

Law and Migration in a Changing World: General Report



Jean-Yves Carlier and Marie-Claire Foblets

Abstract This General Report draws from twenty-six national reports. Structured in two parts, it investigates the status of the migration law regimes in receiving countries, where migration events have come under intense domestic and international scrutiny. The first part (Sects. 2–4) compares the legislative, judicial, and administrative instruments regulating foreign arrivals and stays, signaling an evolution towards a *jus commune* in the highly plural and interactive world of legal orders and sources, judicial and decision-making bodies, as well as hierarchies and sovereignties. The second part (Sects. 5–6) reflects on convergences and divergences, and how countries variously leverage such instruments to formulate their migration management policies. Although a given in the legal field, the gap, especially between law and practice, is frighteningly wide in migration matters, with dramatic consequences for some categories of migrants, their communities, and—directly and indirectly—for their countries of origin and the society where they seek a new life. The General Report advocates for the human rights of migrants to be more firmly imprinted in understandings of national sovereignty and security and a greater permeability of national law to international human rights law.

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1 Introduction: Towards a *jus commune*?

At the XIXth International Congress of Comparative Law held in Vienna from 20–26 July 2014,¹ our panel, ‘Law and Migration in a Changing World’, assessed the global status of migration law, drawing on reports from twenty-four countries spanning six continents that national rapporteurs had prepared in response to a questionnaire we had distributed.² We aimed to bring to light the main legal instruments and practices in migration law and analyse them in relation to the history, development, and trajectory of the migration law regime in each country. We hoped to provide a clearer picture of the evolution of that regime in light of the unprecedented levels and forms of cross-border human mobility in the past decades.

This volume features a total of eighteen reports from countries across the globe, a smaller number than the twenty-four national reports originally drafted for the 2014 IACL Congress in Vienna.³ However, as this volume is part of a comparative law series, our General Report also draws from the wealth of insights contained in those national reports that could not be updated for this publication.

It is worth mentioning here that the vast majority of the reports grouped in this volume analyse migration law from the point of view of receiving countries. To that extent, this volume does not address the link between law and migration in countries of emigration, which would have produced an equally rich contrasting picture of international migrations and the legal questions they raise. However, that is not so much a disclaimer as it is an observation to be critically considered.⁴

As we worked on this publication, our concern, year by year, was about the sustained topicality of receiving countries in the realm of law and migration. We

¹The Congress in Vienna was sponsored by the International Academy of Comparative Law (IACL) and the Interdisciplinary Association of Comparative and Private International Law.

²We would like to thank our co-panellists at the Congress, Professor Kees Groenendijk (Nijmegen) and Professor Daniel Ghezlbash (Sydney) for contributing to an invigorating and enlightening discussion on the links between law and migration across the globe in the context of the migratory trends in the past years. See Annex 3 for the list of the national rapporteurs who prepared the national reports for this Congress and Annex 2 for the Questionnaire.

³The publication of the national reports had to be delayed for logistical reasons. Of the twenty-four reports prepared for the Congress, only sixteen could be updated for this volume, and two reports were subsequently added (which is why Annex 3 lists twenty-six national reports). We would like to thank all the national rapporteurs whose reports are featured in this volume (marked in bold in Annex 4) for their generous efforts over the years (some as late as 2021) to update their reports, in some cases, rewrite them from scratch. This publication would not have been possible without their collegial support along the way. We would also like to acknowledge our gratitude to two other persons: Dr Gita Rajan, who provided editing support in direct consultation with the authors, and Dr Luc Leboeuf, for his time and effort to re-read and comment on a previous version of the General Report. Finally, this volume would not have seen the light of the day without the patient support and encouragement we received from Springer’s editorial and book production team. We owe profuse thanks to Springer’s Manuela Schwieterz, Kay Stoll, Anja Trautmann, and Abdus Salam Mazumdar, as well as Nancey Biswas from Straive.

⁴On this issue, see, for example, the reflections of Thomas Spijkerboer, presented in a lecture for the Francqui Chair: ‘Confronting the Colonial Structure of International Migration Law’ (2021): <https://www.youtube.com/watch?v=f-oZhvQDfAs>.

were indeed surprised to learn that the *first* common characteristic of all receiving countries, including those with an otherwise stable legal regime, is that the broad field of migration and asylum law was undergoing profound, unforeseen changes, often in response to migrations triggered by global events. Moreover, due to the rapid and often erratic introduction of laws, legal systems were being rendered incoherent, ever more restrictive, and at times merciless and difficult to track—trends that several reports in this volume also affirm. *Second*, the topicality had vastly expanded, catapulting receiving countries to centre stage of critical debates, discussions, and legal reforms. Thus, in the past years, keeping pace with the law and with the changing times and sensibilities has proved to be a challenge.⁵ Within the contours of what this volume offers, we were able to witness the resounding effects of the local and world events on migration law, both in individual countries and across regions and continents. As we submit this manuscript for publication during a worldwide pandemic, law and migration are again at the forefront, however, due to the unprecedented levels of restrictions on human mobility, both within national boundaries and across international borders. That unequivocally points to the vital links between law and the health and safety of some highly marginalised and vulnerable segments of the global migrant population and, in some instances, of ordinary citizens.

Taken together, the initial reports presented at the conference added up to over 1000 pages. The national reports describe the existing legal framework and, where possible, also support their analysis with relevant empirical (mainly qualitative) data. Their rich content brings to the fore the diversity and complexity of the relationship between *migrations* and *legal orders*—both domestic and international. The twofold use of the plural form here (orders and migrations) is deliberate. On the one hand, the diversity of migrations is well established. Cross-border migrations have always existed and will continue to exist as a recurring characteristic of the history of humanity. Migration movements, on the other hand, diverge in time and space. Divergence, in this sense, cannot be overlooked when analysing the composition of most, not to say all human societies. This feature can take different forms. First, in quantitative terms: Whereas in 1965, the worldwide migrant population was estimated at 75 million,⁶ by mid-2020, it had reached 280.6 million,⁷ up from 272 million in 2019⁸ and 258 million in 2017.⁹ In effect, the migrant population today

⁵As noted earlier, the national rapporteurs whose reports are featured in this volume were, without exception, forced to respond to the plethora of rapid developments in legislation and case law to discuss the most relevant ones, some occurring as late as 2021. This General Report has also been updated to account for recent events linked to migration movements that are rapidly changing the world and its demographics.

⁶https://publications.iom.int/system/files/pdf/wmr_2000_edited_0.pdf

⁷https://migrationdataportal.org/?i=stock_abs_&t=2020.

⁸UN Department of Economic and Social Affairs, https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/files/documents/2020/Feb/un_2019_factsheet4.pdf. Also see Migration Data Portal: https://migrationdataportal.org/?i=stock_abs_&t=2020.

⁹International Migration Report 2017, UN Department of Economic and Social Affairs, http://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2017_Highlights.pdf.

represents the fourth-largest demographics in the world, or a fourth ‘world’ power after China (1.4 billion), India (1.3 billion) and the United States (329 million) and is roughly on par with Brazil (210 million). This increase in absolute numbers, when taken as a proportion of world population (7.8 billion), gives a more or less constant figure of around 3% of global population.¹⁰

Different forms of migration movements must be distinguished here. As the statistics indicate and several national reports confirm, three types of migration dominate: family migration (family reunification), migration of persons seeking protection (asylum), and subsistence and labour migration (economic). Previously significant forms of migration that had resulted in profound population shifts, such as migration after conquest, have more or less disappeared. Newer forms, such as migration caused by the direct and indirect effects of environmental changes, are becoming increasingly relevant. These different types of migration are influenced by both ‘push factors’ (that impel people to leave their country of origin) and ‘pull factors’ (that promise new opportunities and improved living conditions elsewhere). Depending on the interplay between these factors, the form and scope of migration may vary over time. Such variations within migration impact how the law accommodates the shifting reality. Today one notices that emigration, especially from overpopulated and severely impoverished geographic areas, has in part brought forth unrest and divisions in receiving societies and strained the political will. As several reports indicate, legal developments within the domestic order of countries reflect that strain and unrest. However, to gain a better understanding of the reports, two other fundamental distinctions deserve mentioning.

The *first* distinction underscores the difference between countries of *emigration* and countries of *immigration*. At the 2014 Congress in Vienna, a strikingly small number of national reports indicated that the country in question was, in the first place, a country of emigration: Colombia and Croatia. Yet, the growing importance of these two countries in recent years as receiving or transit countries cannot be underestimated. Other countries, such as Japan, are only gradually transitioning to countries of immigration. Many reports have emphasised that this shift from the former to the latter category had already transpired in their respective cases, i.e., from being overwhelmingly a country of emigration—or sometimes transit—to a country of immigration (Croatia, Greece, Malta, Poland, Romania, South Africa). The reports included in this volume—largely in the category of countries of immigration—address the challenges entailed in this transition.

The *second* distinction, relevant from the legal and economic points of view, is the difference between migratory flows and migratory stocks. *Flows* have to do with the migration itself, that is, with the management of mobility, and mainly involves legislation on admission to the territory of a country, as well as on residence and

¹⁰OECD, *International Migration Database*, <http://stats.oecd.org> (Demography and Population heading) and United Nations, Department of economic and social affairs, population division, International Migration, data, <https://www.un.org/en/development/desa/population/migration/data/index.asp>.

removal. *Stocks* refer to the long-term management of immigrant populations residing on a country's territory. These populations are no longer regarded as migrants in the strictest sense of the term. They may have retained their foreign nationality or become citizens of their new country. The management of multicultural societies, in particular, raises questions relating to private international law and the protection of fundamental rights. As a rule, thus, it could be said that in international law, flow management falls under the purview of the sovereignty of states while stock management is mainly regulated through the principle of non-discrimination, a fundamental principle of international human rights law.

This General Report is broadly divided into two parts: The first part (Sects. 2–4) presents the technical dimensions of migration law at the domestic, regional, and international levels and discusses the scope and relevance of the interplay between its plural dimensions. The second part (Sects. 5–6) reflects on trends in cross-border mobility in the past decades and the legal and policy framework regulating such mobilities.

Throughout the General Report, we refer to 'plural legal orders' (see also *infra*, Sect. 5) to draw attention to the multiplication of legal instruments and levels of decision-making in recent years and their link, directly or indirectly, with a rise in international migration. One can indeed observe that diverse sovereignties (legal, jurisdictional, and territorial) and supranational controls are being cross-implemented at increasing levels. This cross-implementation is a characteristic of an ongoing development in all fields of law and not just in migration law. The frequent cross-references between various international and domestic courts that read different provisions with a concurring interpretation build an 'emerging *jus commune* of human rights'.¹¹ Aside from the traditional diversity of sources of law, ranging from texts (binding or not) to case law, or the distinction between theory and practice, entirely new legal orders and/or levels of decision-making now also constitute a vital source. Traditionally, migration law falls into the domain of national (state) sovereignty par excellence. A body of national law shapes national politics. Yet, more and more, this national law is deemed bound by international law, which means that a variance may at times come across as divergence or non-compliance. That is not an entirely new development. For the most part, it is the consequence of bilateral treaties between countries of immigration and countries of emigration and several binding international agreements on the protection of specific categories of migrants, such as the Geneva Convention of 1951 on the status of refugees. The interplay of plural sources and sovereignties wields considerable influence over the field of migration law, as migrants' rights traditionally come within the purview of national sovereignty. These interactions indicate an evolution towards a *jus commune*. And it is precisely this evolution towards a *jus commune* that corresponds in migration law to what many scholars now see as a *response to the gap between global mobility and the law*.¹² This is not to say that today the

¹¹See De Schutter (2019), p. 36.

¹²Ramji-Nogales and Spiro (2017); Bergé (2021).

differential treatment accorded to nationals and foreigners would be tantamount to discrimination. However, in granting (or refusing) permission to enter a country or reside there, competent authorities must ever more concretely and systematically take account of the broader view of international human rights standards.

Today, *two* major developments show how this pluralisation of legal orders plays out in the field of international migration: On the one hand, an increasingly sharper sensitivity to the question of the protection of fundamental rights, and on the other, several processes of regional integration.

1.1 *Fundamental Rights*

Even if the fundamental rights are enshrined in most national constitutions, it is less clear to what extent these rights serve as a valid parameter in the treatment of foreigners. The question of applicability is especially relevant to foreigners who have yet to enter the territory formally and are still at or outside the national border. The national reports confirm ongoing debates on the significance and impact of fundamental rights in numerous countries. As international texts on human rights protections apply to ‘every person’, for that scope of application to be enabled and established, it is essential to see ‘territorial limits’ symbolising and, in practice, designating national sovereignty as *at least permeable*. This is particularly important where these texts are the subject of a supranational jurisdiction such as the European Court of Human Rights (ECtHR) or the Inter-American Court of Human Rights (IACHR). Indeed, national sovereignty is reaffirmed, for instance, by ECtHR, in these terms:

... based on a well-established principle of international law, States have the right, without prejudice to their commitments under the treaties, to control the entry of non-nationals to their territory.¹³

However, this sovereignty cannot be exercised at the expense of individual fundamental rights. That entails, for example, respecting the prohibition against inhuman and degrading treatment and torture, which forbids the expulsion of migrants to countries where there are ‘substantial grounds’ to believe that they would be subjected to such treatment and thus face a ‘real risk’ to their life or person. Equally, it also entails respect for private and family life, which prohibits the expulsion or refusal of admission into the territory of a country if that would result in disproportionate interference with family life. Several national reports emphasise the growing protective influence of human rights (Japan, New Zealand, South Africa,

¹³ECtHR, 28 May 1985, *Abdulaziz, Cobales and Balkandi v. United Kingdom*, para. 67. Formula repeated in several judgments of the Court, including *Cruz Varas*, 1991, para. 70; *Vilvarajah*, 1991, para. 102; *Chahal*, 1991, para. 70; *Amuur*, 1996, para. 41; *H.L.R.*, 1997, para. 33; *Mahr*, 2012, para. 63; *Jeunesse*, 2014, para. 100; *Salija*, 2017, para. 41; *Z.A. e.a.*, 2019, para. 160; *Ilias and Ahmed*, 2019, para. 125.

United States) and, in particular, the rising significance of ECtHR (Belgium, Estonia, France, Germany, Greece, Malta, Norway, United Kingdom) and IACHR (Dominican Republic). At the same time, they also show how nations have diverged from the ideals of universal human rights in the name of national security or economic or cultural threat.

1.2 Regional Integration

The second major development has to do with the processes of regional integration. As it happens, territorial expansions open up spaces, both for political integration and the free movement of people. In the EU—a key example among others—the result is twofold: facilitation of cross-border movement (migration) within the integrated space (such as the EU or Schengen) and international treaties and agreements towards a shared migration policy. The reports of several new Member States (Estonia, Malta, Poland, Romania) underscore the benefits of the freedom of internal movement after acceding to the EU, especially for their citizens, who enjoy more options for migration and relocation. However, these countries have also experienced a considerable loss of human capital as a result of their educated workforce drifting towards more favourable economic and professional opportunities and more stable legal and infrastructural environments (particularly workers from Poland and Romania). By contrast, the Member States benefitting from these new, facilitated migration options are also seeing measures being introduced at the EU level to limit such options: transitional measures are being adopted to restrict the free movement of workers from the new Member States within the EU. The national reports on the new EU Member States emphasise this (Croatia, Estonia, Malta, Poland, and Romania), and the reports of some older Member States mention it as well (esp. the United Kingdom, with different pre- and post-Brexit approaches).

These measures also explain why certain states in other regions have refused to sign a free movement agreement that applies across that region to all member states. For example, such a legally binding agreement would have resulted in a large influx of migrants to South Africa, perhaps explaining why it has not supported ratifying the free movement agreement in the Southern African Development Community (SADC). Or states have shown reluctance to expand regional integration efforts to levels that could lead to a more liberal immigration policy: for instance, Singapore, as the Member State of the Association of Southeast Asian Nations (ASEAN, under the ASEAN Declaration of the Protection of the Rights of Migrant Workers) or Japan as part of the Trans-Pacific Partnership (TPP). Regional integration impacts internal mobility and the overarching policies and laws governing incoming migration from outside the region. For example, all EU Member States have had to align their legislation on the migration of non-EEA family members of EU citizens with the free movement rights guaranteed to EU citizens (e.g. Belgium, Denmark, Germany). Thus, Ireland was obliged to grant a residence permit to a Cameroonian man married to a British national following the decision of the European Court of

Justice (ECJ). According to Irish law, as the British woman had married the Cameroonian man only after moving to Ireland, the situation fell under the jurisdiction of the domestic migration policy. However, ECJ held that this issue came under the scope of the Freedom of Movement for Workers in the EU, enshrined in Article 45 TFEU, and not under the national migration law as the European citizen in question would have been impeded from exercising her right to free movement had she known that she would not be able to marry a foreigner in another Member State and live with him in her current home Member State, namely Ireland (United Kingdom, ECJ case law, *Metock*, C-127/08).¹⁴ Following the same principle of free movement of European citizens and their family members, Romania was obliged to grant the right of residence to the American spouse of a Romanian national. The spouses had entered a same-sex marriage in Belgium, where they were living before deciding to settle in Romania. However, Romania refused the right of residence because same-sex marriage is contrary to its law and public order. ECJ reasoned that as a matter of law this was a disproportionate restriction on the freedom of movement of European citizens and the right to live as a family.¹⁵ This case law extends beyond the EU to the EEA. Although there is no common citizenship in the EEA, the principle of free movement of persons is underpinned by respect for family life. Thus, for example, the EFTA Court ruled that in line with the principle of free movement, a Canadian woman married to a Norwegian woman must be granted residence rights in Norway after the couple had established their genuine residence in Sweden for two years before returning to Norway.¹⁶

In the context of regional integration, shared borders have often led to an intensification of border control at the region's external frontiers and a tightening of its asylum and immigration policy. As a result, the status and situation of the countries located at the external borders of a free-movement region have profoundly changed. With internal borders separating countries within a region rendered more open and permeable, their borders no longer represent national boundaries over which they have sovereign powers. However, as gatekeepers of a significantly larger area, these frontline states of the free-movement zone bear the significant burden of additionally having to control the cross-border mobility of third country nationals. Several reports have noted a lack of solidarity among the EU Member States (Greece, Malta, Romania), especially during the 2015 'asylum crisis'. The impetus to enforce more equitable responsibility-sharing for the flows of asylum-seekers from Greece and Italy among Member States, by allocating quotas under the EU's emergency relocation mechanism, emanated from an internal assessment identifying this lack of solidarity. Hungary and Slovakia requested the annulment of these measures, and in this they were supported by Poland, for whom these measures represented an attempt to restrict their sovereignty rather than provide an appropriate

¹⁴This is confirmed even if EU citizens become nationals of a different Member State where they chose to move, ECJ, *Lounes*, C-165/16 [2017].

¹⁵ECJ, *Coman*, C-673/16 [2018].

¹⁶EFTA Court, *Campbell*, E-4/19 [2020].

solution to the problem of organising solidarity between EU Member States. ECJ rejected this position, underlining that:

[i]f relocation were to be strictly conditional upon the existence of cultural or linguistic ties between each applicant for international protection and the Member State of relocation, the distribution of those applicants between all the Member States in accordance with the principle of solidarity laid down by Article 80 TFEU and, consequently, the adoption of a binding relocation mechanism would be impossible.¹⁷

In a slightly different context, one of the main concerns in the debate before the Brexit referendum was the regulation of solidarity within regional integration agreements, specifically immigration and the free movement of persons. These questions remained integral to discussions between the EU and the UK on Brexit implementation.

1.3 Interaction Between Fundamental Rights, Regional Integration and Sovereignties

One of the consequences of the rising influence of fundamental rights and regional integration is the interaction between different legal orders and, therefore, between sovereignties. This global/regional interaction facilitates cross-implementation of different sovereignties, which, in turn, may lead to better checks and balances between human rights and sovereignty considerations. The cross-case law of the two European courts (Strasbourg and Luxembourg) in asylum cases is an excellent example, particularly for the implementation of the Dublin Regulation, which establishes the criteria and mechanisms for determining which EU Member State is responsible for examining an application for international protection in any given case.¹⁸

In *MSS v. Belgium and Greece* (2011), ECtHR made a strong and noteworthy reference to state sovereignty, albeit in the context of safeguarding the human rights of an asylum seeker whose personal situation had been put at risk when Belgium resorted to a blind application of the EU Dublin Regulation. The facts were as follows: Belgium had returned an Afghan asylum seeker to Greece, his first entry point to the EU. His defence countered this decision to return him to Greece, relying mainly on Article 3 of the European Convention on Human Rights (ECHR), which prohibits inhuman and degrading treatment or punishment, to argue that the

¹⁷ECJ, *Slovak Republic and Hungary v. Council of the EU*, C-643/15 and C-647/15 [2017], para. 304. The value of solidarity was emphasised even stronger in the opinion issued by Advocate General Bot: ‘The present actions provide me with the opportunity to recall that solidarity is among the cardinal values of the Union and is even among the foundations of the Union’ (opinion of 26 July 2017, para. 17). See also, ECJ, *Commission v. Republic of Poland, Hungary and the Czech Republic*, C-715/17, C-718/17 and C-719/17 [2020].

¹⁸Regulation (EC) 343/2003 (Dublin II) and Regulation (EU) 604/2013 (Dublin III, recast), *OJ*, 2013, L180/31.

fundamental rights of asylum seekers are not respected in Greece. Belgium claimed it had to apply the criteria enshrined in the EU Dublin Regulation under the presumption that this regulation conforms with the fundamental human rights. ECtHR, however, condemned Belgium for violating Article 3 ECHR by calling upon the authority of another legal order, namely that of the EU. The Court had interpreted a provision of the so-called sovereignty clause, which allows a Member State to examine an asylum application in derogation from the European criteria for determining which Member State could be held responsible. ECtHR makes an obligation of this exercise of sovereignty, failing which it deems that the inhuman and degrading treatment violates the fundamental rights of the person(s). In other words, ECtHR (sovereign entity no. 3: Council of Europe) interpreted the national sovereignty (sovereign entity no. 1: State) in the secondary law of the EU's legal order (sovereign entity no. 2: EU). Put differently, national sovereignty (no. 1) came to the rescue of human rights against European sovereignty (no. 2), which would be misinterpreted were it not controlled by another European sovereign entity (no. 3). It is possible to reconcile these—compatible and conflicting—sovereignties over time through a concurring interpretation of the rights in question: in the same year, ECJ, following ECtHR, adopted the same interpretation. Since then, ECJ case law has continued to follow the 2014 ECtHR decision.¹⁹

1.4 Preliminary Considerations

The General Report is broadly divided into two parts. As mentioned above, it details the technical dimensions of migration law in the first part (Sects. 2–4), whereas the second part (Sects. 5–6) takes a broader perspective to explore the complex inter-sections of law and migration in national contexts.

Highlighting the relevance and plurality of the technical dimensions of migration law, the first part addresses the diverse legal rules on the admission, residence and removal of foreigners at the domestic, regional and international levels.²⁰ It synthesises the principal areas of commonality and distinction rather than reproduce the responses of the national rapporteurs to the questionnaire (see Annex 2). For other more detailed issues, we refer to the national reports in this volume (see also Sect. 6). Section 2 is structured around two preliminary questions: the context and the text. The context requires examining the basic concept of nationality underlying the definition of a foreigner (Sect. 2.1), whereas the text demands an analytical focus on the wide range of sources, actors, and bodies in migration law at both the national and international levels (Sect. 2.2 and Annex 4: Main International Texts and Bodies

¹⁹ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09 [2011]; ECJ, *N.S.*, C-411/10 and C-493/10 [2011]; ECtHR, *Tarakhel v. Switzerland*, No. 29217/12 [2014]; ECJ, *C.K.*, C-578/16 [2017].

²⁰The General Report and the individual national reports use various designations: foreigners, aliens, third country nationals (TCNs), non-nationals, migrants, or migrant persons.

in Migration law). Section 3 examines three aspects of admission to and residence in a country: *first*, the distinction between short and long stays (Sect. 3.1); *second*, the right to migration based on family reunification, asylum, and several other privileged categories of foreigners (Sect. 3.2); and *third*, discretionary migration or migration grounded in interest, such as scientific migration, economic migration, and regularisation (Sect. 3.3). Section 4 addresses three supplementary issues relating to migration: sanctions (Sect. 4.1), procedural guarantees (Sect. 4.2) and social rights (Sect. 4.3).

The second part (Sects. 5-6) offers main points of departure for undertaking a comparative analysis to identify and understand how migrations are regulated in national contexts. The national rapporteurs were requested to delineate both the regulation of migration in the legal order of their respective countries and the underlying domestic and international frameworks. They were also invited to be attentive to factors that could help explain why one country, in one instance, had chosen to adopt a more restrictive migration policy while another remained relatively flexible, and examine why, in some cases, only certain categories of migrants or countries of origin enjoyed preferential treatment. The national reports show that even as, increasingly, the economic, security, and humanitarian dimensions of migration are conceived as competing rather than complementary concerns, shifts in levels, contexts and avenues of identity formation complicate the picture.

A general discussion on positions adopted by countries on migration (Sect. 5.1), their attempts to harmonise their policies with the agreements and conventions they ratify (Sect. 5.2), different migration trends (Sect. 5.3), the legislative approaches and (restrictive) policy responses countries inherit or employ (Sect. 5.4), and the place of a human rights-driven approach in migration policy (Sect. 5.5) culminates in the section detailing specific factors influencing a country's migration policy (Sect. 6). How the migration policy of a country registers the impact of such factors as geography (Sect. 6.1), its history in the contemporary era (Sect. 6.2), its political environment (Sect. 6.3), and the degree of the relevance of human rights (Sect. 6.4), among others, is so complex that no country neatly fits into any one particular category. *Thus, the grouping of countries in section 6 exemplifies the constellations of concerns that the volume editors and the respective rapporteurs have chosen to illustrate rather than their definitive belonging in particular categories.* All in all, the General Report offers a sober assessment of the law in receiving countries, and as it can be observed in the broader context of globalisation.

2 Migration and Residence

2.1 Nationality

2.1.1 Definitions

The legal definition of a foreigner, as someone *not* holding the nationality of the country of residence, is negatively denoted or not affirmatively defined. International

migration law builds on this binary opposition between nationals and foreigners. In principle, the national of a country will be admitted into the territory of the home country at any time and enjoy the right to reside there—unlike a foreigner. This principle follows from the prohibition of the expulsion of one's own nationals in international law, as set out, for example, in Article 12.4 of the International Covenant on Civil and Political Rights: 'No one shall be arbitrarily deprived of the right to enter his own country'.

