevant under the statutory health insurance. However, in practice, as we have demonstrated, lacking an authorisation to be in the country usually goes hand in hand with lacking a social security number. This in turn makes it almost impossible to affiliate with the social security authorities without being detected, as opposed to an irregular migrant worker who is 'only' violating alien employment laws. In that sense, the status under immigration laws is *de facto* more relevant for insurance than the status under alien employment laws.

The second observation is in a way a counterpart to the first one. It concerns the fact that even in Canada and the Netherlands where insurance is primarily based on residence, the violation of alien employment laws bears legal consequences for a foreigner's position under health insurance laws. In the Netherlands this is more obvious, since persons who are not residents of the country are alternatively insured if they work in the country and are subject to Dutch income tax. By making it necessary that such a work is in compliance with alien employment laws, the legislator deliberately closed the door for insurance for foreigners who are not considered as residents to qualify through their employment. In the Canadian province Ontario we can also see a deliberate decision made by the legislator to keep out foreigners who infringe alien employment laws.

[1873] Health care costs related to industrial accidents or occupational diseases may in Belgium and Canada be covered by worker's compensation schemes. These schemes have already been compared under the social risks of death and of incapacity for work. Since there is nothing to add here, we can refer to our comparisons in the previous subchapters.

[1874] This observation can also be made with respect to other Belgium employee social insurance schemes, such as the retirement and survivor's pension insurance. I decided to mention it here in order to contrast it with the second observation for the other two countries.

However, the difference is that this does not exactly fit in the rationale of its health insurance. Let me shortly explain what I mean. In Ontario, a person must be a Canadian citizen, a native Indian or a foreigner with a certain status related to immigration law in order to be in a first step considered as resident of the province and hence be insured under the provincial health insurance. However, the legislator also sees it as sufficient if a foreigner works under a valid work permit. On first sight this seems to be an alternative route. But a closer look reveals that it is quite the contrary. This provision in combination with the limited list of eligible immigration categories makes insurance for a number of migrants residing in Ontario dependent on compliance with alien employment provisions. The legislator could have extended the list of eligible immigration categories and included for instance temporary residents for work purposes or persons subject to an unenforceable removal order. Instead it made sure that such foreigners are only insured if they, first, perform work and, second, do so under a valid employment authorisation. This, as I mentioned in the Canada Part, does not exactly fit into the logic of Canada's and Ontario's health insurance, where insurance is based on residence.

Comparing now the situation for irregular migrant workers with the situation for nationals whose work is not declared we can see that in two countries, *i.e.* Canada and the Netherlands, national workers are in a better position than migrant workers without immigration status or with a weak immigration status. By contrast, irregular migrant workers with a stronger immigration status are treated equally with citizens under these statutory health care insurance schemes. This difference, once more, can be explained by the fact that the Canadian and the Dutch health insurance primarily cover residents and requires a certain immigration status in order to be considered as resident.

In Belgium, irregular migrant workers and nationals not declaring their work seem at first sight to be in a similar position. The work of nationals who are undeclared workers is by definition not declared, and the work of irregular migrant workers is, for a number of reasons, usually undeclared. As a consequence of the non-declaration of work and the non-payment of contributions both groups are not effectively insured against health care costs. Both groups have however, upon the fulfilment of certain conditions, the possibility that periods of undeclared work are retroactively regularised and that insurance becomes effective. So in that sense we can talk about equal treatment between these two groups in Belgium. But there are differences in practice – differences which, interestingly enough, can to some extent be observed between Belgian citizens whose work is not declared and category B workers on the one hand and category A workers and category B workers with a very short term or precarious immigration status on the other.

First, although it is not done, the work of Belgian citizens may be declared, by which insurance would become effective. The declaration of work of irregular migrant workers, by contrast, always bears the risk of being discovered and being penalised. Concerning irregular migrant workers without immigration status or with a precarious immigration status it is even the case that registration with social insurance is not possible. This is because their lack of a social security number immediately attracts the attention of the social security authorities, which usually would make an end to the employment before it had already started and before rights could have been built up.

Another difference concerns the ability to effectively enjoy health care benefits in case of retroactive insurance. With respect to foreigners unlawfully staying in the country and maybe also persons with a precarious immigration status, there is a chance that they would be required to

leave the country, provided that this is from a medical point of view possible. If so, they could not enjoy health care benefits.

Finally, in practice Belgian citizens and category B worker with a 'more stable' immigration status may be insured on other grounds than employment, such as for instance residence in Belgium. This is *de iure* not possible, since a person can only be insured on the basis of residence if the person does not fall within the scope of the health insurance in his or her capacity as worker – which is the case for the two groups under investigation. But in practice it may provide for them a possibility of insurance, as long as the authorities do not know about their work. This way is not open to category A workers and category B workers with a precarious or short term residence status, since they are not included in the list of foreigners who can qualify for insurance by way of their residence.

5.2. Health care regimes and facilities for unlawfully staying foreigners

From the previous subchapter we can see that nationals who perform undeclared work and irregular migrant workers with a more stable immigration status are usually insured against the occurrence of health care costs – either correctly (Ontario and the Netherlands) or fraudulently by concealing their employment (Belgium). Below, in the chapter on the social risk financial need, we will see that irregular migrant workers with a precarious immigration status in Belgium and the Netherlands have, by and large, the possibility to receive health care through social assistance schemes. In Canada, this group receives health insurance coverage through a special programme for migrants with a temporary or precarious immigration status, established by the federal government. The only group which is, in general, not covered by all these mechanisms is unlawfully staying foreigners. In this chapter we will therefore particularly address the possibilities for unlawfully staying migrant workers to receive health care free of charge.

Migrants without lawful presence in the country of work may have in all of the investigated countries the possibility to receive medical care without needing to pay the costs of it. This, at least, can be identified as the common denominator. For the rest, we can observe huge differences with respect to the benefit, the administration, and the financing – in particular between the two European countries on the one hand and Canada on the other. But let us have a closer look of how the situation compares.

Belgium and the Netherlands explicitly and particularly regulate by law the coverage of costs for medical treatment of migrants who are not authorised to be in the country. However, the rationale in the two countries is a different one. In Belgium, the coverage of the health care costs is part of its basic social assistance scheme. Accordingly, the unlawfully staying migrant is given the right to coverage of health care costs, provided that certain conditions are fulfilled. In the Netherlands, by contrast, there is no right at all to cost coverage for the migrant. The health insurance laws only lay down the mechanism for the payment of a financial contribution from the government to health care providers who treat unlawfully staying foreigners and cannot recover their costs. The legislator made clear that this is neither a right, nor any kind of insurance or semi-insurance for the migrant. Aside from cost coverage, there is also no right to get treated – there is only an obligation for Dutch health care providers to render care that is medically necessary to everyone under Dutch disciplinary law. This leads to the conclusion that the legal position of unlawfully staying

foreigners with respect to cost coverage is in the Netherlands weaker than in Belgium, since they have no right which they possibly can enforce.

This difference in the rationale explains further differences, such as with respect to the administrative procedure of coverage of medical costs for unlawfully staying foreigners and the financing. For instance, in Belgium, health care providers are reimbursed by the social assistance authorities, which are in turn reimbursed by the federal Ministry for Social Integration. In the Netherlands, health care providers get their costs directly refunded by the Ministry of Health.

However, in both countries three similar conditions have to be fulfilled before medical costs are refunded: (1) no status under immigration laws, (2) no ability to pay the costs of the treatment and (3) the need for what Belgians call urgent medical assistance and what the Netherlands know as medically necessary care. So, it is about paying the costs of medical treatment, which includes an element of urgency or necessity, for unlawfully staying foreigners who otherwise would not be able to cover the expenses.

(1) Concerning the immigration status, in both Belgium and the Netherlands these rules are basically only applicable to foreigners who lack the authorisation to be in the country.[1875] This relates most notably to unlawfully staying aliens who have not come to the attention of immigration authorities. Foreigners who are unlawfully present with the knowledge of the immigration authorities have in both countries, under certain circumstances, the possibility to fall back on other statutory regimes, providing for more comprehensive medical treatment. For instance, foreigners who were lawfully staying and who received certain forms of social assistance may continue to receive it, including health care insurance (the Netherlands) and medical assistance (Belgium), after losing their residence status until the moment they can effectively be deported. Another example would be that foreigners unlawfully present in Belgium may access social assistance of last resort, including medical assistance, when they pledge themselves to voluntarily leave the country. In case unlawfully present foreigners are not able to leave the country, most notably due to medical reasons, we can see that in both countries there is the possibility to get health insurance (the Netherlands) or medical assistance (Belgium) via social assistance schemes. The difference is however that in the Netherlands such foreigners, basically, must first regularise their immigration status, whereas in Belgium, according to case law, social assistance and health care insurance is to be granted in such situations independent of the foreigner's status under immigration laws. More on this, when discussing the social risk financial need.

(2) The second criterion to be fulfilled for cost coverage is the inability to pay the medical treatment. It is clear: Belgium and the Netherlands are only willing to pay the bill for those unlawfully staying foreigners who can't afford to pay. The methods to assess the foreigner's inability to pay the bill are different in Belgium and the Netherlands – but amount to the same thing. In Belgium, a means test, which is conducted by the social assistance authority, must establish that the available means of the unlawfully present alien and his family are insufficient to

[1875] One exception exists: in the Netherlands also foreigners who are awaiting a decision on a temporary ordinary residence permit or on a notice of objection or appeal and who are allowed to await the outcome of the procedure in the Netherlands may benefit from this particular cost compensation scheme for unlawfully staying foreigners. This group has been included, since they do not fall within the scope of any statutory arrangement for health care cost coverage. In Belgium, this group would fall within the scope of the last resort social assistance scheme, through which they are provided medical treatment.

live a life in human dignity. In the context of cost coverage for urgent medical treatment, this test comes down to the requirement to not be able to pay the medical expenses. In the Netherlands, the health care provider has to make sure that (parts of) the costs cannot be covered by the alien him- or herself, an insurance company or on the basis of another legislative provision. The difference in the administration, once more, can be explained by the different rationale of the cost coverage mechanisms. One would be tempted to comment that the Dutch procedure leads to an additional administrative burden for health care providers. And indeed: this has been identified by national evaluation reports as being problematic.

Irregular migrant workers, as defined for the purpose of our research, have by definition income from work. From a legal point of view they are only eligible for medical treatment free of charge in Belgium and the Netherlands, if their income is not sufficient enough to pay the medical treatment. If it is sufficient, they are ineligible. However, the competent national authorities have complained that it is rather difficult to assess the ability to pay the medical expenses when dealing with clandestine migrants, who possibly have income from undeclared work or from assistance provided by NGOs. This may enable irregular migrant workers who have sufficient income from undeclared work to fraudulently get their medical expenses paid for by the State.

(3) The medical urgency (Belgium) or necessity (the Netherlands) has in both countries only to be determined by the attending doctor. In the Netherlands, medical associations have further interpreted this concept. What is more, the Dutch laws prescribe that doctors shall in their judgment on necessity take account of the expected duration of stay of the foreign patient. In Belgium, such guidance as for the interpretation of 'medical urgency' has not been given. Also an obligation or recommendation to take the expected duration of the stay into consideration for the assessment of urgency does not exist. Despite the guidance in the Netherlands, doctors of both countries complained that they have difficulties to work with the notions 'medically necessary care' and 'medically urgent care' – not least because a *judgement* on which health care falls under the concept of necessity or urgency does not fit with their tasks and working methods. For the sake of completeness it shall be mentioned that the medical necessary or urgent assistance for which costs can be recovered may comprise in both countries not only curative, but also preventive care, and not only primary, but also secondary care, *i.e.* hospitalisation. Both Belgium and the Netherlands emphasised the coverage of costs for treatment that is necessary due to public health considerations, such as the treatment of communicable diseases.

Our investigations showed that both the Belgian and the Dutch rules emanate primarily from immigration policy considerations. The Belgian restriction of social assistance to urgent medical assistance only, was motivated by the wish not to provide an incentive for irregular migration, which would make it more difficult to integrate foreigners into Belgian society and to provide for a peaceful living together. One can allege that there is also a social integration objective – but then not for irregular migrants, but for regular ones. The Dutch motivation for the particular rules on cost coverage for medically necessary care for unlawfully present foreigners has to be read in the context of the Linkage Act. Out of immigration policy considerations, which have been already outlined before, the Linkage Act bans foreigners without authorisation to be in the country from all statutory social security benefits – except for medically necessary care. The particular rules for cost coverage of such medically necessary care were then justified in a positive way, *i.e.* no argumentation why restriction, but argumentation why extension. The Dutch legislator saw it as the price the rest of the population has to pay for the implementation of the new restrictive

immigration policy, which benefits society. In addition, public health reasons were brought forward.

In Canada, and more particular in Ontario, no specific provisions for the health care of unlawfully staying aliens can be found. The federal government set up a programme to cover health care costs of migrants with a temporary or precarious immigration status – such as victims of human trafficking under a temporary residence permit or failed refugee claimants whose removal order is suspended because they applied for pre-removal risk assessment due to the risk of persecution in the country of deportation – who are not able pay for the health care services and who cannot fall back on statutory or private health insurance. Unlawfully staying aliens are however not addressed. The only group of unlawfully staying persons who may benefit from this programme are foreigners detained for immigration purposes.

Our investigations have revealed that in practice unlawfully staying migrants in Ontario turn to non-profit centres which provide primary health care and which are, for the most part, funded by Ontario's Ministry of health. However, whether an irregularly staying migrant is eligible for free health care at such a centre depends on the centre's policy. In more detail, at some centres the migrant must belong to its target population, at others the migrant must be residing in its catchment area. Concerning secondary health care, in general, there is no statutory cost coverage regime accessible for unlawfully staying migrants. In practice, staff members of above-mentioned health centres often negotiate on a case-by-case basis lower health care rates. If it concerns life-threatening situations, public hospitals are under the legal obligation to provide medical assistance. In case the costs for this assistance cannot be recovered, hospitals themselves have to pay them.

Compared to Belgium and the Netherlands, unlawfully staying irregular migrant workers are in a weaker position in Ontario when they are confronted with the need for health care for which they cannot pay the bill. In Belgium, they are entitled to urgent medical assistance free of charge, if they cannot pay for it. In the Netherlands, health care providers are under the legal obligation to provide medically necessary care, for which the payment of the costs is mostly covered by the State, if the unlawfully staying patient cannot pay. In Ontario, there is only a legal obligation for public hospitals, which are the vast majority of hospitals, to render medical assistance in life-threatening situations.[1876] If in such a situation the patient cannot pay the treatment, the hospital has to cover the expenses. For all other medical treatment, except for such danger of life treatment, unlawfully staying migrants have no direct or indirect right and depend on external circumstances whether they can access it or not, when not being able to pay for it. With external circumstances I mean, for instance, the fact whether they live in the catchment area of a non-profit health canter or the fact whether lower rates for hospital treatment can be negotiated with the support of such health centre collaborators.

5.3. Health care: children

Let us first compare the national situations for children of irregular migrant workers in the general statutory health care insurance. As we already have seen, citizenship and the status under immigration laws play a role under national insurance schemes. So we will look how children having the citizenship of the country where at least one parent works as an irregular migrant

[1876] For the lack of relevant criminal law obligations and the like see Part IIb of this thesis on Canada.

worker and how unlawfully present children of irregular migrant workers are protected. For reasons of simplicity we leave every immigration status in between, from stable permanent residence statuses to precarious residence statuses, aside.

Children having the citizenship of the country where one parent works as an irregular migrant worker are insured in all countries under investigation. They have an independent right to insurance by way of their residence in the country – even in Belgium. It must be remarked that the chance that the child of an irregular migrant worker is a citizen of the country where the parent works is much higher in Canada, as compared to Belgium or the Netherlands. This is because Canada operates basically under the *ius soli* principle for citizenship. In other words, children of irregular migrant workers born on Canadian soil acquire Canadian citizenship. In Belgium and the Netherlands, in contrast to this, at least one parent must be a citizen of these countries so that the child acquires this citizenship by birth.[1877] This entails that Canada, and more specifically Ontario, introduced special administrative procedures to guarantee that Canadian citizens, born to migrants with an irregular immigration status, are insured under the statutory health insurance. Such procedures do not exist in Belgium and the Netherlands – but they are also not necessary, since usually the other parent is a citizen of the country and has therefore no problems to contact public authorities.

Children of nationals who do not declare their work, if we also assume citizenship of the children, are in exactly the same position as above-mentioned children of irregular migrant workers. They are independently insured, on the basis of their residence.

Quite the contrary is the situation for unlawfully present children of irregular migrant workers in the investigated countries. They are in all three countries basically not insured under the statutory health insurance. However, there may be exceptions: not in Canada, maybe in the Netherlands and certainly in Belgium. In the Netherlands, as from 2009 on, children are insured if they were born in the country and if at least one parent resides there under a 'rather stable' immigration status or if they were born outside the country and both parents reside in the country under a 'rather stable' immigration status. As illustrated in Part IIc on the Netherlands, it is not yet clear whether children without authorisation to be in the country are insured under this provision. Still, if they were, the field of application would be extremely limited – to children in immigration procedure or to children for which parents did not make use of their right to apply for a residence permit for family formation or reunification purposes. In Belgium we know for sure that from a legal point of view there may be situations in which unlawfully residing children of irregular migrant workers are insured. This relates to situations where the child is insured on account of his/her insured parent. This parent can be the other parent who is not an irregular migrant worker, can be an irregular migrant worker with a 'rather stable' immigration status who is fraudulently insured due to his/her residence, or can be an irregular migrant worker with a 'rather stable' immigration status who is exceptionally insured due to his/her declared work.

Since unlawfully staying children of irregular migrant workers are basically not insured under the general statutory health care insurance, one can ask whether they can fall back on other legal arrangements. Our investigations have shown: they can, but in some jurisdictions hardly more than unlawfully staying adults can. In the Netherlands, costs for medically necessary care may be

[1877] Exceptions from this *ius sanguinis* principle exist in Belgium and the Netherlands for foundlings, children who would otherwise be stateless or third-generation foreigners. But this is of no big relevance for our research.

covered by the State, as it is the case for adults. In addition, they are able to receive treatment in case of psychosocial, psychological and behavioural problems. In Ontario, they may receive primary medical care through government funded non-profit health centres, like adults. However, this finding has to be put into perspective by above-mentioned fact that children of irregular migrants born in Canada are no unlawfully staying children, like in the other investigated countries, but are citizens who receive full health care insurance. In Belgium unlawfully staying children are in a different position than unlawfully staying adults when it comes to health care. After an intervention of the Constitutional Court, unlawfully staying children receive medical assistance at reception centres for asylum-seekers which is indispensible for the development of the child. Unlawfully staying adults, as illustrated in the previous subchapter, only receive urgent medical assistance.

One can conclude that children of irregular migrant workers who have the citizenship of the country where at least one parent works, and possibly also stays, irregularly are mandatorily insured against health care costs – like every other child possessing the citizenship of this country, even if one or both parents who are also citizens of this country engage in undeclared work. In contrast to this, unlawfully staying children of irregular migrant workers are basically not insured. In Canada and the Netherlands they even can only fall back on a minimum medical treatment,[1878] hardly more than what unlawfully present adults would receive. From our country research we know that in Canada and in the Netherlands, the line for children between being fully insured and being eligible only for minimum health care is having no precarious residence status. One can ask whether the immigration status should make the difference for children. Are children to be blamed for a 'decision' of their parents? Are not they therefore in a different situation than adults? But we have seen that they are treated like adults when it comes to health care. On the other hand, are not they in a similar situation as children who are nationals of the country where they stay? But we have seen that they are treated differently than young citizens in health care. That access to full statutory health care insurance is possible to organise, is demonstrated by Ontario. Special procedure enable that Canadian children of unlawfully residing foreigners are affiliated with health insurance without any risks for the parents. So this should be also possible for unlawfully residing children of unlawfully residing foreigners.

[1878] For Ontario we are talking about voluntary health care provided by government funded NGOs.

6. The social risk of family

This chapter only deals with social security arrangements which address the social risk of having and raising children irrespective of the families' financial needs. Arrangements which provide benefits only after the assessment of the parents' needs are compared below in subchapter 7.3.

6.1. Overview comparison

Unlawfully present irregular migrant workers which are confronted with costs for having and raising children are not supported by the Dutch and the Canadian state. In the Netherlands, as a consequence of the introduction of immigration motives in family allowance laws, only foreigners with a certain immigration status can be insured on the basis of their residence and only foreigners with the authorisation to work in the country can be insured based on their employment. In Canada and in Ontario, a combination of a number of qualifying conditions makes it virtually impossible for migrant workers without immigration status to qualify for benefits. These conditions are: first, a certain immigration status either from the applicant or from the applicant's partner, second, residence in the country, which is determined according to both factual and legal circumstances, and, third, for most child benefits programmes the filing of an income tax return, which irregular migrant workers due to a lack of the legally required social security number usually cannot do. In Belgium, child benefit insurance laws do not require compliance with immigration or alien employment laws, nor do they require the payment of social security contributions for benefit eligibility. So, in the absence of an explicit exclusion and against the background that an invalidity of the employment contract can basically not be invoked, irregular migrant workers *de iure* qualify for benefits. However, *de facto* work of migrant workers without immigration status goes almost necessarily hand in hand with undeclared work. The competent authority declared in this context that they are not paying out benefits, as long as no contributions have been paid in.

With respect to lawfully present irregular migrant workers one has to distinguish between foreigners with a precarious and foreigners with a somewhat more stable immigration status. The first are in all three countries in the same position as unlawfully present irregular migrant workers. The latter, by contrast, may be in a better position; meaning that they may be eligible for benefits. However, there are differences between the countries under investigation. In the Netherlands, category B workers with a more stable immigration status qualify by way of their immigration status in combination with their actual residence in the country. In Canada, their lack of a social security number prevents eligibility under most federal and provincial child benefit programmes. Only under one federal programme, where the file of an income tax return is no legal requirement, this group may qualify for benefits on the basis of their immigration status in combination with their actual residence. In Belgium, category B workers with a more stable immigration status may basically be affiliated with social insurance. If they did so, they would be able to collect child benefits. Nevertheless, whether employers really register irregular migrant workers is another question.

Citizens whose work is not declared are eligible for child benefits in Canada and in the Netherlands by way of their residence and their citizenship. In Belgium, their situation under social insurance law is not much different from the one of irregular migrant workers. According to the practice of the competent administration, undeclared workers are not getting paid out any benefits under the child benefit insurance.

6.2. Further comparison

The three investigated countries use rather different social security techniques in order to alleviate the financial burden of having and raising children: Belgium works with a social insurance based on employment; the Netherlands operates a social insurance based, primarily, on residence; and Canada as well as the province Ontario know a number of social security programmes based on residence and strongly interlinked with the federal and the provincial income tax system, which could best be labelled as demogrant schemes. These different techniques lead to a rather mixed picture of our law comparison

There is no pattern when we compare the legal status of irregular migrant workers internationally. Too different are these statuses in the jurisdictions under investigation. Only some similarities between the schemes where the personal scope of application is based on presence or residence can be observed. To be more precise, in these jurisdictions the legislator made entitlement to benefits, in one way or the other, dependent on a certain immigration status.

There is also no common pattern when we compare the internal relation of the protection awarded to the different groups of workers under investigation. Under Belgian social insurance law irregular migrant workers and Belgians working in the black economy are treated almost equally, with some slight advantages for citizens. In the Netherlands we see a difference in treatment of irregular migrant workers without immigration status or with a precarious immigration status on the one hand and irregular migrant workers with a somewhat stronger immigration status and Dutch citizens working on the black market on the other. In Canada, for most child benefits schemes there is a difference in treatment between irregular migrant workers and citizens not declaring their work. Under one federal Canadian scheme, there is a difference in treatment between irregular migrant workers without immigration status or with a precarious immigration status on the one hand and irregular migrant workers with a somewhat stronger immigration status and Canadian citizens working in the black economy on the other. So, how much more different can the internal relation between the groups of workers amongst the three countries be? One can nevertheless ask whether in the absence of similarities, the differences might tell us something. A tempting answer may be to say that the highest possible equality of treatment between irregular migrant workers and undeclared national workers can be observed in the country where insurance is based on employment. This answer seems to be indeed true with respect to the social risk of family. Nevertheless, a look at the comparisons under the other social risks shows us that such a statement is not generally valid. There are a number of examples where under schemes based on employment the status for these groups differs. This may be, for instance, because the legislator intervened out of immigration policy motives or because the validity of the underlying employment contract was assessed differently.

What is more, under all investigated national schemes, it is basically the parent or caregiver who is entitled to child benefits. The child him- or herself triggers eligibility to benefits, but is usually under none of the schemes entitled to receive them.[1879] We have in our national investigations nevertheless asked whether there are any legal requirements to be fulfilled by the child, which are

[1879] Only in exceptional situations the child may be also the entitled person. This is for instance the case for orphans in Belgium.

relevant for our research. The answer is no. As a consequence, child benefits may be also received for children who are unlawfully present in the country.

7. The social risk of financial need

Individuals who face the risk of not having sufficient means (anymore) to live a decent life may enjoy financial and material assistance by the State. In the three investigated countries, a distinction is made between social assistance for needy groups of people who are affected by a particular social risk and social assistance for needy people in general. The first is called categorial or special social assistance. It relates for instance to needy people who are in addition confronted with disability or old age. This chapter will follow this distinction and internationally compare, first, the protection provided under special social assistance schemes and, later, the protection granted under the general social assistance schemes.

A preliminary remark must be made with respect to the social risk financial need and social welfare schemes, which cover this risk. Both irregular migrant workers and nationals who are undeclared workers have by definition income from work. This fact does not make them the target group of welfare schemes. In other words, whenever workers have sufficient income from work, they are not needy within the meaning of welfare schemes and hence do not qualify for benefits. Nevertheless, irregular and undeclared workers may be confronted with the social risk financial need if their income from work is too little or when they lose their job and hence their source of income.

