Migration and Law

General report

Jean-Yves Carlier
Marie-Claire Foblets

July 2014
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Case law sites

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Country reports

Introduction

This general report is based on twenty-four national reports:

Argentina
Agustín Parise – Researcher, Faculty of Law, Maastricht University

Australia
Mary Crock – Professor of Public Law, Faculty of Law, The University of Sydney
Daniel Ghezelbash – Associate Lecturer, Macquarie Law School, Macquarie University
Sudrishti Reich – Senior Lecturer, ANU College of Law, The Australian National University

Belgium
Sylvie Sarolea - Professor of Law, Faculty of Law and Criminology, Université Catholique de Louvain

Brazil
José Augusto Fontoura Costa – Associate Professor, Faculty of Law, University of São Paulo

Canada
France Houle - Associate Professor, Faculté de droit, Université de Montréal

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

Croatia
Helga Spadina - Senior Teaching and Research Assistant, Faculty of Law, University of Osijek

Denmark
Silvia Adamo – Postdoctoral Researcher, Faculty of Law, University of Copenhagen

Dominican Republic
Paola Pelletier Quiñones - Human Rights Specialist, American University Washington College of Law Fulbright Fellow

Estonia
Kristiina Albi – Adviser 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
Winfried Kluth – Professor of Law, Faculty of Public Law, Martin Luther University Halle-Wittenberg

1 Where reference is made to a national report, the name of the country is mentioned in parentheses, with, where relevant, the page number in that report.
<table>
<thead>
<tr>
<th>Country</th>
<th>Name, Position, Institution and Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Greece</td>
<td>Zoe Papassiopi-Passia – Emerita Professor of Law, Aristotle University of Thessaloniki</td>
</tr>
<tr>
<td></td>
<td>Eleni Pasia – Lawyer at the Greek Council for Refugees (GCR).</td>
</tr>
<tr>
<td></td>
<td>Dimitrios Varadinis – Lawyer, Coordinator of PRAKSIS Legal Department</td>
</tr>
<tr>
<td>Japan</td>
<td>Atsushi Kondo – Professor of Law, Faculty of Law, Meijo University</td>
</tr>
<tr>
<td>Macau</td>
<td>Denis de Castro Halis – Senior Instructor, Faculty of Law, University of Macau</td>
</tr>
<tr>
<td>Malta</td>
<td>Jean-Pierre Gauci – Director of The People for Change Foundation</td>
</tr>
<tr>
<td></td>
<td>Patricia Mallia – Head of Department of International Law, University of Malta</td>
</tr>
<tr>
<td></td>
<td>Christine Cassar – Director of The People for Change Foundation</td>
</tr>
<tr>
<td>New Zealand</td>
<td>Caroline Sawyer – Senior Lecturer, School of Law, Victoria University of Wellington</td>
</tr>
<tr>
<td>Norway</td>
<td>Vigdis Vevstad – Independent Adviser and Researcher, Sonconsult</td>
</tr>
<tr>
<td>Poland</td>
<td>Barbara Mikolajczyk – Assistant Professor, Department of International Public Law and the European Law, University of Silesia</td>
</tr>
<tr>
<td>Portugal</td>
<td>Nuno Piçarra – Professor of Law, Faculty of Law, Nova University of Lisbon</td>
</tr>
<tr>
<td>Romania</td>
<td>Irina Zlatescu – Director of the Romanian Institute for Human Rights (IRDO)</td>
</tr>
<tr>
<td>Singapore</td>
<td>Jaclyn L. Neo – Assistant Professor, Faculty of Law, National University of Singapore</td>
</tr>
<tr>
<td></td>
<td>Vinna Yip – LLB (Hon) Student, Faculty of Law, National University of Singapore</td>
</tr>
<tr>
<td>South Africa</td>
<td>Roni Amit – Senior Researcher, African Centre for Migration &amp; Society, University of the Witwatersrand</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Sonia Morano-Foadi – Reader in EU Law and Director of the Centre for Legal Research and Policy Studies, School of Law, Oxford Brookes University</td>
</tr>
<tr>
<td></td>
<td>Luke Campbell – Research Assistant, School of Law, Oxford Brookes University</td>
</tr>
<tr>
<td>United States</td>
<td>Peter W. Schroth – Attorney, Connecticut and New York</td>
</tr>
<tr>
<td></td>
<td>Linda L. Foster – Attorney, New York</td>
</tr>
<tr>
<td>Venezuela</td>
<td>Allan R. Brewer-Carías – Professor, Central University of Venezuela</td>
</tr>
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The reports taken together add up to some 1000 pages, whose richness, both quantitative and qualitative, indicates the diversity and complexity of the relationship between legal orders and migrations. The twofold use of the plural here is deliberate. On the one hand, there is a variety of different types of migration. This has been well established. Migration has always existed and always will. As such, it is a constant in human history. Migration is diverse in both time and space. In this sense, it is a variable within the construction of organised societies. This variation can take different forms. First, in quantitative terms. Whereas in 1965 there were 75 million migrants worldwide, today the figure is around 200 million. This would make the migrant population effectively the fourth largest “world” power after China (1.3 billion), India (1.2 billion) and the United States (300 million), and roughly on par with Brazil (200 million). However, this increase in absolute numbers, taken as a proportion of the world’s population (7 billion) gives a more or less constant figure of 3% of the global population. Then, in qualitative terms, there are different forms of migration to be considered. Statistics suggest, and the national reports confirm, that there are three main types of migration today: family migration (family reunification), migration for protection (asylum) and subsistence migration (economic). While certain ancient forms of migration have more or less disappeared (migration by conquest) or decreased (population shifts), other newer forms are developing (e.g. environmental migration, New Zealand, p. 33). These different types of migration are influenced by both ‘push factors’ (impelling people to leave their land of origin) and ‘pull factors’ (the attraction of certain new areas). The same type of migration may vary over time in both quantity and quality, depending on these factors. Thus, population shifts by conquest and colonisation towards sparsely populated regions have given way to emigration from overpopulated areas.

These variations in the type of migration have an impact on the way in which law encounters this shifting reality. Two distinctions ought to be made.

The first involves the distinction between countries of emigration and countries of immigration. Some of the national reports remind us that they are for the most part countries of emigration (Colombia, p. 4 “Colombia has never had immigration flows”; Croatia, p. 4, which has nevertheless, since its accession to the European Union, become an important transit country, over and above its tourism-related migratory flows). Certain countries can become countries of immigration (Japan, p. 1). A large number of reports emphasize that this shift has already taken place and that they have moved from the former into the latter

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category, i.e. from a country of emigration – or sometimes of transit – into a country of immigration (Greece; Malta, p. 76; Poland, p. 35 with a significant diaspora resulting from forced movements, of which a certain number return: (Poland, Romania, p. 13), South Africa, p. 19).

The second distinction to be made, in law as in economics, is between migratory flows and migratory stocks. The first aspect has to do with migration itself, that is, the management of mobility. It principally involves legislation on admission to a country, residence and removal. The second aspect has to do with the management over time of the presence of immigrant populations. These people are no longer migrants. They may have retained foreign nationality or become naturalised citizens of their host country. The management of multicultural societies, in particular, raises questions of private international law and fundamental rights. To simplify matters, it could be said that the management of flows is dominated by the principle of sovereignty, while the management of stocks is governed by the principle of non-discrimination.

The influence of the variety of migratory forms on law and on the different forms it must take in order to manage migrations does not in itself, however, explain our use of the plural: legal orders. Rather, it is because another kind of plurality has emerged more recently: that of the sources of law. It is not merely the traditional diversity of sources of law, ranging from texts (binding or not), case law, different levels, or the distinction between theory and practice. What we are dealing with here is more a diversity in legal orders or levels where law is made. Traditionally, since the creation of nation-states, the law of foreigners is the place of expression par excellence of national sovereignty. A national body of law gives form to national politics. Yet more and more, this national law is encompassed by international law. This is not an entirely new phenomenon, but was for the most part the subject of bilateral treaties between countries of immigration and those of emigration, and of a few international texts on the protection of specific categories of migrants, such as the Geneva Convention of 1951 on the status of refugees. Today two major developments can be seen. On the one hand, there is the rise of the importance of human rights, and on the other, the process of regional integration.

- Fundamental rights

If the protection of fundamental rights already existed in national constitutions, their application to foreigners was less certain. The national reports indicate that it is still the
subject of debate in numerous countries, especially for foreigners who are not considered to be already within the territory because they are at the border or beyond the border (USA). The international texts on human rights protection apply to ‘every person’, rendering these territorial limits to the scope of fundamental rights if not obsolete, at least permeable. This is the case, in particular, where these texts are the subject of a supranational jurisdiction such as that of the European Court of Human Rights or the Inter-American Court of Human Rights. Certainly national sovereignty is reaffirmed, for instance by the European Court of Human Rights, 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 nonnationals to their territory.3

But this sovereignty must be exercised while respecting the fundamental rights of the persons concerned. This entails, for example, the prohibition against inhuman and degrading treatment and torture, which forbids the expulsion of a person to a country where “substantial grounds” have been shown for believing that he or she would face a “real risk” of being subjected to such treatments. It also entails respect for private and family life, which prohibits expulsion or refusal of admission to the territory that would constitute a disproportionate interference with family life. Several national reports emphasize this growing influence of human rights (South Africa, Japan, New Zealand, United States) and in particular the European Court of Human Rights (Belgium; Estonia; France, p. 6; Greece; Malta, p. 44; Norway; United Kingdom) or the Inter-American Court of Human Rights (Dominican Republic, p. 12ff).