As a result, the conditions set out in the domestic legal order of any country for attribution of citizenship precede the determination of who will be subjected to the rules on migration in that country. Nationality law also determines the prerequisites and procedures according to which a foreigner may obtain citizenship in the country of residence. 'It is for each State to determine under its own law who are its nationals'.²¹ Generally speaking, while some texts of international law recognise the right to a nationality (UDHR, Article 15; ECN, Article 4, a), there is 'no right to a specific nationality';²² at the same time, access to nationality cannot rely on arbitrary or discriminatory criteria.²³

All countries covered in this volume have enacted legislations, most of them codified, that allow foreigners to acquire nationality and/or citizenship. However, in several, if not most countries, legislation in this regard has recently undergone amendments. For the most part, these changes can be explained by the developments in a country's migration policy towards allowing, more or less broadly, the acquisition of nationality. Strikingly, the amendments reflect major political shifts (Estonia, Macau, New Zealand, Poland, Singapore, South Africa). In some cases, the link between changes in the conditions for acquiring nationality and the migration policy is mentioned explicitly, as in the title of a Belgian law passed in 2012, 'amending the Belgian Nationality Code with a view to making the acquisition of Belgian nationality neutral from an immigration point of view'. The adjective 'neutral' suggests that access to nationality should be disconnected from access to territory and residence permit. In other words, it should not be easier to acquire nationality than a residence permit. As another example, the report on Germany underlines that '[t]he conditions of verified identity and nationality and the general integration requirement were added to the law in August 2019, thereby adding a vague formulation, which has been extensively criticised as corrupting the legal clarity of the conditions for naturalisation and may facilitate arbitrariness'.

2.1.2 Attribution Upon Birth

Attribution of nationality at birth (sometimes also known as 'full' nationality) occurs mainly on the basis of the principles of *jus soli* and *jus sanguinis*. It is tempting to

²¹The Hague Convention of 12 April 1930 on certain questions relating to the conflict of nationality laws, Article 1.

²²ECtHR, *Boudelal v. France*, No. 14894/14 [2017].

²³H.C. South Africa, *Miriam Ali and others* [2017].

believe that the former is characteristic of immigration countries that seek to promote the automatic integration of children of migrants, while the latter is more typical of countries of emigration that seek to foster close links with the home country. That is partly true. Thus, the traditional object of the automatic *jus soli* in the United States, as affirmed in the 14th amendment to the Constitution, comprises a robust version of citizenship acquisition by virtue of the *jus soli* principle: ‘All persons born . . . in the US, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside’. By contrast, the Polish Constitution affirms, in Article 34, a strong version of the *jus sanguinis*: ‘Polish citizenship shall be acquired by birth to parents being Polish citizens,’ and this is so regardless of which parent it is and the place of birth.

However, even for the two countries mentioned above, these models no longer exist in their original form. The United States also goes beyond its Constitution to provide for the possibility of acquiring nationality by right of blood (*jus sanguinis*) if the child is born to an American parent (even abroad). Poland goes beyond its Constitution in a converse move to allow the acquisition of nationality by right of soil (*jus soli*), be it for the sole purpose of preventing statelessness. Although the laws of some countries exhibit a stronger preference for *jus sanguinis* (Estonia, Germany, Japan, Malta, Norway, Singapore) and those of others for *jus soli* (Colombia, Dominican Republic, Australia, South Africa), in practice, countries do not follow just one principle to the exclusion of the other. Typically, *jus soli* applies only if at least one of the two parents is a citizen or a foreigner with permanent resident status (Australia, South Africa). The combination of both principles may apply to children whose parents live in a foreign country, often for a longer period of time. They risk not being granted citizenship, neither in the country of birth for instance, if the parents’ residency in that country is not considered sufficiently sustainable, nor in the country of origin of their parents. At particular risk, for instance, are Dominican-born children of (undocumented) Haitian workers who are considered ‘in transit’ regardless of the length of their stay in the Dominican Republic, resulting in situations of statelessness that IACHR has condemned.²⁴

Most countries today opt for mixed regimes that have evolved over time, either by adding elements of the *jus soli* principle to the traditional *jus sanguinis* principle with

²⁴IACHR, *Case of expelled Dominicans and Haitians v. Dominican Republic*, 28 August 2014, C, No. 282. In this case, the Court ‘considers that the determination of its nationals continues to be subject to the internal jurisdiction of the States. Nevertheless, this State attribute must be exercised in conformity with the parameters that emanate from binding norms of international law which States, in the exercise of their sovereignty, have undertaken to abide by. Thus, in accordance with the current trend of international human rights law, when regulating the granting of nationality, States must take into account: (a) their obligation to prevent, to avoid and to reduce statelessness, and (b) their obligation to provide each individual with the equal and effective protection of the law without discrimination. . . . Regarding its obligation to prevent, avoid and reduce statelessness, States have the obligation not to adopt practices or laws on the granting of nationality whose application contributes to increasing the number of stateless persons. Statelessness makes it impossible for individuals to enjoy their civil and political rights, and places them in a situation of extreme vulnerability’ (para. 256–257).

a view to integrate the second-generation (Belgium, France) or third-generation migrants (Greece) more easily or, conversely, by adding select elements of *jus sanguinis* to the traditional *jus soli* principle (Canada, New Zealand).

2.1.3 Declaration or Naturalisation

Nationality can be acquired irrespective of the place of birth, nationality, or ethnicity through naturalisation or declaration. With the exception of the cases reserved for the head of state (Poland), one central condition for obtaining nationality by declaration or naturalisation is the length of a person's regular residence in a country. The requirements in terms of the number of years of stay vary greatly: 1 year (Colombia, in certain cases), 2 years (Dominican Republic), 3 years (Canada), 4 years (Australia, South Africa), 5 years (Belgium, France, New Zealand), 7 years (Croatia), 8 years (Estonia, Germany), or 10 years (Singapore).

The calculation of the duration of residence also differs depending on whether what is required is simply authorised residence or, as is more often the case, a permanent status. Other factors that can reduce the stipulated length of stay include, among others, good language proficiency (Colombia), former bonds of dependency (Colombia, Macau, Singapore), evidenced membership in the 'nation' while living in the diaspora (Croatia, Poland, and Greece for Greeks from the former Soviet Union). Also, certain types of military or religious commitments (in Greece, the monks of Mount Athos²⁵) can be considered. Less often, it involves the purchase of nationality through considerable investments in the country (e.g. the 'golden visa' in Malta). Generally speaking, the list of conditions also includes language proficiency (Belgium, Estonia, Germany, Japan, Norway) or cultural or political knowledge (Canada, Croatia, New Zealand, Singapore). Marriage no longer automatically leads to the acquisition of nationality, although it usually facilitates it, whereby sometimes men and women are treated differently (Dominican Republic). Often nationality is conferred formally through a citizenship oath taken at an official ceremony marking a person's entry into the community.

2.1.4 Statelessness

The majority of the states included in the volume have ratified the United Nations Convention Relating to the Status of Stateless Persons, which was drawn up in New York on 28 September 1954. Its Article 26 notably declares that '[e]ach Contracting State shall accord to stateless persons lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances'.

²⁵The Monastic State of the Holy Mountain and the Athonite Institutions have a special jurisdiction, which was reaffirmed with the admission of Greece to the EU.

Some states have not yet ratified this Convention (South Africa, and despite having promised to do so, the Dominican Republic). The vast majority of the Member States of the Council of Europe, with few exceptions (Croatia, France), have also ratified the European Convention on Nationality (ECN, Strasbourg, 6 November 1997) and the Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession (Strasbourg, 19 May 2006). These two conventions aim at preventing statelessness.²⁶

In several countries, significant categories of people continue to face situations of statelessness, such as the Roma in Croatia or the children of Haitian workers in the Dominican Republic. In recent years, different countries have introduced the possibility of revoking citizenship as a measure to combat terrorism (Belgium, France). These measures can also lead to situations of statelessness.

2.1.5 Multiple Citizenship

The states' approach to multiple citizenship has clearly evolved over time. Dual or multiple citizenship, once viewed with suspicion, notably because of a presumption of divided allegiance to two or more states, seems more or less inevitable as a consequence of increased migration. Many reports mention that the acquisition of the nationality of the country of residence no longer entails renouncing the original nationality (Belgium, Colombia, France, Greece, Switzerland).

Conversely, some countries opposed to dual citizenship have retained the automatic loss of original citizenship upon the voluntary adoption of another nationality in their legislation (Japan, Singapore, South Africa), at least if the second nationality is not a 'privileged' one (Germany). Some countries have recently returned to this principle (Norway) or allow for an ambiguous situation to be maintained, i.e., acknowledging multiple citizenship in the constitution but permitting only single citizenship in the nationality code (Estonia). In some countries (Australia), dual citizenship may constitute a reason for exclusion from political mandate.

2.1.6 Nationality by Degrees

Nationality turns out to be an extremely intricate matter in some countries. Some might allow several types of nationality that give access to different rights. That is the case, for instance, in the UK, with no less than six categories of nationality: (1) British citizens; (2) British Overseas Territories citizens (BOTC); (3) British overseas citizens (BOC); (4) British nationals (overseas); (5) British protected persons; and (6) British subjects. If, at first glance, simplification might appear to

²⁶For many years, the High Commissioner for Refugees (HCR) led campaigns on behalf of stateless persons (notably 'Mapping Statelessness' and 'Ending Statelessness'), which have given rise to several published reports. The HCR adopted, in 2012, four guiding principles on statelessness (definition, procedures, status at the national level and acquisition of nationality) and, in 2014, a 'Global Action Plan to end Statelessness' by 2024.

be desirable, a closer look shows that this diversity also exists elsewhere, albeit differently: a binary categorisation, or a simple and clear distinction between nationals and foreigners, is absent. Some countries might allow non-citizens the same status as citizens (e.g. the Portuguese and Chinese residents in Macau) or a status that is nearly identical to citizenship (European citizens in EU Member States) or limited rights for transitional periods (like Croatians, Estonians, Poles). In yet other cases, they receive a privileged status due to geographical and/or historical proximity (Australia—New Zealand) or because of shared ethnicity or ethnic characteristics that presume membership in the nation and/or grant them the right of return by virtue of descent or cultural identification (Croatia, Greece, Poland).

This diversity in statuses ranging from citizen to foreigner translates into a situation of multiple statuses that impacts, to varying degrees, the right of residence in a country. The resulting ‘hierarchy of migrants’ (Norway) justifies the need to highlight the plurality of migrations and laws. Furthermore, they reflect the diversity of the sources that produce these laws and the bodies entailed in their genesis and implementation.

2.2 Sources and Bodies of Migration Law

2.2.1 National

Closely linked to sovereignty and political choices, migration law remains largely governed by national legislation and national authorities. As a majority of states have issued a code or a more general law governing both migration and nationality, in domestic law, sources that make up the body of laws regulating migration are numerous. Some have been in place for a long time (Australia, 1958), while others are fairly recent (France, 2004; Greece, 2006; Norway, 2008). In all countries, these laws were amended rather frequently in response to political developments, and in several countries, new draft laws are still under consideration. Regulations of a more practical nature accompany these codifications or general laws. In almost all countries, migration law requires these regulations to be implemented by administrative bodies under the jurisdiction of the Interior Ministry. However, in some cases, their services are overseen by the Ministry of Justice and Public Security (Norway). In countries where emigration concerns have historically outweighed immigration issues (Colombia, Estonia),²⁷ the competence lies with the Ministry of Foreign Affairs. In countries experiencing significant economic migration, immigration matters are overseen by a relevant ministry, for instance, the Ministry of Commerce, Innovation and Employment in New Zealand, or they fall under a separate ministry dedicated to immigration matters such as the Ministry of Citizenship and Immigration in Canada.

²⁷We say ‘historically’ because Estonia has seen positive net migration, with immigration exceeding emigration in the past three years, and Colombia has taken on over a million Venezuelan refugees.

Particularly two developments pertaining to the origin of some of these national laws and competences deserve mention here. On the one hand, regional authorities in federal or decentralised states have considerably expanded their powers, especially when it comes to economic migration (Belgium, Canada, Germany, and Switzerland for local authorities). On the other hand, the importance of administrative practices is generally on the rise. Time and again, the realities of practice weigh heavily and often seem far removed from the texts. *This gap between law and practice is a constant in all areas of the law, and yet, it appears from several national reports to be particularly wide in migration law.* The implementation of immigration policy, even by a relatively autonomous bureaucracy, has in some cases been guided by securitisation goals rather than by legal obligations (e.g. South Africa). Court rulings condemn some of these practices, but often they fail to make any changes to the general practice beyond the individual case in which the judgment was handed down; in other cases, however, where they lead to a change in the law, there is a tangible impact on the practice. Yet, while the gap between ‘the law’ and practice is not exclusive to migration law, ‘it raises concerns in situations where it appears to be a conscious decision to allow the situation to develop and persist’ (Malta). It leads to a sort of ‘ping-pong battle’ between the judiciary and the executive (United Kingdom, Greece). In this ping-pong framework, however, as transnational courts seem to play an increasingly important role, both in terms of human rights (ECtHR, IACHR) and in the context of regional integration (ECJ), international and regional sources are gaining considerable influence as well.²⁸

2.2.2 International

Although the national sources and bodies mentioned in each report remain vital to understanding how a country regulates international migration, as explained above, however, they alone can no longer tell the entire story. In the search for a balance of interests between national sovereignty, universal human rights, and commitments to regional integration, precedence is increasingly given to supranational sources. Therefore, becoming acquainted with the main international and regional sources and bodies is a worthy investment. Annex 4 (Main International Texts and Bodies in Migration Law) of this General Report contains a detailed list of select bodies and the main international texts in the field of migration law. Depending on the legal system, the international sources and standards will either directly apply in the national legal orders after ratification, or they will require transposition into domestic law.

The diversity of sources and places where migration laws are discussed and written is obvious. The national reports identify several recurrent topics, *first* on the conditions for admission and residence (Sect. 3) and, *second*, on a wide range of complementary questions (Sect. 4).

²⁸Cf. *supra* fn. 15: ECJ, *Coman*, C-673/16 [2018].

3 Admission to and Residence Within the Territory of a Country

3.1 *Short and Long Stay*

3.1.1 Distinction

All states distinguish between admission to their territory and short stays, on the one hand, and long stays and permanent residence on the other. The decisive difference is the length of stay. For several countries, for instance, the EU Member States applying the Schengen Borders Code and the Visa Code, a short stay shall not exceed 3 months (calculated over a 6-month period). In other countries, a short stay refers to a visit for purposes of tourism, family visit, care, or business. Applications for short-stay visas must be submitted before arrival, in principle, at a diplomatic mission located in the country of residence or request. In some cases, representation agreements between states allow another state's diplomatic mission to issue the visa, although the latter possibility can complicate the issue. In case of an appeal against the refusal to issue a visa, the question of which state is responsible for issuing the visa becomes central.²⁹ Increasingly, countries are now issuing so-called electronic visas. Each country of visit defines its visa regulations and requirements, which may vary greatly depending on the quality of the diplomatic relationship with the state of nationality of the applicant. States often conclude bilateral agreements, such as visa facilitation agreements or visa-waiver agreements to ease the visa requirements. Within the framework of a highly integrated regional entity, such as the EU, the autonomy of the states to establish visa criteria is limited in two ways: First, the majority of the Member States (Schengen) subscribe to the principle of suppression of systematic internal border controls, exempting their nationals from the visa requirement within the EU or even from having to present any document other than their national identity card. Second, Member States agree on a (common) list of third countries whose nationals will be subjected to visa requirements for entry, which must be secured prior to their arrival on any Member States' territory. As a result, the visa issued entitles the holder to a short stay in the country issuing the visa and in all the Member States that are party to the agreement.

3.1.2 Conditions

The purpose of the short-stay visa is generally tourism, family visits, or short-term employment. In national legislation, these three situations are classified into different, sometimes quite an impressive number of categories (Canada: 4, United Kingdom: 9, Colombia and South Africa: 13). In a ruling concerning an application lodged by Syrians for humanitarian visas that would enable them to apply

²⁹ECJ, Minister van Buitenlandse Zaken, C-225/19 and C-226/19 [2020].

for asylum upon arrival in the country of destination, ECJ declared that this *per se* could not be called a short-term visa under the EU Visa Code.³⁰

Several countries facilitate mobility for border residents across the border mainly to make it easier to visit family members, foster interactions with the ethnic or national groups (Dominican Republic, Poland) living along or across the border, and promote small-scale cross-border trade or labour. In Europe, the provisions of the Schengen Borders Code to control the external borders are ‘without prejudice to Community rules on local border traffic’ (Article 35). These rules are specified in a regulation laying down the rules on local border traffic at the ‘external land borders of the Member States’.³¹ The aim is to regulate the particular situation of persons living along or in the close vicinity of a border between Member States of an integrated regional entity (EU, Schengen) and a non-Member State. Recital 4 of this Regulation lays down the principle of ‘easing of border crossing for bona fide border residents having legitimate reasons frequently to cross an external land border’. To do so, a Member State is entitled to conclude bilateral agreements with neighbouring third countries. Poland has signed such agreements with Ukraine and Russia as well as with Belarus. According to Regulation 1931/2006, stay falling within the ambit of this kind of local border traffic must not exceed 3 months unless provisions in existing bilateral agreements provide for a different treatment.

Moreover, ECJ has opted for a lenient interpretation of the 3-month period. On the question of whether this period should be limited to a maximum of 3 months calculated over a 6-month period, as is the case for the short-stay Schengen visa, or, once the maximum 3 months have been exceeded, the border resident can begin another 3-month period immediately upon return, the Court ruled in favour of the latter interpretation. If the agreement does not impose any limit beyond the 3-month limit, the person concerned is entitled to stay an additional period of 3 months immediately upon return to the home country. The Court justified this autonomous interpretation, which is different from that of the Schengen visas, in the following terms: it is to ‘enable populations in the border zones in question ... to cross the external borders of the Union ... easily ... without excessive administrative constraints, and on a frequent or regular basis’.³² In the medium- to long-term, these regulations on cross-border traffic and their broad interpretation are likely to have significant quantitative and qualitative consequences. For example, in quantitative terms, the agreement between Poland and Ukraine affects 1.5 million people who live within an 18-mile (30 km) radius of the Polish border. The agreement between Poland and Russia, which is not limited to this border zone and, in

³⁰ECJ, *X. and X.*, C-638/16 [2017], *contra* the opinion of Advocate General Mengozzi. The ECtHR also ruled that a state was not responsible for the possible consequences of a refusal of a humanitarian visa. The Court considers that the persons concerned do not fall within the jurisdiction of the state whose embassy refuses the visa since that embassy does not exercise any control or authority over them, ECtHR, *M.N. e.a. v. Belgium*, No. 3599/18 [2020]. See also Leboeuf and Foblets (2020).

³¹Regulation (EC) 1931/2006, *OJ*, 2006, L405, p. 1 and *OJ*, 2007, L29, p. 3.

³²ECJ, *Shomodi*, C-254/11 [2013], para. 24; in the context of another bilateral agreement between Hungary and Ukraine.

fact, covers the entire Kaliningrad region, is even more significant in quantitative terms, as it can potentially apply to three million people. The qualitative consequences are also important. On the one hand, these measures facilitate cross-border movement on account of territorial proximity and family, cultural and economic ties. On the other hand, enabling short circular migration can reduce the migratory pressure and risks of clandestine resettlements. As the Court of Justice noted, it regarded borders in ‘border zones’ less as a demarcation line or wall of separation and more as zones of encounter—as confines (*cum fines*) rather than as limits (*limes*).

Unlike the cross-border movement facilitated by a special authorisation that is free of charge or low cost, the short-stay visa is issued upon the fulfilment of additional—often financial—conditions. Thus, the applicant must, for instance, show proof of adequate funds, sufficient means of subsistence both for the duration of the stay and for the return (EU Visa Code, Article 14, § 1, c) or must make a security deposit (Singapore, between S\$1000 and S\$3000). Under certain domestic laws, additionally, a character test (Australia) or health test is required (Australia and New Zealand may require proof that the applicant is not infected by HIV) for ascertaining if the short-stay visa requests can be approved. Health tests or health passes will increase in the context of the COVID-19 pandemic (Corona Vaccine Passports).

In principle, a short stay can be converted to a long stay (in Germany, possible for nationals of some countries), but it is difficult. Long stays generally require a long-term visa or a temporary residence permit before arrival and can be divided into two major categories. On the one hand, legal frameworks are in place for issuing a permit that would allow the applicant to move to another country for a longer period upon the fulfilment of the conditions. This applies, in particular, to family reunification and asylum situations (Sect. 3.2 on legal migration). It also derives from diplomatic relations that specifically concern privileged migrants and diplomats. On the other hand, discretionary migration remains within the domain of national sovereignty and includes migration for study and work purposes and stays for humanitarian reasons or stays awarded via regularisation (Sect. 3.3 on discretionary migration or migration of interest).

A change of status resulting in a move from one category to another is rare but sometimes possible (e.g.: United Kingdom, point-based system, PBS; Greece, from student to qualified worker; Japan and Belgium: from student to resident). The most significant change of status is from a long-term temporary stay to permanent residence. The length of time required varies, as in the case of naturalisation: 4 years (Canada), 5 years (Belgium, Croatia, France, Germany, Greece, Malta, Dominican Republic, Poland, Romania, United Kingdom), 7 years (Macau) or 10 years (Japan). Within the framework of the EU law, the status of the permanent resident has been formalised for two different categories. EU citizens, after residing 5 years on the territory of another Member State, acquire the ‘right of permanent residence’,³³

³³Directive 2004/38 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, *OJ*, L158 of 30 April 2004, p. 77 ff., Article 16.

which is almost equivalent to the status of a national, notably considering the political and social rights afforded and in the sense that this (permanent) EU citizen-resident can no longer be expelled from the country of residence, except on ‘serious grounds of public policy or public security’.³⁴ Third country nationals who have resided 5 years ‘legally . . . and continuously’ in a Member State can obtain the status of ‘third-country nationals who are long-term residents’.³⁵ The latter status, in part equivalent to that granted to European citizens, enables a person to move and reside freely anywhere in the EU, although each Member State is allowed to independently set limits on access to the labour market and social rights.

3.2 *Legal Migration*

3.2.1 **Family Reunification**

According to several national reports, migration for family reasons represents a significant segment of the migratory flows (United States, 80%; Norway, 60%; Australia, 30%). According to OECD, national percentages can even be higher and represent, on average, at least a third of the migrants in the OECD countries. According to the OECD statistics, ‘the United States has the largest share of family migrants in the OECD, about three out of four new permanent immigrants are in this category’. That is, no doubt, due to the reality of family life, which is constituted or reconstituted with immigration. In many countries, that is also due to the legal recognition of every person’s right to family life, including that of migrants. As confirmed by several national reports, the legal regime of many countries foresees a right to family reunification (Belgium, Denmark, Estonia, Germany, France, Malta, New Zealand, Switzerland, United Kingdom), although the conditions under which family reunification is granted may vary considerably depending on the conditions set out in different regional agreements (such as EU or EFTA) or bilateral agreements regarding the nationality of the family members (inviting and/or invited). The conditions may also vary depending on the economic position (financial autonomy) of the migrants. In some countries, the right to family reunification is limited to the families of certain migrants only (Macau, Singapore, for qualified workers). In others, it is made conditional on a ‘fairly high income’ (Norway, United Kingdom, and Belgium) or not explicitly recognised as such (Japan). Several national reports emphasise the role of the constitutional courts in recognising the right to family reunification as a fundamental right (France, 1993) or in refusing to allow this form of migration to be counted towards the annual quotas for new immigration, as determined by the competent authorities in the country (Estonia, 2000).

³⁴*Idem*, Articles 28, § 2.

³⁵Council Directive 2003/109 of 25 November 2003 concerning the status of third country nationals who are long-term residents, *OJ*, 2003, L16, p. 44.

In Europe, the role of two European courts (ECtHR in Strasbourg and ECJ in Luxembourg) in this regard is foundational. ECtHR applies Article 8 ECHR to migrants, which prohibits disproportionate restrictions on respect for the private and family life of migrants. ECJ has also held that the EU directive ‘on the right to family reunification’ recognises, as its title suggests, a ‘right’ to family reunification. Moreover, ECJ holds that the right to family reunification of a third country national with a European citizen falls within the scope of application of EU provisions on the freedom of movement, insofar as the European citizen resides in another EU Member State than that of his/her nationality.³⁶ The effects of this case law on domestic legislation has been emphasised in most reports on EU Member States, which also highlight some surprising consequences. Family members of EU citizens who did not exercise their freedom of movement within the EU, and are still residing in their home country, cannot benefit from EU provisions on family reunification. As a result, conditions for family reunification with citizens of some Member States are more stringent than those for reunification with other EU citizens residing in that Member State (Belgium, Denmark, Norway). This paradoxical effect of the EU provisions on free movement amounts to a form of reverse discrimination, so to speak, in that some Member States end up treating their own citizens less favourably than the citizens of other EU Member States residing on their own territory.³⁷

Progressively, under pressure from multiple enquiries of national courts, ECJ has taken steps to condemn this form of reverse discrimination. However, so far, it has condemned such discrimination only in exceptional situations, namely, when refusing a right of residence to the family member of an EU citizen would amount to depriving him or her of the ‘genuine enjoyment of the substance of the rights’.³⁸ The exact meaning of this declaration is yet to be developed more precisely in case law. So far, the Court has ruled that the genuine enjoyment of the European citizen’s substance of the rights is involved only if that citizen would in practice be obliged to leave ‘the territory of the Union as a whole’.³⁹ According to some authors, the ‘substance of the rights’ could be linked to the fundamental rights, namely the right to family life. The Court seems to subscribe to this opinion by referring, for instance, to the best interests of the child.⁴⁰ Notably, in doing so, the Court has referred only to the Charter of Fundamental Rights of the European Union (Article 24.2), whereas the Court, or at least the Advocate General, in his opinion, could have cross-referenced

³⁶ECJ, *Metock*, C-127/08 [2008]. This also applies to situations where the family ties were created after the EU citizen left the Member State of his/her nationality to reside in another EU Member State.