7.1. Special assistance schemes

7.1.1. Overview comparison

Unlawfully present irregular migrant workers with special needs and with insufficient means to live a decent existence have, by and large, no possibilities to receive assistance from the Belgian or the Dutch State or the province of Ontario. Their presence in violation of the immigration laws mostly disentitles them to benefits.

The access of lawfully present irregular migrant workers to special social assistance benefits depends basically on the foreigner's status under immigration laws. In general we can see that foreigners with a precarious residence status are rather ineligible for benefits, whereas foreigners with a somewhat more stable immigration status may qualify.

Citizens who work or worked in the black economy, who have special needs and who are indigent may qualify for assistance on the basis of their citizenship, their simple physical presence or their residence.

7.1.2. Further comparison

Belgium, the Netherlands and the Canadian province Ontario run social welfare programmes particularly for needy seniors and needy disabled people. Belgium, in addition, provides child benefits of last resort to indigent parents.[1880] Most of these special social assistance schemes have

[1880] This peculiarity, compared with the other countries, can be explained by the fact that the other countries provide child benefits on the basis of residence, whereas Belgium grants child benefits only on the basis of work. Therefore,

a strong link to other national social security programmes. The Belgian social assistance schemes for the elderly, for the disabled and for the parents serve only as a backup for those people who are not protected by the respective social insurance schemes. The Dutch assistance scheme for the unemployed elderly provides only for the continuation of public benefits to those who are no longer entitled to unemployment or disability insurance benefits. Finally, Ontario's social assistance for the elderly is linked to the federal old age programme. Independent from other national social security schemes is only the social assistance schemes for the disabled in Ontario. All these links are reflected in the entitlement criteria and hence provide a first obstacle in particular for irregular migrant workers. For instance, eligibility under the Dutch assistance for the unemployed elderly requires previous entitlement under the unemployment or disability insurance. Since irregular migrant workers are explicitly excluded from these insurance schemes, they are also not able to qualify for the special assistance for the elderly, except for changes in the immigration status.

Nevertheless, for migrants unlawfully present in the country of work, the main obstacle to entitlement to benefits is the *explicit* requirement of presence in compliance with immigration laws. This is the case for Ontario's[1881] and the Dutch special social assistance schemes, as well as for the Belgian social assistance for indigent parents. The Belgian special assistance schemes for the elderly and for the disabled lack such a requirement. In lieu thereof, the Belgian schemes list categories of privileged foreigners who are eligible for benefits. However, exceptionally these categories have no necessary link to a lawful presence in the country. For instance, the recognition as a stateless person does not entitle a foreigner to stay in Belgium, but give the foreigner *de iure* the possibility to qualify for special social assistance benefits. However, *de facto* their application necessarily leads to a disclosure of their status, with the possible consequence that they have to leave the country. Since residence in Belgium is required for entitlement to benefits, they could no longer qualify when being abroad.

What is more, under one of the investigated special social assistance schemes, *viz* Ontario's assistance for the disabled, the social assistance authorities are by law given the discretion to deviate from the lawful residence requirement in situations where a foreigner who is subject to an enforceable removal order is unable to leave the country for reasons wholly beyond his or her control. Canadian immigration authorities, like Dutch or Belgian immigration authorities, have the possibility to stay a removal order in such situations. However, the provincial legislator has additionally conferred the social assistance authorities the power to determine such situations and grant assistance, independent from the immigration authority's opinion. This issue will be discussed in more detail below in the context of general social assistance schemes.

In contrast to the requirement to comply with immigration laws, there is no such requirement, under none of the special social assistance laws, with respect to compliance with alien employment laws. However, in Ontario it is the policy of the competent ministry to not grant employment assistance to foreigners who lack a work authorisation. In the Netherlands, the lack of authorisation to work in the country may indirectly affect eligibility to special social assistance. As we heard above, the Dutch assistance for the unemployed elderly requires previous entitlement

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the social assistance benefit for persons who exclusively or primarily care for a child serves as a safety net for all those not entitled to child benefits through their employment.

[1881] In Ontario the law only excludes unlawfully staying foreigners with respect to whom a removal order has become enforceable. However, policy guidelines recommend not granting benefits to foreigners who are not legally entitled to reside in Canada.

under the unemployment or disability insurance. These social insurance schemes are based on employment and explicitly exclude from coverage foreigners without work authorisation in the Netherlands. So, there may be an indirect effect. What is more, the Dutch special social assistance scheme for the unemployed elderly requires cooperation in labour market (re)integration measures. Still, the competent authorities may refrain from imposing such obligations. Non-compliance may result, also at the discretion of the competent authority, in a reduction or the loss of the benefit. How the lack of employment authorisation is considered in this regard, depends on the single authorities. General policy guidelines or case law does not exist.

Foreigners without employment authorisation are foreigners who have no permanent or stable immigration status in the investigated countries. This entails, since special social assistance schemes mostly link entitlement to a rather stable immigration status, that not all of them are eligible for special social assistance. A comparison of which immigration status allows for entitlement to special social assistance is however rather difficult, since the immigration laws of the investigated countries strongly differ. So far in our international comparison we talked about precarious or somewhat stable immigration statuses of foreigners without authorisation to work in the country. Here, in the context of social assistance schemes, we should try to make a closer approximation and give one example of a precarious immigration status and its consequences for special social assistance. In Belgium, foreigners subject to a removal order who cannot leave the country due to medical reasons may be granted a postponement of departure or may apply for a regularisation of their stay on medical grounds. When postponement is granted and during the application procedure for regularisation the removal order is not executed. In Canada, foreigners who are subject to a removal order, but who cannot leave the country because of medical problems may apply for permanent residence based on humanitarian and compassionate considerations. During this application procedure the removal order is stayed. In the Netherlands, a removal order is not executed when the state of health of the foreigner does not allow for it. The exact conditions and consequences of all these national procedures for the non-deportation of foreigners on medical grounds differ. Nevertheless, all these procedures serve, by and large, the same function in that the stop the removal of a foreigner on the basis of medical considerations. The consequences for social security are rather different. In the Netherlands the stoppage of deportation, for the maximum of one year, does not entitle the foreigner to special social assistance benefits. In Belgium, both the postponement of the deportation, in principle for the maximum of three months, and the simple application for regularisation do not allow the foreigner to become eligible under the special social assistance scheme for family allowance. Concerning Belgian social assistance for the elderly and the disabled, such foreigners may exceptionally qualify for benefits. This is the case if they belong to a privileged category of foreigners, such as persons falling under a bilateral agreement or being recognised as stateless person. In Canada, applicants for permanent residence on humanitarian and compassionate grounds may qualify for social assistance for the elderly or social assistance for the disabled. Concerning the first social assistance, one must however remark that an accumulated residence in Canada of at least ten years is required. So, there are differences with respect to foreigners who cannot leave the country due to medical reasons. The differences in social security may be explained by different objectives of the procedures under immigration law. The Dutch and the Belgian immigration law procedures enable or provide the perspective of only temporary residence.[1882] In contrast, the Canadian immigration law procedure, where rights under special

[1882] In Belgian, a successful application for regularisation leads, in the first instance, to a temporary right to residence. Only after five years of residence this right becomes permanent.

social assistance schemes are opened, provides the perspective of permanent residence in the country.

In contrast to irregular migrant workers who, by and large, only qualify for special social assistance if they have a somewhat stable immigration status, undeclared national workers do not face any obstacles. They are in all three investigated countries in the better position.

7.2. General assistance schemes and special assistance schemes for foreigners

7.2.1. Overview comparison

Unlawfully present irregular migrant workers who have insufficient means to live a decent existence are, by and large, due to their lack of immigration status excluded from the social assistance schemes of Belgian, Ontario and the Netherlands. Exceptions only exist in Belgium and Ontario with respect to unlawfully present foreigners who are unable to leave the country for reasons wholly beyond their control.

Lawfully staying irregular migrant workers who are indigent may in the main fall back on social assistance – either on general social assistance or on social assistance especially for foreigners. However, upon discretion of the competent social assistance authority, benefits may be reduced or even stopped if the beneficiary does not comply with back-to-work obligations. The lack of a work authorisation may provide a reason for such a reduction or stop.

Citizens who engage or engaged in undeclared work and who are in need may qualify for assistance on the basis of their citizenship or their personhood, in combination with either their simple physical presence in the jurisdiction or their residence there.

7.2.2. Further comparison

Belgium, Ontario and the Netherlands run general social assistance schemes for residents who are in need. In addition, Belgium knows as a last resort a second social assistance scheme for every person who is without support not able to live a life in human dignity. What is more, all three countries have set up special assistance programmes for certain groups of foreigners: Belgium provides particular assistance to asylum-seekers, Canada operates a resettlement programme for refugees selected abroad, and the Netherlands provides reception to asylum-seekers and some other categories of foreigners, as well as social assistance to certain foreigners who do not qualify under the general social assistance scheme.[1883] Not all of these programmes turned out to be relevant for our research. This relates to the Canadian resettlement programme, since foreigners already arrive with a permanent residence authorisation in Canada. The other programmes bear relevance for foreigners without immigration status or with a precarious immigration status. Therefore, in this part of the comparison the national results for both general social assistance schemes and relevant assistance schemes for foreigners will be compared internationally.

[1883] In addition, there exist remigration programmes, which provide financial and other assistance to foreigner voluntarily leaving the country. Since assistance only takes place during the journey and after the arrival in the country of origin, these programmes fall out of the scope of our research.

Adult persons who have no authorisation to be in the country are basically not entitled to social assistance of any kind.[1884] This relates in principle to foreigners who have not yet come to the attention of the authorities and to foreigners subject to an enforceable order to leave the country.[1885] However, Ontario's laws stipulate that the general exclusion of unlawfully staying foreigners subject to an enforceable order to leave the country shall not be applied in situations where the social assistance authority is satisfied that the foreign person is unable to leave the country for reasons wholly beyond the control of the person. Similar is the situation in Belgium, where the Constitutional Court found with respect to the last resort social assistance that foreigners who are not able to leave the country due to medical reasons are in a different situation than foreigners who can leave and who are thus able to comply with an order to leave the country. In addition, the highest Belgian court held that last resort social assistance must be granted to foreigners who cannot leave the country for reasons wholly beyond their control. As a consequence, the Belgian social assistance authorities are required to grant, upon their assessment, social assistance of last resort to foreigners subject to an order to leave the country who cannot comply with this obligation due to medical or other reasons wholly beyond their control. The legal situation in Belgium and Ontario may raise some questions. Most notably, the fact that two entities of the State may be busy with one and the same question, *viz* when is a foreigner unable to leave the country, does not contribute to legal certainty, legal predictability and efficiency. Concerning the latter, the situation in Belgium shows that foreigners who applied for social assistance on the ground that they are unable to leave due to medical reasons almost always also tried to get their immigration status (temporarily) regularised due to medical reasons.[1886] Concerning the question of legal certainty and predictability, instead of only one federal authority specialised in immigration issues, the question of inability to leave the country must be (also) assessed by a municipal authority specialised in social assistance matters. In Belgium this has led to a non-uniform answering of the question by the social assistance authorities and appellate courts.[1887]

In contrast to Ontario and Belgium, the Dutch social assistance authorities have no obligation to determine whether a foreigner is able to leave the country and to grant upon their assessment social assistance. In the Netherlands, the situation of unlawfully present foreigners who are unable to leave the country for reasons wholly beyond their control must first be regularised under immigration law – upon application or *ex officio* –, before they can qualify for social assistance. This difference between Ontario and Belgium on the one hand and the Netherlands on the other may be explained by the Dutch Linkage Act, which in general disentitles unlawfully staying aliens from social security benefits. The

[1884] Some very few exceptions exist in the investigated jurisdictions. For instance, people in detention receive social and medical assistance under particular legal regimes for people in detention. In Belgium and the Netherlands, foreigners who received certain forms of social assistance may continue to receive them after losing their immigration status until the moment they can effectively be deported. In Belgium unlawfully staying foreigners may access basic social assistance, when the pledge themselves to voluntarily leave the country – usually within four weeks.

[1885] In Ontario the law only excludes unlawfully staying foreigners with respect to whom a removal order has become enforceable. However, policy guidelines recommend not granting benefits to foreigners who are not legally entitled to reside in Canada.

[1886] See Part IIa of this thesis on Belgium.

[1887] *Steven Bouckaert* analysed that labour courts have not applied fixed assessment criteria when interpreting the vague guidelines of the Belgian Constitutional Court. See Steven Bouckaert, *Documentloze vreemdelingen: Grondrechtsbescherming doorheen de Belgische en internationale rechtspraak vanaf 1985* (Antwerp/Apeldoorn: Maklu, 2007), pp. 674-78.

It is interesting to observe that all three countries, as a principle, do not provide social assistance to unlawfully staying foreigners; and that all three countries provide social assistance to those foreigners who have to leave the country, but who cannot do so for reasons wholly beyond their control. This seems to be the basic floor with respect to the protected population.

Concerning the principal exclusion of adult foreigners unlawfully present in the country from any form of social assistance, the Belgian Constitutional Court and the highest Dutch court in social security matters declared the exclusion to be in line with the Constitution (Belgium) and with international obligations (Belgium and the Netherlands). Both high courts regarded the different treatment between nationals and foreigners lawfully present on the one hand, and foreigners unlawfully present on the other as objectively and reasonably justified in view of the countries immigration policies. To be more precise, the different treatment was considered (1) to pursue a legitimate aim, *i.e.* the immigration policy objective to prevent irregular migration in general and a continuation of an irregular stay in particular, and was considered (2) to be a measure that allows realizing this aim, *i.e.* the removal of the possibility to fall back on social assistance can be a disincentive to continue the irregular stay in the country. Moreover, the Belgian Constitutional Court held that (3) there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised, since social assistance is provided until the order to leave the country becomes enforceable, *viz* for the time necessary to leave the country, which is up to one month. In addition to compliance with the principle of non-discrimination, the Belgian Constitutional Court found also conformity of the exclusion with other international obligations, such as the prohibition of torture or inhuman or degrading treatment (Article 3 ECHR), the right to an adequate standard of living (Article 11 ICESCR) or the right to social and medical assistance (Article 13 (R)ESC). In contrast to Belgium and the Netherlands, Ontario's welfare provisions with respect to unlawfully staying aliens have to our knowledge not been subject to legal scrutiny.

With respect to foreigners unable to leave the country for reasons wholly beyond their control, one can ask whether the protection itself, *i.e.* the benefits provided, is similar among the investigated countries. This question can best be answered by looking at the assistance granted to citizens of the country. Here we can see that such foreigners indeed are basically entitled to the same assistance as citizens – at least in Ontario and under the social assistance of last resort in Belgium. In the Netherlands, by contrast, their assistance is comparable to the one granted to asylum-seekers. That is to say, it comprises housing, sickness insurance coverage, education and a small pocket money for food and clothing. This means that the package is somewhat less comprehensive than the benefit package available for Dutch citizens.

As opposed to the requirement to comply with immigration laws, there is no similar requirement, under none of the investigated general social assistance schemes and special assistance schemes for foreigners, with respect to compliance with alien employment laws. However, a lack of a permission to work may bear some relevance with respect to back-to-work obligations under social assistance schemes. Under the general social assistance schemes of all countries, benefits can be reduced or stopped if the beneficiary does not comply with obligations like register as a job seeker, make reasonable efforts to find work, accept employment or participate in employment measures. However, the laws grant the social assistance authorities a margin of appreciation for refraining from imposing these obligations and/or from imposing sanctions for non-compliance. In Ontario, it is the policy of the social assistance authorities that the case handler may defer the beneficiary's participation requirement if the beneficiary is unable to obtain a work permit or if

there is a delay in obtaining a work permit. In Belgium and the Netherlands, such explicit guidance does not exist – neither by law, nor by case law, nor by policy.

It is worth mentioning that the special assistance schemes for foreigners do not require any efforts to integrate into the national labour market. This difference may be explained by the different objectives of general social assistance schemes and of assistance schemes for foreigners. The Belgian and Dutch reception regimes for asylum-seekers and related categories of foreigners intend to provide such foreigners with the means to live during the asylum procedure. Moreover, these regimes want to prepare the asylum-seekers for their future, wherever this may be, by offering education and also vocational training. However, it is not the intention to integrate asylum-seekers in the national labour market, as long as there is no final decision on their future in the country. Different is the situation with respect to the second Dutch assistance regime particularly set up for foreigners. This scheme is intended to provide a safety net for all those foreigners lawfully staying in the Netherlands who due to their precarious immigration status do not qualify for the general social assistance. Financial and other assistance are only granted on a monthly basis until a decision, in one direction or the other, is taken with respect to their immigration status. Also here it is about foreigners whose future in the Netherlands is uncertain. So, there is no intention to integrate them in the national labour market.

Foreigners without employment authorisation have a weaker, sometimes even precarious, immigration status. By and large, the social assistance schemes of the three investigated countries also support such foreigners.[1888] However, there are some exceptional categories of foreigners who are despite their lawful presence not in the position to qualify for social assistance. This concerns for instance tourists, who are in Ontario and the Netherlands excluded and may in Belgium only be entitled under exceptional circumstances.

In general we can see that foreigners with a precarious residence status – such as those who cannot be removed from the country due to medical reasons or those who are in the application procedure for a residence authorisation – enjoy protection in the Netherlands usually under the special schemes for foreigners and in Belgium under the general social assistance scheme of last resort. In other words, the precarious residence status usually makes them ineligible for general social assistances (of first instance) in Belgium and in the Netherlands. Only in Canada, where there is simply neither a particular regime for foreigners other than permanent residents nor a two-tier general social assistance regime, foreigners with a precarious residence status are protected by Ontario's general social assistance.

Belgian, Canadian or Dutch citizens who work or worked in the black economy can fall back on social assistance when their means are not sufficient to live a decent existence. Their citizenship or their simple personhood, in combination with their residence or their simple physical presence, paves the way for that. Whether they are better of than irregular migrant workers with respect to access to social assistance, depends on the concrete immigration status of the foreigner and on whether the authorities consider the lack of a work authorisation as an obstacle for the fulfilment of back-to-work obligations.

[1888] We shall mention that the social assistance schemes for which these foreigners with a precarious immigration status qualify – in particular in Belgium and the Netherlands – also provide for medical benefits. The Dutch social assistance regimes for foreigners provide for a health insurance, comparable to the general health insurance. The Belgian social assistance scheme of last resort provides for health care benefits in kind.

7.3. Children

A particular vulnerable group amongst foreigners without regular immigration status is children. Our national investigations have shown that much attention, at least in the two European countries, has been paid to the welfare of unlawfully staying children. In Canada, the attention in laws, case law and policy guidance has been less. This however might be explained by the fact that in Canada, as opposed to Belgium and the Netherlands, children born on Canadian soil are Canadian citizens, irrespective of their parents' immigration status.

If we want to compare the protection under national social assistance schemes for children with an irregular immigration status, it is useful, in a first step, to distinguish between (1) social assistance schemes conferring rights directly to children and (2) social assistance schemes where children are only taken into consideration indirectly, through their parents.

(1) In our research, two national social assistance schemes could be identified which directly confer rights to children. This concerns the Belgian social assistance of last resort and the Dutch social assistance under section 16 of the general social assistance scheme.[1889] The Dutch section 16 assistance has unlike the normal social assistance no age limit. In addition, the particular assistance schemes for foreigners in the two countries also do not know a minimum age. By contrast, in the province Ontario, children themselves are unable to be entitled to social assistance.[1890] In Belgium and the Netherlands, the issue of social assistance for unlawfully staying children has been vividly discussed in case law. Eventually, in both countries the high courts dealt with this topic against the background of constitutional or international obligations. However, the outcome of the high courts' assessment was different. In Belgium, the Constitutional Court found that not providing social assistance of last resort to unlawfully staying children violates the principle of non-discrimination – as enshrined in Belgium's Constitution and the UN Convention on the Rights of the Child –, as well as the right to health, to social security, and to an adequate standard of living – as also laid down in the UN Convention on the Rights of the Child. The Constitutional Court acknowledged that providing assistance may be an incentive for foreigners subject to an order to leave the country to not comply with this obligation. However, the court found that by not providing assistance the objective of the social assistance scheme would be foiled, which weighs with respect to children heavier. The legislator implemented the ruling of the Constitutional Court by granting social assistance benefits in kind at reception centres for asylum-seekers to foreigners below eighteen years of age who are together with their parents unlawfully present in Belgium. The Dutch highest court in social security matters reached another conclusion when it assessed the country's obligation under the UN Convention on the Rights of the Child. It found that the legal exclusion of unlawfully staying children from section 16 assistance is a proportional measure to not provide an incentive for a continued unlawful stay in the Netherlands – proportional against the background of the country's obligations under the UN Convention on the Rights of the Child. Any other conclusion, the court continued, would foil Dutch immigration policy. Still, the high court acknowledged that there might be special circumstances when an exclusion can no longer be accepted, such as in case of the impossibility to return to the country of origin. However, thus far no such situation has been found by case law. Two things are interesting

[1889] As written in Part IIc on the Netherlands, § 16 gives local executives the discretion to grant assistance to persons who have no right to social assistance under the Act, but where there are compelling reasons to assist them.

[1890] Exceptions only exist for children between sixteen and eighteen years of age in special circumstances. Children below age sixteen may only qualify for social assistance if they are single parents.

to observe: first, a diametrically opposed interpretation of the obligations under the UN Convention on the Rights of the Child by national high courts; second, the fact that the special situation in which the Dutch high court could imagine to provide in future social assistance even to unlawfully staying children is a situation in which, according to the Belgian Constitutional Court, social assistance must already now be provided to unlawfully staying adults.

(2) Social assistance schemes where the needs of children are only taken into consideration indirectly, through their parents, can take two forms: first, higher rates of financial benefits and wider scopes of benefits in kind for beneficiaries who have to take care of children than for beneficiaries without such obligations; and second, special benefits for needy parents who have to take care of children and do not qualify for social insurance child benefits. The first relates to Ontario's social assistance, to the Dutch social assistance and to Belgian's Social Integration assistance; the latter relates to Ontario's social assistance and to the Belgian child benefits of last resort.

Except for the Belgian child benefit of last resort, in all three countries the laws are silent on the immigration status of the child. That is to say the laws hardly require more than that the child is dependent on the applicant or that the child lives together with the applicant. In the Netherlands, the highest court in social security matters ruled that the fact that children are in the country in violation of immigration laws is irrelevant for the determination of the benefit rate. In other words, the higher benefit rate, which takes account of the additional burden, has to be granted for the qualifying parent. This was concluded from the absence of any requirements as to the immigration status of the child and from the fact that the Linkage Act only prohibits the grant of public benefits to irregular migrants, which is not the case here. In Belgium, it is the practice with respect to the Social Integration assistance to assess the factual family situation, and not to look at the child's immigration status. Accordingly, higher benefits are granted if the applicant has to take care of a child, irrespective of the child's immigration status. I argued that this seems to be perfectly in line with the laws and the intention of the legislator, which expected from the social assistance authorities to investigate whether a child is dependent and lives together with the applicant according to the facts of each single case. Finally, in Ontario, case law and policy guidance are silent on this issue. I argued that both a textual and teleological interpretation of the relevant legal provisions strongly point to a consideration of unlawfully staying children. So, leaving Belgian's child benefits of last resort aside, in all three investigated countries, the needs of children seem to be taken into account for the determination of the scope of social assistance of a qualifying individual, irrespective of the child's status under immigration laws. I carefully used the term 'seem', since the sources on which I based my statement differ from country to country (Netherlands: case law, Belgium: practice, Ontario: own interpretation). Only for the Belgian child assistance of last resort, the legislator explicitly requires legal presence in the country.

One has to be careful when bringing the comparative results of all these difference schemes together. Under schemes where unlawfully staying children are taken into consideration indirectly, their access always depends on the parent. If the parent does not qualify due to his/her irregular migration status, the unlawfully staying child does not qualify either. In schemes where rights are conferred directly to children, in contrast, the access of unlawfully present children is independent from their parent's status. What we can see is that in Ontario and the Netherlands the needs of children with an irregular immigration status are (likely to be) taken into consideration when determining the scope of assistance for parents. However, this requires that the parents qualify. In

Belgium unlawfully staying children are themselves entitled to benefits in kind which are indispensable for the development of the child.

If one compares the protection granted to unlawfully staying children with the protection conferred to children possessing the citizenship of the country where their parents work and where their parents also possess the respective citizenship, it becomes obvious that the latter are in every respect better protected. The needs of Belgian, Canadian or Dutch children are under every social assistance scheme taken into consideration – directly or indirectly.

8. Common observations

This chapter brings the results of our risk per risk comparisons as much as possible together. We will try to identify general similarities, but also differences among the three investigated countries in their treatment of irregular migrant workers. Moreover, we will see how the position of irregular migrant workers compares in general to the position of nationals who engage in undeclared work.

Let us first look at the national social security schemes *not* based on need. What we can see is that the Netherlands is the only of the investigated countries which expressly and by law excludes in general foreigners unlawfully staying and almost all foreigners unlawfully working in the country from all of its social insurance schemes. In Belgium and Canada such exclusion can only be found in certain sectors of social security. In Belgium it is only the unemployment scheme, where foreigners unlawfully staying or unlawfully working are explicitly disentitled to benefits. In Canada there are a few more schemes where a lawful immigration status is in one way or the other relevant. First, in Ontario, it is the health care insurance, where foreigners unlawfully staying are excluded from coverage. Second, the Canadian old age pension scheme bars from eligibility foreigners unlawfully staying in the country at the time of application for benefits. However, with respect to the residence history, relevant for qualifying for an old age pension, periods of unlawful residence of foreigners can theoretically be taken into account. Finally, also for family benefits a lawful immigration status is required at the time of application. Nevertheless, this requirement can be bypassed if the applicant's partner is lawfully staying in the country.