- Regional integration

The second major development results from the processes of regional integration. The European Union is of course the key example, but it is not the only one. According to different levels, territorial expansions create spaces, if not of political integration then at least of freedom of movement. The result is twofold: the creation of free movement migration within the integrated space and a shared migration policy vis-à-vis the outside. This greater freedom of internal movement emerges in particular from the reports of certain European countries after their accession to the Union (Estonia, Malta, Poland, Romania). Nationals of these countries enjoy more options for migration, but as a result they have experienced a significant drain of physical and intellectual workers (Poland, Romania). By contrast, those

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Member States that now enjoy these new, easier migration options are seeing new measures taken to limit them. The latter is the purpose of the transitional measures adopted to limit the free movement of workers from the new Member States within the European Union. The national reports for the new Member States emphasise this (Croatia, Estonia, Malta, Poland, Romania) and the reports of older Member States mentioned it as well (United Kingdom). These measures also explains why certain States have refused to sign a free movement agreement within a regional area, since such agreements attract the most migrants (South Africa as regards the Southern African Development Community – SADC, p. 5) or the reluctance to further expand such regional integration efforts (Singapore as regards the Association of Southeast Asian Nations – ASEAN, with the ASEAN Declaration of the Protection of the Rights of Migrant Workers, p. 66; Japan as regards the Trans-Pacific Partnership – TPP, which could lead to a more liberal immigration policy, p. 18). The influence of regional integration is felt not only on internal movement but also on the policies and laws governing migration from outside the given region. For example, in the European Union, the Member States, even the long-standing ones, have had to adapt their legislation or practices, restricting the migration of EU citizens’ family members who are non-EEA nationals as a result of the rights of free movement enjoyed by EU citizens. Thus, Ireland has been obliged by a decision of the ECJ to recognise the right of residence of a Cameroonian man who marries a British national. Irish law considered that this is part of its national migration policy, since the British national was not married to the Cameroonian before arriving in Ireland. The European Court of Justice held that this issue falls under the European right to freedom of movement and not under national migration law, since the European citizen in question would be impeded in exercising her right to free movement if she knew 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, p. 11, ECJ case law, Metock). Regional integration also leads to the creation of shared – and often enhanced – control of external borders and of the asylum and immigration policy of the region. This development can profoundly alter the situation in countries whose borders are no longer simply national boundaries but external ones enclosing a shared space. These countries bear a significant burden of control and of receiving migrants, and several of the reports note a lack of solidarity among the member states of a union (Greece, Malta, Romania).
This report is divided into two parts. The first, more technical in nature, has to do with the classic questions relating to admission to and residence in a country. The second, more reflective, examines the relationships between laws and migrations in a wider and multidisciplinary perspective.
Part One: Migration and residence

This part of the report addresses the legal rules on the admission, residence and removal of foreigners. It does not seek to reproduce the answers of the 24 national reports to the questions asked (see questionnaire in annex) but attempts to synthesise the main commonalities as well as the principal points of distinctiveness. For certain details we refer to the pages of the national reports. The structure of the synthesis is as follows. The first point is devoted to two preliminary questions: the context and the texts. The context demands that we examine the sources and actors in migration law at both national and international levels (I). The second point examines three aspects of admission to and residence in a country: the distinction between short and long stay, legal migration (family reunification, asylum, privileged categories) and discretionary migration or migration of interest (economic migrants, students, humanitarian cases, regularizations) (II). The third point considers three supplementary issues relating to migration: control (detention, fighting human trafficking and people smuggling), procedural guarantees (appeals) and social rights (III).

I. Preliminary considerations

A. Nationality

1° Definitions

The definition of a foreigner is always presented in negative, as in a mirror. A foreigner is a person who does not hold the nationality of the State where he or she is living. International migration law is linked to this binary opposition between the national and the foreigner. Unlike the foreigner, the national will in principle always be admitted to the territory of his or her country and enjoy the right to reside. This principle follows from the prohibition in international law against banishment, enshrined 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 for admission to a country and to citizenship are prior to the determination of who, on the contrary, are the subjects of the law on foreigners and migration law. Nationality law also determines the prerequisites and procedures according to which a foreigner may obtain citizenship in the host country. This is why we have asked the national
reporters for some details on the conditions for acceding to citizenship. “It is for each State to determine under its own law who are its nationals”\(^4\).

It is not surprising, therefore, to note that all the States reported on have a law, or more often a code, on nationality. This legislation is generally recent or has undergone amendments fairly recently. These changes can be explained for the most part by developments in migration policy intended to allow, more or less broadly, the acquisition of nationality, particularly as a result of major political shifts (Estonia, Macau, New Zealand, Poland, Singapore, South Africa). The link between changes to the conditions for acquiring nationality and migration policy is sometimes mentioned explicitly, as in the title of a 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”, thus revealing, contrary to what the adjective ‘neutral’ tries to affirm, that the definition of who is a national necessarily has an impact on that of a foreigner (Belgium).

2° Attribution upon birth

The modalities of attributing the full nationality upon birth fall into the two categories of *ius soli* and *ius sanguinis*. It is tempting to believe that the former is characteristic of immigration countries, in order to promote the automatic integration of children of migrants, while the latter is more typical of countries of emigration in order to maintain the link with the home country. This may be partly true. Thus the traditional object of the automatic *ius soli* in the United States as affirmed in the 14\(^{th}\) amendment to the Constitution comprises “a particularly strong version of citizenship by *ius soli* (USA, p. 16):

> 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 *ius sanguinis*: “Polish citizenship shall be acquired by birth to parents being Polish citizens”, and this is so regardless of which parent it is and of the place of birth (Poland, p. 29). However, these models no longer exist in their pure state, even for the two countries just mentioned. The United States also provides, beyond the Constitution, for acquisition of nationality by blood in the event of the birth, even abroad, of a child of an American parent (USA, p. 16). Conversely, Poland also provides, beyond its Constitution, for acquisition of nationality by the *ius soli*, but for the sole purpose of preventing statelessness (Poland, p. 29). If certain countries exhibit a strong preference for *ius sanguinis* (Estonia, Japan, Malta, Norway,

\(^4\) The Hague Convention of 12 April 1930 on certain questions relating to the conflict of nationality laws, Art. 1.
Singapore) and others for *ius soli* (Colombia, Dominican Republic, Australia, South Africa), these are not pure systems either. In particular, the *ius soli* is often effective only if at least one of the two parents is a citizen, or a foreigner with permanent resident status (Australia, South Africa). This situation may result in children who were born in of foreign parents residing in such a country, often since a long time, not being accorded citizenship if the parents’ residency is not considered to be sufficiently regular. This is the case in the Dominican Republic of the children of Haitian workers, who regardless of the length of their stay, are considered as being ‘in transit’, resulting in situations of statelessness that have been condemned by the Inter-American Court of Human rights (Dominican Republic, p. 16).

The majority of countries have mixed regimes that have evolved, a long time ago or more recently, either by adding elements of the *ius soli* to the traditional *ius sanguinis* in order to integrate second generation migrants (Belgium, France) or only the third generation (Greece), or, conversely, by adding to the traditional *ius soli* certain elements of the *ius sanguinis* (Canada, New Zealand).

3° *Declaration or naturalization*

The acquisition of nationality after birth takes place by means of naturalisation or declaration. Other than cases reserved to the head of State (Poland), one central condition for obtaining nationality by declaration or naturalisation is the length of a person’s regular residence. The requirements in terms of number of years can vary greatly: one (Colombia, in certain cases), two (Dominican Republic), three (Canada), four (Australia, South Africa), five (Belgium, France, New Zealand), seven (Croatia), eight (Estonia), or ten (Singapore).

The calculation of these time periods is also highly variable, depending on whether it must simply be authorized residence or, more often permanent status. Connecting factors can sometimes reduce these periods. These include language, for example (Colombia), former bonds of dependence (Colombia, Macau, Singapore), belonging to the ‘nation’ in the diaspora (Croatia, Poland, and Greece for Greeks from the former Soviet Union, p. 26). They can also be certain types of military or religious commitment (in Greece, the monks of Mount Athos, p. 25). More rarely, it may involve the purchase of nationality by making investments (Malta). Generally speaking, linguistic conditions (Belgium, Estonia, Japan, Norway) or cultural or political knowledge (Canada, Croatia, New Zealand, Singapore) are added. Marriage no longer has an automatic effect on nationality but usually facilitates its acquisition, though sometimes differences in treatment between men and women remain (Dominican Republic).
A ceremony often marks the acquisition of nationality, formalising the person’s integration into the community (Canada, New Zealand, United Kingdom).

4° Statelessness
The majority of States for whom we received reports have ratified the United Nations Convention relating to the Status of Stateless Persons, drawn up in New York on 28 September 1954. Its Article 26 provides, notably, that

Each 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.

Some States have not yet ratified this Convention (Malta, South Africa, and despite having promised to, the Dominican Republic). Most of the Member States of the Council of Europe, apart from a few rare exceptions (Croationa) have also ratified the European Convention on Nationality (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 are intended to prevent statelessness. For many years, the High Commissioner for Refugees (HCR) led campaigns on behalf of stateless persons (notably “Mapping Statelessness”), from which several reports have been published (cf. United Kingdom, p. 42).