³⁷Some nationals, therefore, choose to move with their family to a neighbouring country, and then return with no other aim than to qualify for the application of the (more generous) principle of free movement within the territory of the EU. As indicated in the Danish report, such informal practices are a sign of inequality. See on the issue of reversed discrimination: Cambien (2018); Verbist (2018). For the European Economic Area, see also EFTA Court, *Campbell*, E-4/19 [2020].

³⁸ECJ, *Ruiz Zambrano*, C-34/09 [2011], para. 42; *Dereci*, C-256/11 [2011], para. 33.

³⁹ECJ, *Dereci*, *op. cit.*, para. 66.

⁴⁰ECJ, *Chavez*, C-133/15 [2017], para. 70.

various other sources as well: for instance, the New York Convention on the Rights of the Child (Article 3), the European Convention of Human Rights (Article 8, with ECtHR case law). Cross-references at this level have the effect of building or reinforcing a *jus commune*, as mentioned in the introduction of this general report. ECJ also declared that EU citizens who have exercised their freedom of movement must benefit from the right to family reunification, a right that also applies to a third country family member even if the EU citizen acquired the nationality of the (host) Member State, having also retained the nationality of origin.⁴¹

While, in some cases, family reunification entitles applicants to a multiple-entry visa (Colombia) or a ‘super visa’ (Canada), it generally confers the right to a temporary stay (Australia, Belgium) that, in due course, will turn into a right to permanently reside. This is usually the case after a probationary period to test the veracity or durability of the family ties and ensure that certain conditions are met, notably those relating to the proof of funds to cover expenses during the visit.

Where family ties are concerned, these generally apply to spouses, minor or dependent children and parents. Regarding spouses, debates revolve around marriage and civil partnership. Most states recognise only monogamous marriage between members of the opposite sex. Polygamy is only occasionally recognised for ascertaining residency in the interests of children (Belgium, Constitutional Court), but normally residency is limited to the right of residence of a single spouse (Belgium, France, Greece, New Zealand). That is also the position taken in the European Directive on the Right to Family Reunification, which explicitly refuses to recognise the right of residence to more than one spouse but cedes the decision on the rights granted to children of polygamous couples to the Member States.⁴² As mentioned above, marriage generally recognises the heterosexual union of two spouses (Estonia, Macau), although a number of national reports have also indicated recognition of same-sex unions under either statute law (Belgium, South Africa) or case law (United States). ECJ also mandated a Member State (Romania) to grant a right of residence to the foreign spouse (American) of a married couple in a same-sex marriage if the marriage had been legally contracted in another Member State where they had been residing.⁴³ In practice, the situation of same-sex couples is protected through the right of residence accorded to ‘partners’ (Australia, New Zealand). The recognition of legal civil partners (registered ones in the EU) or de facto ones (cohabitantes in New Zealand) also allows the latter countries to avoid the risk of sham marriages, which are contracted solely to secure a residence permit. Sham marriages are also an issue in other countries (Belgium, Estonia, Macau, Malta, Norway, Poland). In the context of family ties, gender inequality is sometimes legally entrenched, as evidenced by the legal propensity in several countries to give preference to family reunification with a male sponsor. (Dominican Republic, Japan). The standard justification for this

⁴¹ECJ, *Lounes*, C-165/16 [2017].

⁴²Directive 2003/86 of 22 September 2003 on the right to family reunification, *OJ*, 2003, L251/12, Article 4 (4).

⁴³ECJ, *Coman*, C-673/16 [2018].

unequal treatment is that the (foreign) woman who joins her husband will enter the household and not compete on the domestic labour market. In Europe, ECtHR has condemned this unequal treatment as discriminatory on the grounds of sex or gender and also as incompatible with the concern to protect family life.⁴⁴

3.2.2 Asylum

Asylum is another form of cross-border mobility connected to fundamental rights. Although not insignificant, it falls behind family migration in terms of numbers.

The available figures only imperfectly reflect the reality.⁴⁵ On average, the recognition rates (i.e., of persons receiving the status) vary between 5% and 30%. A distinction must also be made between asylum granted to persons who arrive directly in a country (*onshore*), asylum granted abroad for resettling the protected person in the host country (*offshore*, Australia, Canada, New Zealand, Norway, United States), and asylum issued via an embassy (Poland). Regarding the protection itself, at least three major categories of protected persons can be identified: refugees as defined in the Geneva Convention relating to the Status of Refugees, those with the status of subsidiary protection, those granted constitutional protection. Few countries have enshrined the last category in their respective constitutions (Germany, France, Colombia, Croatia).

According to the Geneva Convention, ‘the term refugee shall apply to any person who . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality’ (Article 1 (A) 2). It should be noted that Norway removed the word ‘race’ from its definition in 2012, replacing it with ‘ethnicity, origin, skin colour’. The terms used in the definition given by the Geneva Convention (‘well-founded fear’, ‘persecution’, and the five grounds) give rise to different interpretations. Decision-making bodies, in particular the judicial bodies usually ruling in appeal, therefore, play a crucial role. However, the degree of intervention countries allow may vary: In some countries, there is little to no judicial intervention (Dominican Republic, Estonia, Greece, Japan, Malta), whereas in most others, specialised tribunals or administrative bodies have been put in place to handle requests, usually at the first instance level. International bodies facilitate the exchange of information and the harmonisation of interpretations: HCR, IARLJ (International Association of Refugee Law Judges), EASO (European Asylum Support Office). Within the EU, a ‘Qualification Directive’,⁴⁶ whose interpretation

⁴⁴ECtHR, *Abdulaziz, Cabales, Balkandi and others v. United Kingdom*, No. 9214/80, 9473/81, 9474/81 [1985].

⁴⁵Figures are available on a permanent database of the HCR (popstats.unhcr.org).

⁴⁶In its most recent version: Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, *OJ*, 2011, L337, p. 9.

lies within the competence of ECJ, offers some clarifications, for instance, on persecutions relating to religion⁴⁷ or sexual orientation as a social group.⁴⁸

Under the Geneva Convention, refugee status still requires establishing a nexus to one of the five persecution grounds and presenting clear evidence that the person has reason to fear persecution on one of those grounds. The growing observation that the necessary proof of individual persecution, as required by the Convention, cannot always be provided even when the threat is real has led to the creation of other statuses of subsidiary protection. These could be qualified as ‘Geneva +’. The OAU Convention governing specific aspects of the refugee problem in Africa, signed in Addis Ababa on 10 September 1969, allows for a *prima facie* protection on the grounds of ‘events seriously disturbing public order’ (Article 1, § 2). However, this subsidiary definition gives rise to group-oriented protections but not individual decisions. In Central and South America, the Cartagena Declaration of 22 November 1984, supplemented by the San José (1994) and Mexico City (2004) Declarations, established a similar kind of group-oriented protection. The Cartagena Declaration borrows the definition from the African Convention and adds, as a ground, the ‘massive violation of human rights’. For instance, the Inter-American Commission on Human Rights made a reference to the Cartagena Declaration in 2018 in a Resolution on Forced Migration of Venezuelans and urged the OAS Member States to ‘consider the adoption of collective protection . . . including the possibilities of *prima facie* or group determination of refugee status’.⁴⁹ Although not binding, this Cartagena Declaration has been transposed into domestic law (Colombia). In the EU, the aforementioned Qualification Directive also provides for subsidiary protection (Article 15). Drawing on the case law of ECtHR pursuant to Article 3 ECHR, it covers the real risks of serious harm in the form of inhuman or degrading treatment and also provides for protection in case of ‘a serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict’ (Article 15 c). By softening the requirement to prove an element of threat to the individual⁵⁰ and a link to an armed conflict, as understood in international humanitarian law,⁵¹ ECJ has once again adopted a broader interpretation of the definition, emphasising, in this case, the level of indiscriminate violence. That corresponds to the provisions in domestic laws in certain European (Norway) or non-European countries (Australia, Canada, New Zealand) that reserve ‘severe violations of human rights’ for subsidiary protection.

Several national reports elaborate on the principle of *non-refoulement*, which prohibits the return of individuals who have entered the territory of a country while

⁴⁷ECJ, *Y. and Z.*, C-71/11 and C-99/11 [2012].

⁴⁸ECJ, *X. Y. and Z.*, C-199/12 and C-210/12 [2013].

⁴⁹Resolution 2/18, 14 March 2018, available on Refworld.

⁵⁰ECJ, *Elgafaji*, C-465/07 [2009]. In Belgium, the word ‘individual’, qualifying the threat, was deleted from the law transposing the EU qualification Directive.

⁵¹ECJ, *Diakité*, C-285/12 [2014].

their request is being examined (Geneva Convention, Article 33). Nevertheless, expulsion or return to the borders, notably in international or national waters, gives rise to legal challenges, which have been handled in a range of contrasting decisions.⁵² In practice, legal controversies and potential human rights violations occur whenever the return decision is adopted prior to any possibility of obtaining protection; similarly, returns to safe third countries or safe countries of origin through simplified or accelerated procedures may impede access to effective protection (Australia, Canada, EU countries).

Countries such as Australia and New Zealand use ‘offshore applications’ for asylum, i.e., through a visa request, instead of following the traditional model of the ‘inshore applications’ to guarantee access to protection. Recent developments in European asylum and migration law show that the EU policy is also evolving towards offshore applications through agreements with third countries like Turkey or Morocco.⁵³ Without serious compensatory guarantees, however, such policies risk the possibility of a violation of the principle of *non-refoulement*. In order to avoid that, the Global Compacts and the proposals of the UN Special Rapporteur on the Human Rights of Migrants propose regular, safe, accessible and affordable mobility solutions to all migrants.⁵⁴

3.2.3 Privileged Foreigners

Privileged foreigners are, generally speaking, foreigners who can claim special treatment. There are three categories: diplomats, citizens and neighbours.

Diplomats have a special status subject to accreditation, generally by the Ministry of Foreign Affairs. The national reports note few difficulties in this regard. However, they stress that diplomats are, in principle, excluded from the conditions for admission to permanent residence or nationality.

Citizens may include two categories of migrants. The first category comprises ‘national’ emigrants living abroad, who are considered an expat minority residing in another country. Sometimes, their return to the ‘homeland’ is encouraged (Greece, Poland, Japan, see above regarding nationality). The second category involves citizens of an integrated entity, in particular within the EU. They enjoy free movement and are entitled to permanent residence after a period of time (see above). All national reports covering this right of free movement emphasise the considerable impact it has had on the EU Member States’ migration policy. It can, *mutatis mutandis*, be extended to larger areas, such as the European Economic Area.

⁵²US Supreme Court, *Sale v. Haitian Centers Council Inc.* [1993]; Inter-American Commission on Human Rights, *Haitian Center for Human Rights* [1997]; ECtHR, *Hirsi v. Italy* [2012] and *Khlaifia v. Italy* [2016]. ECJ, *Ministerio Fiscal (Authority likely to receive an application for international protection)*, C-36/20 PPU [2020].

⁵³On the EU-Turkey Declaration, see *infra*, 6.2: History and Accelerated Globalisation.

⁵⁴See *infra*, 7.2 on the *Global Compact for Safe, Orderly and Regular Migration*.

Potentially, nothing prevents it from being transposed to other integrated regional entities on other continents using such constructions as NAFTA, Mercosur, or ASEAN. However, the citizenship of an integrated regional entity raises difficult questions when a Member State decides to leave this regional integration. At stake in the post-Brexit approach mentioned in the UK report is not only the future status of the Brits in EU Member States but also the rights of residence and other rights of EU citizens in the UK. The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 sets to end the rights to free movement of persons under retained EU law and provides a new method for EEA citizens to enter and reside lawfully in the UK.

Neighbours are migrants from neighbouring countries with which agreements, often bilateral in nature, have been signed. This proximity may be territorial and constitutes a first step towards the integrated entities referred to above (Australia and New Zealand plus the nearby Pacific islands; Colombia and Chile; Norway and other Nordic countries: Sweden, Denmark, Finland and Iceland). This proximity may also be historical rather than geographical in nature (United Kingdom and the Commonwealth; Croatia and Germany; Macau and Portugal). By contrast, territorial proximity associated with a political or economic differentiation may lead to a less favourable status for migrants from a neighbouring country (Dominican Republic and Haiti) or at least a reluctance to join in a free movement zone (South Africa and the SADC). Maintaining a balance between *limes* and *cum fines* is always a delicate task.

3.3 *Discretionary Migration or Migration of Interest*

As indicated above, the requirement to protect the fundamental rights of migrants severely restricts the sovereignty of states to exercise control over access to their territory. That is much less the case for discretionary migration, which allows states to act in their best interests. Discretionary migration involves mainly scientific migrants (Sect. 3.3.1), economic migrants (Sect. 3.3.2) and, be it by way of exception, the regularisation of migrants (Sect. 3.3.3).

If sovereignty is the guiding logic here, the state's interest in granting access to its territory is not necessarily opposed to that of the migrants seeking to study, improve their economic situation, or regularise their residence status. However, the decision about the stay permit is not bound by pre-established legal criteria. At most, the law guarantees respect for certain rights ancillary to the acquisition of the residence permit, particularly regarding procedural guarantees, and in some countries, this also applies to social rights (Sects. 4.2 and 4.3). Since this discretionary right to immigrate is conditional upon meeting the interests of the state issuing the residence permit, it is to be treated as 'chosen migration', that is, chosen by the state allowing the foreigner to enter its territory. The host state and the country of origin may share many interests, but all depends on what is at stake. In the longer run, a country of origin may, for example, benefit from the training offered to some of their younger citizens residing abroad and from the financial returns through migrant

remittances, which are among the most important sources of foreign currency for many countries of origin.⁵⁵ At the same time, countries of origin may also experience brain drain—the loss of skilled workforce and brain power—putting at risk their country’s development.

3.3.1 Scientific Migration

Although quantitatively less significant, scientific migration represents a significant qualitative and economic resource for several countries. This is indicated by programmes such as ‘Building the Europe of Knowledge’⁵⁶ that are intended to attract highly skilled students and researchers. States that pursue scientific migration methodically use approaches that can range from a policy that strives to turn it into a legal form of immigration (such as those associated with fundamental rights or privileged statuses examined above) to a less ambitious and more traditional policy that maintains scientific immigration as an option.

The new tendency in the EU and its Member States is to regard scientific migration as a form of legal migration. On the one hand, internally, within the EU, free movement and students’ right of residence is a given, and promoted by mobility programmes such as Erasmus. The question of which Member State is financially responsible for the student and, more so, for the study grants—the home country or the host Member State—still remains a point of contention. ECJ case law has gradually moved towards a principle of proximity, allowing the students to claim their socio-economic rights in the state with which they have the closest ties.⁵⁷ On the other hand, scientific immigration from outside the EU is equally favoured. However, the state might still be involved in the selection or impose specific conditions, such as requiring enrolment in a recognised full-time educational institution or proof of sufficient means of subsistence. But once these conditions are met, the student can claim the right of residence. In the first phase (2004–2016), the EU adopted two main legal texts (since 2004) in this regard as a way to distinguish between student⁵⁸ and researcher immigration.⁵⁹ The recommendations

⁵⁵The Migration and Development Brief and the latest migration and remittances data are available at <https://www.knomad.org/publication/migration-and-development-brief-31>; see also: <http://blogs.worldbank.org/peoplemove/>.

⁵⁶https://ec.europa.eu/research/fp7/pdf/fp7_press_launch.pdf.

⁵⁷Example from the case law: ECJ, *Giersch*, C-20/12 [2013]; *Prinz and Seeberger*, C-523/11 and C-585/11 [2013]; *Elrick*, C-275/12 [2013]; *Thiele Meneses*, C-220/12 [2013]; *Depesme and Kerrou*, C-401/15 and C-403/15 [2016]; *Linares Veruga*, C-238/15 [2016]; *Aubriet*, C-410/18 [2019]; *Caisse pour l’avenir des enfants (Child of the spouse of a frontier worker)*, C-802/18 [2020]; see, however, *Commission v. Netherlands*, C-233/14 [2016].

⁵⁸Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, *OJ*, 2004, L375, p. 12.

⁵⁹Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research, *OJ*, 2005, L289, p. 15.

accompanying this latter text were not legally binding and had been issued by the EU to the Member States, inviting them, among other things, ‘to refrain from using quotas to restrict the admission of third-country nationals for research posts’ (Article 1, § 1, b).⁶⁰ In a second phase, since 2016, the two directives for students and researchers were replaced by one single Directive ‘on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing’.⁶¹ Regarding the right to residence, the Directive establishes that ‘where all the ... conditions are fulfilled, the third-country national shall be entitled to an authorisation’ to enter and stay. Member States are not allowed to set maximum numbers for student admission. For researchers, trainees and *au pairs*, Member States are only entitled to put limits if they consider that these persons are or will be in an employment relationship. In other words, the greater tendency is to consider the pursuit of higher education as a right, while employment authorisation is still considered a favour.⁶²

Three Member States—namely, the UK (a Member State at that time), Ireland and Denmark—opted out of this Directive and chose to include student immigration in their point-based system (under Tier 4; United Kingdom). Similar processes exist in other countries (Canada). Some ‘small’ countries attract relatively large numbers of students, especially with easily accessible specialised training programmes (e.g. Romania for medicine) and/or if their economic situation is attractive (Singapore; S\$84,000). The possibilities of combining work with study (New Zealand, NZ \$70,000), particularly through programmes that set quotas for ‘working holidays’ (New Zealand) are equally attractive. The total number of hours a student is permitted to work can vary considerably and range from 10 h/week (Malta) to 28 h/week (Japan). Extending one’s stay beyond the period of study is, for understandable reasons, easier in countries that favour economic immigration (Canada, developing programmes for ‘qualified workers’ and for the Canadian ‘experience’).

3.3.2 Economic Migration

Economic migration is discretionary by its very nature since it responds to the needs of a country seeking new input into its economy. It is a form of migration ‘that works for’ the country (United Kingdom). Together with family migration, it forms a considerable part of all migration movements, on average between 20 and 35% (e.g. Colombia, 23%). While some countries are considered ‘top destinations’ for their region (South Africa), others have a population of economic immigrants larger than their domestic population (Macau).

⁶⁰Council Recommendation of 12 October 2005 to facilitate the admission of third-country nationals to carry out scientific research in the European Community, *OJ*, 2005, L289/26.

⁶¹Directive 2016/801 of 11 May 2016, *OJ*, 2016, L132/21.

⁶²Directive 2016/801, Art. 5 (3) and 6.

Economic migrants can be divided into three categories: seasonal workers, non-specialised workers and highly skilled workers. In addition, some countries divide them into yet more detailed categories (Canada, five categories).

Seasonal or temporary workers meet needs that are limited in time, principally in the agricultural or hospitality sectors (New Zealand, United Kingdom). The EU Member States were scheduled to transpose a Directive on seasonal workers into their domestic legal order by 30 September 2016.⁶³ The Directive distinguishes between stays lasting more or less than 90 days (Articles 5 and 6). Seasonal workers are not automatically entitled to have recourse to the host countries' social assistance systems (Article 5 § 3; Article 6 § 3).

Workers with low to medium qualifications are hired under the category of 'non-specialised workers'. For example, Macau employs no less than 122,000 mainland Chinese workers in the largest casino economy in the world, which generates six times the revenues of Las Vegas and in South Africa, the mines attract considerable numbers of non-specialised workers. Migration quotas are often set for moderately qualified workers (Croatia, quotas not met; Norway). This may involve an annual lottery system, as is the case for American green cards (United States). Bearing in mind the different needs of its Member States, the EU has so far refrained from defining common conditions for this type of economic migration; instead, it lays down the procedure and the format for issuing a 'single' work-permit.⁶⁴ Despite what the term 'single permit' might suggest, this is not a single permit for all types of work, nor one for the entire EU. It is a permit that grants access to both employment and residence. As the definition reads in the text, it is 'a permit issued by the authorities of a Member State allowing a third-country national to reside legally in its territory for the purpose of work' (Article 2 c). Moreover, depending on the country, this may also be issued to self-employed workers, such as salespeople, who fill specific niches and may employ local people such as in the 'Chinese trade centres' in Poland.

A majority of national reports emphasise the relevance of the third category: the selection of highly skilled labour migration (Australia, Canada, France, Germany, Singapore, New Zealand, Malta, South Africa, United Kingdom, United States). Several countries have adopted a point-based system setting out different criteria, such as diploma, experience, age, language, remuneration, and/or capacity for adaptation (Australia, Canada, New Zealand, Singapore, the United States, and the United Kingdom: since 2006, inspired by the example of Australia). Several European reports (Belgium, Estonia, France, Germany, Malta) mention the EU's

⁶³Directive 2014/36/EU of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, *OJ*, 2014, L94, p. 375.

⁶⁴Directive 2011/98/EU of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in a Member State and on a common set of rights for third-country workers legally residing in a Member State, *OJ*, 2011, L343, p. 1 (transposition 25 December 2013).

‘Blue Card Directive’⁶⁵ as being specifically tailored for this purpose, but sometimes noting its scant practical relevance because the salaries in the countries concerned are relatively low (Poland, Romania) or the existing domestic legislation does not require highly skilled workers to apply for the Blue Card (Belgium). However, in reality, the practical definition of highly skilled work remains within the competence of each Member State and its legislation. Following the text of the Directive, the term high professional qualifications refers simply to a higher educational degree or a higher level of experience. By contrast, the Directive sets the minimum salary threshold at 1.5 times the average gross annual salary in the country concerned. For certain categories of occupations specified in an annually updated list, the minimum threshold might be set at 1.2 times that salary by way of derogation (Article 5 § 3 and § 5). A proposal to amend the Blue Card Directive seeks to address some of those weaknesses.⁶⁶ Some EU Member States have retained their own system or adopted a supplementary one to attract highly skilled migrants, either by not participating in the Blue Card Directive (the United Kingdom, an EU Member State at that time), or because they already had their own legislation in place, such as France’s ‘competence and talents’ residence permit for foreigners who prove to be able to ‘contribute significantly and lastingly to economic development, or to the intellectual, scientific, cultural, humanitarian or sporting excellence of France and directly or indirectly of the country of which they are nationals’. Some countries seeking to enhance their economic development also offer residence permits to investors (New Zealand, Romania, United Kingdom: including global leaders in their field and innovators) or owners of property of a specific set value, such as in Greece after the crisis.

3.3.3 Regularisation

Regularisation represents a powerful expression of a sovereign state’s control over its territory on questions of access and residence. The English term, ‘discretionary leave to remain’, speaks for itself. This form of regularisation still exists in a relatively large number of countries. The German report underlines that ‘the granting of such a residence permit is discretionary’. Some countries do not foresee regularisation for reasons linked to their difficult economic situation (Croatia) or to particular political motives that exclude certain categories of foreigners (Dominican Republic, plan not applicable to Haitians), or as a general policy (Norway). Others only use it rarely since, in their case, the selection usually takes place before arrival (Macau, Singapore, Japan after 10 years). According to the reports, in recent years,

⁶⁵Directive 2009/50 of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, *OJ*, 2009, L155, p. 17 (transposition 19 June 2011, amended in 2021 by Directive (EU) 2021/1883).

⁶⁶COM (2016) 378 of 7 June 2016. (For the follow-up of the procedure, see: <https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=COM:2016:378:FIN&sortOrder=asc>).

some countries have undertaken several collective or semi-collective regularisation campaigns, be it upon examination of application files (Belgium twice, France, Greece and Poland three times, South Africa four times). These campaigns are often no more than an exceptional measure, aimed at resetting the clock, so to say, to address the needs of a large population of irregular immigrants on their territory, who are involved in lengthy asylum application procedures.

Regularisation on humanitarian grounds is mainly a measure taken to complement and compensate for the lacunae in the asylum procedure. Humanitarian regularisations are individual in nature. In the case of a person who has been refused international protection as a refugee within the definition of the Geneva Convention or as a beneficiary of subsidiary protection, a return to the country of origin may nevertheless be deemed ‘unduly harsh’ (New Zealand, Canada), for reasons having to do with the situation in the country in question (in Croatia for persons of Bosnian, Serb, or Kosovar origin) or the person’s private or family life. These two situations have been examined by ECtHR in several cases according to Articles 3 and 8 ECHR and by the Committee Against Torture according to Article 3 CAT. The practice in certain non-EU countries (e.g. Dominican Republic) is explicitly to take account of regularisation for medical reasons. Often, regularisation is based on the de facto integration of migrants within the host society. In such cases, regularisation is a true social challenge. That is the case in the US for several millions of ‘foreign-born children’—children born abroad to parents residing in the US and brought into the US at a very young age. Regularisation lies somewhere between the national programme of the Development, Relief, and Education for Alien Minors (DREAM) Act (since 2001) and while awaiting the specifics of the DREAM Act, the implementation of a more individual programme that allows people with pending court cases not to be expelled for two years (Deferred Action for Childhood Arrivals—DACA).⁶⁷

4 Complementary Questions

The national reports identify three issues related to admission and residence: sanctions and detention; procedural guarantees; social rights.

⁶⁷*Department of Homeland Security v. Regents of University of California*, 591 U.S. (2020). The Court overturned the decision to rescind DACA, because it was ‘arbitrary and capricious’. Although President Biden has issued a memorandum to preserve and fortify the DACA policy (<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/preserving-and-fortifying-deferred-action-for-childhood-arrivals-daca/>) and proposed a comprehensive immigration reform bill (<https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/>), the programme still faces legal challenges from Republicans under the claim that ‘the original 2012 memo is unlawful’. For more, see <https://www.nytimes.com/article/what-is-daca.html>.

4.1 Sanctions and Detention

Sanctions may be imposed on the migrants themselves, in particular in the form of detention (Sect. 4.1.1). They may also be imposed on those who engage in migrant trafficking or smuggling (Sect. 4.1.2).