From the Netherlands we know the motivation of the legislator to disqualify irregular migrant workers from social insurance. The exclusion from social security was justified by immigration policy motives. It was the wish, on the one hand, to prevent unlawfully staying aliens from continuing their unlawful stay and, on the other hand, to prevent aliens who are not (yet) admitted to the Netherlands from getting a semblance of complete legality, which would make expulsion more difficult. With respect to Belgium and Canada the motives for partial exclusion from social security are not known. One can ask why it are particularly these schemes in these two countries from which unlawfully residing, and with respect to Belgium, unlawfully working aliens are fully or to a certain extent excluded. In Canada, it is striking that it concerns all the country's social insurance schemes based on residence. So, this might be an indication that it is not so much the particularity of the social risk, but rather the applied social security technique, which led the legislator to choose only these schemes. Different is the situation in Belgium. The unemployment insurance uses exactly the same basic technique with respect to the personal scope of application as any other social insurance in this country. This might suggest that it has been this particular social risk which played a role when excluding irregular migrant workers. Yet one has to be careful in drawing such a conclusion. There could have been (also) other reasons why it was the unemployment scheme and not any other.[1891]

Let us come back to the fact that the Netherlands explicitly excludes almost all irregular migrant workers from social insurance, whereas in Belgium and Canada exclusion only takes place partially. Does this mean that in the other two countries irregular migrant workers are protected

[1891] For instance that, at the time when drafting the rules for this insurance, the Belgian government simply felt the need to exclude irregular migrant workers; whereas in other moments in time when other social insurance laws were drafted there was no such sense.

against the realisation of a social risk in that they are entitled to benefits? The answer is by and large no. Also in Belgium and Canada irregular migrant workers are usually not entitled to benefits. Exclusion in these countries is the consequence of case law and of the fact that irregular migrant workers do not or cannot affiliate with social security. Concerning the first, Canadian case law limited insurance with respect to unemployment, to sickness *not* related to an industrial accident or occupational disease, and to maternity and paternity to only those foreigners who acted in good faith when violating alien employment laws. Otherwise the employment contract is invalid and no insurance is constituted. Although not explicitly confirmed by case law, there is a chance that this rationale would be also applied to the old age, survivors' and disability insurance. If not, then there is still the barrier that irregular migrant workers, due to lacking a social security number, cannot affiliate and contribute to this insurance. This disentitles them from benefits. The same is true for Canadian family benefits to which access depends on filing income tax, which in turn is not possible without valid social security number. In Belgium, affiliation with insurance administrations and payment of contributions are also decisive for insurance. Irregular migrant workers are usually not entitled to benefits due to their undeclared work. Only exceptional when their work is declared, insurance can be constituted.

So, it is not only the Netherlands where irregular migrant workers do not enjoy social insurance protection, but to a large extent also Belgium and Canada. The crucial difference is however that in the latter two countries there is room for taking account of exceptional circumstances. This relates, most notably: to irregular migrant workers who acted in good faith when they violated alien employment laws; to irregular migrant workers, mostly those with a regular immigration status, who correctly declared their work to the social security authorities; and to migrants with an irregular migration status who built up factual ties to the country and were due to weighty reasons not be able to earlier formalise their intention of permanent residence in the country.[1892] One might therefore ask for the added value of the interference of immigration policy in social security.

Since we have seen that irregular migrant workers are by and large not protected under the investigated social insurance schemes, we can ask now: what are then the social risks against which they enjoy enforceable protection, without having exceptional circumstances applied as indicated in the previous paragraph? Now it is useful to make a distinction between irregular migrant workers who are unlawfully present in the country of work (category A) and those who are not (category B). As to category A workers, (1a)[1893] protection is granted under worker's compensation schemes against the risk of incapacity for work, health care costs and death in case of industrial accidents and occupational diseases. This concerns the two jurisdictions which operate worker's compensation schemes: Belgium and Ontario. In the Netherlands, (1b) protection is granted against the risk of incapacity for work due to sickness, because of the employer's obligation to continue the payment of wages for up to two years. Both the Dutch wage continuation obligation and the Belgian and Ontario's worker's compensation schemes have their basis in private law.

What is more, (2a) in case of indigence the costs for medical care with an element of urgency are covered in Belgium and in the Netherlands. In Ontario they are not covered. But this does not

[1892] In addition, at least for sure in Belgium, irregular migrant workers whose work has not been declared may under certain conditions get their periods of undeclared work regularised. This would enable them, like it would nationals of the country, to build up social insurance rights retroactively.

[1893] For more clarity, I use here and in the following paragraphs the numbers 1 and 2 to distinguish between social insurance (1) and social assistance (2) schemes, both in the widest sense.

necessarily mean that unlawfully staying foreigners have to pay the bill: they may, when it is about primary care, enjoy treatment free of charge through and at the discretion of non-profit organisations, which are funded by the province. Besides – but now we are talking again about special circumstances, this time in the field of social assistance – (2b), in Belgium and Ontario, welfare benefits are provided to needy foreigners who cannot comply with an order to leave the country for reasons wholly beyond their control. In the Netherlands, foreigners in such circumstances are also not let down. Yet they first have to regularise their immigration status in such situations.

Can we identify similarities, maybe a common floor of social risks for which protection is offered to foreigners without regular immigration status? From the analysis in the previous paragraph we can see that there is not one social risk against which this group is fully protected in all three investigated countries. With respect to urgent medical care (direct State protection in Belgium and in the Netherlands) and primary care (indirect State protection in Ontario), we can say at least that there is a sense of necessity to provide unlawfully present migrants, in one way or the other, medical treatment and protection against the costs thereof. Concerning the need for means indispensable to make one's living, social assistance schemes render assistance under a similar exceptional situation: when the foreigner is unable to leave the country for reasons beyond his/her control. However, it is difficult to claim that this is common to all three countries, since in the Netherlands the immigration status first needs to be regularised. Finally, protection for irregular migrant workers is granted in the investigated jurisdictions, when social security techniques are used which have a strong link to private law, such as the worker's compensation schemes and the employer wage continuation obligation. The social risks covered by these techniques relate in the Netherlands only to incapacity for work because of sickness, whereas in Belgium and Ontario incapacity for work, health care costs and death in case of industrial accidents and occupational diseases are covered.

It is worth mentioning that human rights shaped the social security of migrants unlawfully present in the country only to a limited extent. In Canada human rights played virtually no role. In Belgium and the Netherlands human rights considerations have frequently been brought forward to extend social security protection beyond the point which the legislator determined out of immigration policy considerations. However, the cases where adjudication extended protection beyond the law have been rare. Most notably this happened with respect to social assistance; and there, in particular, for children. The difference in the importance of human rights between Canada on the one hand and Belgium and the Netherlands on the other might be explained by the fact that in Canada, as a dualist State, international human rights treaties ratified by Canada are not directly enforceable by Canadian courts, unless they have been incorporated into Canadian law, while in Belgium and the Netherlands they are.[1894]

Let us come now to category B workers, *i.e.* migrant workers who violate alien employment laws, but who are within the country of work in compliance with immigration laws. In Belgium, if we leave exceptional circumstances aside like that they declare their work or that their undeclared work is retroactively regularised upon the payment of contributions, they enjoy basically the same

[1894] The fact that Canada's Constitution does not contain any social rights does not seem to be the reason for the difference. In Belgium and in the Netherlands, countries which contain social rights in their Constitutions, the importance of constitutional social rights has been rather small in comparison with the role of social human rights enshrined in international documents.

limited protection under social insurance as category A workers. This means protection in case of industrial accidents or occupational diseases.

In the Canadian province Ontario and in the Netherlands, category B workers may be better off than category A workers if we are talking about social insurance based on residence. I use the words 'may be' because these social insurance schemes either exclude foreigners with a too weak immigration status from the outset or make it more difficult for such foreigners to be insured. To illustrate how limited the group of foreigners without work authorisation is which is insured based on their residence I want to mention that in the Netherlands it only concerns, first, foreigners with a temporary residence permit for other purposes than asylum and, second, foreigners who already possessed a temporary or permanent residence permit and who apply for extension or appeal the withdrawal of the permit. Category B workers who are insured based on their residence are in the Canadian province Ontario and in the Netherlands protected against the social risks of health care, of old age and of death. Regarding old age and death, one has to remark that in Canada this concerns the basic protection under the old age insurance, whereas no protection is provided under the retirement insurance. What is more, in the Netherlands also family benefits are granted to residents of the country. Consequently, category B workers who have a stronger immigration status are eligible for Dutch family benefits. Like category A workers, category B workers are in Ontario insured against labour accidents and occupational diseases and in the Netherlands against incapacity for work due to sickness.

Foreigners lawfully residing under an immigration status prohibiting them to work or not strong enough to relieve them from the obligation to obtain a work authorisation are usually eligible for social assistance. Only very exceptionally they are disentitled. This concerns for instance foreigners having a tourist status. Therefore, unlike for unlawfully residing foreigners, entitlement to social assistance is the rule, rather than the exception. For the sake of completeness it should be mentioned that social assistance scheme, in particular in Belgium and in the Netherlands, also provide for health care benefits for persons in need. This means that foreigners lawfully present but without work authorisation in Belgium and foreigners who do not qualify for health insurance in the Netherlands due to their weak immigration status may fall back on this protection. In Canada, foreigners who do not qualify for health insurance due to their weak and temporary immigration status may be insured under a special health insurance for foreigners.

Concerning social assistance, one can conclude that lawfully present aliens who have no work authorisation are better protected than unlawfully present aliens. This has to do with the fact that social assistance schemes in all three countries make eligibility to social assistance, basically, dependent on a regular immigration status. Under social insurance, category B workers are in Belgium basically in the same legal position as category A workers.[1895] In Canada and the Netherlands those category B workers who have a somewhat more stable immigration status are, as opposed to category A workers, insured under social insurance based on residence. This difference in insurance between Belgium on the one hand and Canada and the Netherlands on the other can be explained by the fact that the latter two countries operate social insurance schemes based on residence and that category B workers are lawfully resident in the country.

[1895] However, category B workers are in the better position to exercise possible rights. For instance, they might affiliate with social security and work in a declared way; or they face less the risk of having to leave the country when undeclared work is regularised and social insurance rights can be established.

In a next step we look how the legal position of citizens of the country of work whose work is not declared to the social security authorities compares internationally. Thereafter, we will see how the position of nationals who perform undeclared work compares to irregular migrant workers.

Under residence-based social insurance and social assistance schemes, nationals not declaring their work are eligible for benefits. Their residence in the country and their citizenship allow for this. Under most schemes both elements residence and citizenship are required for coming within the scheme's personal scope of application. Exceptionally, undeclared workers qualify for benefits simply because of their residence in the country. We can identify the following social security schemes where the personal scope of application is defined solely by residence:

- the Dutch general social insurance schemes, as well as the related laws Dutch Health Care Insurance and Dutch Disablement Assistance for Disabled Young Persons;
- the Belgian child benefit scheme to indigent parents; and
- the Belgian social assistance of last resort.

However, with respect to the Dutch schemes and the Belgian Guaranteed Family Allowance, citizenship has an indirect impact. To be more precise, under the Dutch schemes Dutch citizens do not have to prove a legal bond to the country for the assessment of residence in the country. Under the Belgian Guaranteed Family Allowance scheme, Belgian citizens are exempted from the five-year residency requirement. All this will be discussed in more detail in the following final Part of this thesis.

Under social security schemes based on employment the situation is as follows. Our national investigations brought to light that, basically, two types of such social insurance schemes can be distinguished: first, those where insurance and eligibility to benefits is dependent on the deduction of social security contributions for the respective scheme and, second, those where this is not the case. In both cases undeclared workers have to turn to authorities to exercise their rights or their possible rights. This brings about that their previously undeclared work becomes known to the social security authorities. Also in both cases the social security authorities involved[1896] have to determine that employment, which constitutes insurance, actually took place. The difference is however that in the latter case the establishment of the circumstances of employment is sufficient for entitlement to benefits, whereas in the first case entitlement to benefits only arises after the outstanding contributions were actually paid in retrospect.

In terms of protection one can say that undeclared workers are insured under the second category of insurance, but have to turn to the competent authorities, where the circumstances of the employment need to be established, in order to exercise their right to benefits. In contrast, under the first category of insurance undeclared workers are not insured. Insurance can only be established retroactively when the circumstances of the employment are clarified *and* when social security contributions are paid in arrears. Comparing the countries we can see that the Netherlands only knows social insurance of the second category, *i.e.* insurance not dependent on the payment of contributions. Belgium and Canada have both categories of social insurance.

[1896] Depending on the national situation, these are the social security authorities competent for the payment of benefits and the social security authorities in charge of levying contributions. The concept 'social security authorities' is to be understood in purely functional terms and hence also includes tax authorities entrusted with the disbursement of social security benefits or the collection of social security contributions.

Let us now in general look at the relationship between irregular migrant workers and nationals who engage in undeclared work:

- We can see that the biggest difference in the protection between these two groups exists in the Netherlands: whereas most irregular migrant workers are excluded from almost all social security protection, undeclared workers enjoy full protection under social assistance, social insurance based on residence and social insurance based on work.[1897]
- Also in Ontario/Canada, undeclared workers are for the most part in a better position than irregular migrant workers. Under residence-based social security schemes, nationals who are undeclared workers are eligible for benefits due to their residence and citizenship. Irregular migrant workers, by contrast, are often excluded due to their irregular or precarious immigration status. Under employment-based social security schemes the situation differs. In Ontario's worker's compensation scheme there is by and large no difference between these two groups. Both are protected. In the Canadian unemployment insurance these two groups are only treated equally if the irregular migrant workers acted in good faith when he/she violated alien employment laws. In the Canadian retirement insurance both groups are basically excluded from benefits, since no contributions are deducted from the wages.
- In Belgium, irregular migrant workers and Belgians who perform undeclared work are in a rather similar position under most social insurance laws. This means that both groups are excluded from many employment-based social insurance.[1898] Under social assistance law, by contrast, nationals who are undeclared workers enjoy more rights, due to their residence and, mostly, due to their citizenship.

It is striking that the differences between the two investigated groups are bigger when there is an explicit policy of exclusion towards irregular migrant workers, when undeclared workers qualify for benefits irrespective of the fact that no contributions have been deducted, and when social security is based on residence (in combination with citizenship).

[1897] For insurances based on work we assume full protection since entitlement to benefits is not based on the payment of contributions.

[1898] For insurances based on work we assume no protection since entitlement to benefits is dependent on the payment of contributions.

9. Financing

In the last chapter of our comparison the focus is on the question whether there is a balance between protection conferred and financial duties to be fulfilled when it comes to the two groups of workers under investigation. A sole comparison of the financial duties in the investigated countries will not be done here. This is because we are only interested in the relation between rights and duties.

The question of balance will be addressed with respect to social insurance in the strictest sense only,[1899] where there are direct and clear obligations of the employer, the employee or the resident to contribute to the funding of the schemes. It has to be noted that statutory social insurance usually include a redistributive element. In other words, the protection received will not reflect the contributions made as it would under private insurance arrangements. However, this is not what I mean when I am talking about a balance between rights and duties in the context of irregular or undeclared work. What interests me in this chapter is simply whether the balance between rights granted and financial duties to be fulfilled, however this balance may be in the national context, is different when it comes to irregular or undeclared work; different in that sense that there is an imbalance because there is no protection granted although contributions must have been made or, *vice versa*, because there is protection although no contributions have been required.

Based on our national research, we can make the following classification with regard to the relationship between rights and obligations for irregular migrant workers and undeclared workers:

1) outside scope *ratione personae* – no obligation to pay contributions – no entitlement to benefits
2) within scope *ratione personae* – obligation to pay contributions – entitlement to benefits
3) within scope *ratione personae* – obligation to pay contributions – no entitlement to benefits because non-compliance with obligation to deduct contributions
4) within scope *ratione personae* – obligation to pay contributions – no entitlement to benefits because irregular stay or work

ad 1) This rule can be found in the Netherlands and, to a certain extent, under the unemployment insurance and possibly also under the retirement, survivors' and disability insurance in Canada – in both countries only with respect to irregular migrant workers. Also in both countries, contributions already paid[1900] can basically be recovered, due to a lack of legal basis for the payment. For Canada it should be mentioned that courts tested *ex post* whether the irregular migrant workers acted in good faith when working in violation of alien employment laws. If this was not the case, the person fell outside the scope *ratione personae* of the social insurance, was not entitled to benefits, and had the possibility to recover already paid contributions.

ad 2) This applies to nationals who are undeclared workers in the Netherlands; to nationals who are undeclared workers and irregular migrant workers under the worker's compensation schemes in Belgium and in Canada; to nationals who are undeclared workers and irregular migrant workers,

[1899] Leaving aside the Canadian schemes for old age pensions, family benefits and health care coverage, which are no social insurances in the strictest sense.
[1900] Court cases show that this has exceptionally happened, when administrative controls failed and irregular migrant workers succeeded in contributing to social security.

who acted in good faith when violating immigration laws, under the unemployment insurance in Canada;[1901] possibly to irregular migrant workers who acted in good faith, which includes the payment of contributions, under the retirement, survivors' and disability insurance in Canada.[1902] Under these social insurance schemes, persons are insured because they are residing or working in the country. For entitlement to benefits, it is not necessary that contributions are paid. There is no link between entitlement to benefits and actual payment of contributions. The right to benefits arises also out of undeclared work.[1903] Of course, in the context of undeclared work – either by citizens or by irregular migrant workers, the entitlement to benefits can only be exercised –, if the competent social security authorities establish in retrospect that employment which constitutes insurance actually took place. However, once this is established, the right to benefits can be exercised, even if the competent authorities do not succeed in recovering contributions.

ad 3) Here we are talking about the Belgian retirement and survivor's pension, the Belgian incapacity for work and health care insurance and Belgian the family benefits insurance[1904] with respect to both undeclared Belgian workers and undeclared irregular migrant workers;[1905] the Belgian unemployment insurance with respect to nationals who are undeclared workers; and the Canadian retirement, survivors' and disability insurance with respect to nationals who are undeclared workers. Under these social insurance schemes, the deduction of contributions is a precondition for entitlement to benefits. No right to benefits arises out of undeclared work. In the context of undeclared work – either by citizens or by irregular migrant workers –, an entitlement to benefits only exists, if the competent social security authorities establish in retrospect that employment which constitutes insurance actually took place and if the required contributions are paid. If the competent authorities do not succeed in recovering contributions, there is no entitlement to benefits.[1906] There are two crucial differences to the previous category, *i.e*. class (2). First, in the previous category of social insurance schemes the entitlement to benefits arises out of undeclared work, but can only be exercised by retroactively declaring the work. By contrast, in this category the entitlement to benefits does not arise out of undeclared work. It only arises out of the retroactive declaration of work, including the successful recovery of the contributions. This brings me to the second difference. In the previous category of social insurance, former undeclared workers are entitled to benefits and can actually exercise this right, even if the social insurance contributions does not succeed to collect the outstanding contributions. In contrast, in this category there is no entitlement to benefits if the authorities fail to collect the outstanding contributions. This may happen, for instance, in case of bankruptcy of the employer.

ad 4) Finally, one scheme has been identified where irregular migrant workers fall within the personal scope of application, but are ineligible for benefits: Belgian's unemployment insurance.

[1901] Court cases show that this has exceptionally happened, when administrative controls failed and irregular migrant workers succeeded in contributing to social security.
[1902] No such cases are yet documented.
[1903] We assume here that working contracts concluded with undeclared workers bear legal consequences under social insurance laws.
[1904] Under the family benefits insurance, non-insurance due to non-compliance with the obligation to pay contributions is not explicitly stipulated in the laws. However, since it is the practice of the competent authority, we put it under this category (3).
[1905] If exceptionally the employment of irregular migrant workers is declared, they would fall into our category (2): within scope *ratione personae* – obligation to pay contributions – insured.
[1906] Only under the Belgian unemployment insurance, contribution deduction and hence entitlement to benefits is assumed when the undeclared worker takes the initiative and notifies the undeclared work to the social inspectors or the unions.

Since they fall within the personal scope of application, social security contributions have to be paid.

If we look at this taxonomy, an imbalance, as defined above, can only be found with respect to category (4). Under the Belgian unemployment insurance irregular migrant workers are obliged, through their employers, to contribute to the funding of the scheme, but do not have the perspective to ever obtain benefits which are based on this employment. Compared to other workers in Belgium, this seems to be an imbalance. Belgian and regular foreign workers are also obliged to contribute, but they are, as long as their work has been declared, entitled to benefits. Belgian and regular foreign workers whose work is not declared and where no contributions are deducted are not insured.[1907] In other words, they are obliged to contribute, but do not do so; therefore insurance protection which would be normally granted is not done so. In case of regularisation of the employment, *i.e.* establishment of the employment circumstances and retroactive payment of contributions, Belgian and regular foreign workers are entitled to benefits. So, the imbalance only concerns irregular migrant workers. Only irregular migrant worker are disentitled to benefits under each and every circumstances. They cannot build up rights through their work and through their (retroactive) payment of contributions. Even if once unemployed their immigration status changed and they obtained the permission to stay and to work in the country, they would not qualify for benefits.

In Part IIa on Belgium, we reported that the Belgian social security authority in charge of collecting contributions has been confronted with claims of irregular migrant workers who wanted to get their contributions, which do not allow for benefits, reimbursed. The authority denied this, with the argument that there is no legal basis for reimbursement, since the laws require making contributions also with respect to irregular migrant workers. The decision of the competent Belgian authority can be perfectly understood. One can nevertheless ask whether the legal situation in Belgium is satisfying. From our comparison we can see that Canadian unemployment insurance laws and Dutch social insurance laws in general provide for the legal basis to refund contributions to irregular migrant workers which do not allow for benefits.

Nevertheless, one has to mention that also the Dutch social security seems to have its problems with its principle 'no insurance, no contribution for irregular migrant workers'. In the Netherlands, employers who, before employment, fail to check and keep records of an alien's permission to stay or work in the country have to pay income tax and contributions for residence-based insurance at the highest rate of 52 percent of the taxable income. The fact that irregular migrant workers are not insured and that accordingly no contributions for insurance based on residence have to be paid has so far neither prevented authorities nor case law from applying this rule. The Supreme Court of the Netherlands justified its application by concluding that the levying of the 52 percent rate is a fine, and not a contribution. The court found that the fine at the rate of 52 percent of the taxable income of the employee applies to both situations: payment of income tax only and combined payment of income tax and insurance contributions. This makes it irrelevant to find out whether it is about an insured person or not.

It might not be easy both in administrative terms, but also with respect to possible competitive advantages to exempt irregular migrant workers from the payment of contributions. Nevertheless,

[1907] For one exception see the previous footnote.

it is only just and equitable that if a country decides to go for an exclusion of irregular migrant workers from social insurance, it has to go for it consequently.

PART IV: Final considerations

Introduction

Our research has shown that the Netherlands pursues a coherent policy of exclusion when it comes to social security for irregular migrant workers. Based on immigration policy considerations, migrants without permission to stay or to work in the country are almost completely excluded from protection under Dutch social security law. Interestingly enough, our research has also brought to light that the differences with Belgium and Ontario/Canada, where there is no such policy of exclusion, are relatively small. In more detail, in Belgium and Ontario/Canada too, irregular migrant workers – in particular those who are unlawfully present in the country – are to a large extent ineligible for social security benefits. The exclusion in these two countries is not the consequence of a comprehensive policy approach towards irregular migrant workers, but is the result of different causes – causes which have their foundation, most notably, in social security law, immigration law and contract law.

With these exclusions in all the investigated countries in mind, we may ask what would happen if a coherent policy were applied in which social security considerations determined the social security situation of irregular migrant workers. That is to say, a coherent policy, like that in the Netherlands; but, in contrast to the Netherlands, a policy behind which social security logic and not immigration logic is the driving force. Would it make a big difference to the current situation in the Netherlands, but also in Belgium and in Ontario/Canada? Or would the application of social security logic ultimately lead to similar results as the application of immigration logic?

Immigration law and social security law each have their own objectives. Immigration law regulates access to the national territory and, sometimes through separate alien employment laws, to the national labour market. Social security law provides protection against the occurrence of recognised social risks, such as old age or sickness. These two objectives may sometimes conflict with each other. In particular, this may be the case when dealing with irregular migrant workers. Let me give an example. A country's retirement pension scheme aims at insuring every worker, irrespective of the worker's immigration status, against the risk of getting old and being unable to work any more in order to make his/her living. Immigration law, on the contrary, prohibits the work of a foreigner without the required authorisation and seeks to put a stop to irregular work. The question is how these conflicting objectives can be reconciled. The Netherlands has solved this conflict by giving priority to immigration policy. Social security objectives and rationales are no longer applicable to irregular migrant workers in the Netherlands. There is, for instance, no longer the objective to insure every worker against the social risk of old age irrespective of his/her immigration status. However, our research has shown that social security can help defuse this conflict, for instance by granting entitlements to benefits only after deducting social security contributions. This has suggested to us the idea of making social security considerations central when determining the social security situation of irregular migrant workers. Such an approach might help reconcile existing conflicts of interests.

What do we mean by social security considerations and social security logic? We mean the objectives, the basic principles and the concrete design of a given social security scheme. However, it is not necessary to identify all these characteristics of a given scheme precisely, in order to tell what the scheme's logic is like. Instead, we can look at the legal position of national workers, especially those engaging in undeclared work. In the treatment of national workers, the objectives, basic principles and design of social security law finds expression. The treatment of

nationals whose work is not declared, in addition, shows us the impact of non-affiliation and of non-payment of contributions on entitlement to benefits. This is important, since irregular migrant workers for the most part work in the black economy. They and their employers usually want to avoid contact with public authorities, because they are violating the laws governing employment and/or presence in the country of aliens. Therefore, if we want to determine the social security situation of irregular migrant workers according to the logic of social security, we can take nationals who engage in undeclared work as a point of reference. However, in the exceptional cases where the work of irregular migrant workers is correctly declared, it seems only logical that our point of reference should then be nationals whose work is declared, and not nationals whose work is undeclared.