In 2012, the HCR adopted four guiding principles on statelessness (definition, procedures, status at the national level and the acquisition of nationality). Several countries’ reports continue to face significant situations of statelessness of specific categories of people such as the Roma in Croatia (p. 26) or the children of Haitian workers in the Dominican Republic (p. 16).

5° Multiple citizenship
States’ approach to multiple citizenship has clearly evolved over time. Formerly considered suspect, notably as regards the allegiance of a person to the State, now multiple citizenship has become a normal consequence of migration. Most of the reports mention that the acquisition of another nationality no longer leads automatically to the loss of the original one (Belgium, Colombia, France, Greece, United Kingdom).

Conversely, however, certain countries that are opposed to dual citizenship have maintained the automatic loss of one’s original citizenship upon the voluntary adoption of another nationality (Japan, Singapore, South Africa) or have recently returned to this principle (Norway, p. 29), or entertain an ambiguous situation of multiple citizenship in the
Constitution but single citizenship only in the nationality code (Estonia, p. 2 with a draft reform of the code allowing for multiple citizenship).

6° Nationality by degrees
In some countries, nationality is a complex matter. There is no single type of nationality but several types, granting access to different rights. The textbook case is the United Kingdom, with six categories of nationality: (1) British citizens, (2) British overseas territories citizens, (3) British overseas citizens, (4) British national (overseas), (5) British protected persons and (6) British subjects (United Kingdom, p. 38). If simplification would be desirable (p. 72), this diversity reflects a certain reality expressed differently in other countries: the absence of a binary categorization and of a simple boundary between the national and the foreign. Among them are people who, while not citizens in the strict sense, sometimes hold the same status (e.g. the Portuguese and Chinese residents in Macau); sometimes a closely similar status (European citizens in the Member States of the European Union who sometimes enjoy reduced rights for transitional periods (Croatians, Estonians, Poles), and in still other cases a privileged status due to geographical and/or historical proximity (Australia-New Zealand) or due to ethnic characteristics that presume membership in the nation and the right of return by virtue of descent or cultural identification (Croatia, Greece, Poland).

This diversity translates into the recognition of multiple statuses ranging between that of a citizen and a foreigner with, of course, effects on the right to a residence permit. The result is a certain “hierarchy of migrants” (Norway, p. 37). And thus we see that we need to speak in the plural of types of migration and of laws, confirming the diversity of both the sources and the players involved.

B. Sources and players

1° At the national level
The national sources in the area of migration law are numerous, and are mentioned in the respective national reports. The majority of States have a code or a more general law governing both migration and nationality. Some have been in place for a long time (Australia, 1958) while others are more recent (France, 2004; Greece, 2006; Norway, 2008). Amendments in response to political developments are frequent in all countries. In some cases, new draft laws are under consideration (Poland, USA). These codifications or general laws are accompanied by more practical regulations. In almost all countries reported on, the implementation of these regulations is entrusted to administrative bodies answerable to the
Ministry of the Interior. In some cases, however, it falls under the competence of the Ministry of Justice and Public Security (Norway), the Ministry of Foreign Affairs in countries where emigration is more substantial than immigration (Colombia, Estonia), the Ministry of Commerce, Innovation and Employment in countries where economic migration is significant (New Zealand, or under a separate Ministry of Citizenship and Immigration (Canada).

Two phenomena should be noted as regards the origin of these national laws and powers: on the one hand, in federal or decentralized States, regional authorities can often have considerable powers, in particular when it comes to economic migration (Belgium, Canada, Germany). On the other hand, generally speaking, we see the importance of administrative practices. 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 reports to be particularly wide in migration law, so much so that “in implementing immigration policy, a relatively autonomous bureaucracy has been guided by securitisation goals rather than by legal obligation (South Africa, p. 26). Court rulings condemn certain practices, but often they fail to make any change to general practice beyond the case in which a given judgment was handed down, or else they lead to a change in the law in order to bring it into line with practice. As a result, if the gap between ‘the law’ and practice “is of course a common occurrence, it raises concerns when there appears to be a conscious decision to allow the situation to persist” (Malta, p. 80). In such cases we see a sort of “ping pong battle between the judiciary and the executive” (United Kingdom, p. 71; Greece, p. 50). In this game of ping pong, transnational courts seem to play an important role, either in terms of human rights (European Court of Human Rights, Inter-American Court of Human Rights) or within the context of regional integration (Court of Justice of the European Union). As a result, international and regional sources are gaining in importance.

2° At the international level

If the national sources and bodies mentioned in each report are important for migration law, they are no longer the only ones. The quest for a balance in interests between national sovereignty on the one hand and human rights and regional integration on the other lend increasing weight to supranational sources. It is therefore useful to list here the principal international and regional sources, as well as certain international and regional bodies. Depending on the legal system, the international sources will apply either directly in the national legal orders after ratification, or will require transposition into domestic law.
**a. International instruments**

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)\(^5\).

**A. General instruments**

Three important texts should be noted.

1. **Universal Declaration of Human Rights (UDHR)**

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

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

2. **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, entered into force on 23 March 1976:

- Art. 2: principle of non-discrimination;
- Art. 7: prohibition of torture, cruel, inhuman or degrading punishment;
- Art. 12: liberty of internal movement, freedom to leave any country, right to enter one’s own country;
- Art. 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 “comments” on individual Communications where the State has accepted this complaint mechanism (Optional Protocol No. 1 of 16 December 1966, Art. 5).

\(^5\) For the status of ratification and the texts, see http://treaties.un.org.
The International Court of Justice can also hear disputes between States that involve migrants, but this is rare.

- **Example:** ICJ, 30 November 2010, Republic of Guinea v. DRC (ex parte Diallo). Mr Diallo, a Guinean businessman, was expelled from the DRC 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, in this instance 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 (pts 66 to 68). The Court also emphasized 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” (pt. 65).

**3. 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, entered into force on 26 June 1987. This Convention further develops Article 7 ICCPR. In particular, Article 3, which prohibits expulsion to a country where there are substantial grounds for believing that a person would be in danger of being subjected to torture. This article in a sense formalises in one text the case law on Article 3 ECHR (principle of non-refoulement and “protection par ricochet” [indirect protection]).

The CAT monitoring body, the 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.

**4. 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](http://www.ohchr.org)

**B. Instruments protecting specific categories of persons**

Four texts should be mentioned here, of which only two are cited by most of the national reports: the Geneva Convention on Refugees (1) and the New York Convention on the Rights of the Child (4). With the exception of Colombia, a country of emigration, no other State has
ratified the International Convention on the Protection of the Rights of All Migrant Workers (2) (infra, III, c).

1. *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, which entered into force on 22 April 1954. This Convention defines the concept of a refugee (Art. 1), imposes a principle of *non-refoulement* (Art. 33) and sets out the recognized rights of the refugee (Articles 2 to 46). Initially limited in time and space, it is supplemented by:


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. It is not, like the United Nations Committee, tasked with monitoring the Geneva Convention. Rather, it is the institutions set up by each State Party that is responsible for doing that.

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

2. *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Family*


As its title indicates, this Convention has to do with migrant workers. Its specificity is that it recognizes the rights of both regular and irregular migrants. For this reason it has been ratified almost exclusively by countries of emigration – among the countries reported on here, this is Colombia.

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 (Art. 72). If the State Party agrees, individual communications can be submitted to the Committee, which issues comments (Art. 77).
3. 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, entered into force on 4 January 1969. This Convention asks States to commit themselves to prohibiting and eliminating 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 (Art. 5).


Adopted in New York by the General Assembly of the United Nations in Resolution 44/25 du 20 November 1989, 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 respect for certain rights in the event of migration by the child or by members of his/her family, separately or together. It lays down 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.” (Art. 3, 1°). Article 10 imposes on States the obligation to examine “in a positive, humane and expeditious manner” requests for family reunification. The right to be recognized 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 (infra, III, A).

Other international institutions give opinions and issue reports on questions relating to migration. The following bodies, in particular, deserve particular attention:
The International Organization for Migration (IOM) founded in 1951 by the Intergovernmental Conference on Migration in Brussels. This inter-state organization, which in 2013 had 149 member states, is intended to “facilitate international cooperation on migration matters”. It issues numerous publications. The IOM also serves as secretariat for the Global Forum on Migration and Development (GFMD) as well as several regional intergovernmental consultations that are occasions for the exchange of information as well as for informal decisions. In certain countries, the IOM also has programmes to help irregular migrants return voluntarily to their country of origin (ww.iom.int);

- the 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 Organization, Kofi Annan. The 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 means of cooperation among States, among regional entities and among organizations, but also on a principled approach that recognizes the fundamental rights of migrants (www.gcim.org);

- the United Nations Special Rapporteur on the human rights of migrants. Tasked with drawing up reports and proposals. Since 2011 Professor François Crépeau of McGill University in Montreal has held the post;

- the International Labour Organization (IOL). In addition to various recommendations on migrant workers, the IOL adopted Convention C 143 on Migrant Workers on 24 June 1975 (www.iolo.org);

- the Hague Conference on Private International Law, traditionally focused on drafting private international law agreements, has produced studies and offered services to States as the place for drawing up certain types of international cooperation on migration matters (www.hcch.net).
b. Regional instruments

A. Europe

a. Council of Europe

a. General instruments

1. European Convention on Human Rights and Fundamental Freedoms (ECHR)

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

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

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

- Art 7 and 17: rights of children and young persons to special protection;
- Art. 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”;
- Art. 19: right of migrant workers and their families to protection and assistance;
- Art. 31: right to accommodation;


www.coe.int/t/dghl/monitoring/socialcharter/ECSR/ECSRdefault_en.asp

β. Instruments protecting specific categories of persons

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

- the European Convention on Establishment, adopted in Paris on 13 December 1955;

b. European Union

α. Primary law

1. Treaty on the Functioning of the European Union (TFEU)

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

- Articles 18 to 25: non-discrimination and Union citizenship;
- Articles 45 to 62: freedom of movement for workers, right of establishment, free movement of services;
- Articles 77 to 80: policies on border checks, asylum and immigration.
2. Charter of Fundamental Rights of the European Union

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

- Art. 1: human dignity;
- Art. 18: right to asylum;
- Articles 20-21: non-discrimination;
- Articles 39 to 46: citizenship;
- Art. 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” (Art. 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, Art. 51).