4.1.1 Detention

Depriving a migrant of the right to freely move on a country's territory generally arises from the need to proceed with a forced removal or sanction the person concerned for illegal entry or residence in the country. The latter situation, which entails criminalising irregular entry or residence, seems increasingly to be less frequent in both legislation and practice. Few national reports discuss it, but two reports, in particular, mention the continued enforcement (France and Greece). By contrast, other reports (e.g. Colombia) indicate that since irregular residence is not inherently illegal, detention is rare. The European legislation makes detention for illegal residence difficult but not entirely impossible. Indeed, the 'Return Directive' explicitly provides that detention must be the very last resort and imposed only after all other possibilities for voluntary return have been exhausted.⁶⁸ As a result, according to ECJ case law, detention for reasons of irregular stay should not delay the person's removal from the national territory.⁶⁹ Proceeding from that logic, the Court ruled that the Italian and French laws (by now amended) on the detention of foreigners staying illegally in the country were being implemented contrary to European Law (France, amended 2013). The Court also specified that under the Return Directive, detention could not be justified as a measure to remove an asylum seeker from the territory. ECJ, taking it a step further than ECtHR,⁷⁰ explicitly states that 'an asylum seeker has . . . the right to remain in the territory . . . at least until his application has been rejected in the first instance, and cannot therefore be considered to be "illegally staying" within the meaning of the Return Directive unless the asylum application was made simply as a delaying tactic, a matter that cannot be presumed but must be assessed on a case-by-case basis',⁷¹ or unless there are reasons that have to do with public order or security.⁷² With the recasting of the European Directive on the reception of asylum seekers,⁷³ Article 8 now provides an exhaustive list of six scenarios in which detention of an asylum seeker is possible:

⁶⁸Directive 2008/115 of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, *OJ*, 2008, L348, p. 98; see also ECtHR, *Abdullahi Elmi v. Malta*, No. 25794/13 [2016] and *O.M. v. Hungary*, No. 9912/15 [2016].

⁶⁹ECJ, *El Dridi*, C-61/11 [2011]; *Achughbabian*, C-329/11 [2011]; *Mbaye*, C-522/11 [2013].

⁷⁰ECtHR, 29 January 2008, *Saadi v. United Kingdom*, No. 13229/03 [2008].

⁷¹ECJ, *Arslan*, C-534/11 [2013], para. 48.

⁷²ECJ, *J.N.*, C-601/15 [2016].

⁷³Directive 2013/33/EU of 26 June 2013, laying down standards for the reception of applicants for international protection, *OJ*, 2013, L180, p. 96 (transposition 20 July 2015).

- to determine his or her identity;
- as a matter of necessity, including for prevention of the risk of absconding;
- to determine the right to enter the territory;
- to determine abuse of the application system pending a removal process;
- for national security or public order;
- to comply with the Dublin procedure.

In other words, according to EU legislation and case law, depriving foreigners of their liberty, while possible, must not hinder the effective execution of an order to leave the territory, nor the effective examination of an asylum application.

The length of detention prior to removal from the territory varies from country to country depending on the legislation in force. Some simply allow for detention for the duration deemed necessary (South Africa, Singapore). On the other hand, the EU Return Directive provides for a maximum period of 18 months, thereby extending the maximum duration allowed in some countries (Belgium, France) but reducing it in the case of others (Estonia, Malta).

Several ECtHR judgments have condemned states for the unacceptable quality of their detention conditions (Greece, Malta). At the same time, the practice of detaining unaccompanied foreign minors (UFM) has also raised questions. Such detentions are common in certain countries (Malta) but rare in several others. In 2017, the Appeal Court of Oslo, Norway, decided that detaining children prior to their expulsion violated their fundamental rights. New Zealand has indicated that this practice should not be confused with the procedure for dealing with unaccompanied minors in airports. Several reports refer to the New York Convention on the Rights of the Child (1990), which not only invokes the ‘best interests of the child’ as the ‘primary consideration’ (Article 3) but also stipulates that ‘the arrest, detention or imprisonment of a child shall . . . be used only as a measure of last resort and for the shortest appropriate time’ (Article 37). Several countries have also enacted special legislation for unaccompanied foreign minors (Belgium, Canada, France, Switzerland). Some countries have designated places for detaining children, such as orphanages, despite prohibiting the detention of children (Poland under 13; Switzerland: under 15). ECtHR has, on numerous occasions, stressed the vulnerability of foreign minors and hence the need to adapt the forms of detention (Belgium, Malta, Poland). The Court nevertheless explicitly refused to limit the detention of a child solely for educational supervision (Article 5, § 1, d), holding that a foreign minor may also be detained to prevent unauthorised entry into the country or to carry out deportation as intended (Article 5, § 1, f).⁷⁴ Various countries have introduced alternatives to detention of a foreign minor (Belgium, Canada, Germany, New Zealand), but similar options are not yet well developed for foreign adults. In such cases, the judge plays a decisive role (Sect. 4.2).

⁷⁴ECtHR, *Mubilanzila v. Belgium*, No. 13178/03 [2006], para. 100: ‘The Court does not agree with the . . . submission . . . that paragraph d) of Article 5 (1) of the Convention is the only provision which permits the detention of a minor. It in fact contains a specific, but not exhaustive, example of circumstances in which minors might be detained’.

4.1.2 Human Trafficking and People Smuggling

Controls and sanctions also target those who exploit migrants (trafficking) or organise illegal migration (smuggling). Two scenarios should be distinguished: trafficking (in French, *traite*) and smuggling (in French, *trafic*). Smuggling is less problematic than trafficking since the latter typically involves exploiting a person's vulnerability, for example, through forced prostitution. While smuggling involves illegal transportation of a person, trafficking combines illegal transporting with exploitation. Even though smuggling is criminalised in all countries featured in this volume, where the sanctions sometimes also extend to those who offer assistance to migrants for humanitarian reasons, the international community has started to vehemently mobilise against human trafficking in recent years.

Three main legislative instruments are mentioned in several reports:

- The Protocol of 15 November 2000 to the United Nations Convention against Transnational Organized Crime, intended to prevent, suppress and punish trafficking in persons, especially women and children (the Palermo Protocol);
- The Council of Europe's Convention of 16 May 2005 on Action against Trafficking in Human Beings, with a Group of Experts on Action against Trafficking in Human Beings monitoring the implementation of the Convention (GRETA);
- Directive 2011/36 of the European Union of 5 April 2011.⁷⁵

A Protocol to the Forced Labour Convention of 1930 (No. 29) that was approved by the International Labour Organization in June 2014 entered into force on 9 November 2016. The Protocol's objective is not only prevention and protection of victims but also ensuring compensation. Convention 29 had already defined forced labour as 'all work or service that is exacted from any person under the menace of any penalty and for which the said person has not offered him-/herself voluntarily' (Article 2.1). In its preamble, the Protocol specifies the inclusion of trafficking in this definition as follows: 'the context and forms of forced or compulsory labour have changed and trafficking in persons for the purposes of forced or compulsory labour, which may involve sexual exploitation, is the subject of growing international concern and requires urgent action for its effective elimination'.

The national reports show that the majority of states have set up national agencies or commissions and action plans for combating trafficking based on these international texts and aids (Belgium, Colombia, Croatia, Estonia, France, Germany, Greece, Macau, Malta, New Zealand, Norway, Poland, Romania, Switzerland). Some countries have set up projects to this end (Singapore, South Africa). However,

⁷⁵ Directive 2011/36 of 5 April 2011 on preventing and combating human trafficking and protecting its victims, *OJ*, 2011, L101, p. 1, which differs from Directive 2002/90 of 28 November 2002, defining the facilitation of unauthorised entry, transit and residence, *OJ*, 2002, L328, p. 7. Directive 2011/36 was preceded by Council Directive 2004/81 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*, 2004, L261, p. 19.

situations vary widely. For some, human trafficking does not pose a problem (at least not to the same extent) due to their geographic remoteness (Australia, New Zealand). In terms of trafficked persons, others tend to be mainly source countries (Romania), transit countries (Colombia: from Africa to North America), or destination countries (Canada, France, Germany, Japan, United Kingdom, United States). It is rare for countries to be linked to human trafficking as the source, transit, and destination country simultaneously (Poland). Since traffickers frequently go unpunished and judicial procedures are initiated with great difficulty, it is critical to ensure that adequate measures are in place to protect victims of exploitation.

4.2 *Procedural Guarantees*

The impact of human rights in the area of migration has raised the significance of judicial authorities: judicial review is increasingly relevant in the context of immigration for ensuring a minimum standard of fairness and consistency in decision-making. The importance of external review by regional courts or bodies has been reinforced at the international level, especially in Europe. At the national level, the reports mention the creation of specialised judicial or quasi-judicial bodies in recent years to deal with asylum or migration law. Two main questions emerge from the reports: firstly, the quality of the judicial oversight and, secondly, its accessibility. Regarding the quality of the review, administrative courts often make a distinction between a substantive review of the decisions and a marginal review of the procedure's legality.⁷⁶ Some countries provide only for the latter (Singapore). Most national reports featured here refer to the practice of combining two types of control that distinguish between decisions in asylum cases, or in cases involving privileged individuals (substantive review), and decisions such as expulsion (marginal review). Criminal courts or '*juges des libertés*' (France) also have the competence to decide on matters of detention.

Regarding access to judicial recourse, the main obstacle is the lack of access to legal aid. Access is either not made available to most foreigners (Singapore, Poland), or it is limited: to certain cases only (Greece, Croatia, Dominican Republic), to the appeal level (Malta), or to specialised lawyers only (New Zealand). Moreover, even where the constitution guarantees such aid, access is not easily available, neither in practice (United Kingdom) nor when provided by law (South Africa). Several reports stress that, for that reason, the role of volunteer non-governmental organisations in facilitating or securing access has significantly increased.

⁷⁶ECtHR, *Maaouia v. France*, No 39652/98 [2000].

4.3 Social Rights

How effective is the principle of non-discrimination in granting regular migrants access to social rights? Several constitutions subscribe to the principle of equality: ‘All foreigners on [the] soil benefit from the protection provided to persons and property, save for those exceptions provided for by law’ (Belgium, Constitution, Article 191). Given the principle of equality, differential treatment, as provided for by law, is the exception. Several other countries adhere to this principle. In particular regard to social rights, ECtHR has held that ‘very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the grounds of nationality as compatible with the Convention’. The Court used this formulation to condemn discrimination based on nationality on the question of contributory social rights, such as unemployment benefits (1996),⁷⁷ and non-contributory allowances, such as benefits for disabled adults (2003).⁷⁸ Surprisingly, the Court categorises these social rights under the individual right to property, which then apply to civil and political rights and criminal law so that they fall under the scope of the European Convention on Human Rights. It is also remarkable that in order to condemn such discrimination on the grounds of nationality, the Court adopts the same formula it drew upon 10 years earlier to condemn discrimination on the basis of sex.⁷⁹

The opinion of IACHR on the legal status and rights of illegal migrant workers, handed down in 2003—the same year as the aforementioned *Koua Poirrez* judgment by the ECtHR—affirms that: ‘States may not discriminate or tolerate discriminatory situations that prejudice migrants’.⁸⁰ By contrast, one of the national reports presented at the IACL Congress in Vienna stressed that the main problem is discrimination against foreigners (Japan: ‘Japan must be the only industrialised democracy not to have an anti-discrimination law’).

That said, the principle of non-discrimination does not exclude differential treatment of nationals and foreigners or of different categories of foreigners. In its opinion IACHR notes that:

The State may grant a distinct treatment to documented migrants with respect to undocumented migrants, or between migrants and nationals, provided that this differential treatment is reasonable, objective, proportionate and does not harm human rights (*Idem*, para. 119).

In practice, the national reports show that differences in treatment are linked to the type of stay: the less stable and regular the stay, the greater the differences in treatment. Foreigners entitled to *permanent residence* (Australia, New Zealand,

⁷⁷ECtHR, *Gaygusuz v. Austria*, No. 17371/90 [1996], para. 42.

⁷⁸ECtHR, *Koua Poirrez v. France*, No. 40892/98 [2003], para. 46.

⁷⁹ECtHR, *Abdulaziz, Cabales and Balkandi v. United Kingdom*, No. 9214/80, 9473/81, 9474/81 [1985], para. 78: ‘very weighty reasons would have to be advanced before a difference of treatment on grounds of sex could be regarded as compatible with the Convention’.

⁸⁰IACHR, advisory opinion of 17 September 2003, Series A, No. 18, para. 119. In practice, the opinion has to do with the situation of Mexican workers residing unlawfully in the United States.

South Africa, United Kingdom) or granted long-term-resident status in the EU (Belgium, Croatia, Germany, Norway, Poland, Romania) have almost the same social rights as the nationals. However, access to these rights cannot be presumed. The challenge is that some state authorities grant them only reluctantly, and sometimes practical hurdles get in the way of accessing these rights. Thus, a country may afford considerable freedom of contract between employers and employees, but in a way that ultimately leads to less favourable working conditions for migrant workers (Singapore). Other countries make certain rights conditional upon reciprocity (Greece: moral compensation after death; France: this was the case with benefits to disabled adults that gave rise to the judgment in *Koua Poirrez* by ECtHR, cited above).

For foreigners who only hold a *temporary residence permit*, social rights are less commonly granted and are often conditional upon a stipulated minimum period of stay or contribution to a social security scheme (Colombia, Croatia).

If the link between access to social security and the type of stay permit granted to a worker is generally recognised, the different terms of access to social assistance are less evident. Even under the principle of non-discrimination among workers from different EU Member States, states have gradually decreased the protection they are prepared to guarantee. Concerning the right to reside test for access to welfare, the UK report notes the refusal to retain a pregnant French woman's worker status (United Kingdom, case *St Prix v. Secretary of State for Work and Pensions*). Although the Upper Tribunal and the Court of Appeal had upheld the Minister's point of view, the Supreme Court agreed to refer the question for a preliminary ruling to the ECJ. In a judgment handed down on 19 June 2014, the Court ruled that 'a woman who temporarily gives up work or stops working because of the physical constraints in the late stages of her pregnancy and the immediate aftermath of childbirth retains the status of "worker" ... provided she returns to work or finds another job within a reasonable period after the birth of her child'.⁸¹

The situation of *undocumented* (irregularly staying) foreigners raises particular problems even if they can claim the status of a regularly employed worker. Several reports indicate that no social rights are granted in such cases (Dominican Republic, Greece, Poland, Croatia, United Kingdom: person is subject to immigration control). Moreover, while sanctions target employers, notably within the EU,⁸² rights are rarely granted to the workers in question (Malta). This was the reason why the said IACHR opinion gives precedence to the status of worker over the status of migrant:

On assuming an employment relationship, the migrant acquires rights as a worker, which must be recognised and guaranteed, irrespective of his regular or irregular status in the State of employment. These rights are a consequence of the employment relationship (*op. cit.*, para. 134 and para. 8).

This is also the objective of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Family (New York,

⁸¹ECJ, *Saint Prix*, C-507/12 [2014]. See also ECJ, *Daknėviciute*, C-544/18 [2019].

⁸²Directive 2009/52 of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, *OJ*, 2009, L168, p. 24.

18 December 1990). In particular, Part III covers the rights of ‘all’ migrant workers (Articles 8 to 35), thus unlike Part IV, which adds the rights specific to migrant workers ‘who are documented or in a regular situation’. The three principle rights guaranteed to all workers, including undocumented workers and their family members, are equality of remuneration (Article 25), essential and urgent medical care (Article 28), and access to children’s education (Article 30). In addition, several reports mention the recognition of the same rights in domestic law. Therefore, one should not be surprised that among the states under consideration in this General Report, only Argentina, Colombia and Venezuela have ratified the UN Convention on the Rights of all Migrant Workers (56 States Parties in 2020, mainly countries of emigration). Indeed, most states that have ratified the Convention so far are also countries of emigration even though some, like Mexico, Morocco or Turkey, are gradually becoming countries of immigration.

The national reports also mention ongoing debates on the definition of certain concepts, for example, what constitutes essential and urgent care (Norway, United Kingdom, France, Estonia) or the level of education for children (primary education: Croatia, Estonia, New Zealand; up to 16 years: Norway; beyond: Canada, United States). The ratification of the 1990 Convention and the observations of the Committee on Migrant Workers (CMW) also deserve mention in that regard.⁸³ Ratification represents a pragmatic approach to labour migration between restriction and flexibility and a dominant tendency in how state authorities and regional bodies manage international migrations.

Migration remains a highly complex issue. Often the law is at pains to keep up with the rapid development of the newly emerging forms and possibilities of mobility. Laying out the complex arrangements of the legal regime, all national reports demonstrate that a proper analysis of migration law—the legal terms and conditions of migration—entails a comparison with international legal and best practices standards. Concerns regarding the human rights dimension of migration, the economic and social factors influencing migration policies, and the attendant state sovereignty matters have all escalated in recent times to such an extent that the hierarchies of importance differ profoundly depending on the situations and the actors involved. Sections 5–6 offer further insights into these issues.

5 A Global View: Trends in Migration Governance

Human mobility has probably never been as intense as in the past decades. But human migration in particular has become a global phenomenon that is increasingly responding to political, environmental, and economic circumstances and events, whereby the waves of migration have been even less foreseeable than their

⁸³See, for example, General Comment No. 2 of the Committee on the rights of migrant workers in an irregular situation and members of their families, dated 28 August 2013 (CMW/C/GC/2).

causes, and their flows largely uncoordinated. Often, this has rendered migration events more prominent and controversial than their causes and contexts, not least in their mediatic reconstructions and representations, especially where the influx was from a different region. In parallel, incidences of human trafficking, migrant detentions, separation of families and child migrants, criminalisation of undocumented migrants and attacks on them have escalated. By mid-2014, when the Congress in Vienna took place, the global humanitarian crisis resulting from international migration had hit a scale unknown since World War II, especially in terms of refugee flows and the number of displaced people.⁸⁴ All that continues to pose a challenge to the law. In many receiving countries that have experienced this surge in cross-border migration, lingering concerns about the magnitude of the flows and their unpredictability have made international agreements on migration and refugees more challenging to reach. This part of the General Report (Sects. 5–6) lays out the broader societal and historical contexts of migration law. Drawing mainly from the national reports included in this volume, it highlights the particular conditions under which cross-border migration is regulated in respect of international laws and agreements. However, the sustained attention all this requires far exceeds the scope of the legal frameworks examined in these reports.

Not only the range and magnitude but also the recent forms of migration are unprecedented. The rapid democratisation of air travel since the 1970s and the expanded means of long-distance communication have rendered the borders between states ever more porous for some categories of people. That development has allowed broader segments of world population to maintain close links with several countries simultaneously. These countries might represent the country of origin, the countries where they have maintained contacts, having lived there for shorter or longer periods, or countries where they have private or professional interests. In the case of ‘circular migration’, or in ‘transnational situations’, a person travels back and forth between countries in repeated cycles; he or she may possess several nationalities simultaneously (see above Sect. 2.1.5), choose or need to reside in two different countries and maintain a family and/or assets in a third country. The scientific literature confirms this tendency, qualifying it either as ‘transnational’ or, more suggestively, as ‘external citizenship’.⁸⁵ Here and there, new legal statuses are being put in place with the aim to specify the rights a person may expect to enjoy in one or more legal orders without fear of losing the protection of the other country. However, these legal innovations are often still in an experimental stage. For instance, the status of ‘long-term resident’ in European law is reserved for third country nationals who wish to exercise their right to freedom of movement within the EU territory (see above Sect. 3.1.2.). Another experiment involves the status of persons benefitting from a ‘circular migration’ programme.

⁸⁴For the first time since WWII, these numbers exceeded 50 million. See: <https://www.theatlantic.com/notes/2015/09/europe-refugee-crisis-war/403315/>.

⁸⁵Bauböck (2009), pp. 475–499.

Increasingly, too, international mobility has become central to the development and well-being of countries. That has required countries to become a party to different regional or supranational and international agreements, as mentioned in the first part of this General Report, and pursue a variety of migration policies that exceed the scope of domestic legislation and legal framework so that one can speak of ‘plural’ legal orders interacting within a national framework (see above Sect. 1.3).

If migratory movements have made a mark on the histories of receiving countries and, as mentioned above, on the policies they have successively adopted, this observation also applies in reverse: the history of a receiving country can explain the trajectory of the migration policy. Several countries that were countries of emigration over many years or even decades have, in the past decades, found themselves having to adapt to a new reality as countries of immigration and prepare for the arrival of populations from a wide range of countries; more often than not, these arrivals have not been actively encouraged or solicited to immigrate, with the exception, for instance, of policies aiding efforts to overcome labour shortage.

5.1 *Positions on Migrations*

A cross-reading of the reports we have analysed shows that, typically, migration policies embody three distinct positions: the *first* position is reactive or defensive and entails reinforcing border control at the country’s external borders and admitting new migrants only by way of exception, for example, on humanitarian grounds.

The *second* position is equally restrictive but entails opening the borders to pre-approved migrants whose profiles match a country’s economic needs or diplomatic interests (for instance, to maintain or signal good relations with certain other countries). In such cases, the migration policy is dictated by the benefits a country expects from a selective and discretionary migration policy. It explains why priority is given at one point to skilled migration while at another to temporary and/or seasonal contracts or else to the nationals of specific countries. In many countries, unskilled or low-skilled workers only qualify for work visa schemes that are designed to be temporary and do not lead to permanent residency or citizenship. As such, especially low-skilled migrant workers can be denied the benefit of certain facilities or rights due to their unstable immigration status and their vulnerable socio-economic condition. This policy is pursued today, among others, by Singapore, Japan, Macau and, though less systematically, by Colombia.

Rarely do countries limit themselves to only the first *or* the second stance. In practice, migration policies often combine the restrictive and selective approaches, while also offering varying degrees of flexibility and understanding when it comes to specific humanitarian situations (notably asylum, family reunification and regularisation campaigns). A migration policy that blends both the restrictive and flexible approaches constitutes, in a sense, the *third* type of response, one that seeks to be both pragmatic and eclectic, and this combination was envisioned in EU migration policy. It can take various forms, as it is often achieved through bilateral or

multilateral agreements between countries requiring a commitment to pursue shared border control policies, as explained in the first part (Sects. 2–4).

5.2 *Harmonising Through Agreements and Conventions*

A state might seek to harmonise its policies with other states for three reasons: The *first* is the freedom to restrict migration to just some forms of mobility. As referred to above, the EU has responded to this issue through instruments, such as Schengen and Dublin II and III, and its agreements with the so-called transit countries.

A *second* reason to allow migration is to foster economic growth. States agree on immigrant quotas and the conditions for permitting migration. Sometimes the economic reason is accompanied by other motives, such as contributing sustainably to the development of the country of emigration through bilateral cooperation. This idea underlies the so-called Mobility Partnerships⁸⁶ set up by the EU, among other reasons, to manage the mobility of persons better, prevent and reduce irregular migration, human smuggling and trafficking, and enhance the positive dimensions of migration and cross-border mobility. However, one could also refer here to the said 1990 United Nations Migrant Workers' Convention mentioned above resulting from the efforts of the International Labour Organization, which many states in the northern hemisphere still hesitate to ratify. It requires State parties to acknowledge the comprehensive human rights of all migrants and commit to specific reporting obligations, for instance, about adverse detention conditions.⁸⁷

Finally, a *third* reason for countries to allow migration is the respect due to human rights and human dignity. According to the 1951 UN Convention on refugees, State parties undertake to respect the right of the persecuted to seek protection in another state. Today, most countries worldwide agree to be bound by a series of agreements with other states, which complicates their migration policy and, above all, imposes considerable limits on their sovereignty: as the decision-making power on migration issues is shared among several levels of competence and distributed across various decision-making areas. Thus, in addition to the situation we have described above as 'plural' legal orders, here, one might also speak of 'multi-layered governance'.

5.3 *Migration Trends*

Since the 1970s, the dynamics of international migration have been shaped by global demographic and economic imbalances. In a study conducted by the

⁸⁶https://ec.europa.eu/home-affairs/what-we-do/policies/international-affairs/eastern-partnership/mobility-partnerships-visa_en.

⁸⁷See *supra*, 4.3 and *infra*, Annex 4: Main International Texts and Bodies in Migration Law.

Population Section of the Economic and Social Department a few years ago, the Secretary-General of the United Nations pointed out that the demographic consequences of ageing in the industrialised world would intensify labour shortage from 2025 onwards.⁸⁸ It would force the industrialised world to view immigration from an entirely new perspective. Therefore, the interim conclusion of the study is that, a few decades from now, Europe, for example, will need 135 million new immigrants to sustain an economically active population at the current level.

The International Labour Organization has also published studies on this vast thematic, which have similarly pointed to the increasing demand for workers in the industrialised world.⁸⁹ These studies conclude that countries with a demographic deficit will have to reopen their borders. Japan and Singapore, for instance, fit into that category. The reasoning is, first and foremost, economic. Questions such as how many (new) migrants the industrialised world could ‘use’ in the coming years show the significance of the receiving country’s economic and demographic standards and agenda, and not least its optimal growth criteria in formulating its migration policy. However, this economic point of view addresses only the flexibility of the labour market without a parallel concern for a balanced mobility policy on a global scale. Discussions in that regard are still ongoing. Countries such as Germany and Canada and the countries mentioned above—Japan, Singapore, and Macau—have opted to bring in highly educated immigrants in areas where they are experiencing worker shortage in the short run.

Some countries adopt a selective or stratified immigration policy using a point system to help them identify newcomers with profiles that correspond to their labour market needs and also ensure employment opportunities for those newcomers. For example, in the late nineties and early 2000s, Spain admitted new workers via a broadly formulated regularisation policy that was meant to supply the Spanish economy with cheap labour. As a result of the economic crisis that followed, however, everything came to a standstill. But other countries can continue to draw on this cheap labour force, whereby selective labour immigration serves as a lever for economic growth. Especially where workers from poorer countries are employed under questionable conditions, there are grave concerns about workforce exploitation.⁹⁰ The reports on countries such as Argentina or even Singapore underscore this point. In Singapore, for instance, the abuse of defenceless, mainly unskilled migrants appears to be standard practice. Household staff is often placed in the most untenably vulnerable position, with little or no regulatory oversight over their employment situation.

⁸⁸See, in the same sense, already: Communication from the Commission COM(2014)96 final, Report on the Implementation of the Global Approach to Migration and Mobility 2012-2013, <https://www.statewatch.org/media/documents/news/2014/mar/eu-com-gamm-implementation-2012-2013.pdf>.

⁸⁹ILO (2018).

⁹⁰For a critical study, see i.a., Xiang (2006).

As to whether countries should take up the suggestion of the Secretary-General of the United Nations to legalise a new wave of labour migration through selective admission of migrants on a large scale (setting an annual quota is one option) is yet another question. An argument often invoked against that suggestion is the persistence of worryingly high unemployment rates, and not only among those with low or no educational qualifications. Moreover, in certain countries, the enduring labour market discrimination against migrants over decades, if not over generations, would require that in the short term, the primary focus remains on available but unused workers on the domestic labour market.