Our whole research has been built up on the comparison of the social security situation of irregular migrant workers with that of nationals who perform undeclared work. This is because we try to come up with suggestions on how to treat irregular migrant workers in national social security law by analysing social security law itself. In order to understand the mechanisms of social security law better, we have not only looked at the treatment of irregular migrant workers, but also at the treatment of a reference group. The reference group we identified consists of nationals whose work is not declared to social security authorities. For more information on this, see the introduction to this thesis. Our law comparison has produced remarkable results with respect to the current social security status of irregular migrant workers. These results have suggested to us the idea of trying to determine the social security status of irregular migrant workers by applying social security logic. To do this, we need to consider nationals who are undeclared workers, as their social security status helps us to dissect the scheme's logic.

When attempting to determine the social security status of irregular migrant workers by looking at a social security scheme's logic, we must not forget that no national social security law is an island, but is embedded in a wider legal framework. In particular a country's immigration law and obligations under international law must be taken into consideration.

Concerning immigration law, it seems only logical to us that the application of social security logic must not undermine the objectives of immigration law. An irregular migrant worker is a person who infringes a country's statutes on presence and/or work in the country. It is therefore the objective of immigration law to put an end to such infringements. Social security must not stand in the way of realising this objective. First, this means that a person's position under social security law must not impact on the person's position under immigration law. Rights under social security law must not create rights under immigration law: an entitlement to a benefit must not in any way regularise the presence or work of the foreigner concerned. Second, it means that immigration law enforcement must not be hindered or interfered with. Immigration authorities must be able to realise the goal of immigration law. Social security law enforcement must not hinder this realisation, for instance by turning a blind eye to irregular migrant workers.

In our research, we analysed the international legal framework with regard to State obligations towards the two groups of workers under investigation. This was done for two reasons: to deepen our understanding of our national and comparative results; and to know the legal boundaries when making suggestions about how the social security situation of irregular migrant workers could be changed. As we have seen from this analysis, international obligations which fulfil the criteria of being explicit, unambiguous and legally binding are scarce. For more information, see Part I. As a consequence of this, the value of this analysis for our national investigations and our law

comparison was limited. Now that we are looking at the consequences of applying social security logic to irregular migrant workers, we will need to take the existing international obligations into account again. Although these obligations do not form a comprehensive framework for the social security situation of an irregular migrant worker, they at least establish some boundaries for specific social risks or specific groups of irregular migrants. Applying social security logic to irregular migrant workers must not lead to an infringement of these international obligations.

In the following chapter (chapter 1), then, we will analyse what it would mean if a social security logic is applied in a coherent way to irregular migrant workers. Afterwards (chapter 2), we will see how doing so would change the current situation in the three investigated countries.

1. Application of the social security logic

1.1. Personal scope of application

We have seen in our research that nationals who engage in undeclared work fall within the scope *ratione personae* of social security either when they are employed in the country or when they reside in the country.[1908] We have also seen that in the latter case it is often not only their residence in the country, but also their citizenship of the country which causes them to fall within the scope *ratione personae*.

Concerning irregular migrant workers, we have seen that employment and residence are not always the relevant criteria for falling within a scheme's personal scope of application. In certain social security laws, it is the permission to be present and the permission to work in the country that define the personal scope of application with regard to irregular migrant workers. However, if we apply the same logic to irregular migrant workers that is applied to nationals who perform undeclared work, employment and residence in the country will become the decisive criteria. Concerning the latter, citizenship may be of additional relevance. This is looked at in more detail in the following.

The scope *ratione personae* is defined by employment when the attachment to the labour force is regarded as the decisive criterion for belonging to the circle of solidarity. In this case, the social security logic indicates that irregular migrant workers will fall within the scope of the social security law in question if they meet the given definition of employment. In the investigated countries, social security laws usually require a contract of employment. Some of the investigated social security laws require a valid employment contract, whereas under other social security laws invalidity cannot be invoked to justify the non-application of these social security laws. We have seen that employment contracts concluded with foreigners who lack authorisation to work in the country may be of questionable validity.[1909] However, this is not a question that can be answered by social security law. Whatever position the law of contracts or labour law takes with respect to employment contracts concluded with irregular migrant workers, will likewise be the position taken for social security purposes. This means that if a social security law requires a valid employment contract, irregular migrant workers come within the law's scope *ratione personae* if this requirement is fulfilled under contract law or labour law; if not, then they fall outside that scope. In all other cases, where there is no requirement for an employment contract, or no requirement that the contract should be valid, irregular migrants will fall within the social security law's personal scope of application if the given definition of employment is met.

Under social security laws where residence in the country defines the scope *ratione personae*, it is a more complex matter to extract the social security logic. The first point that needs to be made is that the undeclared work of nationals is not of relevance for revealing the logic of such schemes. Our investigations have shown that nationals who are undeclared workers come within the scope of these schemes because they are resident in the country, and often additionally because they are

[1908] Social security laws of federated States usually require residence in their jurisdiction rather than residence in the country. For instance, the social security laws of Ontario mostly refer to residence in Ontario, and not residence in Canada. However, for the sake of simplicity we will in this chapter often simply refer to residence in the country.

[1909] Incidentally, we have also seen that employment contracts in which the evasion of contribution payments is agreed upon may raise questions of contractual legality.

citizens. However, their work does not play a role. So, it is the residence and citizenship of a national who engages in undeclared work which are the characteristics from which we may take guidance.

As already indicated, our investigations have shown us that nationals who engage in undeclared work come within the scope *ratione personae* of residence-based social security laws in the following two situations: first, when they reside in the country and, second, when they reside in the country and when they additionally possess the citizenship of the country.

Let us take a closer look at the first situation. In our law comparison, we identified the following social security laws as laws where the personal scope of application is defined solely by residence:

- the Dutch general social insurance laws – *i.e.* the General Old Age Pension Act, the General Survivor's Benefits Act, the General Child Benefits Act and the General Exceptional Medical Expenses Act – as well as two related laws, the Health Care Insurance Act and the Disablement Assistance Act for Disabled Young Persons;
- the Belgian Guaranteed Family Allowance Act; and
- the Belgian Public Centres for Social Welfare Act.

We also mentioned in our law comparison that although citizenship is not a criterion for defining the scope *ratione personae* in these laws, it is often at least a factor which indirectly impacts on the scope. In other words, our country investigations have revealed that even in most of these laws, citizenship plays a role in the logic of the scheme's scope *ratione personae*. We will now analyse this.

The Dutch schemes do not require a person to have Dutch citizenship to fall within the personal scope of application. Nevertheless, Dutch citizenship indirectly exerts an influence on the determination of residence for social security purposes. To be more precise, residence in the Netherlands is assumed if a person has sufficient residential ties to the country. The indicators for determining the existence of sufficient residential ties differ, depending on whether a person has Dutch citizenship[1910] or not. Dutch nationals, like Dutch undeclared workers, must prove that they have sufficient economic and social ties in the Netherlands. Non-citizens, by contrast, must prove to have sufficient economic, social and legal ties in the country. Legal ties relate to a foreigner's immigration status. The logic goes: the higher the guarantee of continued entitlement to stay in the Netherlands, the stronger the legal ties with the country.[1911] This shows that Dutch citizenship is of relevance for these social security schemes, because it guarantees its possessors the unlimited right to reside on Dutch soil.

For the Belgian Guaranteed Family Allowance Act, the statement that Belgian citizenship plays no role in defining the scheme's personal scope of application likewise has to be put into perspective. We saw that until the 1980s, Belgian citizenship and residence in Belgium were the decisive criteria. In the early 1980s, the citizenship requirement was dropped. Instead, a five-year residence requirement and a requirement to be legally entitled to stay in Belgium were introduced. However,

[1910] Individuals who have the right to residence in the Netherlands on the basis of EC law are treated on a par with Dutch citizens.

[1911] Since 1998, *i.e.* since Dutch social security laws have been adapted out of immigration policy considerations, this logic has ceased to be fully applicable, however, as foreigners with a certain immigration status are now excluded by law. For instance, unlawfully present foreigners are now excluded from the outset, whereas before 1998 a legal bond had been assumed if they had stayed in the Netherlands for at least three years.

Belgian citizens were exempted from the five years residence requirement. The Belgian Constitutional Court has confirmed that Belgians are not required to fulfil this residence requirement, since they already demonstrate a sufficient link with the country by having Belgian nationality.

The only scheme among those investigated in which citizenship is completely irrelevant for defining the circle of solidarity is the Belgian Social Welfare Services scheme. Its objective is to provide assistance to everyone who needs it in order to live a life in human dignity. Through it, the Belgian State fulfils a constitutional obligation. To be more precise, the State complies with Article 23 of the Belgian Constitution, which states that "[e]veryone has the right to lead a life in conformity with human dignity". The scope *ratione personae* is only limited by the fact that the person has to reside in a Belgian municipality in order to determine which welfare centre is competent.

The Belgian Public Centres for Social Welfare Act is thus the only of the investigated social security laws in which the personal scope of application is solely defined by residence in the country, without any reference to citizenship. For such schemes the social security logic requires irregular migrant workers to fall within the scope *ratione personae* if they meet the given definition of residence.

The situation appears to be different for social security laws in which a combination of both residence and citizenship, the latter either directly or indirectly,[1912] is relevant to defining the laws' personal scope of application. Citizenship, as has been demonstrated throughout our research, is considered to be an expression of belonging to the country, to the national community, which legitimises inclusion within national social security regimes. This logic seems to be valid. Citizenship designates some form of community membership. At the same time, it is acquired when there is already a certain link to the community; either at birth, if parents possess citizenship or the birth takes place on national soil, or later upon naturalisation, if the person has resided long enough in the country, his or her partner possesses citizenship and so on. Of course, the strength of the existing link will vary – for instance it will be relatively weak in the case of someone born accidentally on national soil when there is no other link to the country. However, this does not change the fact that citizenship is an expression of a link to the country. It is therefore understandable that social security, which requires a link to the country for membership of the circle of solidarity, falls back on citizenship.

However, our research has also demonstrated that situations arise with respect to *all* the investigated social security laws in which non-citizens are treated on a par with citizens. If we leave aside situations where there is an international legal obligation for such treatment, then these are situations where non-citizens are considered to have a link to the country that is similar to that of citizens. In our country investigations we have seen that this link is assumed, most notably,

- when non-citizens have a certain status under immigration law,
- when non-citizens are dependents of citizens or of non-citizens with a certain status under immigration law,
- when non-citizens are or were entitled to other social security benefits of the country, and
- when non-citizens have a strong residential bond with the country.

[1912] By 'indirectly' we refer here to the influence of citizenship in the above-mentioned Dutch general social insurance laws and related laws, as well as in the Belgian Guaranteed Family Allowance Act.

Concerning the first of these situations, *i.e.* a link through immigration status, the following logic is discernible: the stronger the immigration status, the higher the chance that a social security law will treat a non-citizen on a par with a citizen. Foreigners with the strongest immigration status – *viz* with permission to stay in the country without any time limit and with a guarantee that they will only be expelled under exceptional circumstances[1913] – fall within the personal scope of application of every residence-based social security scheme. The position of the lower end of the scale differs: sometimes it stops at permanent residents, sometimes foreigners with a temporary resident status are also considered, and in some cases even foreigners with a precarious[1914] residence status are taken into consideration. Again, the rationale here is understandable. The stronger the immigration status, the more rights and obligations in the country arise, and the more the situation is comparable to that of a citizen. For instance, the stronger the immigration status, the greater the right to continued residence. Besides, as is the case with citizenship, conferral of the strongest immigration status usually requires an existing link to the country. The link can be the previous possession of a weaker immigration status, previous residence in the country for a certain period of time, or being a family member of a citizen or of a foreigner with the strongest immigration status.

The second situation in which non-citizens are treated on a par with citizens for social security purposes is that of dependency on a citizen or a foreigner with a certain immigration status. The link to the country here is the relationship with a person who has a link to the country. The third situation concerns entitlement to social security benefits: non-citizens are treated like citizens for the purposes of a social security law if they are or were entitled to benefits under another social security law of the country. It is assumed that they have already demonstrated a sufficient link to the country by acquiring rights under another social security scheme. Finally, foreigners are also treated on a par with citizens if despite their lack of citizenship they demonstrate a strong residential bond with the country. This is most notably the case when they have actually resided for a long period of time in the country. The assumption is that this actual residence for a long period of time creates strong *de facto* ties with the country. These ties are considered to be tantamount to the ties associated with citizenship.

This illustrates that in the logic of most residence-based social security schemes, citizenship is an important factor. It is an expression of a sufficiently strong bond with the country. However, our research also illustrates that the logic of social security does not insist on citizenship, if the bond with the country can be demonstrated by other means. In the end, the important point is always the existence of a bond with the national community, as well as residence in the country.

Irregular migrant workers – or, in the context of residence-based schemes, foreigners with an irregular, precarious or temporary residence status – do not have citizenship of the country. Therefore they do not have a sufficiently strong link to the country by way of citizenship. The logic of social security would then nevertheless be to admit them to a scheme's personal scope of application if there is a sufficiently strong link to the country in other ways. This is because

[1913] In Canada and the Netherlands this is permanent residence status. In Belgium, we have seen that there are actually two immigration statuses conferring the right to stay without any time limits: the authorisation to stay for an indefinite time and the authorisation to settle. Here I am referring to the authorisation to settle, which grants extra protection against expulsion.
[1914] Foreigners who are in the procedure for admission.

citizenship is not an end in itself, only a means to the end of demonstrating a sufficiently strong bond with the country.

By what means other than citizenship can irregular migrant workers demonstrate their bond with the country? We have already seen that the investigated social security schemes provide for alternative forms of proof. These alternatives will also be open for irregular migrant workers. There is no social security rationale prohibiting irregular migrant workers from demonstrating their bond with the country. This means that foreigners with an irregular, precarious or temporary immigration status will be able to prove their link by means of their immigration status, their family relationship, their entitlement to other social security benefits or their strong residential bond – whatever is required in a particular social security scheme.

We have seen that in the investigated social security schemes the ways of proving the existence of a bond with the country apart from citizenship are rather limited. Usually the bond can only be demonstrated by means of a certain immigration status. In some situations, this may be problematic. These are situations where the immigration status does not reflect the reality, *i.e.* where the legal bond and the actual bond strongly diverge. A foreigner whose immigration status is weak or non-existent may live in the country for a long period of time and may establish strong ties in the country, although his or her status under immigration law would suggest otherwise. This is because foreigners do not always comply with immigration laws, authorities entrusted with the enforcement of such laws do not implement them perfectly , and the laws themselves provide for possibilities of continued residence even without stable immigration status, for instance in the case of multiple renewed removal orders due to continued obstacles to deportation. In such a situation, the foreigner may still not be subject to certain rights and duties under national law, unlike citizens, but may have established strong actual ties in the country comparable to those of citizens – such as social contacts, membership of social clubs, property or private insurance contracts. The bigger this gap between legal and actual bond with the country, the less an exclusion from social security seems to be justified by the logic of social security. As we have seen from our analysis above, social security is intended to provide protection to those who reside in the country and who have a sufficiently strong link to the country. When the link is assessed by way of a foreigner's immigration status, and that status no longer reflects the actual link to the country, its value as an indicator becomes questionable. From a social security point of view, it appears to be useful to introduce a further indicator for those foreigners who are excluded from social security due to their (lack of) immigration status.

Such a further indicator could be the length of residence in the country. One can assume that irregular migrant workers who have lived in the country for a number of years have established strong ties there. In other words, the chance is high that in such a situation there is a big difference between the legal bond and the actual bond. The question is where to draw the line. After how many years of actual residence in the country can we assume a relationship with the country which resembles the relationship of citizens or of immigrants with a strong immigration status? Belgium introduced a five-year residence requirement for foreigners under the Guaranteed Family Allowance scheme when it dropped its citizenship requirement. Until the entry into force of the Linkage Act, the Netherlands operated with a three-year residence requirement before unlawfully present foreigners were regarded as falling within the personal scope of application of residence-based social insurance schemes. This may serve as a reference. However, the ultimate decision about the exact length of time is a political one and cannot be derived from the logic of social security.

The length of residence in the country appears to be a reasonable indicator, since social security law already works with it. Alternatively, one could also determine the existence of sufficiently strong ties in the country by applying an integration test. Similar to what can already be found in some national citizenship and immigration laws, the degree of a foreigner's integration could be assessed according to language skills, knowledge of the host society, family ties, employment etc. If a foreigner whose immigration status is weak or non-existent passes this integration test, a sufficiently strong link with the country for social security purposes could be assumed.

To sum up, the application of social security logic to irregular migrant workers produces the following results: first, irregular migrant workers can be workers in terms of social security and may hence be included within the scope *ratione personae* of schemes based on employment. Second, irregular migrant workers can be residents in terms of social security and may hence be included within the scope *ratione personae* of schemes based purely on residence. Irregular migrant workers may also be included within the scope *ratione personae* of schemes based on residence and citizenship, if they are residents and if they have a sufficiently strong bond with the country. The latter can be demonstrated by immigration status, family ties, entitlement to other social security benefits or a strong residential bond – whatever is already required in the social security scheme in question. In addition, if the irregular migrant worker has been living for a certain number of years in the country, a sufficiently strong bond with the country may be assumed.

1.2. Entitlement criteria

Falling within the personal scope of application of social security laws is only the first step towards entitlement to benefits. The second step is the fulfilment of the concrete entitlement criteria of a social security law. In our research it has become apparent that three entitlement criteria are of particular relevance for irregular migrant workers:

(1) qualifying periods and waiting periods;
(2) payment of social insurance contributions; and
(3) requirements related to the national labour market.

In the following, we will go through these three qualifying conditions.

1.2.1. Qualifying periods and waiting periods

Qualifying periods and waiting periods refer to a certain period of insurance, contributions, residence or employment which has to have passed before a person is entitled to receive a social security benefit. The difference between qualifying periods and waiting periods is that the waiting period starts once all entitlement criteria are met and hence defers the moment of entitlement to benefits, whereas the qualifying period refers to a period before this point of time. The idea behind qualifying periods and waiting periods is usually that a contributor or a member of society should not immediately make a claim shortly after joining the circle of solidarity. In other words, the intention is that the person should first demonstrate sufficient attachment to the circle of solidarity, *i.e.* sufficient attachment to the labour force, to the country or to the social insurance fund.

In our research we identified two different kinds of qualifying periods and waiting periods: those which apply to nationals who engage in undeclared work and irregular migrant workers alike, and those which *only* apply to irregular migrant workers. For instance, under Canada's Old Age Security laws, residence of at least ten years is required of every resident, and under Belgian's sickness insurance laws, insurance of at least six months is required of every worker.[1915] By contrast, under Ontario's health insurance laws, residence in the province for at least three months is required of foreigners with a weaker immigration status, whereas Canadian citizens are exempted. The situation is similar under Canada's and Ontario's family benefit schemes, where only temporary residents first have to have resided for one and a half years in Canada before being entitled to benefits.

Concerning the second type of qualifying periods and waiting periods, undeclared national workers are exempted from their fulfilment, simply because they are citizens of the country. Irregular migrant workers, in turn, have to fulfil them, simply because they have a weak immigration status. The logic that is applied here resembles the logic we analysed in the previous subchapter, when discussing the personal scope of application: citizenship is an expression of a strong bond with the country. Non-citizens, in particular those with a weak immigration status, are not considered to have this bond. Therefore they must first demonstrate sufficient attachment to the country and to the circle of solidarity.

In the analysed social security schemes, this second type of qualifying periods and waiting periods only applies to certain lawfully present irregular migrant workers, such as those staying under a temporary residence permit. Unlawfully present and certain other lawfully present irregular migrant workers, such as those subject to an unenforceable removal order or those staying as tourists in the country, are excluded from the outset from the scope *ratione personae*. When the above-described social security logic is applied to irregular migrant workers in general, those with no immigration status or with a weak immigration status also have to fulfil a qualifying period or a waiting period before being entitled to benefits.

Concerning the first type of qualifying periods and waiting periods, *i.e.* those which apply to everyone, there is no differentiation according to citizenship. People must fulfil the qualifying period or the waiting period because they are insured, they are residents or they are employees. Irregular migrant workers must therefore also meet this condition whenever they are insured, residents or employees.

1.2.2. Payment of social insurance contributions

The work of irregular migrant workers is usually not declared to the social security authorities, which means that contributions for social insurance are not paid.

When investigating the social security of nationals who engage in undeclared work we found that basically two types of social insurance exist: those where entitlement to benefits is dependent on the payment of contributions and those where it is not. We saw that one or the other approach is not opted for exclusively by a country; the two types of scheme exist next to each other within

[1915] There are some exceptions with regard to Belgian sickness insurance, but these do not relate to citizenship or immigration status.

individual countries, an example being retirement insurance and unemployment insurance in Canada.[1916]

The consequence for nationals who engage in undeclared work in the investigated countries is as follows: under those schemes where entitlement to benefits is linked to the deduction of contributions, nationals whose work is not declared are not entitled to benefits. However, entitlement to benefits may arise if the previously undeclared work becomes known to the social security authorities, *i.e*. if the work is declared in retrospect. For instance, this might happen due to social inspections or due to an application for benefits. The authorities must then establish that work in terms of social security actually took place. Once this is established, the employer is usually required to pay the outstanding employer's and/or employee's share of the social insurance contributions. Only if the contributions are actually paid is there a legal entitlement to benefits.

Under the second type of scheme, *i.e.* where there is no link to contributions, nationals whose work is not declared are entitled to benefits. They are entitled simply because they work in the country in terms of social security. Nevertheless, in order to make this entitlement to benefits effective, the social security authorities must know about it and must establish that work in terms of social security has actually taken place. Once this is established, the entitlement can be exercised, irrespective of whether the administration succeeds in collecting the outstanding contributions from the employer or not.

In this treatment of nationals whose work is not declared to the social security authorities, we can see what the consequences are for entitlement to benefits if no contributions are made. If this logic was also applied to irregular migrant workers whose work is not declared, it would have the following consequences. First, under social insurance laws where there is no link between entitlement and contributions, irregular migrants engaging in undeclared work might be entitled to benefits, although in order to exercise the right the work would need to be declared. Second, under schemes which link entitlement to contributions, irregular migrants engaging in undeclared work would not be entitled to benefits. Only in cases where the work was declared in retrospect, might an entitlement to benefits arise upon the payment of the outstanding contributions.

In exceptional cases, migrants without work and/or residence authorisation and their employers might wish to declare their work. In our national investigations we have seen that this usually happens when people are not aware of the prohibition on work. But we have also illustrated cases where work was declared to the social security authorities, although the involved parties were conscious that they had broken the law. In subchapter 1.4. below, we will show that the need to comply with immigration law means that a correct declaration of irregular work will hardly be possible. The important point for the present discussion is that in the exceptional circumstances where work is declared and contributions are correctly deducted from the wages of an irregular migrant worker, there is no need to apply the logic of the non-payment of contributions to this irregular migrant worker. Instead, the social security rationale requires his/her contributions to be treated in the same way as the contributions of a citizen working in the formal economy.

[1916] For more on this, see our law comparison. In addition, our research has illustrated that there is one social risk where there is an international obligation not to make entitlement to benefits dependent on the payment of social insurance contributions: labour accidents and occupational diseases. Article 9 of the ILO Employment Injury Benefits Convention (C121) explicitly obliges State Parties, including Belgium and the Netherlands, not to make eligibility for benefits subject to the payment of contributions.

1.2.3. Requirements related to the national labour market

Our research has shown that social security laws for the risks of incapacity for work, unemployment and need in one way or another require the applicant for benefits or the beneficiary of benefits to meet certain conditions which are related to the national labour market. The exact conditions vary. Nevertheless, it is useful to discuss them all together, since they pose the same problem for (former) irregular migrant workers: how to comply with them without any authorisation to work in the country, *i.e.* without any authorisation to participate in the national labour market.

We have seen that one set of conditions with which (former) national undeclared workers have to comply concerns the requirement to be available for work. This requirement is set out in unemployment insurance law and often also in social assistance law: the unemployed or indigent citizen should be prepared to accept (suitable) work. We also found this requirement under incapacity for work schemes: the temporarily or partially incapacitated citizen must accept and perform work that they can be expected to do from a medical point of view.

Under incapacity for work schemes, the availability requirement also exists in a negative form: the incapacitated national worker must not be unavailable for work for reasons other than sickness, injury, maternity or paternity. Sometimes this condition is formulated explicitly; sometimes it can be derived implicitly. The idea behind such schemes is that the person must be unable to work because of sickness, injury, maternity or paternity. It is not the intention of these schemes to support people who are incapable of work for other reasons, such as old age or being abroad.

Another set of conditions with which (former) national undeclared workers have to comply relates to the requirement to participate in (re)employment measures. This requirement can be found with respect to all three social risks: the incapacitated, unemployed or indigent citizen must participate in labour market (re)integration measures, such as vocational training, basic education or subsidised work.

It is the logic of such schemes that (former) national undeclared workers must meet these conditions related to the labour market in order to be entitled to (full) social security benefits. When this logic is also applied to (former) irregular migrant workers, they too must fulfil these conditions in order to be entitled to benefits. However, as we mentioned above, unlike (former) national undeclared workers, (former) irregular migrant workers face the obstacle that they have no authorisation to work in the country. As a consequence of this, foreigners are not able to comply with these social security requirements, as long as they are not in possession of a work authorisation.