β. Secondary legislation

Secondary legislation, in the form of regulations and directives, is abundant. Such laws have for a long time (1968) governed the freedom of movement within the Union, 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 rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States (the so-called “recast” or “citizen’s” directive).

More recently (in the 2000s), the Union adopted texts relating to migration policy. We cite only five here, three addressing immigration and two asylum:

- Directive 2003/86 of 22 September 2003 on the right to family reunification (known as the “Family reunification directive”),
- Directive 2003/109 of 25 November 2003 concerning the status of third-country nationals who are long-term residents (known as the “Long-term residents directive”),
- Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals” (known as the “Return directive”),
- Regulation 562/2006 of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code),
- Regulation 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (known as the Dublin II Regulation since it
follows upon the Dublin Convention of 14 June 1990, revised by Regulation 604/2013 (known as Dublin III),
. Directive 2004/83 of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (known as the “Qualification Directive”), recast by Directive 2013/33.

All Union law is enforced by the Court of Justice of the European Union. The principal way in which the Court does so is through preliminary rulings, given where a national court asks the Court of Justice for an interpretation of European law (Art. 267 TFEU).


For a presentation of the texts and case law: europeanmigrationlaw.eu

v. European Migration Network

By Council Decision 2008/381 of 14 May 2008, the European Union set up a European Migration Network (REM-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” (Art.1).

University professors have also created, with the support of the European institutions, an academic network of legal studies on immigration and asylum in Europe (Odysseus network).

www.ulb.ac.be/assoc/odysseus

B. Americas

a. General instrument

1. American Convention on Human Rights

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

- Art. 1: applies to “all persons subject to the jurisdiction” of one of the States Parties;
- Art. 5: right to physical, mental and moral integrity;
- Art. 22: right to freedom of movement and residence.

This so-called “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 (Art. 44). The Court can hear petitions from the Commission and from the States Parties. The States may also consult the Court and request its opinion (Art. 64). Thus, the
Court has upon the request of Mexico issued an important opinion on the situation of Mexican workers in the USA (opinion No. 18 on the legal status and rights of undocumented migrant workers, issued on 17 September 2003 (OC-18/03) (infra, III, C). (www.corteidh.or.cr).

b. Instruments protecting specific categories of persons

1. Inter-American Convention on Territorial Asylum and the Inter-American Convention on diplomatic asylum

Both signed in Caracas on 28 March 1954.


Dated 17 December 1992
- Articles 1601 to 1608 on temporary entry for business persons.

3. Cartagena Declaration (Colombia) on refugees

Although this is just a declaration, the text is applied in several South and Central American States.

C. Africa

a. General instrument

African Charter of Human and Peoples’ Rights

Adopted in Nairobi (Kenya) by the conference of heads of state and heads of government of the Organization of African Unity (OAU), which has since become the African Union (AU), on 28 June 1981, entered into force on 21 October 1981:
- Art. 5: human dignity;
- Art. 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, Burkina Faso, on 9 June 1998). Since 2006 the Court has been located in Arusha, Tanzania), but so far it has seen relatively little activity. Individual petitions are possible if the State Party has consented and the Court has given leave (Art. 34 (6) of the Charter and 5 (3) of the Protocol).

b. Instrument protecting specific categories

OAU Convention governing specific aspects of the refugee problem in Africa

D. Other regional bodies dealing with migration.

- **Example:** There are several regional bodies that 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).

It is possible that these integration mechanisms will 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.

- **Example:** In 2013, the IOM counted fifteen regional consultative processes on migration ((RCP).

1° Asia and Oceania (5)

- IOM Regional Seminar on Irregular Migration and Migrant Trafficking in East and South-East Asia (Manila Process, 1996).
- Inter-governmental Asia-Pacific Consultation on Refugees, Displaced Persons and Migrants (APC, 1996).

2° Africa (3)

- Inter-Governmental Authority on Development - Regional Consultative Process on Migration (IGAD-RCP, 2008)
- Migration Dialogue for West Africa (MIDWA or Dakar Follow-up, 2001).

3° Americas (2)


4° western Mediterranean (2)
• Mediterranean Transit Migration Dialogue (MTM, 2003).
• Regional Ministerial Conference on Migration in the Western Mediterranean (5+5 Dialogue, 2002).

5° Eastern Europe and Central Asia (3)
Inter-governmental Concertation on Asylum, Refugee and Migration Policies (IGC, 1985).

The diversity of the sources and places where migration laws are discussed and written is obvious. It is nevertheless possible, based on the national reports, to identify a number of constants, first as regards the conditions for admission to and residence in a country (II) and as regards a number of complementary questions (III).
II. Admission to and residence within the territory of a country

A. Short and long stay

1° Distinction
All States make distinctions between admission to their territory and short stays on the hand, and long stays and permanent residence on the other. The essential difference is of course linked to the shorter or longer period of residence. For several countries, a short stay must not exceed three months during any six-month period. This is the case for Member States of the European Union linked by the Schengen Borders Code and the Visa Code. In other countries, a short stay is considered to be a visit for purposes of tourism, family visit, care or business. The visa which grants admission to a country for a short stay must be applied, for before arrival, at a diplomatic mission theoretically in the country of origin. Representation agreements between States make it possible, however, for a visa to be issued by the diplomatic mission of another (Schengen) State. This can make it difficult, in the case of request for redress, to identify the State responsible. Some countries allow for electronic visa to be issued (New Zealand, Singapore). Each country determines, on the basis of international relations, the list of countries whose nationals do not need a visa. A highly integrated regional entity such as the European Union has two effects on this mechanism. In some cases, all or part (Schengen) of the other Member States enjoy the freedom of movement and hence their nationals are exempted from the requirement of a visa, or even from presenting any other document than the national identity card. In other cases, the Member States draw up a shared list of third countries whose nationals require a visa. As a result of these two mechanisms, the visas issued entitle the holder to a short stay in territory of all the Member States and not only of the State that issued the visa.

2° Conditions
The object of the short-stay visa is generally tourism, family visit or short-term employment. These three situations are classified into different, sometimes numerous, categories in national legislation. (Canada: 4, United Kingdom: 9, Colombia and South Africa: 13).
A number of countries facilitate crossing the borders for border residents. This is intended both to make it easier to visit members of one’s family or ethnic or national group (Dominican Republic, Poland) and to favour small-scale cross-border trade or labour. In Europe, the Schengen Borders Code’s provisions to control the external borders are “without prejudice to Community rules on local border traffic” (Art. 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”.\(^6\) It’s a question of settling the particular situation of populations living along a border between a member state of an integrated regional entity (European Union, 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, the Member States in question can conclude bilateral agreements with neighbouring third countries. Thus Poland has signed such agreements with Ukraine and Russia as well as with Belarus, but the latter has not come into force (Poland, p. 3). Stays permitted in the context of this kind of local border traffic, according to Regulation 1931/2006, may not exceed three months, unless other provisions in existing bilateral agreements so provide. They correspond therefore to the short stay, which they facilitate for the benefit of border residents.

Moreover, the Court of Justice of the European Union has given a wide interpretation to this short stay of three months. As regards the question of whether this period should be limited to a maximum of three months out of every six-month period, as is the case for the short-stay Schengen visa, or whether, once the maximum three months have been exceeded, the border resident can, after returning home, immediately begin another three-month period, the Court ruled in favour of the latter option. If the agreement did not impose any other limit than that of three months, the persons concerned can begin a second period immediately after having returned to their home country. The Court justified this autonomous interpretation, which is different from that of the Schengen visas, in order 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”\(^7\). 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 in a zone within 30 kilometres of the Polish border. On 11 October 2012, the Polish consulate had already issued 100,000 special cards for simplified border crossing. The card is free for minors, the elderly and disabled people, and costs EUR 20 for adults. The agreement between Poland and Russia, which is not limited to a 30 km zone but covers the entire Kaliningrad region, is even more significant in quantitative


\(^7\) CJ, 21 March 2013, case C-254/11, \textit{Shomodi}, pt. 24; in the context of another bilateral agreement between Hungary and Ukraine.
terms, as it can potentially affect 3 million people (Poland, p. 4). The qualitative consequences are also important. On the one hand, these measures facilitate movement that is justified on account of territorial proximity and family, cultural and economic ties. On the other hand, by making it easier to come and go in a sort of brief circular migration, they reduce the migratory pressure and risks of clandestine resettlements. In the process, as the Court of Justice noted when it spoke of “border zones”, the borders in such areas are regarded less as a demarcation line or wall of separation, and more like a zone of encounter. As confines (cum fines) rather than a limit (limes).