Policy measures must be put in place for people with migrant background, be they newcomers or second- and third-generation migrants, among whom the unemployment rates are worryingly high, for instance, in much of Europe. That is mainly to ensure more stable prospects for entering the labour market.⁹¹ Refugees and newcomers who have been recently recognised under family reunification programmes in several European countries (see below), as well as the thousands of those who remain in 'legal limbo',⁹² significantly expand the domestic labour supply and should, therefore, not be overlooked. Beyond that, the recent enlargement of the EU, which allows free movement from the new Member States, raises new issues. Admitting new waves of migrants will, in any case, also require a policy that works towards creating the necessary conditions for equal and attractive opportunities for newcomers at various levels. This is true not only for the labour market but also for other life domains, among others, access to housing, health services, schooling, and some basic services, as a way to ensure better and more sustained participation in society.

The economic and political contexts are closely linked. Several reports indicate that migratory flows and their consequences are at the centre of many public debates today. Strikingly, in discussions, the issue is often linked to the various kinds of migratory flows involved. Some migrations or groups of migrants are perceived as more problematic than others: the Chinese living in New Zealand and Japan, the Venezuelans in Colombia or Brazil in light of the recent economic crisis, and the Haitians in the Dominican Republic constitute 'undesirable' groups.

The detailed statistics that several national reports provide are enlightening and reveal the interaction between migratory patterns and the demographic dynamics of immigrant populations. In contexts where the (majority) society has not yet developed an affinity towards the migrant population—whether historical, social, cultural, ethnic, political and/or religious—government efforts to legitimise the migration policy are challenged by vocal demands from different groups to limit certain forms of immigration. In this context, several national rapporteurs have sought to connect the history of migratory flows—in terms of their nature and scale—to the migration

⁹¹Wrench et al. (1999).

⁹²Migrants who stay in 'legal limbo' situations cannot be expelled due to legal and practical obstacles, and at the same time, even as they are (still) left without a stable residence permit, they benefit from a more or less formalised policy of tolerance.

policy currently being pursued by the country's legislative, administrative, and legal authorities. Depending on the priorities set, the question of residence of foreigners (arriving/leaving) can be approached either in a particularly restrictive way or with greater flexibility. As the Greece Report shows, the sudden uncontrolled and large migration flows of third country nationals into Greece, a country with no prior experience with immigration policy, together with a challenging economic situation, is key to understanding why a significant part of the Greek society views the reception of new migrants negatively.

5.4 *Restrictive Policies on Migration*

Most countries resort to sanctions to distinguish between 'desirable' and 'undesirable' migrations as a way to reassure the majority society. A striking development of our time is that, in several countries, the regulatory instruments for enforcing migration policy have significantly expanded since the mid-1980s, both to manage migratory movements and combat illegal immigration.

The proliferation of ever more restrictive policies has given rise to a trend towards 'criminalisation of migration law',⁹³ i.e., a trend that criminalises irregular migration by imposing sanctions for infringements of rules on residence or stays under *criminal law*. Illegal residence, in and of itself, is not necessarily a criminal offence, as we explain above (see *supra*, Sect. 1). However, ever more frequently, states have resorted to criminal law and traditional law enforcement to deter a surge in migrants and migration in general. At the same time, deterrence measures intended to target those who abet and assist the unlawful entry of a foreigner or the extension of an illegal stay (such as 'slumlords', human traffickers, people smugglers, those employing foreign workers in an irregular situation under exploitative conditions) sometimes end up targeting the undocumented migrants instead.

Some countries have introduced administrative penalties⁹⁴ to allow detaining several categories of unauthorised (or not yet authorised) foreigners for a fixed period (up to a few months) under administrative authority with a view to removing them from the territory. In many countries, the risk of abuse is exacerbated owing to a lack of oversight over the practice of frequent administrative detentions. Court rulings decrying and criminalising such abuses have little effect in practice. In addition to criminal and administrative sanctions, in recent years, countries with a relatively well-developed social welfare system have imposed ever more stringent restrictions on access to social rights for 'undesirable' foreigners. Already in the 1990s, H.B. Entzinger, a Dutch sociologist of law, noticed that the stricter admission policy of more prosperous countries leads to increased border controls, stricter

⁹³Swart (1996), pp. 1–22.

⁹⁴Nasimbene (2001), 602 p.

guarding of physical national borders,⁹⁵ and increased monitoring of access to social welfare.⁹⁶ This means that benefits for foreigners are often struck, leaving them with limited resources and material assistance, as a consequence of which mainly migrants with a precarious legal status, or undocumented migrants, are affected. In effect, the possession of a legal residence permit is increasingly the explicit prerequisite to access the regular labour market, conventional forms of social security benefits, social assistance, and other (semi-) public government services (including welfare and social housing). This situation is referred to as the ‘logic of connectedness’ (in Dutch: *koppelingslogica*). Migrants without legal residency, as it were, are ‘cut off’ from the social security system and denied the right to legal employment, and as a result, they are left with fewer opportunities to acquire the classic social security rights.

Owing to a diverse array of reasons, such as the outbreak of an economic recession, some foreign residents risk losing access to social welfare, or there can be significant cuts in unemployment benefits or loss of jobs altogether, which prohibits them from renewing their work permit to remain in the country. In countries not overly concerned with human rights, one notices that national laws can at times impose a variety of often very harsh sanctions. For instance, foreigners without a long-term residence permit may be restricted from marrying a national or a permanent resident or may require the prior authorisation of public authorities to do so. In addition, women who get pregnant while holding only a temporary residence permit are threatened with repatriation, which could force them to undergo illegal and unsafe abortions. More recently, several countries have started to criminalise ‘sham marriages’ of foreigners with citizens, although this has not come without criticism or its own set of challenges. It is difficult, however, to distinguish between a bona fide union and a sham marriage. Even where marriage has helped one partner to qualify for a residence permit, where securing that right might have been impossible or arduous otherwise, that does not automatically mean that the *sole* purpose of the marriage was to gain legal status in the country. The criminalisation of the so-called sham marriages has also given rise to a culture of institutional scepticism and hostility, in that even genuine partnerships have come under official scrutiny; there have been reports of wrongful raids, delays and detentions without a credible or legitimate basis.⁹⁷

The general trend in many states is, thus, to pursue a policy that keeps so-called undesired migration *out* of the country or develop a path that allows transition to legality, but under predefined stringent conditions. In both cases, the aim is to protect the country’s own economy and social solidarity systems, where these exist, and, thus, to avoid unsettling public opinion. However, the migratory

⁹⁵Albrecht (2002), pp. 1–22.

⁹⁶Entzinger (1995), pp. 142–173; more recently: Jakubiak (2017), pp. 51–70. See also *supra*, Sect. 4.3.

⁹⁷Charlsley (2012), pp. 10–26; Kofman (2004), p. 243; Williams (2010); <https://www.theguardian.com/uk-news/2019/apr/14/couples-sham-marriage-crackdown-hostile-environment>.

pressure is so great today that restrictive legislation and measures, particularly in the more prosperous countries of the world, have scarcely any effect on substantially reducing that pressure. On the contrary, many of those measures serve mainly as symbols, both for domestic use (reassuring their own people that they have matters under control) and for potential migrants (to prevent a pull effect on potential newcomers). As a result, there is a gulf between an increasingly restrictive legislative framework on the one hand (the so-called ‘restrictive’ turn in migration law) and the empirical reality on the other. Furthermore, in countries where such a gulf widens over the years, legal solutions to situations of ‘tolerance’ may emerge.

A country’s *policy of tolerance*⁹⁸ in migration matters, in particular as H. Van Amersfoort qualifies it, refers to situations where public authorities offer a range of temporary regularisation statuses entailing temporary permits to stay or remain on humanitarian grounds. They are sometimes intended for migrants with orders of (forced) removal, generally outside the country’s regular rules of immigration or the asylum procedure and in recognition of the exceptional circumstances. Their removal risks constituting a violation of the obligation to comply with human rights laws and conventions, for instance, of the principle of *non-refoulement*. Or a removal is not possible owing to a lack of personal documents or the refusal of another country to readmit the person. One such status is ‘tolerated stay’ (also see Sect. 3.3.3 on the question of regularisation). Depending on the country issuing it, it is also designated as ‘discretionary/exceptional leave to remain’ (United Kingdom/France), ‘temporary suspension of deportation’ (*Duldung* in Germany), ‘temporary protection from deportation’ (US), or ‘provisional protection’ (Switzerland). The temporary protection comes with different levels of rights. In some cases, it removes certain barriers, for instance, to finding employment, and sometimes it can even become coterminous with the country’s integration policy. The legislative or executive power, depending on the case, may also turn a blind eye, either openly (officially) or more implicitly (unofficial), for fear that intervening would make no difference or even exacerbate the situation. The authorities responsible for intervening may also be perceived as turning a blind eye—out of compassion, as an expression of resignation or powerlessness, or owing to a lack of institutional or state resources. The examples range from overcrowded detention centres to insufficient police force hindering timely law enforcement. In some cases, the decision is left to individual discretion, such as when professional considerations come into play. Thus, physicians sometimes decide to treat an undocumented person who may not be entitled to publicly funded medical care. As mentioned, in the US, where a political consensus on immigration reform is yet to be reached, the question of providing access to medical care to the most vulnerable categories of the migrant population remains fraught as they not only lack health insurance but are often also excluded from relief packages.⁹⁹

⁹⁸Van Amersfoort (1995), pp. 243–257.

⁹⁹<https://hms.harvard.edu/news/care-undocumented-immigrants>.

For many immigration countries, ‘tolerated stays’ represent a daily reality due to a range of factors: insufficient capacity to house undocumented migrants (whose detention conditions are sometimes in violation of human rights laws); inadequate capacity and pathways to effectively combat human trafficking or sham marriages; the impossibility to return people to countries that refuse to cooperate (deemed ‘unremovable’ foreigners); and, not least, the prevalence of the workplace abuses mentioned above, where foreigners with precarious status are often hired to do heavy or unpaid labour, with no regulatory oversight.

The continuing presence of relatively large groups of irregular and clandestine foreigners, albeit contrary to the law, impelled many countries in the 1990s, including those in Europe, to take recourse to regularisation campaigns.¹⁰⁰ Although the concrete modalities of such campaigns differ from one country to the next, the total number of undocumented migrants who were able to obtain the legal right to reside via such a campaign between 1980 and 2000 is estimated at more than two million for the entire EU.¹⁰¹

The political context is significantly different for countries that attract migration and those that see their nationals emigrate; within the former group, a further distinction should be made between attracting desirable and undesirable migration (as mentioned above, in Sect. 3.3). It is principally in countries that attract migration that one sees how policy seeks to navigate between a stricter approach to infractions against the law governing the admission and residence of foreigners on their territory, on the one hand, and the reality of these infractions, on the other, which cannot be tackled simply by introducing more restrictive measures. The matter is politically highly sensitive, in particular in countries where migration is widely seen, first and foremost, as a ‘problem’, fearing that a continued, large-scale migration will, in the long term, undermine the future prospects of a (prosperous) society. This position stands in sharp contrast to the above-mentioned standpoint of the United Nations Secretary-General. Policymakers in countries of immigration are, thus, facing the challenge of finding the right balance between ensuring, often through restrictive legislation, that migration does not threaten the country’s well-being and its social cohesion on the one hand and fostering a certain degree of flexibility and tolerance for foreigners on the other by providing for more permeability. Increasingly, the latter is linked with the protection of the human rights of migrants and newcomers, a concern that has helped shape the debate on ‘law and migration’ worldwide in the past 50 years.

¹⁰⁰See i.a.: De Bruycker (2000); Spencer and Triandafyllidou (2020).

¹⁰¹*Ibid.*

5.5 *A More Protective, Human Rights-Driven Approach to Migration?*

The principle underlying the majority of legislative instruments for regulating migration is the optimisation of control of cross-border personal mobility. To that extent, the legislative approach to migration is first and foremost *functional*. Depending on the political and economic agenda of a given country, that control is intended both to *counter* migration, especially of the ‘undesirable’ kind, and *promote* a ‘desirable’ kind of migration. Within that logic of migration governance, the human aspect takes a back seat. However, at least partly due to the growing impact of human rights protection on national migration policies, an overly functional approach to migration has come under fire.

As most national reports indicate, respect for the *protective* role of the fundamental rights of migrants enshrined in international instruments and case law has grown in recent years. Known exceptions are countries like Singapore, which do not deny privileging economic efficacy over respect for the rights of non-nationals.

For migrants in precarious and irregular situations, the human rights framework might allow enlisting the help of competent authorities (local, regional, and national/central) and other public services, as well as the cooperation of migrant advocates and migrant-led initiatives to reach a solution that respects their fundamental human rights. Often, this commitment must be negotiated, and where necessary, it may be imposed by judicial means. In addition, courts and tribunals themselves may intervene to tackle the different, frequently challenging and intricate aspects of the situation: admission and residence, the right to family life, access to work and a profession, salary protection, acquisition of nationality, protection against unjustified detention and removal, etc.

Several national rapporteurs carefully demonstrate how this commitment to the protection of human rights has been implemented within their country’s domestic law and how, with a greater or lesser degree of friction, the relevant international instruments and case law concerning the fundamental rights of migrant persons have been transposed into binding law. The principle of respect for human rights in migration matters makes it possible either to classify a person administratively as ‘unreturnable’, or, to name but two possibilities, grant him or her subsidiary or temporary protection. But that depends on the particular circumstances and is applicable to people fleeing their countries owing, *inter alia*, to environmental disasters, and thus would qualify as environmental and/or economic refugees.

Several national reports pay particular attention to court decisions that have denounced certain dysfunctionalities within the public administration, thus paving the way for a more protective approach, in effect, suggesting a new interpretation of the rules that apply. In countless proceedings before national and supranational courts or international fora, one can see how the world over, and in Europe in particular, migrants—or bodies and organisations defending their rights—invoke human rights to appeal against administrative measures such as detention or

repatriation, withdrawal or the non-issuance of a stay permit, refusal of family reunification, etc.

The applicability of a human rights claim is not assessed *in abstracto*. In practice, the claim is examined with careful attention to the question of whether, and if so, to what extent, a fundamental right has been violated. The outcome will depend on what takes precedence in the opinion of the court where the application is lodged: the administrative measure that serves the aims of the policy in place that could be restrictive and centred on issues of state sovereignty and border control, or, for that matter, the fundamental rights invoked by the foreigner(s) concerned. In recent years, the case law in Europe has made significant breakthroughs on the human rights of minors and foreigners who find themselves in situations of medical necessity. Courts have repeatedly ruled that a straightforward application of restrictive measures in the case of minors is incompatible with the human rights standards for protection. This also applies to the detention of minors without a (valid) residence permit on administrative grounds or the practice of forcing them to stay in a closed centre ‘as a measure of last resort’. In some countries, minors without a valid residence permit are (expected to be) admitted to school.

Principles concerning fundamental rights developed by the case law might be enshrined in legislation subsequently, but, clearly, that does not happen systematically. Thus, without wanting to sound too pessimistic, one cannot but notice that the impact of the case law on human rights protection in the field of migration so far, has turned out to be somewhat *ad hoc* in nature.

The national reports address some aspects of the subject that encompasses a great diversity of situations to which human rights apply. However, generally, the reports have concentrated on studying the available legislation and case law and do not take stock of *all* the practices that might constitute a violation of human rights. By way of example: Are fundamental rights systematically taken into consideration in the legal aid offered to migrant persons when they make a request or lodge a complaint? Are migrants correctly informed of their rights and obligations and the appropriate procedures and forms of recourse? Are they, where applicable, directed to specialised institutions or services? These and other questions could not possibly be systematically assessed.

Several reports are critical of the overall domestic situation: the situation of certain categories of migrants when it comes to employment—particularly undocumented migrants or those in a precarious residency situation—is far from what the legislative texts would make one believe. Even where a state is considered a pioneer in granting human rights and protection to vulnerable migrants, the national reports take stock of serious divergences in practice. In addition, the reports decry other situations which are alarming from a human rights perspective: the poor treatment of Haitians in the Dominican Republic, the conditions under which foreigners are detained in South Africa as well as serious flaws in managing the asylum process in several European countries, or the severe restrictions imposed by various laws on workers with a temporary residence permit (Macau, Japan, Singapore), to give but a few examples. Why that might be is explored in further detail in the section below.

6 A Comparative View: Factors Influencing a Country's Migration Policy

Sometimes it may not be possible for countries to pursue a national policy that is at variance with certain international commitments and agreements or independent of external frameworks and decisions of supranational judicial bodies. As already mentioned, countries may also have to respond to extreme events or situations, such as political upheavals, environmental catastrophes, economic crises, or tensions between religious or ethnic groups that result in a massive influx of migrants and asylum seekers at specific points in time. However, generally, a complex mix of factors offers a rich backdrop to explore how countries might forge a distinct migration policy at different times. Aside from the economic considerations mentioned above, the national reports identify at least *four* other broad areas that impact, or stand in tension with, how a state regulates contemporary forms of cross-border migration—on its own territory and in relation to that of others:

- the impact of geography on expressions of state sovereignty (Sect. 6.1);
- the impact of history in the contemporary era (Sect. 6.2);
- the impact of political environment on a state's approach to cross-border mobility (Sect. 6.3); and finally,
- the impact of a country's compliance or non-compliance with international human rights law on the status of vulnerable migrants (Sect. 6.4).

We take these areas as *points of departure* to analyse, country by country, some aspects of migration law that touch on central concerns raised in each of the reports. Mainly, we seek to open up further perspectives for reflection on the law and its response to the realities of international migration today.

6.1 Geography and Sovereignty

Perhaps the most common feature inherent to any discussion on national sovereignty is the territory over which a state exercises its sovereign power. Not the only force at play, the question of territory, and thus of geographic space, inevitably enters the fray in establishing the criteria for who may enter or exit (and how), reside or work (and for how long) on a state's territory and what visas, work permits, or other documents must accordingly be issued in line with those hierarchies and distinctions. Although geographic spaces are natural configurations, borders and boundaries defining a state's territory might shift due to wars, conflicts, colonial occupation, reunification, regional integration or dissolution. Shifts may occur in how these lines of demarcation and, thus, the country's environs, are imagined, perceived, and explored over time. A country's migration law might register these shifts in meaning or, equally, it may confer new meanings on the bounded spaces under state jurisdiction. For that reason, geography's effect is foundational and cumulative,

reverberating into the present and the future. However, it is also unpredictable in that boundaries, alliances, and adjacencies can be reconfigured legislatively with long-term consequences, sometimes disregarding respected norms. The countries featured in this section are select territorial entities that embody characteristics of island states whose legal regimes on migration build on or contend with varying forms of insularity and levels of vulnerability.

As a nation spread over an entire continent whose territories can be accessed only by air or sea, Australia, for instance, controls pivotal aspects of its immigration policy and 'immigration in all its incidents'. Australia became a nation in 1901 on a territory that is home to hundreds of the world's oldest continuous indigenous cultural groups by consolidating six British colonies, introducing a 'White Australia Policy' to halt non-European immigration until that policy was dismantled in stages after World War II. Migration to Australia thereafter became culturally and ethnically diverse, so that more than a quarter of its total population today is foreign-born. However, according to the report, the national discourse on migration still supports 'the notion that immigration can and should be strictly controlled'. This is possible because Australia's Parliament is vested with relatively broad constitutional powers to legislate on immigration and naturalisation as well as on the status of aliens i.e., without a constitutionally entrenched Bill of Rights or a national body empowered to oversee compliance with international standards. Australia is a party to a range of human rights agreements, but it has reserved its progressive family migration policies and generous humanitarian programmes only for refugees with a valid visa: those without one are 'deprived of even the most basic human rights'. Its offshore processing practices, arranged bilaterally with the neighbouring Pacific Island states, ensure that even recognised refugees will not be resettled in Australia. These arrangements are also based on 'non-binding diplomatic assurances' that asylum seekers will not be sent back to countries where they would likely face persecution, which makes the compliance of those states with international law difficult to monitor and enforce.

The immigration and asylum law of New Zealand, approximately a three-hour flight away from Australia, is 'largely shaped by geography': its insular remoteness and an 'efficient monitoring and enforcement system' deter irregular arrivals by sea and allow the country to 'choose' its migrants and refugees. However, its demographics and citizenship policy are 'the legacy of the British empire'. Immigrants come 'disproportionately' from the old Commonwealth countries, especially from Britain, and may be 'popularly assumed not to need a visa' despite many factors: New Zealand's 'definite turn to China and Asia in terms of trade', an immigration system that favours skills, and its 'considerable contact' with, and special immigration arrangements for, people from the smaller South Pacific islands (whose inhabitants, however, New Zealanders 'generally regard as foreigners'). However, the notion of a 'White New Zealand' policy is 'less widespread', according to the report, due to New Zealand's 'official biculturalism' and its explicit concern for the Māori, the indigenous Polynesian settlers from the fourteenth century, the second-largest ethnic group in New Zealand. In due part to the safety provided by its insular geography, New Zealand is 'generally well-disposed' towards upholding human

rights and humanitarian laws, and its judiciary, legislators, and the public are ‘not resentful’ of the international obligations, nor view them ‘as external constraints’. That is critical as ‘elements of protective and human rights legislation that are accepted and taken for granted in Europe do not exist in New Zealand’.

Embedded in a contrasting setting, Singapore—an island city-state comprising the island of Singapore and an archipelago of many islands within its territorial waters—has ‘fairly porous’ borders, is ‘easy to visit’ and ‘fairly easy’ to immigrate to. Once a thriving British colony when the British ‘open-door policy’ to the migration of Chinese, Malaysian, Indian and Indonesian labour permanently changed the country’s demographics, Singapore continues to rely heavily on immigration at all levels and in all sectors of its fairly open, high-income economy. Yet the sharp distinction that Singapore’s regulatory framework draws between workers based on skills, while standard practice, ensures that low-skilled and unskilled economic migrants are eligible only for a ‘Work Permit’ and blocked from access to citizenship. This segment faces severe exploitation, abuse, and social discrimination, including restrictions on marriage even after termination of the work contract, and lacks legal recourse or the right to strike. Compared to many countries with strong economies, Singapore stands out because of its relative legal insularity: It has not ratified key ILO agreements on the rights of migrant workers, and the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers, to which it is a signatory, is non-binding. Moreover, civil society responses to ensure justice and fairness, and governmental measures to improve mobility conditions, have not resulted in a ‘strong justiciable rights-based approach to economic migrants’. All that renders this category invisible and highly vulnerable in a high-income economy. More recent (2021) regulatory changes seem to suggest that foreigners are ‘not as wanted as before’ in Singapore.

Although not a state, Macau—comprised of two islands and the Macau Peninsula, which shares a narrow border with mainland China—presents a unique combination of proximity and insularity. A Portuguese-administered territory until 1999, it was transferred to China as the Special Administrative Region (SAR) of the People’s Republic of China under the principle of ‘one country, two systems’, guaranteeing a relatively high degree of autonomy until 2049. Macau’s constitutional document, the Basic Law, derives from ‘diverse legal heritages’, mainly Portuguese law, with some influences from China and Hong Kong. Thus, separate rules apply in Macau’s immigration law for Chinese and Portuguese nationals and Hong Kong permanent residents regarding entry and right of abode. Macau can independently control its external borders, enter into ‘visa-related agreements’ with foreign states and regions, become a signatory to international human rights treaties, several of which Macau has ratified, and regulate the terms of permanent and non-permanent residency. However, permanent residency is the closest non-citizens in Macau can come to securing citizenship: ‘Permanent residents have political rights, such as the right to vote and to be elected to public office and . . . a broader range of social benefits than the non-permanent residents’. The report argues that the mainland’s top authorities increasingly dictate the ‘one country, two systems’ arrangement. As a result, Macau’s autonomy, or even the East/West blend of perspectives, remains contingent and cannot be taken for granted.

Malta's geographical and geopolitical environs are still evolving. As an island-state on the Mediterranean Sea that 'bridged East with West and North with South', Malta was once a 'target of colonial interests'. Since acceding to the EU in 2004, its location on the EU's geographical fringes as a 'frontline state' has taken on new meanings, weight, and urgency, notably after April 2015, when over 800 migrants perished in the Mediterranean Sea in an attempt to reach the European shores. Malta joins other frontline states—Greece, Italy, and Spain—in continuing to demand that the EU 'play a greater role' in sharing the responsibility for taking in migrants who land on their shores. This resulted in two relocation programmes in 2015. However, such concerns do not fully overlap with those closer to home, which Malta's migration policy must address. Local understandings of the colonial invasions and the view that Malta's human rights obligations are 'imposed', due to its size and vulnerability, distract from deeper concerns, among others: Malta's continued reliance on the 'Roman Catholic principles of charity and support' rather than on an 'established legal framework of human rights', its detention and regularisation policies, the treatment of undocumented migrants, a general lack of awareness of existing legislation, its broad discretionary practices on the immigration front, inconsistent adherence to provisions of international law, frequent stalemates between Malta and Italy, and the need to nurture links with neighbouring North African countries. However, as long as Malta remains synonymous with border control and 'the first point of entry for asylum seekers', its structural deficits affecting many groups of migrants will be ignored.

6.2 History and Accelerated Globalisation

Regimes of migration law might evolve in response to diverse histories as legacies—to protect, defend, or maintain them, or in equal measure, to challenge, redress, or depart from them as more pressing issues or powerful currents in the contemporary era could supersede in relevance, giving rise to new trends, trajectories, and approaches. In the aftermath of the World Wars and independence movements leading to a crumbling of empires, Europe sought to turn the corner. The European countries featured in this section have progressively acceded to varying levels of Europeanisation of regulation and agreed (with greater or lesser reluctance or equanimity) to a suppression of systematic internal border controls. As they crossed the threshold of a time frame once marked by wars and regional conflicts to explore the pull towards 'common developments', these countries also acknowledged the increasing significance of cooperation through regional and international treaties. The years and decades immediately following the end of World War II were marked by shifts in the role states played in a world characterised by rebuilding, increasing levels of mobility, global interdependence, and a search for fresh future options. In Europe, migration policy was a collateral development mediated by domestic economic needs and regional and global influences. Increasingly now, the notion of a

shared development also suggests a common trend towards national solutions and a need to engage with more local circumstances and sensibilities.