From a social security point of view, non-compliance is the only possible consequence with respect to foreigners who lack work authorisation in the country, since there are legal and consequently practical constraints for such a person on the national labour market. The logic of social security schemes related to the social risk of unemployment is to grant benefits only to persons who are available for work, and to get beneficiaries back on the labour market as soon as possible. In both cases, this precisely excludes foreigners without work authorisation: they are not available for work, and they cannot be got back on the national labour market. The logic of schemes related to the social risk of incapacity for work is to support only those who are incapable of work due to sickness, injury, maternity or paternity, and not for other reasons. Again, this

excludes foreigners without work authorisation: they are unable to work in the country not (or not only) because of sickness, injury, maternity or paternity, but because they lack the authorisation to do so. Moreover, any conditions related to (re)employment measures cannot be met by foreigners without work authorisation, so that the objective of (re)integrating the incapacitated worker into the labour market as soon as possible cannot be achieved. For social assistance schemes too, the logic increasingly emphasises the (re)employment of the indigent person. Foreigners without work authorisation, once more, are not in a position to take up employment in the country. Therefore they cannot comply with these conditions.

We have seen in our analysis of the Dutch situation that at the end of the 1990s and the beginning of the new millennium Dutch case law considered foreigners without work authorisation to be available for work for the purposes of unemployment insurance. The argument was that although such foreigners are unavailable for work on the formal labour market, they are still available on the informal labour market, *i.e.* in the black economy. To our mind, this case law does not appear to reflect the logic of social security. First, the court admitted that foreigners without work authorisation are only available for work to a limited extent. They are not available for employers who want to declare the work of their employee correctly and do not want to break the law by employing a person without work authorisation. Second, it does not seem coherent with the logic of a social insurance scheme to entitle a person to benefits on the basis of availability for employment for which the person's employer would need to infringe the social insurance laws' provisions on the payment of contributions. This would reduce the obligation to pay social insurance contributions to absurdity. We therefore do not consider the equation of availability for the informal labour market with availability for the labour market in general to reflect the logic of social security.

What will be the consequences if foreigners without work authorisation do not comply with entitlement criteria which are related to the national labour market? Under unemployment and incapacity for work schemes, (former) national undeclared workers who do not comply with these requirements do not qualify for benefits. The same will therefore be true for foreigners who do not comply with these requirements due to lack of work authorisation.

However, in our country investigations we have seen that in exceptional situations social security laws do provide for relief for such foreigners. Under Belgian unemployment insurance, foreigners without work authorisation are nevertheless entitled to benefits when they are in the situation that a work authorisation may not be denied according to alien employment laws. In addition, foreigners who lose their work permit remain entitled to unemployment benefits for sixty more days. Under Canadian unemployment insurance, foreigners without work authorisation are entitled to unemployment benefits for a certain period of time if they are in a catch-22 situation. This is the case if, on the one hand, the foreigner has to have a job offer before he/she can apply for a work permit; whilst on the other hand, he/she is refused unemployment benefits which would support him/her in finding work because he/she must have a work permit to be considered available for work. This shows that social security law has developed rules for foreigners without work authorisation in particular situations in order to avoid hardship.

Under social assistance schemes, the consequences of non-compliance will depend on the concrete design of the scheme in question. In the investigated countries, (former) national undeclared workers who do not comply with the availability for work condition and other labour market (re)integration obligations may face ineligibility to benefits, a temporary suspension of benefits or

a reduction of benefits. The reason why non-compliance does not *per se* lead to ineligibility is that social assistance schemes pursue different objectives from unemployment and incapacity for work schemes. The objective of social assistance in our investigated countries is protection of the indigent by the State. The indigent should be free from hunger, have sufficient clothing, have a decent shelter etc. These are the very basic human needs which are addressed by social assistance schemes. In addition to poverty alleviation, social assistance schemes may also pursue the objective of social (re)integration through labour market (re)integration. Thus labour market (re)integration is not the only objective. This is reflected in the sanctions for not complying with labour market (re)integration obligations: in order to ensure that the indigent person's basic human needs continue to be fulfilled, social assistance will usually only be reduced or temporarily suspended. Even if the law provides for the complete loss of entitlement to social assistance, the application of such provisions is still to a large extent at the discretion of the competent social assistance administration. In any case, the application of the social security logic to foreigners who lack permission to work in the country requires them not to be treated differently from nationals. In other words, they must be treated like nationals who do not comply with the availability for work requirement and other labour market (re)integration obligations. In short, they are supposed to be treated like nationals for whom the labour market (re)integration objective cannot be achieved.

As is the case for unemployment schemes, we have seen that temporary relief from labour market (re)integration obligations may be granted for foreigners without work authorisation. In Ontario, the policy guidelines state that the social assistance authorities can make use of their discretionary power to defer employment participation requirements if the beneficiary is a foreigner who is unable to obtain a work permit or if there is a delay in obtaining a work permit. This is an example of the special treatment of foreigners without work authorisation, developed by and within the logic of social security.

1.3. Other legal issues

1.3.1. Worker's compensation and similar schemes

Legal arrangements for the social security of employees which are strongly connected to private law are in a special position. The classic example is worker's compensation schemes which provide financial compensation in the case of occupational accidents or professional diseases. The idea behind them is that employers largely enjoy immunity from civil lawsuits and hence are protected against the risk of unforeseeable expenses; whereas employees and their survivors receive benefits without the delays and insecurity inherent to civil law proceedings. The benefit should be seen as compensation – compensation not only for the loss of income, but also for the distress caused by the loss of a family member or by the accident or disease. This compensation rationale flows from civil law. As well as worker's compensation schemes, wage continuation obligations of employers are also legal arrangements based on private law. Usually these arrangements provide for the continued payment of wages for the first days or weeks of sickness. In the Netherlands we have seen that this obligation lasts for up to two years and has largely replaced statutory sickness insurance. Wage continuation payments in case of sickness are considered as part of the employer's obligation, arising from the employee-employer relationship

The particular logic of worker's compensation schemes and wage continuation payment rules described above requires us to adapt our analysis of the previous subchapter - not for the risk of survivorship or medical treatment, but for the risk of incapacity for work. We wrote that the logic of schemes related to the social risk of incapacity for work is to support only those who are incapable of work due to sickness, injury, maternity or paternity, and not for other, additional reasons such as lack of work authorisation. Foreigners without work authorisation will therefore not be entitled to incapacity for work benefits. Such logic works for classic statutory incapacity for work insurance, but would contradict the idea of worker's compensation and wage continuation payment rules.

For worker's compensation schemes it would mean that the incapacitated foreigner without work authorisation gives up his/her right to compensation under private law and receives nothing in exchange. The basic concept of no private lawsuits in exchange for foreseeable compensation payments would be invalidated. The rationale of worker's compensation laws therefore requires incapacitated foreigners without work authorisation to be basically entitled to compensation benefits. Only if worker's compensation laws provide for the reduction of benefits if the beneficiary is again able from a medical point of view to perform work, the foreigner without work authorisation will be confronted with the same consequences as a citizen who does comply with the requirements to accept suitable work and to participate in reemployment measures.

For wage continuation payments, loss of entitlement to benefits in principle for foreigners without work authorisation would mean that the employer was relieved from his or her private law duty to take care financially of the employee in times of sickness. It would also be against the spirit of this private law rule. In addition, it would provide an incentive for employers to hire foreigners without work authorisation. The private law logic therefore requires that foreigners without work authorisation should not in principle lose their entitlement to wage continuation payments. Only when the sick foreigner is again able to perform work from a medical point of view will he/she be confronted with the same consequences as a citizen who does comply with the requirements to accept suitable work and to participate in reemployment measures.

1.3.2. Medical treatment

We have seen in our investigations that particular attention – at least in Belgium and the Netherlands and on the international level – has been paid to guarantee a minimum level of medical treatment for foreigners unlawfully present in the country who cannot afford it. In Belgium, indigent, unlawfully present foreigners are explicitly granted the right to urgent medical assistance. In the Netherlands, health care providers are under a legal obligation to provide medically necessary care to everyone, including unlawfully present foreigners. And on the international level we can see, for instance, the explicit obligation for Contracting States to the ICMW to provide irregular migrant workers with emergency medical care on the basis of equality of treatment with nationals.

Here, in our final Part, we intend to apply the social security logic to irregular migrant workers, including unlawfully present workers. Within this logic there is no reason to specially address medical treatment for unlawfully staying foreigners and the coverage of the associated costs. These things must be provided to individuals who fall within the scope *ratione personae* of the relevant social security law. We have seen that from a social security perspective the decisive

factor for falling within a law's personal scope of application is either employment or residence, the latter usually in combination with citizenship or some alternative strong bond to the country. If unlawfully present foreigners possess one of these characteristics and fulfil other relevant eligibility criteria, they will receive medical treatment and have the associated costs covered. If not, social security logic does not indicate that they should nevertheless be entitled to these things.

However, the fact that particular attention is paid to health care for unlawfully present foreigners is understandable. Our research has shown that unlawfully present foreigners are currently by and large excluded from statutory health insurance coverage. Even when the pure social security logic is applied, unlawfully present foreigners may not qualify for statutory health insurance coverage – as demonstrated in the previous paragraph. We may therefore ask whether there is a kind of guaranteed minimum medical treatment for foreigners unlawfully present in the country who cannot afford it, outside the logic of social security. To answer this question it may be useful to look at the situation of undeclared workers and their treatment if they are not insured.

Our research has shown that nationals who engage in undeclared work are usually protected against the social risk of health care. In Ontario and the Netherlands, they are insured on the basis of their residence in the province/country and their citizenship. In Belgium, by contrast, they are not insured since their employment is not declared to the social security authorities and no contributions are paid. However, Belgian undeclared workers may insure themselves in their capacity as residents, in return for the payment of personal social insurance premiums.[1917] From a legal point of view this is not possible, since as the fact that they are a worker takes precedence over as the fact that they are a resident. However, in practice it works, as long as their employment is not discovered. Despite this tight net of protection in the three investigated jurisdictions, we have seen that undeclared workers may be uninsured – for instance if they do not apply for insurance. What happens to these uninsured workers? We saw that in all the investigated jurisdictions, (public)[1918] health care providers are under an obligation to provide some sort of minimum medical treatment to everyone – irrespective of the person's insurance status or ability to pay for the treatment. These are obligations under criminal law, hospital law or disciplinary law.

We saw that these obligations for (public) health care providers also apply irrespective of a person's immigration status. It follows that if the logic of social security laws does not allow for entitlement to health care benefits for an individual irregular migrant worker, (public) health care providers are nevertheless required to treat them for certain medical conditions. They will receive the same treatment as citizens who have no insurance and who are unable to pay the health care costs. Against this background, there seems to be no need to specifically address the situation of uninsured foreigners who lack immigration status in the country. Their situation does not seem to be different[1919] from that of uninsured citizens.

The costs of such minimum treatment which cannot be recovered is usually borne by the health care provider. In this respect the Dutch approach seems interesting. As shown in Part IIc on the

[1917] If their income does not exceed a certain threshold or if they receive social assistance, they are exempted from the obligation to pay premiums. See Part IIa on Belgium.

[1918] I put 'public' in brackets because in Canada only public hospitals are legally obliged to provide emergency treatment.

[1919] One possible difference is that unlawfully present foreigners may be afraid to contact health care providers. However, our research has shown that health care providers are either not under any duty to report the foreigner's unlawful presence, or that their duty of professional secrecy prevails.

Netherlands, the Dutch government fully or partly compensates health care providers for costs related to the minimum provision of medical treatment to certain foreigners who are not covered by social insurance or social assistance law and who have not contracted private health insurance and cannot pay the medical bill. This could serve as a role model. It provides financial relief to health care providers with regard to legally imposed medical treatment. This reduces the risk that health care providers will try to get rid of such patients and disregard their legal obligation. Incidentally, there appears to be no clear reason to restrict this reimbursement mechanism to foreigners only. As is already the case in some countries, could not health care providers be reimbursed for the legally prescribed provision of minimum treatment to uninsured citizens who are unable to pay the bill?

1.3.3. Children and social security protection

The welfare of unlawfully present children or children of unlawfully present parents has also received particular attention in the investigated countries and in some international organisations. For instance, in Belgium and the Netherlands, there has been a vigorous debate in case law about the access of unlawfully present children to social assistance services. This has not been the case for unlawfully present adults. Another example would be the European Committee of Social Rights, which recommended in a particular legal case that unlawfully present children, as opposed to unlawfully present adults, should be entitled to basic health insurance coverage.[1920]

We have seen on a number of occasions that to fall within a scheme's scope *ratione personae*, social security logic requires employment or residence, the latter usually in combination with citizenship or an alternative strong bond to the country. Children will receive health care benefits or social assistance benefits[1921] if either they or their parents, whichever is required, possess one of these characteristics and fulfil other relevant eligibility criteria. If they or their parents do not possess one of these characteristics, social security logic does not indicate that they should nevertheless be entitled to health benefits and social assistance.

In national and international case law we sometimes come across the argument that children following their parents cannot be blamed for not having the required residence permits. In other words, children cannot be blamed for the wrongdoing of their parents. Accordingly, and in contrast to their parents, children should be entitled to health or social assistance benefits. This argument is also familiar to social security law. We have seen that under social assistance law the reduction or cessation of benefits due to a parent's non-compliance with labour market (re)integration conditions must not affect that portion of the welfare benefit which is intended to support the child. Here too, the rationale is that the child must not be blamed for the wrongdoing of the parent. However, even if this argument with respect to unlawfully present children is considered to be within the logic of social security, it will not change anything. The exercise in which we are currently engaging is the application of social security logic to irregular migrant workers, including unlawfully present ones. Social security logic does not blame anyone for having violated immigration laws, so it follows that foreigners are not excluded because they lack

[1920] See European Committee of Social Rights, Decision of 8 September 2004, *FIDH v. France*, Collective Complaint no. 14/2003, analysed in Part I of this thesis.

[1921] I am only addressing the social risks of health care and of financial need with respect to children, since these are the only risks that usually affect children. For this see also the introduction to Part III of this thesis.

a correct immigration status in the country. However, a foreigner may be excluded if, for instance, he/she has not built up a sufficiently strong bond to the country. We saw above in subchapter 1.1. that a strong immigration status or actually living for a certain period of time in the country can be an expression of such a bond. This is required from a social security point of view. The question of whether or not blame should be attached for not having the required residence permit is therefore irrelevant when applying the logic of social security to unlawfully present children or children of unlawfully present parents.

1.3.4. Maintenance of acquired rights and rights in the course of acquisition

We have shown that irregular migrant workers may build up rights when the logic of social security is applied. Below, in subchapter 1.4., we will suggest that in order not to undermine immigration law, the social security authorities must report any infringement of immigration law to the immigration authorities. This might result in the person in question having to leave the country – especially if he or she is a foreigner who has been present unlawfully. However, it depends on the foreigner, on immigration law and on immigration practice whether voluntary or forced repatriation actually takes place. Anyway, if the foreigner does leave the country, questions of the maintenance of acquired rights and of the maintenance of rights in the course of acquisition come up.

Export and aggregation rules can be found either in national law or in bi- or multilateral international law. The export rules in Belgian, Canadian/Ontarian or Dutch law do not refer to a person's residence or work authorisation. We have seen that export is possible if, for instance, a person has resided for a certain period of time in the country, a person has the citizenship of a certain country or a person enjoys a protected status, such as a refugee or a stateless person. This means that former irregular migrant workers will maintain their acquired rights, if they meet the requirements set out by national social security law.

Export and aggregation rules under international law have been outside the scope of our research. A quick look at ILO treaties,[1922] CoE treaties[1923] and bilateral agreements shows that a person's (previous) immigration status is not relevant. Only under EU law can we see that legal residence or legal work is sometimes required in order to fall within the scope *ratione personae* of coordination instruments.[1924] At first sight such lawful residence and lawful work requirements

[1922] See Equality of Treatment (Social Security) Convention, 28 June 1962, Convention No. 118 and Maintenance of Social Security Rights Convention, 21 June 1982, Convention No. 157.

[1923] See European Interim Agreement on Social Security Schemes Relating to Old Age, Invalidity and Survivors, 11 December 1953, ETS No. 012; European Interim Agreement on Social Security other than Schemes for Old Age, Invalidity and Survivors, 11 December 1953, ETS No. 013; and European Convention on Social Security, 14 December 1972, ETS No. 078.

[1924] See Regulation (EU) No 1231/2010 of the European Parliament and of the Council of 24 November 2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality, OJ L 344/1, 29 December 2010. Article 1 of this Regulation reads: "...Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 shall apply to nationals of third countries [...] provided that they are legally resident in the territory of a Member State ...". See also international agreements concluded between the EU and third countries, such as the Euro-Mediterranean Agreement of 17 July 1995, establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part, OJ L 97/1, 30 March 1998; the Euro-Mediterranean Agreement of 26 February 1996, establishing an association between the European Communities and their Member States, of the

seem to be superfluous. Social security coordination is about rights which have been built up or which will be built up under national law. One can therefore assume that it only matters whether the national conditions for the building up of rights are met. The sole task of international law will then be to coordinate these national laws. Yet international coordination instruments do also need to restrict their personal scope of application. Here, we see not only a restriction to persons to whom the relevant national social security legislation is applicable,[1925] but all sort of additional restrictions: only citizens of the Contracting States, only citizens who are employees,[1926] only citizens as well as refugees and stateless persons[1927] and so on. As mentioned before, the analysis of international coordination instruments has been outside the scope of this research. Moreover, a quick look at some of the many coordination instruments reveals that extracting the logic – if there is *one* logic at all – of the personal scope of social security coordination would constitute a research project in its own right. We therefore cannot comment on whether the requirement of lawful residence or lawful work under some EU coordination laws is within the logic of social security coordination. We can merely state that a person's (former) immigration status is usually not relevant for international coordination law. Accordingly, (former) irregular migrant workers who leave Belgium, Canada or the Netherlands can usually maintain their acquired rights or their rights in the course of acquisition, provided that they fulfil the requirements set out by coordination law.

It is worth mentioning that Belgium, Canada and the Netherlands lack any instrument for the reimbursement of social insurance contributions for persons whose acquired rights or rights in the course of acquisition cannot be maintained. Hence reimbursement is not within the logic of these national social security laws. Any question whether irregular migrant worker will profit from reimbursement is therefore redundant.

1.4. Practical issues

We have shown above that when the logic of social security is applied, irregular migrant workers may be subject to rights and obligations under social security law. In this subchapter we will see how this can be organised in practice.

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one part, and the Kingdom of Morocco, of the other part, OJ L 70/1, 18 March 2000; or the Euro-Mediterranean Agreement of 22 April 2002, establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part, OJ L 265/1, 10 October 2005. When it comes to social security coordination, Article 66 of the Tunisian Agreement and the Moroccan Agreement, as well as Article 69 of the Algerian Agreement read: "The provisions of this Chapter shall not apply to nationals of the Parties residing or working illegally in the territory of their host countries".

[1925] For instance, Agreement on Social Security Between the Government of Canada and The Government of Sweden, 30 January 2002, Proclamation Giving Notice that the Agreement on Social Security between Canada and Sweden Comes into Force on 1 April 2003, SI/2003-42; or Overeenkomst Betreffende de sociale zekerheid tussen het Koninkrijk België en Australië, 20 November 2002, B.S. 20 June 2005.

[1926] For instance, Algemeen Verdrag tussen het Koninkrijk België en het Koninkrijk Marokko betreffende de sociale zekerheid, 24 June 1968, B.S. 25 June 1971.

[1927] For instance, Overeenkomst betreffende de sociale zekerheid tussen het Koninkrijk België en de Republiek der Filippijnen, 7 December 2001, B.S. 22 July 2005; or, at least with respect to France, Agreement Between Canada and France on Social Security, 9 February 1979, Proclamation Declaring the Agreement Between Canada and France on Social Security in Force Effective 13 January 1981, SI/81-28.

Social security administrations have the task of enabling people to exercise their social security rights and obligations. This is done with respect to all persons subject to a given social security law. When this logic is applied to irregular migrant workers too, social security administrations need to make it possible for them to exercise their rights and comply with their obligations. Irregular migrant workers must not be denied access to their legal rights and obligations, whether because of lack of work or residence authorisation, or lack of a social security number, or for any other reason.

Nevertheless, in our introduction to this final Part we have already pointed out that social security law and practice does not work in isolation, but is embedded in a wider legal framework. This means that social security administrations have to respect immigration law when fulfilling their legal mandate. Immigration law prohibits unlawful presence and unlawful employment in the country and seeks to put a stop to such infringements. Social security administrations must not stand in the way of the achievement of this objective. This means that they must not ignore irregular residence and irregular work. If they did turn a blind eye to irregular migrant workers, they would undermine the objectives of immigration law. Irregular residence or irregular work would at least be tolerated, if not actively supported. The way would be paved for the continuation of irregular residence and irregular work. This would impede the achievement of the objective of immigration law. Therefore, social security administrations must not ignore irregular residence and irregular work.

Instead, social security administrations should respect immigration law and support immigration authorities in the fulfilment of their task. This can be done by a simple but systematic check of a foreigner's authorisation to be present and to work in the country and the communication of the results to immigration authorities. The check should be conducted whenever social security authorities come into contact with non-nationals. For instance, this happens when an employer wants to affiliate a foreign worker with social security or when a foreigner applies for benefits. It also occurs when the existence of common household with a foreign partner needs to be assessed in order to calculate a benefit rate or when the existence of a foreign child needs to be determined in order to trigger an entitlement to child benefits. Not checking immigration status in such situations would be inconsistent and would also contribute to the continuation of the unlawful presence. The next step after checking residence and work authorisation would be the communication of any positive results to the immigration authorities. In other words, the social security authorities would simply have to alert the immigration authorities to their discovery of unlawful residence or unlawful work. That is where the responsibility of the social security authorities with respect to immigration law would end. Social security authorities would then not be responsible for the implementation of the legal consequences of the infringement of immigration laws – such as a removal procedure for the foreigner. This is the task of the immigration authorities. To sum up, social security administrations can demonstrate their respect for immigration law by checking the residence and work authorisation of foreigners and communicating any positive results to the immigration administrations. This guarantees that the State acts in a coherent way, with one authority not sabotaging the work of another.

These measures, *i.e.* checking and alerting, do not have a direct impact on social security law and practice. An irregularly present migrant who wants to apply for benefits can do so. An employer who wants to declare the work of an irregular migrant worker correctly and pay premiums can do so. Access must not be denied by the social security authorities, whether because of lack of status

or because of the lack of a social security number.[1928] After completing their check and alert task, the social security administration should then carry out their social security tasks. This means for instance that if all benefit entitlement criteria are fulfilled, benefits should be paid out to an unlawfully present foreigner, or that social insurance contributions should be levied.

How would such an approach look in more detail? Let us first turn to unlawful residence. When an unlawfully present person contacts a social security administration for any reason, or another person does so with respect to an unlawfully present person, the administration will discover the person's unlawful presence and inform the immigration authorities. This may have one of the following two consequences: the foreigner leaves voluntarily or is deported, or the foreigner remains in the country. The latter may occur because immigration law provides for the person's continued lawful or unlawful[1929] presence, because the immigration authorities fail to enforce immigration law or because the foreigner evades the immigration authorities.

If the previously unlawfully present foreigner leaves the country, the social security administrations will have to treat him/her like anyone else who leaves the country: social security rights which are acquired or which are in the course of acquisition will be maintained, if there is a legal basis to do so. In other words, the export of benefits or aggregation of insurance, residence or employment periods will take place if this is stipulated under national or international legal rules.

If the foreigner continues to reside unlawfully in the country, the social security consequences will be different. His or her residence will still need to be considered for social security purposes. Under schemes where simple residence in the country triggers entitlement to benefits, such as the Belgian Social Welfare Scheme, such unlawfully present foreigners would have a chance to qualify for benefits. Under schemes where residence and citizenship (or an alternative strong link with the country) are relevant, such unlawful residence would count as residence and may, in the course of time, contribute to demonstrating a strong link with the country. For the exercise of social security entitlements for which residence in the country is required, unlawfully residing persons would simply be treated as persons residing in the country. For example, if the unlawfully residing person qualifies for an old age pension which is only paid out to persons living in the country, he or she will receive the pension.

We stated above that a continued unlawful stay may be due to immigration law, the behaviour of the immigration authorities or the behaviour of the foreigner. One may ask whether the reason for continued unlawful residence is of relevance for social security. Is it consistent with the logic of social security to differentiate according to the reason for unlawful residence? That is to say, would there be any justification for not taking a person's continued unlawful residence into consideration as residence for social security purposes when such continued unlawful residence is *solely* due to that person's actions? Here, the treatment of nationals who perform undeclared work cannot tell us anything about social security logic. Nationals by definition have the unlimited right to be in the country, so the situation could never arise where a reason needs to be determined for unlawful residence. What is more, the authorities' treatment of undeclared work for the determination of social security entitlements does not seem to be an adequate point of reference. First, we have seen that the declaration of work is basically an obligation of the employer, not the

[1928] We have seen in Part II of this thesis that in Belgium, for instance, an administrative number is created if there is no social insurance number, and serves the same purpose as a social insurance number.
[1929] For instance, multiple renewed removal orders due to continued obstacles for deportation.

worker. Second, failure to declare work is an illegal practice in the sphere of social security law, not in any other context. The question is whether there are examples under social security law where the illegal actions of a person outside the sphere of social security impact on his or her entitlements under social security law *and* where the reason for those illegal actions influences that impact. In other words, do guilt and blame with respect to behaviour outside the sphere of social security play a role in social security law? One point of comparison that might be relevant here is the restriction of social security entitlements in case of criminal convictions. For a criminal conviction, a court has to find a person guilty of a crime. This guilt may then impact on social security entitlements, as is the case, for example, with government employees in Belgium whose retirement pension is forfeited in case of a criminal conviction.[1930] The issue of criminal conviction will be looked at more closely in the following subchapter. Apart from criminal convictions, social security seems in general not to deal with questions of guilt and blame where these lie outside the sphere of social security.[1931] This would suggest that it would be inconsistent with the logic of social security to differentiate according to the reason for a person's continued unlawful presence. Thus, regardless of whether the continued unlawful presence is the consequence of some toleration policy or occurs because the foreigner goes underground, the only relevant issue for the question of residence under social security law seems to be whether the person resides in the country or not.