Unlike this cross-border movement facilitated by a special document that is free or low in cost, the short stay authorised by a visa requires additional conditions, often financial ones, to be met. The applicant must have “adequate funds” (Australia), “sufficient means of subsistence both for the duration of the stay and for the return” (EU Visa Code, Art. 14, §1, c) or else must give a “security deposit” (Singapore, p. 4, of between $1000 and $3000). Under certain legislation, a character test (Australia) or health test (Australia, New Zealand: refused to those with HIV) is also required for the short-stay visa.

The long stay can sometimes be obtained by extending a short-stay visa, but this is rare. It generally requires prior authorization sought before leaving the country of origin, in the form of a long-stay visa or a temporary residence permit. It may be divided into two major categories. On the one hand (B), there are legal forms of migration, so that if the migrant fulfils certain conditions, he or she has the right to migrate. This is a form of influence of human rights that applies in particular to family reunification and asylum. It also reflects the effect of political relations that concern privileged migrants and diplomats. On the other hand (C), there is discretionary migration, which remains the expression of national sovereignty. This has to do with migration for study, work and stays for humanitarian reasons or by regularization.

A change of status, moving from one category to another is rare, but sometimes possible (United Kingdom, point system; Greece, from student to qualified worker; Japan, from student to resident). The main change is moving from a long-term temporary stay to permanent residence. The length of time after which the latter can be acquired varies, as is the case for naturalization as well, ranging from 4 years (Canada) to 5 years (Belgium, Croatia, France, Germany, Greece, Malta, Dominican Republic, Poland, Romania, the United Kingdom), 7 years (Macau) or 10 years (Japan). In the European Union, the status of permanent resident has been formalized in two different ways. The first is for European
citizens. After 5 years of residence on the territory of another Member State, they acquire the “right of permanent residence”. This status is almost entirely equivalent to that of a citizen, notably from the point of view of social assistance, and it means they can no longer be expelled except on “serious grounds of public policy or public security”. The second way is for third-country nationals. After the same period of five years of residing “legally… and continuously” in a Member State, they can obtain in that State the status of “third country nationals who are long-term residents”. The latter status is partly equivalent to that of European citizens, enabling them in particular to move and reside freely throughout the whole of the EU, but leaves the individual States the possibility of setting limits as regards access to the labour market and to social rights.

B. Legal migration

1° Family reunification

Migration for family reasons represents, according to several reports, a significant portion of the migratory flows (USA, 80%; Norway, 60%; Australia, 30%). According to the OECD, certain national percentages are even higher and represent in any case, on average, at least 1/3 of the migrants in the OECD countries (OECD, *International Migration Outlook*, 2012 and USA, p. 15). 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” (USA, p. 15). This is no doubt due to the reality of family life, which is constituted or reconstituted with immigration. It is also due no doubt to the legal recognition of every person’s right to family life, including for migrants. Several of the reports point to the right to family reunification (Estonia, France, Malta, New Zealand, United Kingdom). Others note that there is no true right to family reunification, since the existing right is limited to the families of certain migrants (Singapore, p. 10, for qualified workers) or is not explicitly recognized as such (Japan, p. 10).

In Europe, the influence of the two European courts (European Court of Human Rights in Strasbourg and the Court of Justice of the European Union in Luxembourg) is important in this regard. The Strasbourg court applies article 8 ECHR to migrants, which prohibits disproportionate attacks on respect for private life and family life (see for example United

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9 *Idem*, art. 28, §2.

Kingdom, p. 15). Some of the reports emphasize the role of the constitutional courts of their countries, which have recognized the right to family reunification as a fundamental right (France, 1993, p. 6) and refused to allow this form of migration to be counted among the annual quotas determined by the authorities (Estonia, 2000, p. 8). The Luxembourg court has also held that the European directive “on the right to family reunification” recognizes, as its title suggests, a “right” to migration. Moreover, the Luxembourg court has considered that the right to family reunification of a non-EEA national with a European citizen moving freely within the European Union falls within the freedom of movement of European citizens and not within migration policy, even if the family was not created prior to that movement by the citizen of one Member State to another. The influence of this European case law on national rights, in particular within the United Kingdom, has been emphasized in the reports: “the decision has placed a clear restraint on the United Kingdom’s competence to regulate the migration of non-EEA national family members” (United Kingdom, p. 11). This extension of the right to residence to a family member of the European citizen who is moving between countries can, moreover, have some surprising consequences. To the extent that the family member of a “sedentary” EU citizen continues to fall within the national migration policy rather than the European law on freedom of movement, it may be that the EU citizen’s family member has more difficulty obtaining family reunification than the family member of an EU citizen who is moving between EU countries, for example because more onerous financial conditions may be imposed (Belgium, Norway). This amounts to a form of reverse discrimination.

While in some cases family reunification can entitle someone to a multiple-entry visa (Colombia, p. 10) or a “super visa” (Canada, p. 3), it generally confers the right to a temporary stay (Australia, Belgium) that in due course will confer a right of permanent residence after a probationary period that will allow the reality or durability of the family ties to be tested as well as to ensure that certain conditions, notably relating to means of subsistence, are met.

Where family ties are concerned, these generally apply to spouses, minor or dependent children and parents. As regards spouses, there have been several debates regarding marriage and civil partnership. As regards marriage, most States recognize only monogamous marriage between members of the opposite sex. Polygamy is occasionally recognized in its effects on residency in the interests of children (Belgium, Constitutional Court) but is limited to the

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residence of a single spouse (Belgium, France, Greece, New Zealand). This is the position taken in the European directive on the right to family reunification, which refuse explicitly to recognize the right to residence by more than one spouse, but leaves it up to the Member States to decide regarding the same right to children of polygamous couples. Generally speaking, the marriage recognized is heterosexual marriage (Estonia, Macau) although a few countries also recognize same-sex couples by statute law (Belgium, South Africa) or in the case law (USA). More often, this scenario is covered by the right to residence by “partners”. The recognition of legal civil partners (registered ones in the EU) or of de facto ones (cohabitees in New Zealand) also helps the latter countries to avoid the risk of sham marriages, contracted solely for the papers. This phenomenon is rare in New Zealand, for example, (p. 34) while it is subject to various types of controls and sanctions in numerous countries (Estonia, Macau, Belgium, Poland, Norway, Malta). The inequality of the sexes is also present in some countries in the form of a preference given to family reunification with a man (Dominican Republic, Japan). This measure, generally justified by the fact that the foreign woman who joins her husband will enter his household and not be a competitor on the labour market, has since 1985 been condemned as discriminatory on grounds of sex in the protection of family life by the European Court of Human Rights\(^\text{12}\).

2° Asylum

Asylum is also a form of migration connected to fundamental rights. Although not insignificant it is quantitatively much less substantial than family migration. For the year 2013, we can break down the number of applications for asylum in a number of the countries reported as follows (Sources: HCR, Inter-governmental Consultations on Migration, Asylum and Refugees, Migration News Sheet, March 2014 and the national reports):

<table>
<thead>
<tr>
<th>Asylum-seekers 2013</th>
</tr>
</thead>
<tbody>
<tr>
<td>Japan</td>
</tr>
<tr>
<td>Singapore</td>
</tr>
<tr>
<td>Estonia</td>
</tr>
<tr>
<td>Romania</td>
</tr>
<tr>
<td>Greece</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Country</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Canada</td>
<td>8 500</td>
</tr>
<tr>
<td>Norway</td>
<td>12 000</td>
</tr>
<tr>
<td>Poland</td>
<td>14 000</td>
</tr>
<tr>
<td>Belgium</td>
<td>15 800</td>
</tr>
<tr>
<td>Australia</td>
<td>24 300</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>27 000</td>
</tr>
<tr>
<td>USA</td>
<td>46 000</td>
</tr>
<tr>
<td>France</td>
<td>65 900</td>
</tr>
<tr>
<td>Germany</td>
<td>109 600</td>
</tr>
</tbody>
</table>

These figures only imperfectly reflect the reality, however. They do not indicate either the quantity or the quality of the statuses granted. As regards quantity, the recognition rates vary between 5 and 30%. A distinction also has to be made between asylum granted to persons who have arrived directly in a country (on-shore) and those granted abroad with view to resettling the protected person in the host country (Australia, Canada, New Zealand, Norway, USA), or issued via an embassy (Poland). As regards the quality, we can distinguish at least three major categories of persons receiving international protection: Geneva Convention refugees, persons receiving subsidiary protection, and persons receiving constitutional protection. For the latter category, relatively few countries have enshrined asylum in their Constitution (Germany, France, Colombia, Croatia). By contrast, with the exception of Japan\(^\text{13}\) and Singapore (and this is the case for other South-East Asian countries with the exception of Cambodia and the Philippines), all States covered in the report have ratified the Geneva Convention of 28 July 1951 on the status of refugees.