Immediately after Germany's defeat in World War II and the emergence of two new German states seeking to break with the Nazi era', each adopting a 'one German nationality' rule, both Germanys welcomed large numbers of postwar refugees and expellees. With the right of asylum firmly incorporated into its provisional Basic Law of 1949, West Germany received migrants and refugees with 'German (blood) links' or a legal claim to German citizenship: East Germans from the former GDR and ethnic Germans from Central and Eastern Europe in the 1980s. The trend continued after reunification (as the right of asylum was retained upon reunification) with the arrival of the so-called *Spätaussiedler* from the former Soviet Union in the 1990s. In that sense, the large influx of refugees into Germany since 2015 is not unprecedented, and asylum seekers are viewed more sympathetically through the postwar humanitarian lens. Despite this rich history of migration, Germany's standing as a country of immigration was formally confirmed only with the new immigration law of 2005. Germany's support for a key role in the EU harkens back to the establishment of the European Communities after World War II. The parallel aim to restrict the 'influx' of third country nationals (Residents Act), apparent in its disjunctive migratory scheme, also reveals a general denial of the 'need to attract' foreign workers at all levels and the tendency to curb 'the much-debated right to family life', which dates back to the postwar policies restricting family reunion for 'guest-workers'. Fears about 'migration into the social security system' still dominate debates and influence migration policymaking in today's Germany.

In contrast to Germany's role in the World Wars, in the Cold War, and subsequently in the EU, Switzerland's stance was relatively neutral. For long, a country of emigration, although humanitarian admission of foreigners (especially religious refugees) was already an inherent part of its history, Switzerland became a country of immigration only as its economy began to expand. The Federal Constitution of Switzerland stresses the values of 'common welfare, sustainable development, internal cohesion and cultural diversity', reflecting the main features of Swiss history and its multilingual society. Similarly, Switzerland's approach to immigration is also rooted in history. Beyond the involvement of the national and cantonal authorities, the Swiss migration governance system also requires direct civil-society participation (direct democracy) in keeping with a system that was in place well before it became a federation in 1848. The Swiss voted against the EEA accession in 1992 but in favour of an association with the Schengen *acquis* and the Dublin *acquis* in 2005, owing to which Switzerland is part of the Schengen area since December 2008. As the report summarises, the effect is visible in the current migration scheme: on the one hand, the freedom of movement of European workers, on the other hand, 'a stringent admission policy' for third country nationals coupled with 'a restrictive interpretation' of the refugee definition and 'a relatively liberal approach' to other forms of protection that, however, 'often do not allow for permanent inclusion into society'.

Belgium has been a country of immigration for decades. Having started to sign agreements with Southern European, Mediterranean and Eastern European countries

to attract migrant workers as early as in the 1940s, one-fifth of its population is currently of migrant origin. However, the Law of 15 December 1980 (Aliens Act) introduced a decisive break, signaling a ‘substantial shift towards a rights-based approach to migration’ and leaving behind an era of a more discretionary handling of migration on a case-by-case basis. Linked neither with ‘its industrial and colonial past’ nor ‘its market economy’, Belgium’s shift reflects its geopolitical development as an EU Member State and, more importantly, as host to EU and other international institutions. The resulting EU legislative harmonisation process in asylum and migration matters has reshaped the Aliens Act since the 2000s and enhanced its receptivity to international legal standards. However, Belgium’s efforts to fulfil its EU commitments through a ‘copy-paste transposition method’ for the EU Directives on asylum and migration aim to ensure ‘continuity, efficiency and security’ rather than a comprehensive modification of the Belgian legal framework. In ‘successive phases of reform’, Belgium has also securitised its legal regime towards protecting its welfare system and finances, reducing risks to public order, and safeguarding the prevalent cultural identities. An added consequence is the ‘complexification’ of the legal framework, which stems from the ‘multiplying’ legal regimes on family reunification and an unprecedented spike in ‘inadmissibility grounds’, almost normalising ‘legal limbo’ situations for asylum seekers. According to the report, the next set of reforms must reconfigure the direction of migration law to ‘address contemporary challenges of migration and mobility’.

The example of Greece illustrates how Europeanisation has impacted the legal order of a Member State that was once a country of emigration, for it represents the external border of a free-movement region today. As a frontline EU Member State hosting hotspots (first reception facilities) and a transit point to the other Member States, Greece has inherited considerable border management responsibilities.¹⁰² As its immigration patterns changed dramatically, and irreversibly, after joining the EU in 1981, Greece was challenged by the lack of a pre-existing comprehensive legal framework, the slow pace of migration policy reform and implementation, and the continuing emigration of its highly skilled workforce. Following the arrival in significant numbers of ethnic Greeks and economic migrants in the 1990s from the former Soviet Union and the Balkans, the subsequent waves of migrants to Greece

¹⁰²See: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623563/EPRS_BRI\(2018\)623563_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623563/EPRS_BRI(2018)623563_EN.pdf). The ‘hotspots’—first reception facilities—aim to better coordinate EU agencies’ and national authorities’ efforts at the external borders of the EU, on initial reception, identification, registration and fingerprinting of asylum seekers and migrants. Currently, only Greece and Italy host hotspots. Also see: C. Ziebritzki & R. Nestler, ‘Hotspots’ an der EU-Aussengrenze. Eine rechtliche Bestandsaufnahme [Hotspots at the EU External Border. A Legal Survey] (Working Paper), Max Planck Institute for Comparative Public Law & International Law – Research Paper Series, Heidelberg, 2017. The national report on Greece, included in this volume, sees the problem thus: ‘The safeguarding of national borders in a country, such as Greece, with so many island coasts and with a ‘difficult neighbour’, such as Turkey, is impossible to be achieved, without the cooperation of competent EU organs, when the alien population entering the Greek territory during the last 5 years are, in most of the cases, asylum seekers who must be protected until their request is finally resolved’.

comprised mainly undocumented third country nationals fleeing war, unrest, hunger, and persecution from South Asia, the Middle East, African countries and, more recently, from Syria. For the latter groups, Greece has mainly been a ‘pit stop’ to other European countries, and as the report shows, their flow into other parts of Europe has not been straightforward. The intention to better coordinate the local and EU efforts towards managing the flow of asylum seekers within the EU through reception centres has been abdicated in favour of ‘returning’ asylum seekers under the so-called EU-Turkey Statement.¹⁰³ Despite the introduction of legislative and policy innovations, especially to facilitate the integration of ethnic Greek and second-generation migrants, the example of Greece raises concerns about serious human rights violations in and around the hotspots that have effectively led to a deprivation of civil liberty.¹⁰⁴

Like Greece, Norway became an immigration country only after it began to Europeanise and internationalise its migration policies, however, on different terms. Despite having to refuse EU membership following the 1973 and 1994 referendums, Norway decided to cooperate with the EU on asylum and migration matters when asylum and family reunification applications spiked in the 1990s. Although not legally bound, Norway implements various CEAS-instruments and, accordingly, the leading human rights instruments were incorporated into its 1999 Human Rights Act. As the report puts it: ‘The Immigration Act is a clear example of the legislative internationalisation and Europeanisation of Norway’. Non-binding ECJ decisions are, for example, also given due consideration both by the domestic courts and the Norwegian administration. Similarly non-binding, the EU Family Reunification Directive forms a part of its Immigration Act as immigration to Norway primarily relates to family reunification. However, some consider Norway’s reliance on some more restrictive European policies on asylum and

¹⁰³The aim of the EU-Turkey Statement of 2016 was that every person arriving irregularly (i.e., by boat, without official permission or passage) to the Greek islands—including asylum seekers—would be returned to Turkey. In exchange, EU Member States would take one Syrian refugee from Turkey for every Syrian returned from the islands. That allowed the European states to externalise their borders and reduce the number of refugees arriving on their territories. The European Court refused to decide on the compatibility of the Statement with international law, considering that ‘the EU-Turkey statement . . . cannot be regarded as a measure adopted by the European Council, or, moreover, by any other institution, body, office or agency of the European Union . . . the Court considers that, even supposing that an international agreement could have been informally concluded . . . , that agreement would have been an agreement concluded by the Heads of State or Government of the Member States of the European Union [but not by the EU] and the Turkish Prime Minister’ (General Court, *N.F. v. European Council*, T-192/16 [2017], para 71–72, confirmed by ECJ, C-208/17, C-209/17 and C-210/17 [2018]). See Carlier et al. (2020b), pp. 59–62.

¹⁰⁴www.infomigrants.net/en/post/8977/deprivation-of-liberty-in-greece-under-the-eu-s-hotspot-approach. In fact, in its 2021 report, Human Rights Watch has criticised Greece’s asylum containment policy, the continuing abysmal camp conditions even after the fire on Moria camp, Europe’s largest refugee camp, and a legal framework that exposes refugees to ‘greater risks of deportation and longer periods of detention’. Available at: <https://www.hrw.org/world-report/2021/country-chapters/greece>. Also see the June 2021 press release of Medecins Sans Frontieres: <https://www.msf.org/greece-and-eu-must-change-approach-migration>.

migration (on irregular migrations, fast-track procedures, withdrawal of temporary work permits for undocumented asylum seekers, and stricter return policy) ‘undemocratic’ and as a ‘ceding’ of sovereignty. After a surge in asylum applications in 2015 and 2016, Norway decided to tighten its asylum rules without consulting with civil society and human rights organisations. The report warns that Norway’s policies on migration ‘could prove to be among the most restrictive in Europe’, notably, with severe consequences for children in detention, unaccompanied minors with temporary permits and long-staying children who could be forced to return.

Although an EU Member State, Denmark has responded to the waves of migration in the recent decades and the need for highly skilled workers with a ‘pragmatic and eclectic’ migration policy that is not always in line with EU policy. Frequent legal amendments, scattered legal sources across several national and international legal texts, and an accelerated migration policy that offers ad hoc ‘here-and-now’ solutions have not only resulted in reduced transparency but also delayed enforcement and generated ‘errors in interpretation’. According to the report, the ‘principle of legal certainty for immigrants’ is additionally at risk ‘under the pull’ of anti-immigration politics. The perception that Denmark is a ‘small nation-state with a high degree of cultural homogeneity’ contrasts with a more extended Danish history of immigration that has been responding to global historical events since World War I. The new Aliens Act of 1983, which provided a broader definition of refugees than international conventions, a new ministry handling immigration matters, and municipal authorities entrusted with integration, offered the framework to manage the migration flows resulting from wars, conflicts, and political upheavals in the 1980s and 1990s. By 2001, however, the growing heterogeneity of the Danish population also overlapped with legal measures restricting access to citizenship and family reunification for third country nationals and a broadened requirement for proof of integration (accompanied by a more challenging citizenship test introduced in 2015). As the report concludes, at this point, Denmark is ‘not committed’ to supranational coordination and legislation in migration matters and risks breaching the country’s international obligations.

6.3 Radical Political Changes and Re-Envisioning the State

The third factor influencing a country’s immigration law and policy is its political environment: the status of its political, social, judicial, and educational systems; attitude to broader reforms and compliance with laws, constitutional norms, international law and agreements; integration efforts and bilateral relations; influence of supranational and international organisations; strength of political will; quality of media coverage; and not least the resultant political climate. All the reports in this volume affirm the importance of building an enduring political environment (due to its inherent fragility) that underpins policies and positions adopted by its law-makers in migration matters. The countries featured in this section underwent, or still are undergoing, radical political changes, forcing them to re-envision the state and

the society they represent—also through their migration policy. Around the 1990s, new political and social orders emerged in different parts of the world with a string of upheavals that led to the fall of the Berlin Wall, the disintegration of the Soviet Union and former Yugoslavia, and the culmination of the Cold War. The apartheid in South Africa ended around the same time, putting a stop to centuries of institutionalised white supremacy and opening South Africa to global influences. More recently, many parts of the Global South have seen increased volatility, by way of example, the political and humanitarian crisis in Venezuela. The UK's departure from the EU after the 2016 EU referendum on the withdrawal of the UK's membership in the EU dealt a shock. Today the UK represents another state seeking to reassess its present and reimagine its future, but like many countries featured in the volume, with limited tools of foresight.

Croatia had to re-envision itself as a state after gaining independence from former Yugoslavia in 1991 and following a referendum in 2012 that gave it the mandate to accede to the EU in 2013. Seeking to build a new country based on democratic principles and sustained economic development, Croatia has embarked on an extensive reform of its migration law regime to harmonise national legal provisions with the EU *acquis communautaire*. As the report puts it: 'Neither easy nor smooth, this process is still ongoing'. The requirement to bring domestic legislation in the area of migration law in line with EU law has resulted in what the report terms as 'over-normativity', essentially in conflicting rules, legal gaps, complex administrative procedures and an opaque quota system. While Croatia aims to focus on facilitating migration flows to meet its economic and labour needs, guaranteeing social rights to migrants and aiding in their integration, its migration policy has yet to detach from its overarching focus on security and migration control. Migration matters now come under the purview of the Ministry of the Interior—'not fully in line with the EU trends', and as a relatively new branch of law, Croatian migration legislation has yet to find a 'balance between migration control and facilitation of migration flows' to address 'pressing issues', among others, health protection for migrant workers, gender-gap in work permits issued, workplace abuse of irregular migrants, discriminatory treatment of migrants, lack of integration and language courses for migrant workers and members of their family members.

Despite the end of apartheid in 1991 and the emergence of a democratic South Africa in 1994 with a constitutional transformation heralding 'a new era of human rights and legislation', South Africa 'never fully embraced a rights-based approach to migration'. In a post-apartheid era, characterised by high levels of poverty and unemployment, as well as a spike in refugee numbers, South Africa's migration policy has 'retained some features of the apartheid system' that place restrictions on African migration. As a prime destination for migration on the continent, it opposes regional cooperation, including on migration. As the report argues, this has obstructed the idea of free movement of persons in SADC and hampered economic development in the region, while also failing to address the economic needs of its citizens. Instead, South Africa has favoured 'bilateral agreements with each of the other fourteen SADC member states to manage and facilitate cross-border movements', however, also implementing policies and practices that

largely reflect ‘attitudes of the domestic constituency’, mainly among those segments that have not benefitted from the end of apartheid. Thus, the ‘gap between law and practice has widened’, resulting in a large-scale abandonment of the rights-based migration management practices set up during the country’s transition to democracy towards a form of ‘securitised migration’. Irregular detention practices abound, and there is limited monitoring, with such illegal practices ‘framed in security terms and explained broadly as preventing illegal migration’. Even anti-trafficking measures ‘are linked to security goals rather than support for victims’, with corruption a ‘regular feature of border crossing’. As the report concludes, ‘securitisation may, in fact, be undermining the country’s migration management goals’.

Whereas some countries that once were characterised by high emigration levels are now largely countries of immigration, Venezuela, in contrast, has had to weather multiple crises and register stark developments in the opposite direction.¹⁰⁵ Venezuela’s constitutional and legal regime, as laid out in the 2004 Aliens and Migration Law and the 2001 Organic Law on Refugees and Asylees, emanates from the constitutional tradition of the American countries, which are ‘historically considered nations of immigrants accustomed to receiving flows of foreigners and to fostering their integration into society’. However, this body of laws based on democratic principles, the rule of law, and separation of powers has ‘not always been [deployed]... according to the rule of law... even granting [citizenship] for political convenience’ without the possibility of exercising any review, administrative or judicial, ‘of actions taken by the competent contentious administrative courts’. Moreover, since 2014, Venezuela has seen mass outmigration in unprecedented numbers due to a humanitarian crisis resulting from severe political and economic upheavals, which has led to rampant food shortage, runaway inflation, and health crisis. That has ‘radically transformed the traditional character of Venezuela as a country of immigrants’. Remarkably, Colombia served as both a primary destination and transit country for the tides of documented and undocumented Venezuelans, whereas Venezuelans had welcomed millions of displaced Colombians fleeing civil war since the 1990s.¹⁰⁶ Notwithstanding this more recent history of outmigration in Venezuela, we have included the report submitted for the 2014 IACL Congress in Vienna without assessing the extent of its applicability today. As a result, the current political, economic, and human rights crisis in Venezuela, where a stricter border policy confronts Venezuelans fleeing the crisis, is not addressed in the report.

¹⁰⁵For more information on Venezuela and the developments since 2014, see: www.unhcr.org/venezuela-emergency.html; <https://www.theatlantic.com/international/archive/2019/04/un-tents-venezuelan-migrants-colombia/588007/>; www.theatlantic.com/international/archive/2017/06/venezuela-populism-fail/525321/; <https://www.theatlantic.com/international/archive/2019/01/colombia-welcomes-millions-venezuelans-maduro-guaido/581647/>.

¹⁰⁶In February 2021, Colombia announced its decision to grant nearly one million undocumented migrants ‘rights to legal employment, health care, education and Colombian banking services for 10 years’. <https://theconversation.com/colombia-gives-nearly-1-million-venezuelan-migrants-legal-status-and-right-to-work-155448>, <https://www.bbc.com/news/world-latin-america-57070813>.

The UK's recent departure from the EU has given rise to radical political changes within the country, affecting relations with the EU (and its neighbouring countries) with whom asylum, immigration, and border protection still need to be agreed upon in bilateral agreements. According to the report, the post-Brexit immigration system and policy have been 'rendered more complex, volatile and subject to frequent amendments'. The 'stratification of rights and entitlements' for EEA nationals, shaped by the UK's membership in the EU, had 'fuelled discontent' among a sizeable portion of the British public towards the EU's fundamental principle of freedom of movement. Brexit effectively ended both the free movement for EEA nationals (with the new points-based system treating the EU/EEA and non-EU/EEA members equally) and the recourse to Dublin regulation that would have otherwise allowed the UK to return asylum seekers to the EU country where they first filed their asylum application. With the UK's policy response to immigration becoming increasingly more selective, new tensions have emerged between the state's powers and the national courts on the question of immigration control, as the UK's immigration policies continue to be 'influenced by political ideologies and economic considerations', if not increasingly so, and the judicial approach still is 'inspired by European fundamental rights'. However, the 'scale and effect' of these developments remain 'obscured', as the transition period has overlapped with the Covid-19 pandemic.

6.4 Discrimination, Stigmatisation, and the Human Rights

Countries diverge in the extent to which they recognise international human rights as binding, assume the obligation to respect and fulfil them, and protect individuals and groups against human rights abuses by implementing policy and legislation reflecting these obligations. Beyond the degree of their compliance with international law and human rights, divergences in how they regulate migration—more or less restrictively—can also arise at any given time depending on the shifts in societal attitudes towards the vulnerable segments of the migrant and undocumented population. In greater or lesser depth, many national reports recount that discrimination in migration and nationality laws based on race, religion, class, or gender have rendered migrants and displaced populations highly vulnerable, also in ways that are not immediately apparent. Statelessness is one such hidden problem according to UNHCR. As the vast majority of stateless people are born in the country in which they have lived their entire lives, statelessness does not result solely from migration or displacement.¹⁰⁷ However, the fate of asylum seekers, and of persons who are displaced, stateless, and undocumented, hangs in the balance, especially in contexts where immigration is an emotionally and politically charged topic and compliance

¹⁰⁷ www.unhcr.org/ibelong/wp-content/uploads/UNHCR-Statelessness-2pager-ENG.pdf. See also *supra*, 2.1.4.

with human rights obligations is low or optional. It may also perilously hinge on the caprice of election cycles and election results, with enduring consequences. At the same time, undue and unchecked suspicion or distrust towards certain categories of migrants inherent in an otherwise open and well-regulated migration law regime could put these segments in harm's way, as discrimination risks escaping scrutiny.

Taking on the topic of statelessness with heightened urgency, the report on the Dominican Republic extensively details the forms of discrimination inflicted upon undocumented Haitian migrant workers and their Dominican-born descendants. Not eligible to be registered in the civil registry, they are considered 'in transit', a designation ascribed to non-residents and those with irregular status. This status is not limited to Haitian migrants and their families who worked on Dominican plantations and sugarcane fields for decades under deplorable living and working conditions. The problem persists as Haitian migrant workers are called upon to do work Dominicans are unwilling to perform (construction and agricultural labour). Their children, in turn, inherit the 'in transit' status in violation of international law and the critical rulings of international courts. Immigration and nationality laws that deny them the right to basic human rights go hand in hand with discrimination based on racism and xenophobia. The main targets of 'racial profiling' rendered 'in transit' also include Dominicans perceived as Haitians due to skin colour and lack of proper identification documentation. Despite ratifying the most important international human rights instruments, the Dominican Republic is not a party to critical conventions: the two International Conventions on Statelessness and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Moreover, the Constitutional Court of the Dominican Republic has challenged the validity of the international standards set for migrants and the stateless. As the report puts it: the Dominican state perpetuates modern slavery among those on whose contribution to its economy it sorely depends.

In the US, violations of immigration law are increasingly framed as a 'criminal matter' and represent the 'largest category of federal criminal prosecutions in the US'. Criminal law and deportation have been weaponised as immigration management and control methods with greater severity and frequency since 11 September 2001. Enforced actions, including home and workplace raids and audit-based investigations, have led to countless wrongful detentions at remote centres. However, as the report indicates, US immigration law has also 'remained strongly progressive and humanitarian', on the one hand, through measures such as 'acceptance of refugees for resettlement in the US, shelter from trafficking and violence and, most recently, full recognition of same-sex marriages'. On the other, the steady rise in migration-related prosecutions has led to a 'proliferation of counter-conduct'. They represent challenges to governmental actions through legal action, public demonstrations, media campaigns, and 'by lobbying members of Congress and state legislatures'. As no comprehensive immigration reform has been reached since 2013, major policy decisions are instead being made in the judicial and executive branches, even at the municipal and federal state levels. Attesting to the close links

between criminal and migration law, in a historic 2010 decision, the US Supreme Court ruled that attorneys were required to inform criminal defendants of the deportation consequences of pleading guilty so that a violation of that ruling would result in relief for the defendants. Immigration law reform in the US is also linked to the outcomes of the congressional and midterm elections. Thus, it remains to be seen if the Biden administration's executive orders and policies will redress the Trump administration's hard-line approach to immigration.

Asylum seekers arriving irregularly in Canada, by boat or using 'other forms of transport associated with human smuggling', are characterised as 'designated foreign nationals' (*étranger désigné*) under the Canadian refugee law and subject to a different legal regime than other asylum seekers. That has rendered Canada's national refugee regime 'at odds with core provisions of international refugee law'. Although 'arrival without required documentation does not attract criminal liability', arriving in the context of a 'designated smuggling event' leads to mandatory detention (for those 16 years or older). As the report argues, the sovereign right 'to prevent individuals from arranging the unlawful entry of others into Canada' does not include the obligation to prevent human smuggling or protect its victims. Thus, with 'protection no longer as the guiding principle' (also against *refoulement*), measures to combat human smuggling target asylum seekers who may be victims of human trafficking, denying them the fundamental rights offered to other asylum claimants. For instance, they can become 'lawful residents' of Canada, get a travel document or sponsor family members only after 5 years, however, only if they are 'recognised as persons in need of protection by the Immigration and Refugee Board'—or 6 years if the applicant fails, 'without reasonable grounds, to comply with the terms and conditions of his/her release'. Even judicial interpretations on this segment of asylum seekers contradict or undermine the international human rights law and international humanitarian law, having succumbed to the rhetoric of fear, suspicion, and mistrust and adopted the 'rationale of deterrence and punishment' that 'brings the Canadian refugee law closer to criminal law'.

The long list of challenges identified by the national rapporteurs that remain unresolved in the domestic law of their respective countries is impressive. It allows a closer focus on the capacity of the domestic law to respond and adapt to new migration situations with greater versatility and create more avenues for protection. However, it is equally important to consider possible legal solutions: What legal basis exists for certain new forms of protection? Are these merely temporary protections, so often created on an ad hoc basis, without any intention of extending them over the long term? Or can one speak of a new direction law has taken vis-à-vis the growing complexity of the global migratory phenomenon?

7 Conclusion: Towards Building a *Jus Commune*

7.1 *Migration as a Right to Move with Respect for Human Dignity*

Now, where do we go from here? Almost everyone interested in the subject of ‘law and migration’ can observe the following paradox. On the one hand, these are unusually challenging times for legal technicians. It is almost impossible to keep up with the growing complexity of legislation. At least three areas of legal expertise are increasingly coming together around the issue of migration: national (administrative) law governing residence, that is, the national legislation and the procedural aspects of a foreigner’s right of residence, public international law (with an increasing number of agreements between states), and for the past few years, the treaties and laws governing human rights protection. But, on the other hand, many are becoming aware of the ineffectiveness of law due to a variety of factors, among others insufficient knowledge of the legal rules that apply, the gap between sound policy discourses as formalised in the law and the actual political intent, and informal practices, weak judicial control mechanisms. The underlying causes of forced migration—such as climate change, war situations, various forms of persecution, or more generally, the growing gap between the prosperous countries and the rest—must be addressed structurally. Else the law will be called upon in at least two ways: For some, the legal rules drawn up by sovereign nation states will continue to make selective flows of labour migration possible, namely for workers who contribute to the most successful sectors of the global economy. At the same time, the law must also ensure that measures are in place to secure the borders of those same states against border crossings that pose a threat. Notwithstanding that, identifying those threats and the measures to resolve them in a democratic manner and in compliance with human rights law is important. Sometimes, where possible, more comprehensive agreements between countries will become necessary, as these cannot be restricted to border and sovereignty concerns, especially in environments where human rights violations are perpetrated or largely tolerated. If the law is a border guard, it must be imbued with a consciousness of the difference between humane and inhumane treatment, which must underlie conceptions of national sovereignty and security. In that sense, no nation is without an obligation to define and maintain its sovereign structure and boundaries in consideration of the international human rights standards.

At the risk of repeating ourselves, we maintain that in addition to ensuring border security, the law must serve as an instrument of human protection to ensure that, in situations of exploitation and exclusion, the human rights of each person—citizens and migrants alike—are at the very least safeguarded. In other words, the sense of (civic) security that law is expected to foster must also emanate from its adherence to the basic principles of human rights because migration, in many cases, puts refugees and displaced people in situations of significant vulnerability. In such situations, human rights may serve as a life belt, though often nothing more than that.

In an ideal world, migration should be an act of choice rather than an act of despair propelled by civil wars, human-made catastrophes, or climate change. Emmanuel Kant had already theorised the right to movement in 1795 in his *Perpetual Peace*: ‘the right of men, as citizens of the world, shall be limited to the conditions of universal hospitality’.¹⁰⁸ However, the right to movement worldwide is not yet ‘well-established’. François Crépeau, the former Special Rapporteur for the human rights of migrants, used to say that ‘migration is a dignity-seeking journey’. One could say that, in law, as far as dignity is concerned, migration should be a right. It might, therefore, be time to reverse the mantra of ECtHR, according to which ‘based on a well-established principle of international law, States have the right, without prejudice to their commitments under the treaties, to control the entry of non-nationals to their territory’. And instead, it may be time to declare: Based on a well-established principle of international law, each person has the right, without prejudice to the sovereign right of States to control their territory, to move freely from one State to another. However, reversing the principle and the exception, i.e., establishing movement as the principle and control as the exception, is not neutral in law.¹⁰⁹ This reversal of perspective will, by necessity, take time. It is a long step-by-step journey to build a *jus commune* that recognises a right to move. To that end, in the long run, migration will have to be seen in a broader context as a significant brick in the edifice of a common society.