Let us now turn to unlawful employment and its treatment by social security administrations. When an unlawfully employed person contacts a social security administration for any reason, or another person does so with respect to an unlawfully employed person, the administration will discover the person's unlawful employment and inform the immigration authority or any other competent authority.[1932] This may have one of the following two consequences: the employment of the foreigner without work authorisation stops or the employment continues. The continuation of the employment may occur because the irregular migrant worker continues his/her employment in the informal sector or because the immigration authority or other competent authority fails to follow up on the information provided by the social security administration. The latter would mean that the immigration authority or other competent authority failed even to inform the employer and employee that the employment must be stopped.

If the employment stops, the social security administration will respond to the termination of employment under social security law as it would for anyone else. For instance, under social security schemes where insurance is based on employment, there will no longer be a legal basis for

[1930] § 49 Act of 21 July 1844 (Algemene wet van 21 juli 1844 op de burgerlijke en kerkelijke pensioenen), B.S. 30 July 1844.

[1931] For an exception, see the discussion on the reduction of retirement pensions for former collaborators of the Ministry of State Security of the German Democratic Republic in the context of the German reunification. In the beginning the intention was to reduce the pension entitlements, upon the decision of a Commission, of persons who acted against humanity and the rule of law or who seriously abused their position to their own advantage or to the disadvantage of others. Later on, pensions of all collaborators of the Ministry of State Security were reduced collectively. However, the Federal Constitutional Court of Germany considered this to be unconstitutional. More differentiated and less dramatic reductions were therefore applied. However, this issue is still subject to discussion. See Anlage II, Kapitel VIII, Sachgebiet H, Abschnitt III, Nr. 9, b 2. Einigungsvertrag (Unification Treaty), 31 August 1990, BGBl II p. 889; § 27 Rentenangleichungsgesetz (Pensions Adjustment Act), 28 June 1990, GBl I p. 495; § 10 (2) Anspruchs- und Anwartschaftsüberführungsgesetz (Transition of Claims and Expectations Act), 25 July 1991, BGBl I p. 1606, 1677; Bundesverfassungsgericht, 1 BvL 11/94, 28 April 1999.

[1932] Of course, it may also be the other way around: the immigration authorities, social inspectors or any other competent authority may discover irregular and undeclared employment and inform the social security administration, not least for the payment of taxes and social security contributions.

insurance, or there will no longer be employment and income from employment that might be taken into consideration for entitlement to or the amount of social security benefits.

If the employment does not stop, it should still be regarded as employment for social security purposes. If it occurs in the informal sector of the economy, it will have the same legal effect as the employment of nationals who engage in undeclared work. Where relevant, this might include the retroactive regularisation of employment after the declaration of work. In the unlikely event that the employment is and can be correctly declared, it will have the same meaning under social security law as the correctly declared employment of a citizen. For example, if the immigration authorities or other competent authorities fail to perform at least a minimum follow-up, the social security administrations should facilitate the correct declaration of irregular work. On this basis, insurance can take place.

For the sake of completeness, under many social security programmes the social security administration's check of a foreigner's authorisation to stay and to work in the country is also necessary from a social security point of view. Under programmes where citizenship or an alternative strong link with the country is relevant, information on a foreigner's immigration status may be needed. Under programmes where the availability for the labour market and labour market (re)integration measures are relevant, information on a foreigner's authorisation to work in the country will be needed.

The duty to check and report on a foreigner's permission to reside and to work in the country should apply to all social security administrations. For the sake of clarity, this duty would not concern health care providers, *i.e.* persons or organisations professionally providing qualified health care services. In the investigated countries, health care providers are not administering social insurance or social assistance laws. They are simply providing health care services. Statutory social insurance or social assistance, *i.e.* legal arrangements determining solidarity measures for people facing (the threat of) a lack of earnings or particular costs,[1933] are administered by different administrations.

1.5. Relationship with immigration law

We have already stressed the fact that the application of social security logic must not undermine the objectives of immigration law. To this end, social security administrations should be required to check a foreigner's residence and work authorisation and inform the immigration authority or any other competent authority of any positive result. This has been outlined in the previous subchapter. No more should be required of social security law and social security administrations. In all other respects, the application of social security logic in order to determine the legal position of an irregular migrant worker does not undermine the objectives of immigration law. This will be shown in the following.

The application of social security logic may lead to a situation where irregular employment is considered as employment and irregular residence is considered as residence under social security law. Accordingly, unlawful employment and unlawful residence may be the basis for entitlements

[1933] For the definition see the introduction to this doctoral thesis and Danny Pieters, *Social Security: An introduction to the basic principles*. 2. ed. (Alphen aan den Rijn: Kluwer Law International, 2006), p. 2.

and obligations under social security law. The question is whether it will undermine the objectives of immigration law if rights are built up on the basis of unlawful employment and unlawful residence. To my mind, the answer is: not necessarily. The objective of immigration law with respect to irregular residence and irregular work is to bring such practices to an end – in other words, to put a stop to the infringement of immigration law, including alien employment law. Any entitlements that may exist on the basis of unlawful residence or unlawful employment do not stand in the way of realising this objective, as long as two principles are respected: rights under social security law must not create rights under immigration law, and social security administrations must uphold immigration law when confronted with irregularly present or irregularly working foreigners. Both these principles are respected in the approach we have described so far. The application of social security logic does not require rights under social security law to lead to rights under immigration law. Social security logic does not tell us that, for instance, an entitlement to family benefits creates a right to remain in the country for the beneficiary or the rest of the family. The second principle is also respected. We set out in the previous subchapter that so as not to undermine the objectives of immigration law, social security administrations should be under an obligation to check a foreigner's immigration status and work authorisation and report any positive results to immigration authorities. This ensures that the social security authorities do not support the continuation of unlawful presence or unlawful work in the country: instead, they put immigration authorities in a position to enforce immigration laws. In my opinion, then, provided these two principles are respected, rights for irregular migrant workers do not undermine the objectives of immigration law.

As a consequence of building up rights on the basis of irregular employment and irregular work, unlawfully present foreigners may be entitled to social security benefits. One may argue that the payment of these benefits helps enable the foreigner to continue his/her unlawful presence in the country. The question here is whether it will undermine the objectives of immigration law if social security law provides for the payment of benefits to unlawfully present foreigners. To my mind, such payments may indeed help a person to continue living in the country, but social security law cannot be held responsible for the provision of financial means which may contribute to an unlawful or even criminal act. Presumably nobody would argue that social security law is undermining criminal law if a person uses social security payments to buy a gun and then uses the gun to commit a crime. Similarly, social security law would probably not be called into question if social security benefits were used to buy a car with which traffic laws were constantly infringed; or if social security benefits were spent on illegal gambling. Thus, although I concede that it is possible that social security benefits might be used to continue a person's unlawful residence in the country, it should not therefore be held responsible for the infringement of immigration law. In other words, the link between the payment of social security benefits, the use of those payments to purchase food, clothing, shelter and so on, and the use of such goods to infringe immigration laws appears to be too weak to admit the argument that immigration law is undermined by social security law in such circumstances.

Our research has revealed that under Belgian and Canadian immigration law, unlawful presence is a criminal offence. Moreover, under Canadian immigration law taking up employment in Canada without authorisation to do so is also regarded as a criminal offence. One can ask whether this has implications for an irregular migrant worker's position in social security law. To begin with, it is important to know whether there is any restriction on building up or exercising social security rights which are based on a criminal act. To my knowledge, there is no such restriction in the investigated countries. The logic of social security law or criminal law does not indicate that social

security rights cannot be acquired or exercised on the basis of a criminal act. What we can see is that employment contracts are declared invalid if they are contrary to statute, good morals or public order, for instance if they are entered into for the purpose of irregular work or drug dealing. However, in such a case non-insurance under social security law is the consequence of an invalid employment contract, and not the consequence of violating a statute, good morals or public order. What is more, we can see that social security rights may be limited if a person is convicted of a crime. For instance, in Belgium the retirement pension rights of government employees are forfeited if they are convicted of a crime.[1934] However, these exclusions from benefits only happen after a criminal conviction.[1935] There is no rationale whatsoever for prohibiting the acquisition or exercise of social security rights purely on the basis of a criminal act, and without criminal conviction. There therefore seems to be no credible argument against allowing a foreigner to build up or exercise social security rights simply because those rights are based on the crime of unlawful presence in the country or unlawful work.

Another issue which needs to be considered in connection with crime is assisting of a crime. The immigration laws of both countries make it illegal to facilitate or support people in committing the criminal offence of staying unlawfully. Those who do so commit a criminal offence themselves.[1936] One can ask whether social security administrations which pay out benefits to unlawfully present foreigners are facilitating or supporting their unlawful presence and hence commit a criminal offence. Again, I do not see any direct link between the payment of social security benefits and the criminal offence of unlawful presence. However, even if one takes the view that the payment of benefits may be regarded as facilitation or support of irregular presence in the country, there are other reasons why criminal liability is excluded. First, a close look at the criminal law provisions on facilitating and supporting unlawful presence shows that these provisions target people who act out of financial and criminal motives. Belgian law explicitly sets out that if there is a humanitarian reason for providing support, the criminal law provision is not applicable.[1937] The Belgian Court of Cassation held that this is to be interpreted as meaning that support for non-financial and non-criminal reasons does not give rise to criminal liability.[1938] In Canada too, the focus is on support for financial and criminal reasons, for example in the context of human smuggling or human trafficking.[1939] Social security administrations do not seek financial advantage or act out of criminal motives. They enforce the law which provides benefits in order to protect people against the occurrence of a social risk. Second, social security administrations simply give effect to the law. Both Belgian and Canadian criminal law recognise the enforcement of the law as a valid protection against criminal liability.[1940] Canadian criminal law sets out that everyone – government employees and private individuals alike – who is required or authorised by

[1934] § 49 Act of 21 July 1844 (Algemene wet van 21 juli 1844 op de burgerlijke en kerkelijke pensioenen), B.S. 30 July 1844.
[1935] It should be added here that a criminal conviction for the sole crime of unlawful presence in the country appears to be rather exceptional. For Belgium see Parlementaire Vraag no. 881, 5 October 2006 (Tastenhoye), Vragen & Antwoorden Kamer 2005-06, no. 27.058-27.062.
[1936] For Belgium see § 77 Aliens Act and for Canada § 131 read with § 124 Immigration and Refugee Protection Act.
[1937] § 77 (2) Aliens Act.
[1938] Hof van Cassatie, 18 April 2006, *Rechtskundig Weekblad* 2006-07, p. 1273.
[1939] See for instance Ontario Superior Court of Justice, *R. v. Toor* (2009), 89 Immigration Law Reporter (3d) 248, 2009 CarswellOnt 8881; or "Yarmouth Integrated Border Enforcement Team charge two persons for illegally entering Canada," *The Yarmouth Vanguard*, 22 May 2007; or Edward Corrigan, "Refugee claims and human trafficking," *ImmQuest*, vol. 4, no. 10 (2008), p. 3.
[1940] For Belgium and for Canada see § 25 (1) Canadian Criminal Code. The protection of persons administering and enforcing the law applies to public officers and private persons alike.

law to do anything in the administration or enforcement of the law is justified in doing what he is required or authorised to do, provided that he or she acts on reasonable grounds.[1941] The situation under Belgian criminal law is similar. The commitment of criminal acts which are ordered, allowed or tolerated by law is justified, provided that it does not involve serious violations of international humanitarian law.[1942] This suggests that social security administrations are not criminally liable when they pay out benefits to which an unlawfully present foreigner is legally entitled.

1.6. Compliance with international obligations

In our analysis of the international legal framework, we found that the legal obligations for the investigated countries with respect to the social security of irregular migrant workers are few in number. I refer here to explicit and legally binding obligations. We have seen that Canada is under no such international obligation. Belgium and the Netherlands are under a few obligations, as a consequence of their membership of the EU and their ratification of the CoE Convention on Action against Trafficking in Human Beings. In what follows, we will analyse how the application of social security logic for the determination of the social security of irregular migrant workers needs to be adapted in order to comply with international obligations. Once more, only the explicit and legally binding obligations with respect to the investigated countries will be considered. Obligations where migrants with an irregular residence or work status are not expressly addressed are disregarded. To do otherwise would be mere speculation. That speculation is the right word in this context has been illustrated by the results of both our international investigation and our law comparison.

The EU Member States Belgium and the Netherlands must, *as far as possible*, provide emergency medical care and essential treatment of illness to unlawfully present third-country nationals during periods granted for voluntary departure or during periods of postponed removal orders (Article 14 EC Directive 2008/115). We concluded that social security logic does not guarantee certain forms of medical treatment, or the coverage of their costs, for unlawfully present foreigners. However, we saw that under criminal law, medical law and disciplinary law in Belgium and the Netherlands, emergency medical treatment at least must be provided to everyone, including unlawfully present persons. Disciplinary law, in addition, obliges doctors to provide necessary medical treatment (in the Netherlands) and medical treatment which must not be denied in order not to fail in their human duties (in Belgium). Emergency medical care and possibly also the essential treatment of illness, as required under EC Directive 2008/115, are therefore guaranteed on the basis of criminal law, medical law and disciplinary law in Belgium and the Netherlands. As a consequence, the application of social security logic for the determination of the social security of irregular migrant workers does not need to be adapted.

What is more, Belgium and the Netherlands are under an obligation to provide emergency medical treatment and the means of subsistence to victims of human trafficking who do not have sufficient resources (Article 7 (1) EC Directive 2004/81 and Article 12 (1) (a) and (b) in conjunction with

[1941] See § 25 (1) Canadian Criminal Code.
[1942] See § 70 Belgian Criminal Code. The law only refers to acts which are ordered by law. Case law and the literature also include acts which are allowed or tolerated by law. See Raf Verstraeten and Frank Verbruggen, *Strafrecht en strafprocesrecht voor bachelors* (Antwerpen/Apeldoorn: Maklu, 2007), p. 59.

Article 13 (2) CoE CTHB). We already mentioned in the previous paragraph that the provision of emergency medical treatment is in any case required under Belgian and Dutch criminal, medical and disciplinary law. In this respect, then, no adaptation to the application of social security logic would need to be made. Concerning the guarantee of a minimum standard of living, the situation is different. EU and CoE law require the guarantee of the means of subsistence for victims of human trafficking without sufficient resources – irrespective of the victim's immigration status in the country. We have seen that social security logic does not provide for minimum social assistance coverage for victims of human trafficking. Its logic only covers residents, with or without an additional strong connection to the country. In order to comply with these European obligations, Belgium and the Netherlands would therefore need to guarantee a minimum level of social assistance to victims of human trafficking. This would need to be done irrespective of the victim's residence in the country or link with the country.

This illustrates that in order to comply with international law only a small adaptation needs to be made to the determination of an irregular migrant worker's social security according to social security logic.

2. Changes in the countries

In this chapter we will try to outline what changes would need to be made to current social security legislation and how the legal position of irregular migrant workers would change, if the investigated countries determined the social security of irregular migrant workers on the basis of the inherent logic of social security law. This will give us an idea of how great the difference from the current legal situation would be.

2.1. Belgium

To a great extent, Belgium already avoids any distinction in its social insurance legislation on the basis of a worker's citizenship or immigration status. A person comes within the scope *ratione personae* of Belgian social insurance laws for employees if he or she works under an employment contract. Employment contracts concluded with persons who lack work authorisation in Belgium are in principle invalid. However, this invalidity cannot be invoked to exclude the application of social insurance law. Therefore irregular migrant workers, who lack work authorisation and may also lack residence authorisation, come within the personal scope of application when they work under an employment contract. However, for entitlement to benefits, social insurance contributions must have been withheld from wages. As long as this is not done, both Belgian undeclared workers and irregular migrant workers who work in the black economy are not entitled to benefits. Nothing would need to be changed here. The social security status of irregular migrant workers is already determined by social security logic.

The only component of Belgian social insurance in which irregular migrant workers are particularly addressed is unemployment insurance: while social insurance contributions need to be paid for irregular migrant workers as for every other worker, irregular migrant workers are largely excluded from building up rights. To be more precise, work without work authorisation is not considered as work for the fulfilment of the qualifying period. What is more, for entitlement to benefits applicants/beneficiaries need a correct immigration status and a work authorisation at the moment of application and throughout the whole period of receipt. There are two exceptions: first, when a work authorisation may not be denied and, second, when a foreigner loses the work permit, in which case he or she remains entitled for sixty more days. In these situations entitlement to benefits is possible even without a valid work permit. If the logic of social security were applied, the requirement to have work authorisation when applying for benefits and throughout the benefit period would remain. Foreigners without work authorisation are simply not available for the Belgian labour market. The two exceptions would also continue to apply. A correct immigration status would, however, no longer be needed for the payment of benefits. A further adaptation concerns the qualifying period. We mentioned above that currently, work done by foreigners without work authorisation is not considered as work with respect to the qualifying period. This is not consistent with the logic of social security. We have seen that qualifying periods for foreigners with no immigration status or a weak immigration status may be justified, since they may lack a sufficiently strong link with the country. However, here irregular migrant workers are completely deprived of the possibility to build up rights under unemployment insurance, no matter how strong their link with country is. Therefore, the fulfilment of the qualifying period must be also possible for irregular migrant workers.

An adaptation of the entitlement criteria would also need to be made with respect to the incapacity for work component of Belgium's sickness and invalidity insurance. Currently, foreigners are not required to possess a work authorisation to be entitled to benefits. If social security logic were applied, the fact that a foreigner lacks a work authorisation would mean that the foreigner is unable to work because of this lack of work authorisation, and not because of sickness, injury, maternity or paternity. As a consequence, incapacity for work benefits would be suspended until a work authorisation is obtained.

For Belgian workers' compensation laws, *viz* labour accident insurance and occupational diseases insurance, one small addition would need to be made: clear guidelines with respect to offers of reemployment. Currently, beneficiaries who are able from a medical point of view to (partially) restart work must do so. Otherwise the benefit is reduced from 90 percent of the pre-accident average wage to an amount which equals the worker's actual degree of incapacity. There is no guidance with respect to foreigners without a work permit. If social security logic were applied, it would have to be made clear that foreigners with no work authorisation are not able to comply with offers for reemployment. The consequence would be that the benefit is reduced.

Let us now turn to Belgium's general and special social assistance schemes. In contrast to Belgium's social insurance schemes, social assistance schemes cover residents of the country - in most cases only those who additionally have a sufficiently strong link with the country. If social security logic were applied, foreigners who are residing in Belgium would have to be considered as residents for social assistance purposes, regardless of their immigration status. As a consequence, (former) irregular migrant workers – *i.e.* foreigners with an irregular, precarious or temporary immigration status – would come within the scope *ratione personae* of the Social Welfare Services scheme. This is because this social assistance of last resort covers anyone who is resident in a Belgian municipality. No further link with Belgium is required. The current situation for unlawfully residing foreigners would therefore change. Currently, unlawfully residing foreigners are only entitled to urgent medical assistance. With the application of social security logic, unlawfully residing foreigners would fall within the scheme's personal scope of application with regard to all services, including financial assistance, housing, medical benefits and other benefits in kind.

Concerning the other social assistance schemes, the situation is different. Under these schemes, residence alone is not sufficient for a person to fall within the scope *ratione personae*. The Act on Social Integration, the Act on the Minimum Income for the Elderly and the Act on the Disabled Person's Allowance additionally require either Belgian citizenship or some other evidence of a sufficiently strong link with Belgium, such as a strong immigration status, a privileged position due to international obligations, previous enjoyment of the increased child allowance for disabled children under the Belgian family allowance scheme for employees or the self-employed (Act on the Disabled Person's Allowance), or entitlement to a retirement or survivor's pension based on Belgian law (Act on the Minimum Income for the Elderly). Currently, these alternative forms of evidence of a sufficiently strong link with Belgium are also open under the Minimum Income for the Elderly scheme and the Disabled Person's Allowance scheme to foreigners with an irregular, precarious or temporary immigration status. This would not change if social security logic were applied. Such forms of evidence would also need to be possible under the Social Integration scheme. What is more, the application of social security logic would under all three schemes mean that foreigners with an irregular, a precarious or a temporary immigration status would no longer be excluded if their weak immigration status had ceased to reflect reality, *i.e.* a link with Belgium.

We suggested that the existence of such a link could be assumed after a few years of residence in the country. Five years could be a sufficiently long time to assume the existence of a link with Belgium despite a weak immigration status. I would recommend five years since it is exactly the period of time introduced by Belgian legislation for foreigners under the Guaranteed Family Allowance scheme when the citizenship requirement was dropped.

This brings us directly to the Guaranteed Family Allowance scheme. Here too, the personal scope of application is confined to residents of Belgium who have a sufficiently strong link with the country. Yet this link can no longer be demonstrated simply by having Belgium citizenship. Instead, the applicant and the child must demonstrate a sufficiently strong link with Belgium by having resided for long enough in the country. To be more precise, an uninterrupted period of five years of residence, preceding the day the application is filed, is required. However, exceptions to the five-year qualifying period exist for Belgian citizens and for certain categories of foreigners, such as privileged foreigners under international law or foreigners taking care of a child with Belgian citizenship. Unlawfully present foreigners are currently excluded from the scheme's scope *ratione personae*, simply because they reside in the country in violation of Belgian immigration laws. If social security logic were applied, unlawfully present foreigners would also have to be able to demonstrate their link with Belgium through the five-year residence requirement. The existing exceptions from the five-year residence requirement for Belgian citizens and certain categories of foreigners would continue to exist. This is because Belgian citizens and these foreigners can already provide evidence of a sufficiently strong link with the country, or because these foreigners enjoy particular protection under international law.

We have seen that the two general social assistance schemes in Belgium not only aim at poverty alleviation, but also at social (re)integration through labour market participation. The latter objective is reflected in conditions such as that the beneficiary must make an effort to find a job or must participate in labour market (re)integration measures. Non-compliance may lead to the partial or complete suspension of social assistance benefits. However, the imposition of such conditions as well as any sanctions is left, to a large extent, to the discretion of the competent social assistance administration. At present, there seems to be no explicit policy guideline on how to deal with foreigners without work authorisation. The application of social security logic would require foreigners without work authorisation to be considered to be unable to meet such labour market related conditions. As a consequence, they might face temporary full or partial suspension of benefits, like nationals for whom the labour market (re)integration objective cannot be fulfilled.

For the sake of completeness, it should be added that the three special social assistance schemes do not have a labour market (re)integration objective. They are intended to provide indigent persons who cannot fall back on (sufficient) old age pension or disability benefits with a minimum income. In addition, they support disabled people and parents with children in covering additional costs. Accordingly, there are no entitlement criteria which pose particular difficulties for foreigners without permission to work.

Concerning international law, Belgium is under a legal obligation to provide, first, unlawfully present indigent victims of human trafficking with emergency medical treatment and with the means of subsistence (EC Directive 2004/81 and CoE Convention on Action against Trafficking in Human Beings) and, second, unlawfully present third-country nationals during periods granted for voluntary departure or during periods of postponed removal orders, as far as possible, with emergency medical care and essential treatment of illness (EC Directive 2008/115). Currently,

these obligations are met, most notably, through the provision of general assistance of last resort. In addition, victims of human trafficking can gain help from specialised centres, which provide social-psychological accompaniment. The implementation of social security logic would not change the current situation much.

Victims of human trafficking who are resident in Belgium would fall within the personal scope of application of Belgium's social assistance of last resort. This would be the same as for any other foreigner residing in a Belgian municipality. The foreigner's immigration status would be of no relevance. Under this scheme, medical benefits as well as financial benefits and benefits in kind to ensure subsistence are to be provided if needed. In order to comply with European obligations it must be ensured that those victims who are simply present and do not yet have a permanent place of residence in a Belgian municipality are also covered.

The second European obligation concerns the provision of emergency medical care and essential treatment of illness to unlawfully present third-country nationals during periods granted for voluntary departure or during periods of postponed removal orders. This is required only to the extent that it is possible for the Member State. At the moment, Belgium complies with this obligation by providing *necessary* medical care under the Social Welfare Service scheme and under the Act on the Reception of Asylum-Seekers. In contrast to other indigent unlawfully present foreigners, medical care for such foreigners who are returning voluntary or who have postponed removal orders is not limited to *urgent* medical care. If social security logic were applied to this situation, hardly anything would change. Needy unlawfully residing foreigners would be entitled to necessary medical assistance under the Social Welfare Service scheme. This would be true for unlawfully residing foreigners during periods granted for voluntary departure or during periods of postponed removal orders, but also for any other unlawfully residing foreigner in need. In order to comply with European obligations it is necessary to ensure that such foreigners who are simply present in Belgium and have no permanent place of residence in a Belgian municipality are also covered by the Social Welfare Service scheme.

Incidentally, the obligation to provide emergency medical care to victims of human trafficking and to third-country nationals during periods granted for voluntary departure or during periods of postponed removal orders exists in any case under Belgium's criminal law and disciplinary law.

In general we can say that the current system of health benefits under the Social Welfare Service scheme would change. At present, unlawfully present foreigners in need are entitled to urgent medical assistance. By contrast, certain privileged unlawfully residing foreigners in need, such as foreigners during periods granted for voluntary departure, as well as any other resident in need, are entitled to health benefits which relate to necessary medical care. If social security logic were applied, any resident in need would be able to receive necessary medical care under the Social Welfare Service scheme, regardless of immigration status.

At the moment, there is also a difference of treatment between unlawfully residing adults and unlawfully residing children under the Social Welfare Service Act. While the former may only be entitled to urgent medical assistance, the latter, under certain conditions, may be entitled to full social assistance in kind. The application of social security logic would remove this distinction. When an unlawfully residing foreigner – whether adult or child – is in need, he or she would fall within the scope *ratione personae* of the Social Welfare Service scheme. Accordingly, he or she would have the possibility to qualify for financial benefits or benefits in kind. However, since

unlawfully residing foreigners are not in possession of a work authorisation in Belgium, the social assistance benefits of adults might be temporarily reduced or suspended.