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” (Art. 1, A, 2). It should be noted that in 2012 Norway removed the word “race” from its definition, replacing it with the words “ethnicity, origin, skin colour” (Norway, p. 10). The terms used in this definition (“well-founded fear”, “persecution”, and the five grounds) can give rise to different interpretations. The role of decision-making bodies, and in particular the judicial bodies that generally intervene in the case of appeal, is thus an

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\(^{13}\) Japan nevertheless contributes to the budget of the UNHCR and set quotas for the acceptance of refugees from Myanmar, but the uptake among the refugees concerned was low (Japan, p. 12).
important one. In certain countries there is, however, little or no intervention by the courts (Dominican Republic, Estonia, Greece, Japan, Malta). But in the majority of the countries, specialized tribunals and, in the first instance, administrative bodies have been put in place to handle the question. International bodies facilitate the exchange of information and the harmonization of interpretations: HCR, IARLJ (International Association of Refugee Law Judges), EASO (European Asylum Support Office). Within the European Union, a “Qualification Directive”\(^\text{14}\), whose interpretation is up to the European Court of Justice, has introduced some clarifications. We thus see that persecutions relating to religion\(^\text{15}\) or sexual orientation as a social group have been clarified\(^\text{16}\). It remains the case that refugee status under the Geneva Convention continues to be subject to the condition of a link with one of the five grounds of persecution and by the need to show that the person fearing persecution has been singled out. This is why within regional and national contexts, subsidiary protections, which could be qualified as “Geneva +”, have been developed. In the African context, the OAU Convention governing specific aspects of the refugee problem in Africa, signed in Addis Ababa on 10 September 1969, governs the aspects specific problems of African refugees.

It allows for group protection, \textit{prima facie}, following “events seriously disturbing public order” (Art. 1§2). It does not generally give rise to individual decisions. In the context of Central and South America, it is the Cartagena Declaration of 22 November 1984, supplemented by the San José (1994) and Mexico City (2004) declarations, that governs the question. The Cartagena Declaration uses the same definition as the African Convention. Although not binding, this Declaration has been integrated into national law (Colombia, p. 11, Decree 4503 of 2009, pt 2). In the European context, the aforementioned Qualification Directive also provides for subsidiary protection (Art. 15). Drawing on the case law of the European Court of Human Rights regarding Article 3 ECHR, it covers real risks of serious harm in the form of inhuman or degrading treatment. It also adds “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” (Art. 15 c). Attenuating the individual nature of the

\(^{14}\) In 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, L 337, p. 9.

\(^{15}\) CJ, 5 September 2012, case C-71/11 and C-99/11, \textit{Y. and Z}.

\(^{16}\) CJ, 7 November 2013, case C-199/12 and C-210/12, \textit{X. Y. and Z}. 38
threats\textsuperscript{17} that have already been eliminated in the national law of one country (Belgium) and the link with an armed conflict within the meaning of international humanitarian law\textsuperscript{18}, the Court has once again defended a broad interpretation of the definition, emphasizing in this case the level of indiscriminate violence. This corresponds to what is found in certain European (Norway) or non-European national laws (Australia, Canada), reserving “severe violations of human rights” for subsidiary protection.

Several reports underscore the principle of non-refoulement intended to allow refugee candidates to enter the territory of a country in order for his or her application to be examined (Geneva Convention, Art. 33). Expulsion or return to the frontiers or the sea give rise to problems and have already been handled in a range of contrasting decisions\textsuperscript{19}. In practice, they constitute a major difficulty prior to any possibility of obtaining protection, as do returns to safe third countries or safe countries of origin by means of simplified or accelerated procedures (Canada, EU countries).

\textit{3° Privileged foreigners}

In brief, privileged foreigners can be divided into three categories: diplomats, citizens and neighbours.

\textit{Diplomats} have a special status subject to accreditation, generally by the ministry of foreign affairs. The reports note few difficulties in this regard. They stress that they are in principle excluded from the conditions for admission to permanent residence or nationality.

\textit{Citizens} may include two categories of emigrants. The first are “nationals” living within a national minority of another country. Return to his or her “nation” is encouraged (Greece, Poland, Japan, see above as regards nationality). The second involves citizens of an integrated entity, in particular within the European Union. It may lead to easier access to free movement and then to the right to permanent residence (see Introduction above). This status and the considerable impact it has had on the migration policy of EU Member States is emphasized in all the reports concerned. It can, \textit{mutatis mutandis}, be extended to larger areas, such as the European Economic Area. It could also, in the future, be transposed into other integrated regional entities on other continents, based on constructions such as NAFTA, Mercosur or ASEAN.


\textsuperscript{18} CJ, 17 February 2009, case C-465/07, \textit{Elgafaji}.

\textsuperscript{19} CJ, 30 January 2014, case C-285/12, \textit{Diakité}.
Neighbours are migrants coming 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 (the United Kingdom and the Commonwealth; Croatia and Germany; Macau and Portugal). By contrast, territorial proximity associated with a political or economic differentiation may in fact lead to a less favourable status being given to 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). Keeping a balance between the limes and the sumfines is always a delicate task.

C. Discretionary migration or migration of interest

More than is the case regarding the fundamental rights of migrants, discretionary migration takes into account the interests of the States concerned. This category involves principally (1°) scientific migrants, (2°) economic migrants, and (3°) migration for purposes of regularization.

If sovereignty is of dominance here, in the interests of the host State, this interest is not necessarily opposed to that of the migrant who wishes to study, improve his or her economic situation or regularize his or her residence status. But the stay in question depends on the good will of the host State and not on legal criteria. At most, the law guarantees respect for certain rights ancillary to the stay that is freely granted, in particular as regards procedural guarantees and social rights (infra, III). Since this freely granted right to immigrate corresponds to the interests of the host State, it is often treated as “chosen migration”, that is, chosen by the State more than by the migrant. The interest of the host State may match that of the home country, which benefits from the training received by its young people and from the financial resources of the emigrants, since remittances by migrants constitutes one of the most important sources of foreign currency for the countries of origin. The latter may, however, also suffer, if the brain and loss of manpower threatens the development of the country of origin.

1° Scientific migration

Proportionately less significant in terms of quantity, scientific migration represents a major qualitative and economic challenge for several countries. Programmes such as “Building the Europe of Knowledge”, intended to attract highly skilled students and researchers suggest
this. If scientific migration is desired and organized by the host State(s), the approach can vary from a tendency to turn it into a legal form of immigration, such as those associated with fundamental rights or privileged statuses that we have examined above, to an older tendency to maintain scientific immigration as one of choice.

The European Union and its Member States increasingly follow the new tendency 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 is promoted by programmes such as Erasmus. What remains the subject of debate is which Member State is responsible for the student financially, as regards their study grants: the home or the host Member State?

The case law of the Court of Justice of the European Union has gradually moved towards a principle of proximity, allowing the student to claim socio-economic rights in the State with which he or she has the closest ties\(^\text{20}\). On the other hand, externally, scientific immigration is equally favoured. This does not mean that the State no longer makes any choices or that it does not impose any conditions, such as enrolment in a recognized full-time educational institution or having sufficient means of subsistence. But one these conditions have been met, the student has the right of residence. Two principal legal texts have been adopted by the EU in this regard. The first, dating from 2004, favours migration by students\(^\text{21}\). The other, adopted in 2005, favours migration by researchers\(^\text{22}\). The latter directive, for example, provides that “Once the checks referred to in [the text] have been positively concluded, researchers shall be admitted on the territory of the Member States” (Art. 7) and the latter “shall issue a residence permit for a period of at least one year and shall renew it if the conditions laid down … are still met” (Art. 8). This text is accompanied by recommendations, certainly less binding but nonetheless important, made by the Union 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 (Art. 1, §1, b)\(^\text{23}\). The United Kingdom, which, like Iceland and Denmark, does not participate in this directive, are closer to a process of selection on the basis of national interest, as they include student immigration in their point system (under Tier 4) (United

\(^{20}\) Example from the case law: CJ 20 June 2013, case C-20/12, Giersch; 18 July 2013, case C-523/11 and 585/11, Prinz and Seeberger; 24 October 2013, case C-275/12, Elrick and C-220/12, Thiele Meneses.


Kingdom, p. 14). Similar processes exist in other countries (Canada). Certain “small” countries may have fairly large numbers of students if their specialized training is more easily accessible (Romania for medicine), their economy is attractive (Singapore: 84 000) or if there are possibilities of combining work with study (New Zealand, 70 000), particularly in programmes involving quotas for “working holidays” (New Zealand). The hours a student is permitted to work can vary considerably, ranging from 10 hours/week (Malta) to 28 hours/week (Japan). Extending one’s stay beyond the period of study is naturally easier in countries which continue to favour economic immigration (Canada, p. 35, developing programmes for “qualified workers” and for Canadian “experience”).

2° Economic migration

Economic migration is discretionary migration par excellence, responding as it does to the needs of the host country. It is the form of migration “that works for” the country (United Kingdom, p. 61). Together with family migration, it generally constitutes a considerable between 20 and 35% of all migration (e.g. Colombia, 23%). Some countries are “top destinations” for their region (South Africa, p. 20, 1.2 million en 2012). Still others have a population of economic immigrants larger than the local population (Macau, p. 12).

Economic migrants can be divided into three different categories: seasonal workers, non-specialized workers and highly skilled workers. Some countries divide them into yet more detailed categories (Canada, p. 21, 5 categories).

The seasonal or temporary workers meet needs that are limited in time, principally in the agricultural or hospitality sectors (New Zealand, p. 4; United Kingdom, p. 12). By 30 September 2016, the Member States of the EU will have to transpose a directive specifically addressing seasonal workers24. Distinctions are made between stays of more or less than 90 days (Articles 5 and 6). These workers may have no recourse to the host countries’ social assistance systems (Art. 5, §3; Art. 6, §3).

“Non-specialized workers” may meet need for workers of low to medium qualifications (Macau, p. 12, 122 000 Chinese employed in the largest casino in the world, which generates revenues six times that of Las Vegas; South Africa, the mines).