7.2 Covid, a step backwards?

On 30 January 2020, the General Director of the World Health Organization (WHO) declared Covid-19 a ‘public health emergency of international concern’.¹¹⁰ Later—on 11 March 2020—the WHO officially acknowledged the outbreak of a global pandemic.¹¹¹ No country was safe from the Covid-19 pandemic.¹¹² It has reinforced the reassertion of sovereignty by states, including those within integrated entities such as the EU. Although it is too early to assess the exact impact of the pandemic on migration and freedom of movement, some initial studies are doing so.¹¹³ It is important, however, to note, on the one hand, the fragility of any achievements,

¹⁰⁸E. Kant, *Zum Ewigen Frieden*, 1795, third Article. Kant was inspired by Charles-Irénée Castel de Saint-Pierre, better known as ‘abbé de Saint-Pierre’, who was a negotiator for the Treaty of Utrecht (1712–1713) and published the ‘Projet pour rendre la paix perpétuelle en Europe’, Utrecht, 1713.

¹⁰⁹Sarolea (2006).

¹¹⁰WHO, ‘Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV)’, 30 January 2020.

¹¹¹WHO, ‘WHO Director-General’s opening remarks at the media briefing on Covid-19’, 11 March 2020.

¹¹²For detailed data and statistics, see WHO, Coronavirus Disease (Covid-19) Dashboard.

¹¹³Achiume et al. (2020); Carlier et al. (2020a); European Parliamentary Research Service (2020); Marin (2020); Ramji-Nogales and Goldner Lang (2021); Tsourdi (2020).

and, on the other hand, the need to balance public health issues with the principles of non-discrimination and proportionality. It is necessary, for example, to question the importance given in this crisis to the notions of ‘essential travel’, ‘essential services’ or ‘essential person’. Although explicable in their context, these notions can be sources of reinforced discrimination. This means that, notwithstanding the quantitative impact of the Covid crisis, the core issues are not new.¹¹⁴ However, we must proceed with a great deal of caution and humility in view of the long-term and the cumulative impact of the pandemic amid the grave short-term effects we are already experiencing. Indeed, such global events can have various consequences. As Achiume, Gammeltoft-Hansen and Spijkerboer state in their ‘Introduction to the Symposium on Covid-19, Global Mobility and International Law’, ‘the pandemic may be seized to reinforce those characteristics of global mobility and migration law that make it a prime site of global inequality. Yet, the pandemic may also provide an opportunity for fresh and innovative forms of contestation of such inequality, with international law playing an important role’.¹¹⁵ For instance, the reaction of large parts of the population against restrictions on freedom of movement and the strong expectation that borders will be reopened after periods of containment also send a message: the message of a world that has strongly integrated the mobility of persons. It is also on this basis, and with respect for the balance of interests involved, namely the individual and the collective interest, that long-term migration policies should be built.

7.3 *The Global Compact for Safe, Orderly and Regular Migration, a Step Forward?*

The prospects of the *Global Compact for Safe, Orderly and Regular Migration* (GCM) are promising in the long term. Although not as evolved as to constitute a *jus commune* recognising the right to move with dignity, GCM is an important brick in the building to realise that potential. Both the *Global Compact on Refugees* (GCR) and the *Global Compact for Safe, Orderly and Regular Migration* (GCM) were set in motion following the UN General Assembly’s decision in 2016 to adopt the *New York Declaration for Refugees and Migrants*. This Declaration was an expression of the Member States’ political will to address the need for garnering the cooperation of all Member States towards formulating a comprehensive approach to migration.¹¹⁶ If GCR¹¹⁷ is a product of UNHCR aiming to

¹¹⁴For older issues related to AIDS, see Carlier and Schiffino (1999); Hendriks (1990); Van Overbeek (1990).

¹¹⁵114, AJIL, Unbound, o.c., 314 (2020).

¹¹⁶UNGA Res 71/1 (2016) UN Doc A/Res/71/1.

¹¹⁷UN Doc A/73/12.

operationalise the principles of burden- and responsibility-sharing, GCM¹¹⁸ was elaborated through inter-state negotiations, albeit also with the participation of non-state actors, to offer a comprehensive approach for regulating emigration and immigration in a way that balances both sovereignty and human rights considerations.¹¹⁹ GCM was adopted on December 2018 at an intergovernmental conference in Marrakesh (Morocco) and formally endorsed by the UN General Assembly on 19 December 2018 through a vote, with 152 UN Member States voting in favour, five against, and 12 abstaining.¹²⁰ GCM identifies 23 objectives with 187 actions to realise them. The main objectives range from managing borders for facilitating safe and regular cross-border movements while preventing irregular migration, protecting the human rights of migrants, and promoting their inclusion in host countries. Two main criticisms can be made of GCM. First, GCM seems to be ‘strong on the details but weak on the overall design’.¹²¹ Second, as a consequence of the risk of divergence and fragmentation in the interpretation of this soft law instrument, it could ‘undermine the rule of law in respect of the governance of migration’.¹²²

That said, GCM invites states to see migration as a shared responsibility for the sending, receiving and transit countries, and it formulates a compromise between the two contrasting views mentioned above in that it sees migrations as both a challenge and an opportunity. In that sense, GCM remains a work-in-progress, a means of achieving the ideal, but not yet the achieved ideal. It could reveal normative potentialities¹²³ to build an understanding of migration as a right to move with dignity, to thread the links between law and migration in a changing world more firmly into the law.

This General Report has mapped out various convergences of the human, the economic, the social, and the state on the locus of law as a veritable snapshot of the migration law regime of our time. Yet, ultimately, the main challenge is to reweave the socio-economic fabric of society continually. To that end, the life and livelihood of migrants, who often start from scratch in the hope of improving their own living conditions and those of their children in the country of arrival, are paramount and remain a concern. That is to say that less attention has been paid in this volume to the role of the law in issues directly affecting integration and participation. A separate volume should be dedicated to a comparative study on that, especially on how the law can help to balance often competing and contradictory interests in the stages

¹¹⁸ Access on refugeemigrants.un.org.

¹¹⁹ For historical and general presentations, see Chetail (2019), pp. 300–339; Cholewinski (2019), pp. 315–325; Carlier et al. (2020b), p. 2.

¹²⁰ The five against: Czech Republic, Hungary, Israel, Poland and United States. The 12 abstaining: Algeria, Australia, Austria, Bulgaria, Chile, Italy, Latvia, Libya, Liechtenstein, Romania, Singapore, Switzerland.

¹²¹ Chetail (2019), p. 331.

¹²² Cholewinski (2019), p. 325.

¹²³ Vedsted-Hansen (2019), p. 335; Aleinikoff (2017). See also, in this book, the foreword of François Crépeau, ‘Beyond the Horizon, the Inception of Global Mobility Regime’.

following migration. Ideally, the law must have a valid role in guaranteeing real opportunities for migrants to adapt to life in the new country and set the context for enabling broader participation there. Employment constitutes only one aspect in this regard. However, ensuring that the legal measures are appropriate and timely will require concerted efforts from the legal and human rights activists, the lawmakers and policymakers, the civil society at large, as well as the initiative and direct participation of the migrants themselves. We remain convinced that the law must offer a firm foundation through all stages of migration, and in that sense, provide structural answers to problems that are bound to arise when navigating more essential areas of life. But, as said, that would be the subject of another significant comparative study.

Annex 1: Selected General Bibliography

The selected general bibliography compiled below is complemented by the bibliographies in the references section at the end of each national report.

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Annex 2: Questionnaire for the Preparation of National Reports (2014)

Introduction

Human migrations have been with us throughout history. For some societies, migration constitutes a way of life or is even a matter of survival; these are the nomadic and semi-nomadic societies. These are the exception today, however. More often, migratory movements have left their mark on the history of a country and account at least in part for the more or less pluralistic nature of a society, be it its demography or the ethnic, religious or cultural identities that are called upon to live

together within one state. This observation continues to be pertinent: human mobility has probably never been as intense as today, taking a number of different forms, of which some are truly unprecedented. This is the case, for instance, among communities—increasingly numerous—which maintain intense links, often simultaneously, with several states. Depending on the forms of life adopted, these may be links with the state of origin and that of residence, or links fostered with different states, where one person would go through a succession of shorter or longer periods of one's life with which it maintained contacts and/or individual interests. The literature in this field treats such situations sometimes as cases of 'circular migration' and sometimes as 'transnational situations'. The rapid democratisation of air travel since the 1970s, as well as the multiplication of the means of long-distance communication, has rendered the political boundaries between states much more porous.

In the face of this reality, the migratory policies of states differ. Generally speaking, one can distinguish three types of response: the *first* is of a reactive, defensive nature, consisting in reinforcing the supervision of external boundaries of the country and no longer authorising new migration other than by way of exception, for instance on humanitarian grounds. The *second* response is also restrictive in nature, but consists in nevertheless authorising pre-selected migratory flows for which the borders remain open, depending notably on the particular economic necessities of the country or diplomatic interests (good relations with certain countries). Permission to immigrate is in such cases dictated by consideration of specific advantages that a country hopes to gain from a selective migration policy; this explains why priority is sometimes given to certain types of diplomas, and sometimes to temporary and/or seasonal contracts, or to the nationals of certain countries.

It is rare, however, for countries to limit themselves exclusively to the first *or* the second response. In practice, most migration policies combine the two approaches, namely, the principle of prohibiting new migration is maintained, but at the same time a country may show flexibility and understanding vis-à-vis certain humanitarian situations (notably in terms of asylum, family reunification and/or regularisation campaigns) *and* also authorises, to a certain extent, the arrival of people who it may be hoped will benefit the country—temporarily or permanently by their presence. This combined form of migration policy, restrictive and yet at the same time flexible, constitutes in a sense a *third* type of response, one that is pragmatic and eclectic. It is articulated in different ways, often accompanied by bilateral or multilateral agreements committing countries to a common policy of border control. There are three possible motives for a state to coordinate its policy with that of other states: *first*, the desire to render as efficient as possible the decision to maintain a restrictive migration policy; these include, for instance, the Schengen Accords and/or the instruments drawn up within the framework of Dublin II, as well as certain agreements entered into by the EU and the so-called transit countries. A *second* motive is that of economic necessity, with states agreeing among themselves on the contingents that might be authorised to migrate, and on the conditions for such authorisation. In some cases, the economic motive may be accompanied by other motives such as contributing in a sustainable manner to the development of the country of origin

(departure); this is the idea behind the ‘mobility partnerships’ drawn up recently by the EU. But one might also cite the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (signed 18 December 1990)—resulting from the work of the International Labour Office (ILO)—which many states have nevertheless to this day hesitated to ratify. Finally, a *third* motive is that of respect for human rights and for human dignity in particular. The illustration that comes to mind here is the United Nations’ 1951 Geneva Convention on the status of refugees, which commits signatory states to respecting the right of every persecuted person to seek protection in a state other than his or her own. Today, the majority of states the world over are thus bound by a series of accords with other states, often rendering their migration policy more complex and, above all, explaining why their sovereignty is often significantly reduced. The decision-making power in respect of migration is shared between several levels of competence, and distributed across various decision-making spaces. One can rightly speak of ‘multi-layered governance’ in this respect, to use a term currently in vogue.

The questionnaire below is divided into two parts. The first is intended to enable national reporters to submit a report on the topic of migration and law that inventories the principal legal instruments that bind the state and public authorities in matters of migration, and identifies a number of—major—problems that arise in practice, namely, the concrete application of these instruments; it is further intended to signal any important recent developments. In the second part, national reporters are asked to situate the principal of legal rules on migration in force in their jurisdiction within a broader historical and international context. More specifically, they are asked to show the impact of history and of certain recent developments, in particular on the manner in which a country’s domestic law regulates the right of entry by persons of foreign origin and to what extent the existing normative framework succeeds in adjusting to the new realities of international mobility of persons. The teams are asked to give equal weight, if possible, to both parts of the questionnaire; the two parts are complementary to each other.

PART I: Migration and Residence

Migration and residence designate the problems regarding the entry and right of persons of foreign nationality to reside in a country, as well as, where applicable, their removal. What conditions/restrictions are imposed on entry and residence?

Prefatory Remarks

This initial part of the questionnaire is not intended to force the hand of national reporters, and they should not feel obliged to study or inventory statutes that may be unimportant or irrelevant within a country’s domestic legislation. The aim is, rather, to enable foreign readers to follow the major tendencies that emerge within a given

legislative, administrative and judicial policy regarding the conditions governing entry to and residence in a country by foreign nationals, and to gain a better understanding of the various forms of protection (internal and international) available, and how these have changed over time.

The reporters should devote particular attention to the statutes which they consider deserve closer examination, whether because they give rise to specific legal questions or because they provide a good illustration of the type of migratory policy (restrictive, flexible, pragmatic, etc.) currently being pursued by the country in question. It goes without saying that the statutes that apparently offer adequate protection, namely, protection that is most suited to a foreign national's particular situation should likewise be mentioned. The statistics requested are essentially illustrative in nature: they are intended simply to give an idea of the figures involved, and to emphasise notable trends.

Residence

Which authorities are competent in matters of migration and residence?

What legal texts or other sources (legislation and/or case law) regulate access to the territory, residence and removal of persons of foreign nationality?

The reporters should seek to delineate as clearly and as succinctly as possible the rules that apply to the following situations:

1. **Short stays (tourism, family visits, etc.):** principles; reception; obstacles; visas; removal; possibility of going to another country; recent statistics.
2. **Long stays:** prior residence permits; visas; recent statistics, etc.
3. **Right to family life:** the right to family life covers not only family reunification but all matters relating to the possibility for a foreigner (or a national) to create family ties with foreigners. Also covered, therefore, are issues relating to so-called sham or fraudulent marriages and to certain aspects of private international family law, recent statistics.
4. **Stays by privileged categories of foreigners, who derive specific rights from international accords.** Within the EU, for instance, the nationals of member states enjoy advantages under the principle of the free movement of people. In addition to the free movement of persons enjoyed by European nationals within the territory of the EU, there are other statutes and instruments of European migration policy relating to the migration of workers from third countries: permanent resident status, the blue card and the development of a policy of economic migration ('mobility partnerships'), etc. Recent statistics.
5. **Asylum and the rights flowing therefrom:** Asylum is a form of protection granted by a state within its territory. Asylum is granted to persons who are unable to obtain protection in their country of origin or residence, notably for fear of persecution on grounds of their race, religion, nationality, political opinions or membership in a particular social group. The criteria for awarding asylum are set out in the above-mentioned Geneva Convention. Moreover, in

some countries, notably in Europe in recent years, the authorities with competence for asylum can grant asylum seekers subsidiary protection. This form of protection is intended for persons who do not qualify as refugees under the terms of the Geneva Convention but who face a real risk of being subjected to death penalty or execution, torture, inhuman or degrading punishment, or to serious threats to their life or person by reason of indiscriminate violence in situations of international or internal armed conflict (this applies only to civilians, not members of the military). Recent statistics.

6. **Regularisation:** criteria; obstacles; status; recent statistics.
7. **Humanitarian status (serious illness or other exceptional circumstances):** criteria; recent statistics.
8. **Student and researcher status:** criteria; recent statistics.
9. **Diplomatic staff:** criteria; recent statistics.
10. **Change of status:** criteria; obstacles; recent statistics.
11. **Human trafficking:** consists essentially of exploiting people in various sectors. It may involve sexual exploitation or economic exploitation. National action plan; institutions involved; identification; protection; criminalisation; recent statistics.
12. **People smuggling (smuggled migrants):** consists of assisting the illegal immigration of foreigners in order to make a profit. Punishment; identification; protection; criminalisation; recent statistics.
13. **Economic migration:** authorisation; residence; self-employment; social security; recent statistics; etc.
14. **Absence and return**
15. **Detention upon arrival and with a view to removal:** criteria; minors; vulnerable persons; criminalisation; recent statistics.
16. **Right of appeal and main features of the appeal procedure**
17. **Legal aid:** conditions and principle; other forms of assistance provided by the state or other institutions; recent statistics.
18. **Foreign minors:** identification; protection; recent statistics.

Nationality and Statelessness

Nationality is the legal tie that binds a person to a state of which he or she is citizen. It may be acquired through one or both parents (*jus sanguinis*), by connection to one's place of birth (*jus soli*), or on the basis of a choice.

There are other models as well, however, such as where minors automatically obtain nationality by collective effect when their parents obtain a new nationality. As a general rule, the legal effects of obtaining nationality should not be overestimated, since differential treatment based on nationality are today regarded in most cases as discriminatory and therefore unacceptable. Regarding the right of entry to and residence in a country, however, other than in situations where international accords provide for exceptions and/or particular facilities, possession of the nationality of a

country remains a key distinguishing criterion: only a national is guaranteed to have automatic right of residence.

1. **Acquisition**
2. **Loss and recovery**
3. **Statelessness**
4. **Procedure**
5. **Recent statistics**

Social Security/Reception

Everyone has the right to a life of dignity, without restrictions based on nationality or age. How is this principle guaranteed in domestic law? In theory, social assistance is a universal right. Is the right to social assistance in fact guaranteed, and if so, in what form? Certain conditions may be imposed on beneficiaries, such as availability to work, prior recourse to those responsible for paying support, or the signature of a social integration contract.

What does assistance consist of? Financial aid, material aid (such as housing), a service (hot meals, help with job seeking, training), etc.

What form of access do foreign nationals have to physical and mental health care? Situation of vulnerable persons: children, pregnant women, older persons, those with chronic illnesses, persons who were unable to receive care in their country of origin, etc.?

Are there avenues for appeal if one is refused social assistance?

What rights do people without a residence permit enjoy, or those for whom it is administratively impossible to return?

Are there any restrictions on the schooling of children with foreign nationality, depending on their status?

Recent statistics.

PART II: Migration in a Broader Perspective

The second part uses a multidisciplinary approach intended to provide additional information, supplementing the legal component of the report, regarding the types of migratory flows faced by the countries under study, their origin(s) and the particular challenges they pose in terms of the law.

Throughout history, human beings have migrated from one country to another; however, *the forms of protection they could enjoy varied according to policies and circumstances*. In this part of the questionnaire, the reporters are invited to attend to the different factors that can explain why a country may in a given case opt for a restrictive migration policy while in another situation, it adopts greater flexibility.

The questionnaire takes account of four types of factors: the impact of the history and particular relationships inherited from the past and that continue to make

themselves felt today in a country's foreign policy; the role played by human rights protection in situations involving persons of foreign nationality; the need for new policies in the face of new forms of cross-border mobility; and, finally, the thorny questions regarding the direction in which the migration policy of the given state seems to be heading.

The Impact of History

In many countries today, migration and its consequences are at the centre of numerous public debates. The issue is often closely linked to the way(s) migratory flows are perceived: some forms of migration are perceived as more problematic than others.

The arrival and settlement in a country of populations with whom the (majority) society has no affinity—whether historic, social, cultural, ethnic, political and/or religious—often increases the lack of understanding for the phenomenon of migration. When the issue becomes so sensitive that it gives rise to political debates, it may happen that these debates impact on the policy. Such debates may induce a change in the orientation taken in migration policy, with a view to limiting certain forms of migration as much as possible. In light of this, it would be important for national reporters to provide information, particularly of a statistical nature, that could shed light for the reader on the migratory situation and demographic dynamics of the populations of immigrant origin currently residing on the territory of the country.

What is the link between changes in migratory flows, regarding their nature and scale, and the migration policy currently being pursued by the legislative, administrative and judicial authorities of the country in question? Are certain types of migration encouraged and others avoided or even severely limited? What types of information—as precise as possible—on migratory flows (both inflows and outflows) and residence by foreigners, whether legal or illegal, can help explain certain differences in the treatment, in law, of the status of foreign nationals? Can the history of the country and of its international relations (for example, colonial/and or economic ties) help explain why the legal regime applied to certain categories of foreigners is more (or less) restrictive than the one imposed on other contemporary migrant groups?

The Role of Human Rights and Humanitarian Protection

The protective role of the principle of respect for the fundamental rights of foreigners, by means of international instruments and case law, has increased significantly in recent years. It ensures support for persons who are vulnerable by virtue of their residency status. Such support appears to be increasingly effective: by means of the case law and through day-to-day disputes on issues of entrance and residence permits that oppose public services on the one hand, and migrants and those defending their rights on the other, the principle of respect for these rights is making

an increasing impact on every aspect of a foreigner's situation: entry and residence, the right to family life, access to work and to a profession, access to nationality, detention and removal, etc.

The national reporters should seek to illustrate how this principle of respect is implemented in a country's domestic law. In particular, they should take an interest in the way in which international instruments and case law concerning the fundamental rights of foreigners are transposed into national law. Are fundamental rights systematically taken into account, for example, in the legal aid offered to foreign nationals who make a request or enter a complaint? Are people correctly informed of their rights and obligations, and of the legal procedures and avenues of appeal? Are they steered, when necessary, toward the appropriate specialised institutions or services? What role has case law in particular played in examining specific problematic situations from the perspective of fundamental rights? Which court decisions have made it possible to expose certain dysfunctionalities in public administration or to open the way to new interpretations of specific legal texts?

In their analysis of the role played by the principle of respect for fundamental rights in the area of migration, the reporters should preferably focus not only on individual situations involving foreigners, but also on the political and legal framework that determines these situations. Given that, generally speaking, the transposition of international human rights law in the national legal order has in many countries taken place (and continues to do so) by way of case law, why is it that the initiative was not taken by the legislative and administrative bodies?

The Need for New Policies in the Face of Unprecedented Forms of Cross-Border Mobility (Adapting Law to the New Realities of Migration)

Migration continues to be an extremely complex question and is taking ever newer forms. In recent years, migratory flows have revealed several new profiles of cross-border mobility, including that of the migrant who retains contacts with several countries at the same time. The latter profile is constantly growing, either in the form of individuals holding several nationalities (multiple citizenship) or in many other forms, all of which have in common the fact that a person combines several centres of interest and that these centres are distributed over several countries: it may be that the person resides sometimes in one country, sometimes in another, or he or she has a family or assets in a country other than that of his or her habitual residence, etc. The scholarly literature confirms this tendency, categorising it either as 'cross-border' or applying other terms such as 'external citizen', to cite but one concept.

The law has difficulty following the often rapid development of new forms of mobility. Here and there, new legal statuses are put in place that help manage the situation by specifying the rights a person may hope to hold in one and/or other legal order, without having to fear the loss of protection in the other country. But these provisions are at an experimental stage only. An example of these is the status of 'long-term resident' (LTR) which, in European law, is reserved to third-country

nationals—on certain conditions—who wish to exercise the right to free movement; another example is the status of a person in a situation of ‘circular migration’.

As far as possible, the national reporters should take an interest in the way in which, in domestic law, solutions currently offered or under development can enable persons who maintain (close) legal ties with several countries to find appropriate arrangements for their legal affairs, not only in terms of their residency rights but also with regard to other aspects of their legal position (social, family, professional, etc.).

Migration law is faced with new situations as well—due notably to the effect already mentioned—that increasingly give rise to protection of the principle of respect for human rights in matters of migration: this effect can place a foreign national sometimes in a position where it is administratively impossible for him or her to return to the home country, and sometimes gives rise to the need for subsidiary or temporary protection. In some countries, migrants are fleeing environmental catastrophes, and are classed as ecological and/or economic refugees. What is the role here of international law in general and/or of particular arrangements between countries, if any?

The aim of this question is to focus as closely as possible on the capacity of domestic law to adapt to these new situations, putting into perspective as well the legal solutions proposed: what is the legal basis given for these new forms of protection? Is it temporary protection, designed for urgent cases without the intention of continuation, or is it possible to speak of a new direction taken in law regarding the growing complexity, the world over, of the phenomenon of migration?

The effect of Thorny Questions on the Direction Taken by Migration Policies in Certain States. Specific Questions

The final part of the questionnaire examines particularly thorny questions. These will vary according to the country and context. We cannot, obviously, inventory every potential delicate situation that may arise. Therefore, we propose a few specific questions, by way of example:

- administrative detention of children and families;
- ‘limping’ situations and the absence of civil registry documents in international family situations;
- ‘double jeopardy’, i.e. systematic expulsion of migrants who have committed criminal offences (often regardless of the severity of the latter), even in cases where they migrated at a young age and have been socialised in the country to which they have migrated and no longer have any ties to their ‘country of origin’;
- legal protection for unaccompanied minors;
- regularisation for medical reasons;
- sham marriages;

- use of biometric data by the administration in charge of issuing residence permits;
- the debate on the ratification of the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of their Families;
- legal recognition and protection of rights (civil, political, economic and social) of migrants in an irregular situation;
- absence of punishment of employers of migrants in an irregular situation;
- refusal of multiple citizenship.

These are specific questions, and reporters are encouraged to analyse these specific aspects in such a way as to demonstrate to readers the general orientation of a country's migration policy. How are these thorny questions addressed by the authorities? In seeking solutions, do they adopt a defensive, law-and-order response that tends towards an increasingly restrictive and suspicious migration policy? Or, on the contrary, does a more open, humanitarian attitude prevail?

In sum, and without seeking to be directive in nature, the questionnaire for this second part seeks to approach migration by placing it in a wider context and addressing four categories of questions in particular:

1. What is the impact of history on the developments regarding migration in your country?
2. What is the role of fundamental rights and humanitarian protection?
3. What types of regulations and legislation are there or should there be that take mobility into consideration?
4. What are some of the thorny questions and the responses offered?