Finally, we can turn to the check and alert measures for social security administrations. Where Belgian social security laws require the possession of a certain immigration status or of a work authorisation for some reason, social security administrations already check for it. What is more, once social security administrations have obtained information about the unlawful presence and, under certain conditions, unlawful work of a foreigner, they are legally obliged to report these criminal offences to the immigration authorities, the public prosecutor or any other authority in charge. We explained that for the purpose of upholding immigration law, a systematic check of a foreigner's residence and work authorisation would need to be conducted. The current check measures would therefore need to be extended to every contact with a foreigner under social security law, not just those where social security law particularly addresses immigration status or work authorisation. In addition, a rule would need to be introduced to the effect that any discovery of unlawful residence or unlawful work must be communicated to the immigration authorities or any other competent authority. This means that the present obligation to report, which relates in particular to unlawful presence, would be extended to all situations of unlawful work.

Once more, for the sake of clarity, it should be stressed that the obligation to check and report on a foreigner's permission to reside and to work in the country would not apply to health care providers. At present, private and public[1943] health professionals are likewise under no obligation to check and report on a foreigner's status under immigration and alien employment law, so nothing would need to be changed here.

2.2. Canada and the province of Ontario

Canada and the province of Ontario operate a number of social security programmes which, for the most part, do not share a common personal scope of application. We will therefore discuss the implications of the determination of an irregular migrant worker's social security with reference to social security logic separately for each programme.

Canada's residence-based Old Age Security programme covers the risks of old age and death. Currently, the programme requires either Canadian citizenship or lawful residence in Canada at the time of the approval of the application or, in case of export, at the time the person ceased to reside in Canada. What is more, the fulfilment of a qualifying period is demanded for entitlement to old age and survivor's benefits. In more detail, residence in the country for an aggregated period of at least ten years or, in the case of export, at least twenty years is required. At present, residence is assessed on the basis of a number of indicators, such as a person's economic and social ties in Canada, a person's ties in another country, a person's regularity of presence in Canada and so on. According to the Federal Court, the immigration status of foreigners can be also taken into consideration as one of the indicators for residence. But the Federal Court has made it clear that the ultimate determination of residence must be performed having regard to all the suggested indicators. However, in practice lower instance Review Tribunals pay considerable attention to a

[1943] Health professionals who have the status of government employees are under a duty to report on unlawful presence. However, the government, courts and legal science usually take the point of view that their duty of professional secrecy prevails.

foreigner's immigration status. No immigration status at all or only a temporary one is considered to be a strong indicator that the foreigner has not made the decision to reside regularly in Canada. Accordingly, usually only residence under a permanent residence status or during the application procedure for permanent residence status are regarded as residence for Old Age Security Purposes.

If social security logic were to become decisive for the determination of an irregular migrant worker's social security status, this would have the following consequences. First, residence would be assessed in the same way as for nationals who engage in undeclared work: by way of the actual circumstances. This means that there would be no difference from the current assessment, as set out by the Federal Court. Administration and lower instance courts would have to follow this and pay no attention to the immigration status, if that status did not reflect the residence reality. Second, citizenship and a regular immigration status would continue to define the personal scope of application. However, foreigners without immigration status would need to be taken into consideration if their lack of immigration status did not reflect the reality with respect to their ties with the country. In other words, foreigners who have built up a sufficiently strong link with Canada would need to fall within the scope *ratione personae*. As already outlined in subchapter 1.1., three, four or five years in Canada could be taken as indication of a sufficiently strong link with the country. Since a minimum of ten years of residence is required for entitlement to benefits anyway, unlawfully residing foreigners would, by the time they applied for benefits, have already fulfilled the test for a sufficiently strong link with Canada.

Our research revealed that there is some lack of clarity with regard to irregular migrant workers under the Canada Pension Plan, an employment-based programme covering the social risks of old age, death and incapacity for work. It is clear that contributions need to be deducted in order for a worker to become entitled to benefits. Declared work is currently not possible for irregular migrant workers, since they lack a valid Social Insurance Number. Whether a retroactive regularisation of undeclared periods of work is possible on the basis of an employment contract concluded with an irregular migrant worker is unclear, however. Our analysis suggested that the employment contract will be invalid and void *ab initio*, unless the foreigner acted in good faith when violating immigration law, something which appears to be rather difficult to prove in the case of black economy work.

If social security logic were applied for the determination of the legal position of irregular migrant workers, there would not be much change to the current situation: entitlement to benefits would only be possible after the deduction of social insurance contributions; and for the retroactive regularisation of undeclared periods of work, the Canada Pension Plan would need to rely on the doctrine of illegality of contracts. What needs to be adapted is the administration of the Canada Pension Plan. At present, irregular migrant workers cannot obtain a Social Insurance Number and hence cannot correctly declare their work for Canada Pension Plan purposes. Such an administrative barrier is not in line with the logic of social security. Instead, employers of foreigners without work authorisation should be able to affiliate them with social security. In other words, a number for administrative processes must be assigned. However, in order to uphold immigration law, social security administrations should inform the immigration authorities about the irregular work. If the immigration authorities do not follow up at all, correct affiliation with the Canada Pension Plan will be the consequence.

With respect to disability benefits under the Canada Pension Plan, social security logic demands that they should not be provided unless a foreigner possesses a work authorisation in Canada.

Without work authorisation the foreigner is unable to perform work in Canada because he or she is not entitled to do so, and not because of his or her disability. Hence entitlement to disability benefits would need to be suspended until a work authorisation is obtained.

The legal situation for irregular migrant workers under Canada's Employment Insurance, which covers the social risks of unemployment and incapacity for work, is clearer. Insurance is based on work under an employment contract, and entitlement to benefits is independent of the payment of contributions. At present, irregular migrant workers are only insured if their employment contract is legal. Their employment contract is only legal if they acted in good faith when violating immigration laws. Acting in good faith was possible before administrative barriers to affiliation with the scheme were introduced. Since then, irregular migrant workers have only been able to work in the black economy, which makes it rather difficult to prove good faith. Except for the administrative barriers, the current situation is already in line with social security logic: irregular migrant workers, like nationals who perform undeclared work, are insured if they work under a valid employment contract. Nothing would need to be changed here. By contrast, if social security logic were applied, employers of irregular migrant workers would need to have the possibility to affiliate them with social insurance.

Concerning entitlement to unemployment benefits under Employment Insurance, Canadian case law has made it clear that foreigners without work authorisation are not able to fulfil the qualifying condition to be available for work. However, a temporary exemption has been established for foreigners who can establish that they are seeking employment for which they can reasonably expect to obtain a work permit. Both the general rule and the exception have already been developed out of social security considerations. Hence nothing needs to be changed. Regarding incapacity for work benefits under Employment Insurance, availability for work is important in a negative sense: an applicant or beneficiary must be unable to work because of illness, injury, pregnancy or parenthood, and not for any other reason. Foreigners without work authorisation are unable to work for another reason. Law, case law, policy and legal commentary are silent on the consequences for incapacity for work benefits. If social security logic were applied in this respect, foreigners without permission to work in Canada would need to be considered as unable to work for a reason other than one of those prescribed. As a consequence, there would be no entitlement to incapacity for benefits.

Ontario's Workers' Compensation scheme, which provides for incapacity for work benefits, health benefits and death benefits, does not differentiate according to a person's immigration status. The only relevant consideration is that the injured, sick or deceased person worked as a worker for an insured employer. Irregular migrant workers are considered as workers under the Workers' Compensation laws. The current situation is already an expression of the application of social security logic. Hence nothing would need to be changed. Concerning the enjoyment of benefits, current laws allow for the reduction or even suspension of benefits if an injured or sick beneficiary does not comply with back-to-work measures. From practice we know that not having a work authorisation is regarded as a reason for being unable to participate in these measures. However, to what extent this leads to a reduction or suspension of the benefit is up to the discretion of the administration. Here too, nothing would need to be changed.

The social risk of health care is, in general, addressed by the Ontario Health Insurance Plan. This scheme requires residence in the province. However, Canadian citizenship, a certain immigration status or another tie with Canada, such as a family relationship, are additionally required in order

to fall within the scheme's personal scope of application. Unlawfully residing foreigners and many foreigners with a weak immigration status are now excluded from insurance. If social security logic were applied, everyone, irrespective of immigration status, would have to be able to demonstrate a sufficiently strong link with Canada. Unlawfully residing foreigners and foreigners with a weak immigration status cannot demonstrate such a link by way of Canadian citizenship or a strong immigration status; but they can demonstrate it by other means, such as family ties with an insured person or a certain period of residence in Canada. Concerning the requirement to be resident in Ontario, we have seen that residence is currently assessed according to the factual situation. That is to say, the primary place of residence must be in Ontario and the person must be present in Ontario for a specified period of time (at least 153 of the first 183 days after becoming a resident and at least 153 days in any twelve-month period). This criterion would continue to apply – but would do so for everyone. Incidentally, the existing waiting period of three months for certain eligible categories of foreigners would continue to apply.

Certain categories of foreigners who are excluded from provincial health insurance may currently fall back on the Interim Federal Health Program. This federal programme covers the costs of essential health care services for certain migrants who are unable to pay them by themselves. These include recognised refugees who have not fulfilled a waiting period of up to three months under a provincial health insurance scheme or foreigners detained for immigration purposes. There is no compelling social security reason to cover the costs of health care for those who do not fall under statutory health insurance. However, there is nothing to be said against Canada continuing this programme either. For the sake of completeness, it should be added that public hospitals in Ontario are under a legal obligation to provide health care to anyone who is in a life-threatening situation. Uninsured individuals must therefore be treated in such a situation, irrespective of their ability to pay the medical costs.

Canada and Ontario have a number of programmes to support parents in meeting the extra costs of having and raising children. These programmes cover residents in Canada or Ontario, as defined in the Canadian Income Tax Act. In addition, all programmes require Canadian citizenship or a certain immigration status of either the applicant or his/her spouse or common-law partner. Foreign applicants or spouses/common-law partners under a temporary residence status must additionally fulfil a qualifying period, *i.e.* they must have been resident in Canada for the previous eighteen months. What is more, the child benefit schemes are strongly interwoven with the Canadian income tax system. Under most of the schemes an income tax return must therefore be filed in order to become eligible for benefits. The filing of an income tax return is not possible without a valid Social Insurance Number. However, foreigners without employment authorisation in Canada basically do not have such a number. Currently, this combination of qualifying criteria makes it virtually impossible for irregular migrant workers to qualify for benefits.

If social security logic were applied with respect to irregular migrant workers, two things would need to be changed. First, individuals who do not possess Canadian citizenship or a certain immigration status would also need to have the possibility to demonstrate their link with Canada. For instance this could be done by providing evidence of a certain number of years of residence in the country. As a consequence, irregular migrant workers whose immigration status no longer reflected the reality of their link with the country would come within the schemes' personal scope of application. Second, the administrative barrier would need to be removed. As already outlined above in this subchapter, irregular migrant workers must also be able to get information that they submit, such as an income tax return, processed by the administration. What does not need to be

changed is the qualifying period for foreigners under a temporary residence status. In addition, the current assessment of residence, *i.e.* assessment according to the factual circumstances, would continue to apply.

Ontario's general social assistance scheme, Ontario Works, aims most notably at promoting "self reliance through employment" and at providing "temporary financial assistance to those most in need while they satisfy obligations to become and stay employed".[1944] Currently, the personal scope of application is defined by residence in the province and either Canadian citizenship or a certain immigration status. The application of social security logic would entail that foreigners with no immigration status or with a weak immigration status would also have the chance to fall within the scope *ratione personae*, provided that they had a sufficiently strong link with the country. As we have seen, such a link could for instance be demonstrated by a certain period of residence in the country.

For benefit entitlement, further conditions need to be fulfilled under the Ontario Works Act. These include conditions which relate to the national labour market, such as acceptance and maintenance of employment, and participation in back-to-work measures. Currently, it is the department's policy that if a foreign applicant is unable to obtain a work permit, the administrator may at his/her discretion temporarily defer employment-related requirements. Such deferral for a certain period of time is an expression of temporary extraordinary circumstances and can therefore be justified out of social security considerations. However, permanently lifting the requirements related to labour market (re)integration would definitely not reflect the logic of Ontario Works. In any case, foreigners without work authorisation must be considered as unable to comply with employment-related requirements. As soon as foreigners without work authorisation are required to comply with such requirements, they will therefore face denial or reduction of the benefit – the sanction for anyone who does not comply with employment-related conditions. Denial is the consequence, if a single person is concerned. Reduction is the consequence, if there are dependants in the benefit unit, such as children.[1945] The complete denial of social assistance benefits for persons in need who already fail to comply with back-to-work requirements at the moment of application and who have no dependants can be explained by the objective of Ontario's general social assistance: it aims to satisfy needs, including basic needs, but only while beneficiaries satisfy obligations to become and stay employed. These rules already apply to citizens and eligible foreigners who fail to comply with employment-related entitlement requirements. If social security logic were implemented, these rules would be also applicable to foreigners without a work permit.

Ontario also operates a special social assistance scheme for disabled people in need. The programme covers expenses related to basic needs as well as to the disability. It also supports disabled people who are willing and able to work in their attempts to find employment. The personal scope of application currently resembles that of Ontario's general social assistance scheme. In other words, residence in the province is required and, at least for income support, citizenship or a certain immigration status. Here too, the application of social security logic would demand the provision of alternative forms of evidence of the existence of a sufficiently strong link with Canada, such as a certain period of residence in the country. For employment assistance, it is

[1944] § 1 (a) and (b) Ontario Works Act.

[1945] Here we assume lack of employment authorisation already at the time of application. If a beneficiary fails to comply with back-to-work requirements during the receipt of the benefit, consequences under the Ontario Works programme would be only temporary.

already the department's policy to require an authorisation to work in the country. Nothing would need to be changed here.

Finally, Ontario assists the needy elderly by topping up their old age pensions. Entitlement to an old age pension under the Canadian Old Age Security programme is therefore an eligibility criterion for this special assistance. This means, amongst other things, residence in the country for an aggregated period of at least ten years. Currently, unlawfully present foreigners are explicitly excluded under both Canada's Old Age Security law and Ontario's special assistance for the elderly law. If social security considerations were decisive, foreigners would no longer be excluded due to their lack of an immigration status. Instead, they would have the possibility to demonstrate their links with Canada, for instance by actual residence in the country for a number of years.

With regard to the administration of social security, the social security authorities are not generally subject to a duty to report unlawful presence or work. What does exist under some social security programmes is the requirement to provide a valid Social Insurance Number in order to have contributions correctly attributed and benefit applications processed. Foreigners without an immigration status or without authorisation to work in the country are not normally in possession of a valid Social Insurance Number. Under some social security programmes, their submission is not currently processed. The application of social security logic in a manner compatible with upholding immigration laws, would suggest precisely the reverse approach: report foreigners who lack residence or work authorisation in Canada, but process their submissions under social security law. The latter could be done either by assigning Social Insurance Numbers to irregular migrant workers, or by producing temporary identification numbers. Such an approach would on the one hand prevent the position of an irregular migrant worker from being determined *de facto* by administrative procedures; and on the other hand, it would ensure that the objectives of immigration law were not thwarted.

2.3. The Netherlands

Under current Dutch laws, irregular migrant workers are expressly excluded from statutory social insurance: insurance on the basis of work is not possible without work authorisation; and insurance on the basis of residence is not possible with no or only a precarious immigration status. This *per se* exclusion would need to be lifted if social security logic were allowed to determine the legal position of irregular migrant workers. Instead, irregular migrant workers would be insured if they worked under an employment contract (employee social insurance schemes) or if they were inhabitants of the Netherlands (general social insurance schemes).[1946] Concerning the first possibility, we have shown in our research that employment contracts concluded with unlawfully working or unlawfully staying foreigners are valid in the Netherlands. This entails that irregular migrant workers fall within the scope *ratione personae* of employee social insurance laws. Since insurance does not depend on the payment of contributions, irregular migrant workers would be insured. Regarding general social insurance schemes, we have shown that residence for the purposes of these schemes is assumed if there is a personal and permanent link with the Netherlands. This link is assessed according to a person's economic, social and legal ties in the country. Legal ties relate to a foreigner's immigration status: the higher the guarantee of continued

[1946] Here I am also referring to the Dutch Act on Incapacity Benefits for Disabled Young People (Wajong scheme).

entitlement to stay in the Netherlands, the stronger the legal ties with the country. Dutch citizens do not have to demonstrate their legal tie with the Netherlands. This is the social security logic that applies to Dutch citizens and to certain foreigners. For foreigners with no or with a precarious immigration status in the Netherlands, this logic has been overridden on immigration policy grounds in 1998. Since then, foreigners with no or with a precarious immigration status have been excluded from insurance, no matter how strong their link with the country is. Applying social security logic in such a situation would mean going back to the situation before 1998. At that time, unlawfully present foreigners could also qualify for insurance. The existence of sufficient legal ties was assumed after three years of actual presence in the country. If the law changed, such a period of time could also be considered as providing sufficient evidence of strong ties with the country.

As for entitlement to benefits, we have seen that availability for work is a qualifying condition under unemployment insurance. Currently, foreign workers without work authorisation are *per se* not entitled to benefits. If social security logic were implemented, unemployed former irregular migrant workers without work authorisation would likewise not be entitled to benefits. This is because they would not be able to comply with the availability for work requirement. However, once the authorisation was obtained or could reasonably be expected to be obtained, former irregular migrant workers who were insured due to their work would be eligible for benefits.

Leaving aside for the moment employers' obligation to continue paying wages if an employee falls sick, lack of employment authorisation would also have consequences for the statutory incapacity for work insurance schemes. Currently, foreigners without work authorisation are not entitled to benefits in any case. If social security logic were applied, they would be insured when working under an employment contract. However, this does not mean that they would become entitled to benefits. The Sickness Benefits Act, the Work and Care Act, the Work and Income According to Labour Capacity Act and the Disablement Assistance Act for Handicapped Young Persons stipulate that incapacity for work means no longer being able, due to sickness, ailment, pregnancy or childbirth, to earn the same income as a comparable healthy person. Foreigners without employment authorisation are not unable to earn the income of a comparable healthy person for these reasons, but because of the lack of work authorisation.

In the previous paragraph we mentioned the wage continuation payment obligation for employers under the Dutch Civil Code. Sickness benefits under this Civil Code obligation are the rule, whereas sickness benefits under the Sickness Benefits Act are the exception. Our analysis has revealed that an employee's lack of residence or work authorisation does not relieve the employer from the obligation under the Civil Code. Under its private law logic, any worker working under an employment contract is entitled to wage continuation payments by his/her employer in case of sickness. Nothing would need to be changed here. We have also seen that the Civil Code stipulates that sick employees should not turn down suitable work, *i.e.* any work which is compatible with the medical condition of the employee, and should cooperate in measures aimed at reintegration into the labour market. The provision of suitable work and of reintegration measures is at the discretion of the employer and social security administrations. Non-compliance with these possible requirements may lead to the payment of wages being stopped. Currently there is no guidance on how to deal with foreigners with no work authorisation. If social security logic were applied, sick foreigners with no work authorisation would not be able to comply with possible requirements related to the Dutch labour market. As a consequence, wage payments could be stopped.

Concerning social assistance, the Netherlands operates a general social assistance scheme, as well as a special scheme for the unemployed elderly. In addition, there exist two social assistance schemes for foreigners with a precarious immigration status, who cannot fall back on general social assistance. Unlawfully present foreigners are by and large[1947] not entitled to assistance under any of these schemes. Out of immigration policy considerations, they are excluded from eligibility by law.

For general social assistance, the application of social security logic would have the consequence that residence in the Netherlands and a link with the country would shape the personal scope of application. This means that foreigners with no or with a precarious immigration status would not be excluded from the outset. Instead, they would fall within the scope *ratione personae* if they could demonstrate residence in the Netherlands and a link with the country. Concerning the latter requirement, this could be made possible, for instance, after a fixed period of time, such as three years. Regarding residence, we have seen in our research that the concept of residence under the general social assistance law has a different meaning from the concept of residence under the general social insurance laws. The place of residence for general social assistance purposes is the place where the person concerned has his/her domicile; in the absence of a domicile, the place where he/she is actually staying. Foreigners with no or with a precarious immigration status could therefore comply with this requirement if they were at least actually staying in the Netherlands.

Once entitled to benefits under the Dutch general social assistance scheme, a beneficiary must make efforts, according to his/her abilities, to get back into the Dutch labour market. To be more precise, a beneficiary must seek and accept suitable work, and must participate in measures for labour market (re)integration which are offered to him/her. At the discretion of the competent administration, non-compliance with these requirements may lead to a reduction of the benefit. Currently, there is no guidance on how to deal with foreigners without work authorisation – not least because of the general exclusion of foreigners with no or with a precarious immigration status. From a social security point of view, foreigners with no employment authorisation are not able to comply with labour market related requirements. Therefore, qualifying foreigners who lack a work permit may face a reduction of their benefits. It is worth mentioning that section 9 (2) Work and Social Assistance Act provides for the possibility of temporarily waiving back-to-work requirements for compelling reasons. Here, the reasonable expectation of obtaining a work authorisation or the situation in which a work authorisation may not be denied could be regarded as a compelling reason, for instance.

For the special scheme, the decisive criterion for falling with the scope *ratione personae* is to be an older unemployed worker who has exhausted his/her entitlement to benefits under statutory unemployment or incapacity for work insurance. The special scheme has both a poverty alleviation objective and a labour market (re)integration objective for older former workers who are in need. At present, former irregular migrant workers are *per se* excluded from entitlement to benefits. The application of social security logic would not change anything. Social security logic states that the applicant must previously have been entitled to unemployment or incapacity for work benefits. This is required of Dutch (undeclared) workers. Therefore, it would also need to be required of irregular migrant workers. However, irregular migrant workers are not able to meet this requirement. Their lack of work authorisation and hence unavailability for the Dutch labour

[1947] Exceptions exist in very specific situations where foreigners lose their immigration status, but remain entitled to benefits for a few more weeks.

market prevents them from being entitled to unemployment and incapacity for work benefits. As a consequence they would also not qualify for the special assistance for the unemployed elderly.

As mentioned above, the Netherlands operates two social assistance schemes particularly for foreigners with a precarious immigration status, who cannot fall back on general social assistance. From a social security point of view, there is no compelling reason to provide assistance under a special scheme to those who do not qualify for assistance under the normal social assistance laws. On the other hand, there is also nothing to be said against it, if the Netherlands chooses to do so. On humanitarian grounds, but also due to international legal obligations, it may be reasonable to provide social assistance to certain groups of foreigners. For instance, there are European obligations on the reception of asylum-seekers and the reception of victims of human trafficking. For such groups of foreigners, it may make sense to create special legal rules for reception, instead of dealing with them under general social assistance laws. This is true not least since the latter aim, where possible, at social (re)integration through labour market participation – an objective which is not applicable to someone for whom it must first be determined whether asylum and hence continued presence in the country will be granted. There may therefore be good reasons for the existence of special social assistance schemes for certain groups of foreigners. Alternatively, however, one might also consider creating special social assistance benefits under the general social assistance scheme. Such special benefits would then need to be disconnected from any labour market (re)integration objectives.

This brings us to the international obligations. Like Belgium, the Netherlands is under the European legal obligation to provide, first, indigent victims of human trafficking with emergency medical treatment and with the means of subsistence during the reflection period (EC Directive 2004/81 and CoE Convention on Action against Trafficking in Human Beings) and, second, unlawfully present third-country nationals during periods granted for voluntary departure or during periods of postponed removal orders, as far as possible, with emergency medical care and essential treatment of illness (EC Directive 2008/115).

Concerning victims of human trafficking, the Netherlands immediately, *i.e.* during the reflection period,[1948] grants victims an immigration status valid for three months. In other words, in the Netherlands victims of trafficking in human beings are lawfully resident during the period where EU and CoE law require the provision of emergency medical treatment and assistance to ensure the subsistence. Currently, these lawfully present victims are provided with social assistance and full health care insurance under one of the two special social assistance schemes for foreigners. If social security logic were applied, they would only qualify for benefits if they had already established a certain link with the Netherlands. In order to comply with EU and CoE law, it would be necessary to ensure that victims of human trafficking receive a minimum assistance immediately, *i.e.* even without link with the country – either under the general social assistance scheme or under a particular scheme for certain groups of foreigners.

Unlawfully present foreigners with medical problems who cannot afford treatment currently have the possibility to receive medically necessary care. The health care provider gets the cost for this treatment (partially) reimbursed by the Dutch Ministry of Health. This is also true of unlawfully present foreigners during periods granted for voluntary departure or during periods of postponed

[1948] The reflection period is intended to allow the victim to recover and escape the influence of the perpetrator in order to make a decision as to whether he or she wants to cooperate with the competent authorities.

removal orders. If social security logic were applied, unlawfully present foreigners would have their medical costs reimbursed if they fell within the scope of statutory health insurance. For this, as we have seen, they would need to have a link with the country, which could be assumed to exist after a number of years of residence in the country. In the absence of statutory or private health insurance coverage and if the unlawfully foreigner were unable to pay the medical expenses, health care providers would nevertheless be under an obligation to provide any medically necessary care. This obligation is set out in disciplinary law, so nothing would change for unlawfully present foreigners and compliance with EC Directive 2008/115 would be guaranteed.

Finally, social security administrations would be required to implement check and report measures, in order to respect immigration law and its objectives. Already, social security administrations are required to check a foreigner's residence and employment authorisation, since social security laws explicitly exclude unlawfully present and unlawfully working foreigners. These measures would need to be maintained. In addition, this check would need to be supplemented by a duty to report. For the sake of clarity, it should be stressed once again that the obligation to check and report on a foreigner's permission to reside and to work in the country would not apply to health care providers. Currently, doctors are not under a duty to report violations of immigration law. This would not change.