The migration of moderately qualified workers is often set by quota (Croatia, quotas not met; Norway, p. 21) which may involve an annual lottery, as is done for American green cards card (USA, p. 18). Bearing in mind the variation in the needs of its Member States, the EU has not

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agreed common conditions for this type of economic migration but simply on the procedure and format for issuing such a “single” work permit. Despite what the term “single permit” might suggest, this is not a single permit for all types of work, nor a single one for the entire EU, but a permit that grants access to both work and residence, as in the definition found in the text: “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” (Art. 2, c).

Moreover, depending on the country, there may also be dependant workers, such as salespersons, who fill specific niches and may themselves employ local people such as in the “Chinese trade centers” in Poland (Poland, p. 22).

But the majority of the national reports emphasize the third category: the selection of a highly skilled labour migration (Australia, Canada, France, Germany, Singapore, New Zealand, Malta, South Africa, United Kingdom, USA). Several countries adopted a system of points based on different criteria: diploma, experience, age, language, remuneration, capacity for adaptation (Australia, p. 11; New Zealand, p. 9; USA, p. 18; United Kingdom, p. 7: since 2006, inspired by the example of Australia; Canada, p. 22; Singapore, p. 17).

The EU has adopted a specific directive for this purpose, known as the “Blue Card Directive”. It is mentioned in several European reports (Belgium, Estonia, France, Germany, Malta), if only to stress that it has been little used to date because of low salaries in the countries in question (Poland, Romania). In reality, the practical definition of highly skilled work remains the competence of each Member State and its legislation, as high professional qualifications refer simply to a higher education degree or experience. By contrast, the directive specifies that the salary must be at least 1.5 times the average gross annual salary in the country in question, or, by way of derogation for certain professions based on an annual list, 1.2 times that salary (Art. 5 §§3 and 5).

Certain EU States have retained their own system or a supplementary one to attract highly skilled migrants, either by not participating in the blue card directive (United Kingdom, p. 12), or because they already had in place their own legislation such as France’s “competence and talents” residence permit for foreigners 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”

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(France, p. 9). Certain countries that seek to enhance their economic development also offer residence permits to investors (New Zealand, p. 11; Romania, p. 25) or to owners of property of a certain set value, such as in Greece after the crisis (Greece, p. 20).

3° Regularization

In every age, regularization of a foreign stay has been the best expression of the sovereignty of a State in controlling residence on its territory. The English term “discretionary leave to remain” expresses it well. This form of regularization still exists (United Kingdom, p. 26). Certain countries do not use regularization for reasons relating to their difficult economic situation (Croatia), or for particular political motives with regard to a given category of foreigners (Dominican Republic, p. 6, plan not implemented for Haitians) or as general policy (Norway, p. 5 since 2007, even of the law continues to provide for the possibility of regularization). Others only use it rarely, as economic selection takes place before arrival (Macau, Singapore, Japan after 10 years). According to the reports, several countries have in recent years undertaken several collective or semi-collective regularization campaigns after examining application files (Belgium 2x, France 3x, Greece 3x, Poland 3x, South Africa 4x). These campaigns are often aimed to reset the clock to zero, as a result of a large number of irregular immigrants on their territory, notably after lengthy asylum application procedures. It is often a measure that complements the asylum process which underlies humanitarian regularizations that are more individual in nature. Even if the person does not enjoy international protection as a convention refugee within the definition of Geneva or a subsidiary protection (see above), it may be that return to the country of origin is deemed “unduly harsh” (New Zealand, Canada) either for reasons having to do with the situation in the country in question (Croatia for persons of Bosnian, Serb, or Kosovan origin), or for reasons to do the person’s private or family life. These two aspects have been examined by the European Court of Human Rights in several cases on the basis of Articles 3 and 8 ECHR and by the Committee Against Torture on the basis of Article 3 CAT. The legislation of the European Union (Qualification Directive) or the practices of certain non-EU countries (e.g. Dominican Republic) have explicitly included regularization for medical reasons. Often, regularization is based on the de facto integration of migrants within the host society. In such cases regularization is a true social challenge. This is the case in the US for the millions of “foreign-born children” born abroad to parents residing in the US and brought to the US at a very young age. Regularization there lies somewhere between the national programme of “Development Relief and Educational for Alien Minors (DREAM) Act (since 2001) and the
implementation, while awaiting the specifics of the DREAM Act, of a more individual programme that allows those whose cases are currently before the courts not to be expelled for a period for two years (Deferred action for childhood arrivals – DACA).
III. Complementary questions

The national reports allow us to identify three questions that are complementary to those of admission and residence. The first is that of sanctions (A), the second of procedural guarantees (B) and the third, of social rights (C).

A. Sanctions

Sanctions may be imposed on the migrant him/herself, in particular in the form of detention (1°). They may also be imposed on persons who practice the trafficking or smuggling (2°) of migrants.

1° Detention

Deprivation a foreigner of liberty if he or she arrives as a migrant is based generally on the need to proceed to a forced removal or to punish the person for residing illegally in the country. The latter situation, which criminalizes the irregular residence itself, seems to be less and less common in both legislation and in practice. Few reports discuss it. Two countries have mentioned explicitly, however, that this continues to be enforced (France, p. 22; Greece, p. 21). By contrast, other reports indicate that irregular residence is not itself illegal, and so detention is rare (Colombia). European legislation, while not making detention for illegal residence completely impossible, does make it difficult. Indeed, the “Return Directive” provides explicitly that detention must be the very last resort after all other possibilities for voluntary return have been exhausted. As a result, according to the case law of the Court of Justice of the European Union, detention on any other grounds, such as irregular stay, must not lead to a delay rather than an acceleration of the person’s removal from the national territory.

On this basis, the Court ruled that the Italian laws and the older French law on detention of foreigners staying illegally in the country were, as practised, contrary to European Law (France, p. 20, amendment as from 2013). The Court also specified that detention on the Return Directive, in view of removal from the territory, cannot be applied to an asylum seeker. Going further than the European Court of Human Rights, the European Court of Justice explicitly states that “an asylum seeker has … the right to remain in the territory… at least until his application has been rejected at first instance, and cannot therefore be

29 European Court of Human Rights, 29 January 2008, Saadi v. United Kingdom.
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. The recasting of the European directive on the reception of asylum seekers now provides, in Article 8, for an exhaustive list of six scenarios in which detention of the asylum seeker is possible: (1) to determine identity, (2) necessity, including the risk of absconding, (3) procedure to determine right to enter the territory, (4) abuse of the application system in the course of a removal process, (5) national security or public order, (6) the Dublin procedure. In other words, according to EU legislation and case law, depriving a foreigner staying irregularly in a State of his or her liberty remains possible but may not hinder either the effective execution of an order to leave the territory nor the effective examination of an asylum application.

The length of the detention prior to removal from the territory varies from one country to the next, depending on the legislation in force, some of which simply allow for detention as long as is necessary (South Africa, Singapore). The EU Return Directive provides for a maximum period of 18 months, which has in effect extended the maximum duration provided for in certain countries (Belgium, France) but has reduced it in the case of others (Estonia, Malta). Several judgments of the European Court of Human Rights have condemned States for the conditions of detention (Greece; Malta, p. 44). Questions have been raised with regard to the detention of unaccompanied foreign minors (UFM). If such detention is possible, it remains rare in several countries (Norway; New Zealand, p. 35, indicating that this practice should not be confused with the procedure for dealing with unaccompanied minors in airports and referred to by the initials UM). These are more common in certain countries (Malta, p. 43). Several of the reports refer to the New York Convention on the Rights of the Child (1990), which, in addition to the reference to the “best interests of the child” as the “primary consideration” (Art. 3), 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” (Art. 37) (New Zealand, p. 14). Several countries also have specific legislation for UFMs (Belgium, Canada, France). Some, in addition to maintaining specific places for detention such as orphanages, also prohibit the detention of children under 13 (Poland since 2013). The European Court of Human Rights has, on numerous occasions, stressed the vulnerability of foreign minors and hence on the need to adapt the forms of detention (Belgium, Malta,

30 CJ, 30 May 2013, case C-534/11, Arslan, pts 48 and judgment.
Poland). The Court nevertheless refused explicitly to limit the detention of a child solely for the purpose of his educational supervision (Art. 5, §1,d), considering that the foreign minor may also be detained as a foreigner to prevent him or her from effecting unauthorized entry into the country or if an action is being taken with a view to deportation (Art. 5, § 1, f)\(^{32}\). Alternatives to detention of a foreign minor seem to be emerging in various countries (Belgium, Canada, New Zealand). However, such alternatives are less widely developed for foreign adults. The rule of the judge is therefore significant in the latter cases (infra, B).

2° Trafficking and people smuggling

More than in the case of migrants, controls and sanctions here have to do with the people who exploit the migrant (trafficking) or who organise illegal migration (smuggling). Two scenarios should be distinguished (and care should be taken not to confuse the term trafficking (in French, traite) with the smuggling (in French, trafic). Smuggling is less serious than trafficking, since the latter typically involves the exploitation of the person, particularly through prostitution. While smuggling involves the illegal transport of a person, trafficking combines transport with exploitation. If smuggling is criminalised in all States, with sanctions sometimes being extended also to those who help irregular migrants for humanitarian reasons (contra, Poland, p. 21), it is against human trafficking that the international community has most vehemently mobilised in recent years.