Annex 3: List of Countries and Reporters

Argentina

- Agustín Parise—Associate Professor, Faculty of Law, Maastricht University, Director of Scientific Studies of the International Association of Legal Science (IALS)

Australia

- **Mary Crock**—Professor of Public Law, Faculty of Law, The University of Sydney
- **Daniel Ghezelbash**—Associate Professor, Macquarie Law School, Macquarie University
- **Sudrishti Reich**—Senior Lecturer, ANU College of Law, The Australian National University
- **Rebekah Stevens**—Public Policy Advisor

Belgium

- **Sylvie Sarolea**—Professor of Law, Faculty of Law and Criminology, Université catholique de Louvain
- **Luc Leboeuf**—Senior Research Fellow, Max Planck Institute for Social Anthropology, Department of Law and Anthropology, Halle, Germany

Brazil

- José Augusto Fontoura Costa—Associate Professor, *Faculty of Law, University of São Paulo*

Canada

- **France Houle**—Associate Dean and Associate Professor, Faculté de droit, Université de Montréal
- **Karine Mac Allister**, Director – Customer Experience CAIJ, Montreal, Canada

Colombia

- Adriana Zapata—Director of the Department of Business Law, University Externado of Colombia

Croatia

- **Helga Špadina**—Assistant Professor, Chair of Labour and Social Law, Faculty of Law, University of Osijek

Denmark

- **Silvia Adamo**—Associate Professor, Faculty of Law, University of Copenhagen

Dominican Republic

- **Paola Pelletier**—Human Rights Specialist, Santo Domingo

Estonia

- Kristiina Albi—Advisor for migration matters of the Estonian Chancellor of Justice

France

- Nicole Guimezanes—Professor Emeritus, Faculty of Law, University Paris-Est Créteil Val de Marne (UPEC)

Germany*

- **Constantin Hruschka**—Senior Research Fellow, Max Planck Institute for Social Law and Social Policy, Munich, Germany)

Greece

- **Zoe Papassiopi-Passia**—Emerita Professor of Law, Aristotle University of Thessaloniki

- **Dimitrios Varadinis**—Lawyer, Coordinator of PRAKSIS Legal Department
Japan

- Atsushi Kondo—Professor of Law, Faculty of Law, Meijo University

Macau

- **Denis de Castro Halis**—Associate Professor, Faculty of Law, UNESA, Brazil; Senior Instructor, University of Macau, Macau SAR

Malta

- **Jean-Pierre Gauci**—Director of The People for Change Foundation; Senior Research Fellow in Public International Law and Director of Teaching and Training at BIICL
- **Christine M. Cassar**—co-Founder and co-Director of The People for Change Foundation; Monitoring, Evaluation, Accountability and Learning Advisor at Save the Children UK
- **Patricia Vella de Fremeux (Mallia)**—Professor and Head of the Department of International Law, Faculty of Laws, University of Malta

New Zealand

- **Caroline Sawyer**—Barrister and Solicitor, Petone (near Wellington), New Zealand

Norway

- **Vigdis Vevstad**—Independent Adviser and Researcher, Sonconsult and Norwegian Center for Human Rights, University of Oslo
- **Solveig Marie Igesund**—Advisor, Norwegian People's Aid

Poland

- Barbara Mikołajczyk—Professor and Head of Department, Department of International Public Law and the European Law, University of Silesia

Portugal

- Nuno Piçarra—Professor of Law, Faculty of Law, Nova University of Lisbon

Romania

- Irina Zlătescu—Professor of Comparative Law, European Law and Human Rights Law at the National University of Political Studies and Public Administration of Bucharest

Singapore

- **Jaclyn L. Neo**—Associate Professor, Faculty of Law, National University of Singapore; Director, Centre for Asian Legal Studies
- **Vinna Yip**—LLB (Hon) Student, Faculty of Law, National University of Singapore

South Africa

- **Roni Amit**—Assistant Clinical Professor and Director of the Terry West Civil Legal Clinic, College of Law, University of Tulsa

Switzerland*

- **Constantin Hruschka**—Senior Research Fellow, Max Planck Institute for Social Law and Social Policy, Munich, Germany)

United Kingdom

- **Sonia Morano-Foadi**—Professor of Law and Director of the Centre for Legal Research and Policy Studies, School of Law, Oxford Brookes University
- **Luke Campbell**—Lecturer in Law, Oxford Brookes University
- **Macca Teclehaimanot**—Immigration Advisor and qualified Solicitor in the UK
- **Casey Alves**—LLM Human Rights Law graduate and Research Assistant at the School of Law, Oxford Brookes University

United States

- **Peter W. Schroth**—Attorney, Connecticut and New York; Adjunct Professor of Law, Western New England University
- **Linda L. Foster**—Legal Writer/Attorney, New York

Venezuela

- **Allan R. Brewer-Carías**—Professor, Central University of Venezuela

**Reports on Germany and Switzerland were specifically requested for this publication.*

Annex 4: Main International Texts and Bodies in Migration Law

International Instruments

While there is no general text of international law on foreigners, there are, however, certain important provisions within the general instruments for the protection of human rights (A), and two instruments protecting specific categories of persons (B) deserve to be mentioned here.¹²⁴

¹²⁴For the status of ratification and the texts, see <http://treaties.un.org>.

General Instruments

Three important texts must be mentioned.

Universal Declaration of Human Rights (UDHR)

Adopted in Paris, it was proclaimed by the United Nations General Assembly Resolution 217 A (III) on 10 December 1948. Although non-binding, it remains the source of the other texts protecting human rights. A few articles concern migration:

- Article 13: freedom of internal movement and the right to leave any country;
- Article 14: the right to seek asylum;
- Article 15: the right to a nationality.

International Covenant on Civil and Political Rights (ICCPR)

Adopted in New York by the General Assembly of the United Nations in Resolution 2200 A (XXI) of 16 December 1966, entry into force on 23 March 1976:

- Article 2: principle of non-discrimination;
- Article 7: prohibition of torture, cruel, inhuman or degrading treatment or punishment;
- Article 12: liberty of internal movement, freedom to leave any country, right to enter one's own country;
- Article 13: procedural guarantees for the expulsion of lawfully resident foreigners.

The monitoring body of the ICCPR, the United Nations Human Rights Committee (HRC) has issued general comments concerning foreigners, including:

- General Comment No. 15 of 1986 on the position of aliens under the Covenant;
- General Comment No. 20 of 1992 on Article 7 ICCPR;
- General Comment No. 27 of 1999 on Article 12 ICCPR.

The HRC also issues reports on individual communications where the state has accepted this complaint mechanism (Article 41).

The International Court of Justice can also hear disputes between states that involve migrants. Although rare, this is again a good example of cross-references for building a *jus commune*.

ICJ, 30 November 2010, *Republic of Guinea v. DRC (ex parte Diallo)*. Mr Diallo, a Guinean businessman, was expelled from the Democratic Republic of Congo after having lived there for 32 years. The Court condemned the country for violation of Articles 12 (expulsion) and 9 § 2 (detention) of the ICCPR. The Court accepted the concurring interpretation of the texts on human rights protection held by different competent bodies: The United Nations Human

Rights Committee, the African Committee on Human Rights, the European Court of Human Rights and the Inter-American Court of Human Rights (paras. 66–68). The Court also emphasised that ‘an expulsion must not be arbitrary in nature, since protection against arbitrary treatment lies at the heart of the rights guaranteed by the international norms protecting human rights’ (para. 65).

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

Adopted in New York by the General Assembly of the United Nations in Resolution 39/46 of 10 December 1984, it entered into force on 26 June 1987. This Convention further develops Article 7 ICCPR. In particular, Article 3, which prohibits expulsion or return (*refoulement*) to a country where there are substantial grounds for believing that a person would be in danger of being subjected to torture. This Article formalises the case law on Article 3 ECHR (principle of *non-refoulement* and *protection par ricochet* [indirect protection]).

The monitoring body for the Convention, Committee Against Torture (CAT), has developed a significant body of case law. Protocol No. 1 has also created a sub-committee on the prevention of torture, which carries out visits and makes recommendations and observations.

Office of the United Nations High Commissioner for Human Rights

The High Commissioner for Human Rights, established by Resolution 48/141 of the General Assembly of the United Nations of 20 December 1993, is mandated to coordinate all the programmes of the United Nations relating to human rights. The website of the Office of the High Commissioner for Human Rights has a fairly complete database with links to the different texts and international bodies protecting human rights (www.ohchr.org).

Instruments Protecting Specific Categories of Persons

Four texts should be mentioned here, two of which are cited by most national reports: the Geneva Convention on Refugees and the New York Convention on the Rights of the Child. With the exception of South Africa, the Convention on the Elimination of all forms of Racial Discrimination is rarely cited. With the exception of Venezuela, countries of emigration, no other state included in this volume has ratified the International Convention on the Protection of the Rights of All Migrant Workers (see Sect. 4.3 on social rights¹²⁵).

¹²⁵In the 24 original reports, the Convention on the Protection of the Rights of All Migrant Workers was also mentioned for two other countries: Argentina and Colombia.

Convention Relating to the Status of Refugees

Adopted in Geneva on 28 July 1951 by a conference of plenipotentiaries on the status of refugees and stateless persons convened by Resolution 429 (V) of the General Assembly of the United Nations of 14 December 1950, entry into force on 22 April 1954.

This Convention defines the concept of a refugee (Article 1), imposes the principle of *non-refoulement* (Article 33) and sets out the recognised rights of the refugee (Articles 2 to 46). Initially limited in time and space, it is supplemented by the Protocol Relating to the Status of Refugees, adopted in New York on 16 December 1966, opened for signature on 31 January 1967 and entered into force on 4 October 1967.

All the countries featured in this volume have ratified the Geneva Convention and/or the Protocol of New York. However, one important country, namely India, did not ratify the Refugee Convention, and Turkey, another important country, had reservations about the application of the Geneva Convention and the Protocol only to persons who have become refugees as a result of events occurring in Europe. This raised a question about conformity to the so-called agreement between EU and Turkey to solve the European asylum crisis. For instance, Syrian migrants sent back from Greece to Turkey are not covered by the Geneva Convention in Turkey. The EU Court did not consider this issue, judging that the ‘agreement’ was a declaration of the Member States, not a decision of the European Council (EU), and, consequently, did not fall within the jurisdiction of the Court.¹²⁶

The Office of the United Nations High Commissioner for Refugees (HCR) was established by Resolution 428 (V) of the General Assembly of the United Nations on 14 December 1950. Unlike the United Nations Committee, it is not tasked with monitoring the Geneva Convention. Rather, this is a responsibility for the institutions set up by each State party.

The HCR ‘assumes the function of providing international protection’ to refugees and ‘seeking permanent solutions’ for them (Article 1). In some countries, it participates in the decision-making bodies on the recognition of refugee status, sometimes alongside the national authorities.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Family

Adopted in New York by the General Assembly of the United Nations in Resolution 45/158 of 18 December 1990, it entered into force on 1 July 2003.

¹²⁶General Court, *N.F. v. European Council*, T-192/16 [2017]: ‘the Court considers that, even supposing that an international agreement could have been informally concluded . . . that agreement would have been an agreement concluded by the Heads of State or Government of the Member States of the European Union and the Turkish Prime Minister’ (para. 72), confirmed by ECJ, *N.F. v. European Council*, C-208/17, C-209/17 and C-210/17 [2018].

As its title indicates, this Convention has to do with migrant workers and it specifically recognises the rights of both regular and irregular migrants. For this reason, it has been ratified almost exclusively by countries of emigration, for instance, by Argentina, Colombia and Venezuela. But some countries that did ratify the Migrant Worker Convention are becoming countries of immigration, e.g. Mexico and Morocco.

A Committee for the protection of the rights of all migrant workers and members of their family (Committee on Migrant Workers, CMW) was set up to 'examine the application' of the Convention (Article 72). If the state party agrees, individual communications can be submitted to the Committee, which issues comments (Article 77).

International Convention on the Elimination of All Forms of Racial Discrimination

Adopted in New York by the General Assembly of the United Nations in Resolution 2106A (XX) of 21 December 1965, it entered into force on 4 January 1969. This Convention asks states to commit themselves to prohibit and eliminate racial discrimination in all its forms and to guarantee the equal rights of all before the law, without distinction of race, colour or national or ethnic origin, in particular in the enjoyment of the right to free movement and to choose one's place of residence within a state, the right to leave any country, including one's own, and to return to one's country as well as the right to a nationality (Article 5).

Convention on the Rights of the Child

Adopted in New York by the General Assembly of the United Nations in Resolution 44/25 of 20 November 1989, it entered into force on 2 September 1990. The Convention on the Rights of the Child sets out rights relating to family reunification and draws the attention of the states to the situation of children seeking refugee status. It guarantees children certain rights in the event of migration, even the migration of the members of his/her family, separately or together. It establishes the principle of the best interests of the child: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. (Article 3, 1°). Article 10 imposes the obligation on the states to examine 'in a positive, humane and expeditious manner' requests for family reunification. The right to be recognised as a refugee is considered in Article 22, which requires states to 'take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set

forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties'. Several national reports cite the New York Convention, in particular Article 37, on the question of depriving children of their liberty (see Sect. 4.1.1 on detention).

Other international institutions give opinions and issue reports on questions relating to migration. The following bodies, in particular, deserve a particular mention here:

International Organization for Migration (IOM)

The IOM was founded in 1951 by the Intergovernmental Conference on Migration in Brussels. This inter-state organisation, which counted 173 Member States in 2019, is intended to 'facilitate international cooperation on migration matters'. It brings out numerous publications. The IOM also serves as the secretariat for the Global Forum on Migration and Development (GFMD) and several regional intergovernmental consultations that offer important opportunities to exchange information and informal decisions. In certain countries, the IOM also has programmes to help irregular migrants return voluntarily to their country of origin (www.iom.int).

Global Commission on International Migration

Founded in 2003 at the initiative of thirty states with the support of the then Secretary-General of the United Nations Organisation, Kofi Annan, the Global Commission published a report in 2005 titled, 'Migrations in an Interconnected World: New Directions for Action', which stresses the need to achieve great coherence in the management of international migration, in particular by cooperation among states, among regional entities and among organisations, but also by adopting a principled approach that recognises the fundamental rights of migrants.

UN Global Compact

The Global Compact reiterates the goals and principles formulated and adopted by the United Nations. It is firstly based on *The Sustainable Development Goals* (SDG), whereby the role of migrants/migration with respect to sustainable development is addressed in the UN 2030 Sustainable Development Agenda (<https://www.un.org/sustainabledevelopment/development-agenda/>, targets 8.8, 10.7, 17.18). Louise Arbour, who was Chief Prosecutor of the International Criminal Tribunals for former Yugoslavia and Rwanda, former Justice of the Canadian Supreme Court, former High Commissioner for Human Rights, was appointed in March 2017 as UN Special Representative for International Migration. After a 'New York Declaration for Refugees and Migrants' in September 2016, the UN General Assembly (UNGA)

decided to develop two Global Compacts:¹²⁷ One for refugees, under the direction of the UNHCR¹²⁸ and another for ‘safe, orderly and regular migration’. An intergovernmental conference in Marrakesh adopted this Global Compact for Migration (GCM), Morocco, in December 2018 and formally endorsed by the UNGA on 19 December 2018. This is still a work in progress (see General Report, Sect. 7.2 and the foreword of François Crépeau).

United Nations Special Rapporteur on the Human Rights of Migrants

The Special Rapporteur is tasked with drawing up reports and proposals. From 2011 to 2017, Professor François Crépeau of McGill University in Montreal held the post. Since 2017, it is Felipe Gonzáles Morales, Professor at the University Diego Portales in Santiago de Chile and the University Carlos III in Madrid.

International Labour Organization (ILO)

In addition to various recommendations on migrant workers, the ILO adopted Convention C 143 on Migrant Workers on 24 June 1975 (www.ilo.org).

Hague Conference on Private International Law

Traditionally focused on drafting private international law agreements, The Hague Conference has produced studies and offered services to states as the site for drawing up certain types of international cooperation on migration matters (www.hcch.net).

Regional Instruments

Europe

Council of Europe

General Instruments

European Convention on Human Rights and Fundamental Freedoms (ECHR)

Opened for signature in Paris on 4 November 1950, it entered into force on 3 September 1953:

¹²⁷UNGA Res 71/1 (2016) UN Doc A/Res/71/1.

¹²⁸UN Doc A/73/12.

- Article 1: scope includes everyone within the jurisdiction of one of the High Contracting Parties;
- Article 3: prohibition of torture (interpretation ‘par ricochet’ [indirectly] in the case of expulsion);
- Article 6: right to a fair trial (in principle not applicable under the law of foreigners, unlike Article 13);
- Article 8: right to respect for private and family life (verified for admission to a country through family reunification and in case of expulsion);
- Article 13: right to an effective remedy;
- Article 14: prohibition of discrimination (in convention rights, by contrast with Protocol 12);
- Article 15: derogation in time of emergency;
- Article 16: restrictions on political activity of aliens;
- Prot. 1, Article 1: protection of property;
- Prot. 4, Article 2: freedom of movement, right to leave any country;
- Prot. 4, Article 3: prohibition of expulsion of nationals;
- Prot. 4, Article 4: prohibition of collective expulsion of aliens;
- Prot. 7, Article 1: procedural safeguards relating to the expulsion of a ‘lawfully resident’ alien;
- Prot. 12: general prohibition of discrimination.

Respect for the application of the Convention is monitored by the European Court of Human Rights (ECtHR, Strasbourg). The Court can receive applications from individuals after all domestic remedies have been exhausted (Articles 34–35). Disputes relating to foreigners are heavily represented (www.echr.coe.int).

European Social Charter (ESC)

Opened for signature in Turin on 18 October 1961 and entry into force on 26 February 1965, a revised version was opened for signature in Strasbourg on 3 May 1996, which entered into force on 1 July 1999:

- Articles 7 and 17: rights of children and young persons to special protection;
- Article 18: right to engage in any gainful occupation in the territory of any one of the others, providing for the application of ‘existing regulations in a spirit of liberality’;
- Article 19: right of migrant workers and their families to protection and assistance;
- Article 31: right to accommodation;
- Article E: non-discrimination.

The European Social Charter is monitored by a Committee of independent experts known as the European Committee on Social Rights (ECSR) (Article C, former Article 25). Claims can be made by representative organisations. The Committee of independent experts prepares a report containing its observations (Additional Protocol of 9 November 1995, Articles 1 and 9). An annex to the Charter

specifies that, in principle, its provisions apply only to aliens residing lawfully. However, the Committee also recognised some fundamental rights to irregular migrants such as the right to food and the right to housing (ECSR, 20 October 2009, *D.E.I. v. the Netherlands*; 23 October 2012, *D.E.I. v. Belgium*) (www.coe.int/socialcharter).

Instruments Protecting Specific Categories of Persons

The Council of Europe adopted numerous resolutions and recommendations on foreigners in general and on refugees in particular. There are few binding texts, in particular:

- the European Convention on Establishment, adopted in Paris on 13 December 1955;
- the European Convention on the Legal Status of Migrant Workers, signed in Strasbourg on 24 November 1977;
- the European Convention on Preventing and Combating Violence Against Women and Domestic Violence, signed in Istanbul on 11 May 2011, entered into force on 1 August 2014.

European Union

Primary Law

Treaty on the Functioning of the European Union (TFEU)

Signed in Lisbon on 13 December 2007, entry into force on 1 December 2009:

- Articles 18 to 25: non-discrimination and EU citizenship;
- Articles 45 to 62: free movement of workers, right of establishment, free movement of services;
- Articles 77 to 80: asylum and migration.

Charter of Fundamental Rights of the European Union

Proclaimed in Nice on 7 December 2000, it was revised in Strasbourg on 12 December 2007, and recognised as having ‘the same value as the Treaties’ in Lisbon on 13 December 2007 (Article 6, § 1 TEU):

- Article 1: human dignity;
- Article 18: right to asylum;
- Articles 20–21: non-discrimination;
- Articles 39 to 46: citizenship;
- Article 47: right to an effective remedy.

In principle, ‘the Charter shall not extend in any way the competences of the Union as defined in the Treaties’ (Article 6 TEU) and thus serves to interpret EU law.

The Charter applies only when the institutions and bodies of the Union or the Member States ‘are implementing Union law’ (Charter, Article 51). The exact scope of the Charter will be built step by step by the case law of ECJ. This question was debated in relation to the request of Syrian migrants for a humanitarian visa. As this category of visa would be a long-term residence visa and not a short-term visa valid for a maximum 90 days, the Court decided that this was outside the scope of the EU Community Code on visas, with the consequence that the Charter of Fundamental Rights could not apply.¹²⁹ On the contrary, for the free movement of persons within the EU, the Court did use the Charter, at least in one case, to include into the scope of EU law a purely internal situation which is normally outside the scope of application of the free movement in EU law.¹³⁰

Secondary Legislation

There is an abundance of secondary legislation in the form of regulations and directives. Such laws have governed the freedom of movement within the EU for a long time (1968), dating back from the time of the European Economic Community. These texts have, to a large extent, been recast into a single directive, namely Directive 2004/38 of 29 April 2004 on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States (the ‘citizen’s’ directive).

More recently (in the 2000s), the EU adopted texts relating to migration policy. Only six of them are cited here, three on immigration and three on asylum:

- Directive 2003/86 of 22 September 2003 on the right to family reunification (Family Reunification Directive);
- Directive 2003/109 of 25 November 2003 concerning the status of third-country nationals (TCNs), who are long-term residents (Long-term Residents Directive or the LTR Directive);
- Directive 2008/115 of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive);
- Regulation 2016/399 of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code);
- Regulation 604/2013 of 26 June 2013, establishing the criteria and mechanisms for determining which Member State is responsible for examining an application for international protection lodged in one of the Member States by a third-country national (Dublin III Regulation, since it follows upon the Dublin (I) Convention of 14 June 1990 and the Dublin (II) Regulation 343/2003);

¹²⁹ECJ, *X. and X.*, C-638/16 [2017]: ‘Since the situation at issue . . . is not . . . governed by EU law, the provisions of the Charter, in particular, Articles . . . 18 [right to asylum] . . . do not apply’ (para. 45). *Contra*, the opinion of Advocate General Mengozzi delivered on 7 February 2017.

¹³⁰ECJ, *Chavez-Vilchez*, C-133/15 [2017].

- Directive 2011/95 of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection for a uniform status for refugees or persons eligible for subsidiary protection and for the content of the protection granted (recast ‘Qualification Directive’).

All EU laws are controlled by the European Court of Justice. This is mainly done through preliminary rulings, issued at the request of a court or tribunal of an EU Member State made to the European Court of Justice for an interpretation of an EU law (Article 267 TFEU) (www.curia.europa.eu). For all texts and case law: europeanmigrationlaw.eu).

In 2020, the European Commission advanced a series of communications and legislative proposals, as summarised in ‘A new Pact on Migration and Asylum’, 23 September 2020, COM(2020)609 final. See the collection of articles directed by Daniel Thym on the Odysseus network blog, <https://eumigrationlawblog.eu/series-on-the-migration-pact-published-under-the-supervision-of-danielthym/>.

European Migration Network

By Council Decision 2008/381 of 14 May 2008, the EU set up a European Migration Network (EMN) intended to provide up to date and comparable information on migration policy in each Member State ‘with a view to supporting policymaking in the European Union in these areas’ (Article 1).

Odysseus Network

With the support of the European institutions, university professors have created an academic network of legal studies on immigration and asylum in Europe (<https://eumigrationlawblog.eu/>).

Americas

General Instrument

American Convention on Human Rights

Opened for signature in San José, Costa Rica, on 22 November 1969, entry into force on 18 July 1978:

- Article 1: applies to ‘all persons subject to the jurisdiction’ of one of the State parties;
- Article 5: right to physical, mental and moral integrity;
- Article 22: right to freedom of movement and residence.

This ‘Pact of San José’ is monitored by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The Commission

can hear individual petitions (Article 44). The Court can hear petitions from the Commission and from the State parties. The states may also consult the Court and request its opinion (Article 64). Upon the request of Mexico, the Court issued an important opinion on the situation of Mexican workers in the US (Opinion No. 18 on the legal status and rights of undocumented migrant workers, issued on 17 September 2003 (OC-18/03) (see *infra*, III, C, about social rights) (www.corteidh.or.cr).

Instruments Protecting Specific Categories of Persons

Inter-American Convention on Territorial Asylum and Inter-American Convention on Diplomatic Asylum

Both signed in Caracas on 28 March 1954.

North American Free Trade Agreement (NAFTA, Mexico—United States—Canada)

Dated 17 December 1992, Articles 1601 to 1608 are on temporary entry for businesspersons.

Cartagena Declaration (Colombia) on Refugees

Although this is just a declaration, the text is applied in several South and Central American States and contains a broader definition of who is a refugee, which may offer a *prima facie* protection in cases of mass influx, like in the African Convention for Refugees.

Africa

General Instrument

African Charter of Human and Peoples' Rights

Adopted in Nairobi on 28 June 1981 by the conference of heads of states and heads of governments of the Organisation of African Unity (OAU), which eventually became the African Union (AU); entry into force on 21 October 1981:

- Article 5: human dignity;
- Article 12: freedom of internal movement, right to leave, right to asylum, prohibition of mass expulsion.

The Charter is monitored by the African Commission of Human and Peoples' Rights (Articles 30 and 45) and by the African Court of Human and Peoples' Rights (Protocol adopted in Ouagadougou on 9 June 1998). Since 2006, the Court is located in Arusha, Tanzania. Individual petitions are possible if the State party has consented

and the Court has given leave (Article 34 (6) of the Charter and 5 (3) of the Protocol). But so far it has seen relatively little activity.

Instrument Protecting Specific Categories

OAU Convention Governing Specific Aspects of the Refugee Problem in Africa

Adopted in Addis Ababa on 10 September 1969, entry into force on 20 June 1974.

Other Regional Bodies Dealing with Migration

Several regional bodies have adopted the principle of freedom of movement.

- Africa: WAEMU (West African Economic and Monetary Union) and ECOWAS (Economic Community of West African States), ECCAS (Economic Community of Central African States), SADC (Southern African Development Community), EAC (East African Community).
- Asia: ASEAN (Association of Southeast Asian Nations), TPP (Trans-Pacific Partnership), Pacific Alliance.
- Americas: NAFTA (North American Free Trade Agreement), Mercosur (Southern Common Market).

In future, these integration mechanisms may develop into five continental integrated unions: North America, South America, Europe, Asia, and Africa. In the area of international migration, several intergovernmental, and thus state consultation processes, are developing within regional frameworks.

The IOM counts various regional consultative processes on migration (RCP) (see *iom.int*, in the ‘countries’ tab, sorted by continents).

The UN Global Compact for Safe, Orderly and Regular Migration (GCM) is also an intergovernmental, regional, and international process that is still in progress (see *supra*, 1.2 and Sect. 7).

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