3. Concluding remarks

The aim of this thesis has been to come up with a proposal on how to deal with irregular migrant workers in national social security law. To meet this objective, we have tried new approaches. We wanted to learn more about national social security law and see whether we could make a proposal about the social security position of irregular migrant workers on the basis of the insights we gained. To work towards this idea we decided to analyse the current position of irregular migrant workers in statutory social security and compare it with the position of nationals who engage in undeclared work. In order to better understand the results of our analysis of national law and to ascertain the legal limits of any proposal on the legal position of irregular migrant workers, we also investigated the existing international legal framework in this field.

This approach has proven to be beneficial. The analysis of national and international law has produced some interesting insights, which have allowed us to elaborate a proposal for a coherent social security policy towards irregular migrant workers. The policy proposal is based on the idea that the objectives and logic of social security should be decisive in determining the status of irregular migrant workers in national social security law, although without undermining the objectives of immigration law and without contravening international legal obligations.

We hope that our research in general and our policy proposal in particular will contribute to the current legal discourse on the social security status of migrants in an irregular situation. As mentioned in the introduction to this thesis, legal research so far has mainly approached the question of social security for migrants in an irregular situation by analysing international law, in particular international human rights law. We also started with the premise that international legal obligations, including human rights obligations, form the framework for State action in this respect and carried out an in-depth analysis of international law. This analysis showed that States have a wide margin of appreciation in dealing with migrants in an irregular situation. Explicit, unambiguous and legally binding obligations under international law are scarce. In particular, we found that human rights law merely states general principles, which do not provide enough insight to determine how national social security law should deal in detail with irregular migrant workers.

Here, our research may be able to add an extra dimension to the current state of legal research. We have come up with a comprehensive proposal on the legal position of irregular migrant workers in national social security law. In this proposal we address the position of irregular migrant workers with respect to all relevant aspects of national social security law, including scope *ratione personae*, qualifying periods and waiting periods, and qualifying conditions related to the national labour market. Wherever they exist, the proposal takes international legal obligations into consideration. It is based on a balance between the social security status of irregular migrant workers and other workers, in particular nationals of the country of employment who engage in undeclared work. In addition, it maintains a balance between the rights and duties of irregular migrant workers in national social security law. Finally, the proposal takes account of the fact that irregular migrant workers infringe immigration law and it respects the objective of immigration law to put an end to this situation.

With this balanced proposal I hope to contribute to the valuable legal research that already exists in the field of social security for migrants in an irregular situation. Let me nevertheless make the final remark that all scientific research on this topic has to be put into perspective. This is because

proposals on how to deal with migrants in an irregular situation in social security law address the symptom, and not the cause. Addressing the cause would mean addressing the phenomenon of irregular labour migration itself. In my opinion, this could be done most effectively by reducing emigration pressures. More specifically, it should be done by working on reducing the underlying disparities in living conditions around the world. In the meantime, however, the question needs to be addressed of how the position of migrants in an irregular situation in general and their social security position in particular should be defined in the countries of immigration.

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Act of 2 April 1965	Wet van 2 april 1965 betreffende het ten laste nemen van de steun verleend door Openbare Centra voor Maatschappelijk Welzijn, B.S. 6 May 1965, erratum B.S. 25 May 1965
Act of 28 June 1984	Wet van 28 juni 1984 betreffende sommige aspecten van de toestand van de vreemdelingen en houdende invoering van het Wetboek van de Belgische nationaliteit, B.S. 12 July 1984
Act of 15 July 1996	Wet van 15 juli 1996 tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen en van de organieke wet van 8 juli 1976 betreffende de openbare centra voor maatschappelijk welzijn, B.S. 5 October 1996
Act of 2 August 2002	Programmawet van 2 augustus 2002, B.S. 29 August 2002
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Act of 22 December 2008	Programmawet van 22 december 2008, B.S. 29 December 2008
Act on Emergency Medical Assistance	Wet van 8 juli 1964 betreffende de dringende geneeskundige hulpverlening, B.S., 25 July 1964
Act on Employment Contracts	Wet van 3 juli 1978 betreffende de arbeidsovereenkomsten, B.S. 22 August 1978

Act on Overseas social security	Wet van 17 juli 1963 betreffende de overzeese sociale zekerheid, B.S. 8 January 1964
Act on social and various provisions of 30 December 1992	Wet van 30 december 1992 houdende sociale en diverse bepalingen, B.S. 9 January 1993
Act on Social Documents	Sociale Documentenwet; Koninklijk besluit no. 5 van 23 oktober 1978 betreffende het bijhouden van sociale documenten, B.S. 2 December 1978
Act on Social Integration	Wet Maatschappelijke integratie; Wet van 26 mei 2002 betreffende het recht op maatschappelijke integratie, B.S. 31 July 2002
Act on the General Principles of Social Security	Wet van 29 juni 1981 houdende de algemene beginselen van de sociale zekerheid voor werknemers, B.S. 2 July 1981
Act on the Minimum Income for the Elderly	Wet inkomensgarantie voor ouderen; Wet van 22 maart 2001 tot instelling van een inkomensgarantie voor ouderen, B.S. 29 March 2001
Act on the Disabled Person's Allowance	Wet tegemoetkomingen gehandicapten; Wet van 27 februari 1987 betreffende de tegemoetkomingen aan personen met een handicap, B.S. 1 April 1987, erratum 6 August 1987
Act on the Protection of Wages	Wet van 12 april 1965 betreffende de bescherming van het loon der werknemers, B.S. 30 April 1965
Act on the Reception of Asylum-Seekers	Wet van 12 januari 2007 betreffende de opvang van asielzoekers en van bepaalde andere categorieën van vreemdelingen, B.S. 7 May 2007, erratum B.S. 7 June 2007
Act on various provisions of 27 December 2005	Wet van 27 december 2005 houdende diverse bepalingen, B.S. 30 December 2005
Act on various provisions of 24 July 2008	Wet van 24 juli 2008 houdende diverse bepalingen (I), B.S. 7 August 2008
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Aliens Act	Wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de

	verwijdering van vreemdelingen, B.S. 31 December 1980
Aliens Employment Act	Wet van 30 april 1999 betreffende de tewerkstelling van buitenlandse werknemers, B.S. 21 May 1999
Civil Code	Burgerlijke Wetboek van 21 maart 1804
Code of Belgian Nationality	Wetboek van de Belgische nationaliteit van 28 juni 1984, B.S. 12 July 1984
Constitution of Belgium	Gecoördineerde Grondwet van het federale België, B.S. 17 February 1994
Criminal Procedure Code	Wetboek van Strafvordering van 17 november 1808, B.S. 27 November 1808
Crossroads Bank Act	Wet van 15 januari 1990 houdende oprichting en organisatie van een Kruispuntbank van de sociale zekerheid, B.S. 22 February 1990
Family Allowance Act	Kinderbijslagwet Werknemers; Samengeordende wetten betreffende de kinderbijslag voor loonarbeiders, 19 december 1939 (Koninklijk besluit van 19 december 1939 tot samenvatting van de wet van 4 augustus 1930 betreffende de kindertoeslagen voor loonarbeiders en de koninklijke besluiten krachtens een latere wetgevende delegatie genomen), B.S. 22 December 1939
Guaranteed Family Allowance Act	Wet gewaarborgde gezinsbijslag; Wet van 20 juli 1971 tot instelling van gewaarborgde gezinsbijslag, B.S. 7 August 1971
Institutional Reforms Special Act	Bijzondere wet van 8 augustus 1980 tot hervorming der instellingen, B.S. 15 August 1980
Labour Accident Act	Arbeidsongevallenwet van 10 april 1971, B.S. 24 April 1971
Labour Act	Arbeidswet van 16 maart 1971, B.S. 30 March 1971
Labour Inspection Act	Wet van 16 november 1972 betreffende de arbeidsinspectie, B.S.08 December 1972
Municipal Registers Act	Wet van 19 juli 1991 betreffende de bevolkingsregisters, de identiteitskaarten, de vreemdelingenkaarten en de verblijfsdocumenten en

	tot wijziging van de wet van 8 augustus 1983 tot regeling van een Rijksregister van de natuurlijke personen, B.S. 3 September 1991
National Register Act	Wet van 8 augustus 1983 tot regeling van een Rijksregister van de natuurlijke personen, B.S. 21 April 1984
Occupational Diseases Act	Beroepsziektenwet; Wetten betreffende de preventie van beroepsziekten en de vergoeding van de schade die uit die ziekten voortvloeit, gecoördineerd op 3 juni 1970, B.S. 27 August 1970, erratum B.S. 18 September 1970
OCMW Act	OCMW-Wet; Organieke wet van 8 juli 1976 betreffende de openbare centra voor maatschappelijk welzijn, B.S. 5 August 1976, erratum 26 November 1976
Pension Act	Pensioenwet Werknemers; Koninklijk besluit nr 50 van 24 oktober 1967 betreffende het rust- en overlevingspensioen voor werknemers, B.S. 27 October 1967
Regularisation Act	Wet van 22 december 1999 betreffende de regularisatie van het verblijf van bepaalde categorieën van vreemdelingen verblijvend op het grondgebied van het Rijk, B.S. 10 January 2000
RSZ Act	Wet van 27 juni 1969 tot herziening van de besluitwet van 28 december 1944 betreffende de maatschappelijke zekerheid der arbeiders, B.S. 25 July 1969
Sickness Insurance Act	Ziekteverzekeringswet; Wet betreffende de verplichte verzekering voor geneeskundige verzorging en uitkeringen gecoördineerd op 14 juni 1994, B.S. 27 August 1994
Social Criminal Code	Sociaal Strafwetboek van 6 juni 2010, B.S. 1 July 2010

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Labour Accident Decree	Koninklijk besluit van 21 december 1971 houdende uitvoering van sommige bepalingen van de arbeidsongevallenwet van 10 april 1971, B.S. 28 December 1971
Pension Decree	Koninklijk besluit van 21 december 1967 tot vaststelling van het algemeen reglement betreffende het rust- en overlevingspensioen voor werknemers, B.S. 16 January 1968
Royal Decree concerning urgent medical assistance	Koninklijk besluit van 12 december 1996 betreffende de dringende medische hulp die door de openbare centra voor maatschappelijk welzijn wordt verstrekt aan de vreemdelingen die onwettig in het Rijk verblijven, B.S. 31 December 1996
Royal Decree of 27 September 1966	Koninklijk besluit van 27 september 1966 tot vaststelling, wat de particuliere sector betreft, van de gegevens die de afrekening moet bevatten welke bij elke definitieve betaling van het loon aan de werknemer overhandigd wordt, B.S. 11 October 1966
Royal Decree of 10 November 1967	Koninklijk besluit nr 78 van 10 november 1967 betreffende de uitoefening van de gezondheidszorgberoepen, B.S. 14 November 1967, erratum B.S. 12 June 1968
Royal Decree of 30 December 1976	Koninklijk besluit van 30 december 1976 tot uitvoering van de artikelen 45*quinquies*, 60 en 60*bis* van de arbeidsongevallenwet van 10 april 1971, B.S. 15 January 1977
Royal Decree of 8 December 1977	Reglement van 8 december 1977 vastgesteld in toepassing van de artikelen 1 en 3 van het koninklijk besluit van 30 december 1976 tot uitvoering van de artikelen 60 en 60*bis* van de arbeidsongevallenwet van 10 april 1971, B.S. 7 March 1978
Royal Decree of 31 December 1983	Koninklijk besluit nr 242 van 31 december 1983 tot wijziging van de wet van 20 juli 1971 tot instelling van gewaarborgde gezinsbijslag, B.S. 13 January 1984
Royal Decree of 16 December 1987	Koninklijk besluit van 16 december 1987 houdende organisatie en werking van een centrale gegevensbank bij het Fonds voor arbeidsongevallen, B.S. 25 December 1987

Royal Decree of 24 December 1987	Koninklijk besluit van 24 december 1987 tot uitvoering van artikel 42, tweede lid, van de arbeidsongevallenwet van 10 april 1971, betreffende de uitbetaling van de jaarlijkse vergoedingen, van de renten en van de bijslagen, B.S. 6 January 1988
Royal Decree of 4 December 1990	Koninklijk besluit van 4 december 1990 tot uitvoering van de wet van 20 juli 1990 tot instelling van een flexibele pensioenleeftijd voor werknemers en tot aanpassing van de werknemerspensioenen aan de evolutie van het algemeen welzijn, en tot wijziging van sommige bepalingen inzake werknemerspensioenen, B.S. 20 December 1990
Royal Decree of 18 December 1996	Koninklijk besluit van 18 december 1996 houdende maatregelen met het oog op de invoering van een sociale identiteitskaart ten behoeve van alle sociaal verzekerden, met toepassing van de artikelen 38, 40, 41 en 49 van de wet van 26 juli 1996 tot modernisering van de sociale zekerheid en tot vrijwaring van de leefbaarheid van de wettelijke pensioenstelsels, B.S. 7 February 1997
Royal Decree of 22 February 1998	Koninklijk besluit van 22 februari 1998 houdende uitvoeringsmaatregelen inzake de sociale identiteitskaart, B.S. 13 March 1998
Royal Decree of 8 April 2002	Koninklijk besluit van 8 april 2002 tot goedkeuring van de eerste bestuursovereenkomst van het Fonds voor Arbeidsongevallen en betreffende de vaststelling van de maatregelen tot rangschikking van bedoeld Fonds bij de openbare instellingen van sociale zekerheid, B.S. 4 June 2002
Royal Decree of 13 January 2003	Koninklijk besluit van 13 januari 2003 tot wijziging van het koninklijk besluit van 12 december 1996 betreffende de dringende medische hulp die door de openbare centra voor maatschappelijk welzijn wordt verstrekt aan vreemdelingen die onwettig in het Rijk verblijven, B.S. 17 January 2003
Royal Decree of 12 March 2003	Koninklijk besluit van 12 maart 2003 tot vaststelling van de wijze en van de termijn van aangifte van een arbeidsongeval, B.S. 2 April 2003
Royal Decree of 22 May 2003	Koninklijk besluit van 22 mei 2003 betreffende de procedure voor de behandeling van de dossiers inzake

tegemoetkomingen aan personen met een handicap, B.S. 27 June 2003

Royal Decree of 17 July 2006 — Koninklijk besluit van 17 juli 2006 tot uitvoering van artikel 4, § 2, van de wet van 27 februari 1987 betreffende de tegemoetkomingen aan personen met een handicap, B.S. 28 August 2006

Royal Decree of 18 December 2008 — Koninklijk besluit van 18 december 2008 tot wijziging van het koninklijk besluit van 9 juni 1999 houdende uitvoering van de wet van 30 april 1999 betreffende de tewerkstelling van buitenlandse werknemers, naar aanleiding van de verlenging van de overgangsbepalingen die werden ingevoerd bij de toetreding van Bulgarije en Roemenië tot de Europese Unie, B.S. 30 December 2008

Royal Decree of 24 December 2008 amending the Royal Decree concerning Aliens — Koninklijk besluit van 24 december 2008 tot wijziging van het koninklijk besluit van 8 oktober 1981 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, B.S. 31 December 2008

Royal Decree of 9 February 2009 — Koninklijk besluit van 9 februari 2009 houdende wijziging van het koninklijk besluit van 17 juli 2006 tot uitvoering van artikel 4, § 2, van de wet van 27 februari 1987 betreffende de tegemoetkomingen aan personen met een handicap, B.S. 6 March 2009

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Royal Decree on the Minimum Income for the Elderly — Koninklijk besluit van 23 mei 2001 tot instelling van een algemeen reglement betreffende de inkomensgarantie voor ouderen, B.S. 31 May 2001

Royal Decree on the Disabled Person's Allowance — Koninklijk besluit van 6 juli 1987 betreffende de inkomensvervangende tegemoetkoming en de integratietegemoetkoming, B.S. 8 July 1987

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Royal Decree concerning the Population Register and the Aliens Register — Koninklijk besluit van 16 juli 1992 betreffende de bevolkingsregisters en het vreemdelingenregister, B.S. 15 August 1992

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Instruction of 6 April 2010	Instructie van 6 april 2010 betreffende het einde van de materiële hulp, de verlenging van de materiële hulp, en de overgang van de materiële hulp naar de financiële steun
Instruction of 9 November 2010	Instructie van 9 november 2010 betreffende de begunstigden van de opvang wiens aanvraag tot machtiging van verblijf op basis van artikel 9*ter* van de wet van 15 december 1980 ontvankelijk werd verklaard en die tegelijkertijd nog een lopende asielprocedure hebben
Internal note of 13 December 2007 of the Foreigners Service	Dienstnota van 13 december 2007 van de Algemene Directie van de Dienst Vreemdelingenzaken, FOD Binnenlandse Zaken
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General Briefing of 1 July 2010	Algemene Onderrichtingen van 1 juli 2010 betreffende het houden van de bevolkingsregisters, FOD Binnenlandse Zaken

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Act for the Amendment of the ZVW and AWBZ as to Care for Aliens	Wet van 30 oktober 2008, houdende wijziging van de Zorgverzekeringswet in verband met de verstrekking van bijdragen aan zorgaanbieders die inkomsten derven ten gevolge van het verlenen van medisch noodzakelijke zorg aan bepaalde groepen vreemdelingen en van de Algemene Wet Bijzondere Ziektekosten met het oog op verzekering van bepaalde groepen minderjarige vreemdelingen, Stb. 2008, no. 526
Act on General Provisions to the Citizen Service Number	Wet van 21 juli 2007, houdende algemene bepalingen betreffende de toekenning, het beheer en het gebruik van het burgerservicenummer (Wet algemene bepalingen burgerservicenummer, Stb. 2007, no. 288
Act on Income Provisions for Older, Partially Disabled Formerly Self-Employed Persons	Wet van 11 juni 1987, houdende het treffen van een inkomensvoorziening voor oudere en gedeeltelijk arbeidsongeschikte gewezen zelfstandigen van wie het inkomen duurzaam minder bedraagt dan het sociaal minimum en die als gevolg daarvan het bedrijf of beroep hebben beëindigd (IOAZ), Stb. 1987, no. 281
Act on Income Provisions for Older, Partially Disabled Unemployed Persons	Wet van 6 november 1986, houdende het treffen van een inkomensvoorziening voor oudere en gedeeltelijk arbeidsongeschikte werkloze werknemers van wie het recht op een uitkering op grond van de Werkloosheidswet is geëindigd (IOAW), Stb. 1986, no. 565
Act on Income Provisions for Older Unemployed Persons	Wet van 19 juni 2008, houdende regels voor een inkomensvoorziening voor oudere werklozen, Stb. 2008, no. 340
Act on Juvenile Care	Wet van 22 april 2004, houdende regeling van de aanspraak op, de toegang tot en de bekostiging van jeugdzorg, Stb. 2004, no. 306

Act on the Central Agency for the Reception of Asylum-Seekers	Wet van 19 mei 1994, houdende regels betreffende de instelling van een zelfstandig bestuursorgaan, belast met de materiële en immateriële opvang van asielzoekers (Wet COA), Stb. 1994, no. 422
Act on the Child-Related Budget	Wet van 1 november 2007, houdende regels inzake de aanspraak op een inkomensafhankelijke financiële bijdrage in de kosten van kinderen, Stb. 2007, no. 418
Act on the Protection of Personal Data	Wet van 6 juli 2000, houdende regels inzake de bescherming van persoonsgegevens, Stb. 2000, no. 302
Act on Social Support	Wet van 29 juni 2006, houdende nieuwe regels betreffende maatschappelijke ondersteuning, Stb. 2006, no. 351
Aliens Act 2000	Wet van 23 november 2000 tot algehele herziening van de Vreemdelingenwet, Stb. 2000, no. 495
Aliens Employment Act	Wet van 21 december 1994 tot vaststelling van de Wet arbeid vreemdelingen, Stb. 1994, no. 959
Benefit Restrictions for Foreign Residents Act	Wet van 27 mei 1999 tot wijziging van de Ziektewet, de Wet op de arbeidsongeschiktheidsverzekering en enkele andere wetten in verband met de beperking van het exporteren van uitkeringen, Stb. 1999, no. 250
Civil Code	Burgerlijk Wetboek
Compulsory Identification Act	Wet van 9 december 1993 tot aanwijzing van documenten dienende ter vaststelling van de identiteit van personen alsmede aanwijzing van enige gevallen waarin de identiteit van personen aan de hand van deze documenten kan worden vastgesteld, Stb. 1993, no. 660
Constitution of the Netherlands	Grondwet voor het Koninkrijk der Nederlanden van 24 augustus 1815, Stb. 1815, no. 45
Disablement Assistance Act for Disabled Young Persons	Wet van 24 april 1997, houdende voorziening tegen geldelijke gevolgen van langdurige arbeidsongeschiktheid voor jonggehandicapten (Wajong), Stb. 1997, no. 177

General Act Concerning State Taxes	Wet van 2 juli 1959, houdende regelen, welke aan een aantal rijksbelastingen gemeen zijn, Stb. 1959, no. 301
General Child Benefits Act	Wet van 26 april 1962, tot vaststelling van een algemene kinderbijslagverzekering (AKW), Stb. 1962, no. 160
General Exceptional Medical Expenses Act	Wet van 14 december 1967, houdende algemene verzekering bijzondere ziektekosten (AWBZ), Stb. 1967, no. 617
General Old Age Pension Act	Wet van 31 mei 1956, inzake een algemene ouderdomsverzekering (AOW), Stb. 1956, no. 281
General Social Insurance Financing Act	Wet van 27 april 1989, houdende financiering van de volksverzekeringen, Stb. 1989, no. 129
General Survivor's Benefits Act	Wet van 21 december 1995, tot regeling van een verzekering voor nabestaanden (Anw), Stb. 1995, no. 690
Health Care Insurance Act	Wet van 16 juni 2005, houdende regeling van een sociale verzekering voor geneeskundige zorg ten behoeve van de gehele bevolking (ZVW), Stb. 2005, no. 358
Implementation Act Social Insurance Financing Act	Wet van 16 december 2004 houdende invoering van de Wet financiering sociale verzekeringen, Stb. 2005, no. 37
Individual Health Care Professions Act	Wet van 11 november 1993, houdende regelen inzake beroepen op het gebied van de individuele gezondheidszorg (Wet BIG), Stb. 1993, no. 655
Linkage Act	Wet van 26 maart 1998 tot wijziging van de Vreemdelingenwet en enige andere wetten teneinde de aanspraak van vreemdelingen jegens bestuursorganen op verstrekkingen, voorzieningen, uitkeringen, ontheffingen en vergunningen te koppelen aan het rechtmatig verblijf van de vreemdeling in Nederland, Stb. 1998, no. 203
Municipal Database (Personal Files) Act	Wet van 9 juni 1994, houdende regels ter zake van de gemeentelijke basisadministratie van persoonsgegevens, Stb. 1994, no. 494

Nationality Act	Rijkswet van 19 december 1984, houdende vaststelling van nieuwe, algemene bepalingen omtrent het Nederlanderschap ter vervanging van de Wet van 12 december 1892, Stb. 1892, 268, op het Nederlanderschap en het ingezetenschap, Stb. 1984, no. 629
Occupational Disability Insurance Act	Wet van 18 februari 1966, inzake een arbeidsongeschiktheidsverzekering (WAO), Stb. 1966, no. 84
Occupational Disability Insurance Act for self-employed persons	Wet van 24 april 1997, houdende verzekering tegen geldelijke gevolgen van langdurige arbeidsongeschiktheid en een uitkeringsregeling in verband met bevalling voor zelfstandigen, beroepsbeoefenaren en meewerkende echtgenoten (WAZ), Stb. 1997, no. 176
Remigration Act	Wet van 22 april 1999, houdende regels inzake het treffen van voorzieningen ten behoeve van remigratie, Stb. 1999, no. 232
Sickness Benefits Act	Wet van 5 juni 1913, tot regeling der arbeiders-ziekteverzekering (ZW), Stb. 1913, no. 204
Social Insurance Financing Act	Wet van 16 december 2004, houdende regels betreffende de financiering van de sociale verzekeringen, Stb. 2005, no. 36
The Work and Care Act	Wet van 16 november 2001, tot vaststelling van regels voor het tot stand brengen van een nieuw evenwicht tussen arbeid en zorg in de ruimste zin (WAZO), Stb. 2001, no. 567
Supplementary Benefits Act	Wet van 6 november 1986, houdende verlening van toeslagen tot het relevante sociaal minimum aan uitkeringsgerechtigden op grond van de Werkloosheidswet, de Ziektewet, de Algemene Arbeidsongeschiktheidswet, de Wet op de arbeidsongeschiktheidsverzekering en de Wet arbeidsongeschiktheidsvoorziening militairen, Stb. 1986, no. 562
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Wage Income Tax Act	Wet van 16 december 1964, houdende vervanging van het Besluit op de Loonbelasting 1940 door een nieuwe wettelijke regeling, Stb. 1990, no. 104
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Work and Income for Artists Act	Wet van 23 december 2004 tot vaststelling van een nieuwe regeling inzake inkomensvoorziening voor kunstenaars (WWIK), Stb. 2004, no. 717
Work and Income (Implementation Structure) Act	Wet van 29 november 2001, houdende regels tot vaststelling van een structuur voor de uitvoering van taken met betrekking tot de arbeidsvoorziening en socialeverzekeringswetten, Stb. 2001, no. 624
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Implementation Decree on the Act on Juvenile Care Besluit van 16 december 2004, houdende regels ter uitvoering van de Wet op de jeugdzorg, Stb. 2004, no. 703

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Work and Income (Implementation Structure) Decree	Besluit van 20 december 2001 tot vaststelling van een algemene maatregel van bestuur ter uitvoering van de Wet structuur uitvoeringsorganisatie werk en inkomen, en in verband daarmee van enige andere socialezekerheidswetten, Stb. 2001, no. 688

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Regulation Health Care Insurance	Regeling van de Minister van Volksgezondheid, Welzijn en Sport van 1 september 2005, nr. Z/VV-2611957, houdende regels ter zake van de uitvoering van de Zorgverzekeringswet, Stcrt. 2005, nos. 171, 203, 246 and 249
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