Three principal texts are cited in several of the reports:

1. 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 (known as the Palermo Protocol);

2. The Council of Europe’s Convention of 16 May 2005 on Action against Trafficking in Human Beings;


In June 2014, the International Labour Organization approved a protocol to Convention 29 on forced labour, adopted on 28 June 1930. The objective of the protocol is both prevention and

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\(^{32}\) European Court of Human Rights, 12 October 2006, *Mubilanzila v. Belgium*, pt. 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.”

the protection of victims, including providing them with compensation. Convention 29 had already defined forced labour as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily” (Art. 2.1). The Protocol, in its preamble, 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”\textsuperscript{34}.

The reports show that, based on these international texts and supports, the majority of States have set up national agencies or commissions and action plans for combating trafficking Les rapports (Colombia, Croatia, Romania, Estonia, Poland, France, Greece, Macau, Malta, Norway, New Zealand) or have set up projects (South Africa, Singapore) to this end. Nevertheless, national situations vary widely. Some countries do not face problems of trafficking due to their distance (Australia, New Zealand). Others are source countries for trafficked persons (Romania, p. 20). Still others are mainly transit countries (Colombia: from Africa to North America), while yet others are mainly destination countries (Germany, France, United Kingdom, USA, Canada, Japan). Countries that are sources, transit as well as destinations are rare (Poland, p. 19). Punishment of exploiters is still all too rarely, or only with great difficulty, accompanied by the protection of the victims of exploitation.

\textit{B. Procedural guarantees}

The impact of human rights in the area of migration has led to an increase in the role of the judicial authorities:

The process of judicial review has become an important tool in an immigration context for ensuring a minimum standard of fairness and consistency in decision-making. (United Kingdom, p. 36)

At the international level, the role of external review by regional courts or bodies has been reinforced, especially in Europe. At the national level, the reports show the creation in recent years of specialized judicial or quasi-judicial bodies dealing with asylum or with migration law more broadly. Two major questions emerge from the reports: the quality of the judicial oversight and its accessibility. As regards the quality of review, a distinction is made between a substantive review of the decisions and a marginal review of the legality of the procedure. Some countries have only the latter (Singapore, p. 22). Most of the countries reported on have

\textsuperscript{34} www.ilo.org.
a combination of the two types of oversight, distinguishing between decisions in asylum cases or with regard to privileged individuals (substantive review) and other decisions such as on expulsion (marginal review). Criminal courts or “juges de liberté” (France) are often competent for matters of detention.

As regards the accessibility of judicial recourse, the main obstacle is the lack of access to legal aid, which is either not afforded to most foreigners (Singapore, Poland or is limited to certain cases only (Greece, Croatia, Dominican Republic), to the appeal level only (Malta) or to specialized lawyers (New Zealand). Where the constitutions guarantee such aid, the law (South Africa) or practice (United Kingdom) does not render access easy. The role of volunteer non-governmental organizations has been stressed in several of the reports.

C. Social rights

Do migrants benefit from a principle of non-discrimination when it comes to social rights? Some constitutions affirm the principle of equality: “All foreigners on Belgian soil benefit from the protection provided to persons and property, except for those exceptions provided for by the law” (Belgium, Constitution, Art. 191). The principle is that of equality. Differential treatment, as provided for by law, is the exception. A number of countries have affirmed the same principle. In particular as regards social rights, the European Court of Human Rights 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 ground of nationality as compatible with the Convention.” The Court used this formulation to condemn discrimination based on nationality with regard to contributory social rights such as unemployment benefits (1996)\(^{35}\) as well as for non-contributory allowances, such as benefits for disabled adults (2003)\(^{36}\). It is surprising to note that to include these social rights into the scope of the European Convention on Human Rights, devoted to civil and political rights and criminal law, the Court includes them under the property rights of persons. It is also remarkable that to condemn such discrimination on grounds of nationality, the Court uses the same formula as the one used ten years earlier to condemn discrimination on the basis of sex\(^{37}\).

The Inter-American Court of Human Rights, in its opinion on the legal status and rights of illegal migrant workers, handed down in 2003, the same year as the aforementioned *Koua

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\(^{37}\) European Court of Human Rights, 28 May 1985, *Abdulaziz, Cabales and Balkandi v. United Kingdom*, pt. 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”.
Poirez judgment by the ECtHR, affirms that “States may not discriminate or tolerate discriminatory situations that prejudice migrants”\textsuperscript{38}. By contrast, one of the national reports stresses that the main problem is that of discrimination against foreigners (Japan, p. 19 and 21 “Japan must be the only industrialised democracy not to have an anti-discrimination law”). The principle of non-discrimination does not exclude differential treatment between nationals and foreigners on the one hand, and between different types of foreigners on the other. Even the opinion of the Inter-American Court of Human Rights 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, pt 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 who are entitled to permanent residence (Australia, South Africa, New Zealand, United Kingdom) or to the status of long-term resident in the European Union (Belgium, Germany, Norway, Poland, Romania, Croatia) are also entitled to most of the social rights granted to citizens. This does not mean that there is no reluctance on the part of some States, or that there are no practical difficulties. Thus, it can happen that a country allows considerable freedom of contract between employers and employees (Singapore). Another country may grant certain rights only on the basis of reciprocity (Greece, p. 35: moral compensation after death; France: this was the case with benefits to disabled adults that gave rise to the judgment in Koua Poirrez by the ECtHR, cited above). Foreigners who hold only a temporary residence permit, social rights are less often granted and are often conditional upon a certain minimum period of stay or a membership in a given plan (Croatia, Colombia). If rights to social security linked to the status of a worker are generally recognized, the rights to social assistance are less often so.

Even under the principle of non-discrimination among workers from different EU Member States, the crisis has impelled States to decrease the rights granted. The UK report thus notes the refusal to consider a pregnant French woman as retaining the status of worker (United Kingdom, p. 46-47, case St Prix v. Secretary of State for Work and Pensions). Although the Upper Tribunal and the Court of Appeal had upheld the point of view of the minister, the

\textsuperscript{38} Inter-American Court of Human Rights, advisory opinion of 17 September 2003, Series A, no. 18, pt. 119. In practice, the opinion has to do with the situation of Mexican workers residing unlawfully in the USA.
Supreme Court agreed to refer the question for a preliminary ruling to the European Court of Justice. In a judgment handed down on 19 June 2014, the Court found for the woman and ruled that “a woman who temporarily gives up work or stops for work 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”\textsuperscript{39}.

But the situation of foreigners in an \textit{irregular stay} poses problems even if he or she has the status of a worker. Several reports indicate that no social rights are granted in such cases (Dominican Republic, Greece, Poland, Croatia). If sanctions are provided for against employers of undocumented migrants, notably within the EU\textsuperscript{40}, it is rare for any rights to be granted to the workers in question (Malta, p. 74). This was the reason why the aforementioned opinion of the Inter--American Court of Human Rights emphasized the status of worker more than 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 (\textit{op. cit.} pt. 134 and pt. 8 of the judgment).

This is also the object of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Family (New York, 18 December 1990). In particular, Part III has to do with the rights of “all” migrant workers (Articles 8 to 35), unlike part IV, which adds the rights specific to migrant workers “who are documented or in a regular situation”. The three main rights recognized for all workers, even if undocumented, and their family members, are equality of remuneration (Art. 25), essential and urgent medical care (Art. 28) and access to education for their children (Art. 30). Several reports note the recognition of the same rights, such that one might be surprised that of all the States reported on, only Colombia has ratified this convention on the rights of all migrant workers (47 Stats Parties as of 21 May 2014, all countries of emigration rather than of immigration).

The reports indicate that there may indeed be debates on the definition of certain concepts, for example on what constitutes essential and urgent care (Norway, p. 33; United Kingdom, p. 18; France, Estonia) or on the level of education of the children (primary education: Croatia, Estonia, New Zealand in the future; up to 16 years: Norway; beyond: Canada, USA).

\textsuperscript{39} CJ, 19 June 2014, case C-507/12, \textit{Saint Prix}, judgment.

ratification of this convention and the observations of the Committee on Migrant Workers (CMW) could play a role in this regard\footnote{See 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).}. Such ratification would be in line with a pragmatic approach to labour migration which, between restriction and flexibility, seems to be the dominant tendency today within States and regional bodies in their management of international migrations.
Part Two – Migration in a broader perspective

“The challenge is to manage migration so as to ensure national benefit for the receiving country, while minimizing harm to the economic and social fabric of societies experiencing negative net overseas migration and loss of skilled workers” (Australia, p. 27)

I. Introduction

The second part of the report, as indicated above, is more reflective in nature, the aim of which is to consider the relationship between law and migration from a broader perspective, incorporating information provided in the national reports that shed light either on specific characteristics of a country’s migration policy or showing the contrasts between the policies of different countries.

To this end, the national reporters were asked to situate the principal legal rules in force in their respective countries dealing with migration matters, and which were studied in the first part of each report, now within a wider historical and international framework. The national reporters were invited to be attentive to different factors that help explain why in one case, a country may adopt a restrictive migration policy while another remains more flexible; and to examine why, in some cases, certain categories of foreigners or certain source countries enjoy a preference over others.

It is not certain, however, that we are dealing in all cases with a deliberate choice, as the authorities in a given country may not necessarily be in a position of strength that enables them to choose their migration policy freely: environmental catastrophes, economic crises, tensions between religious or ethnic groups, adhesion to certain international conventions, etc., can all play a decisive role and impose considerable restrictions on their options. More concretely, the reporters were tasked with showing the way in which different variables – geographical, historical, economic, cultural – interact and influence a country’s migration policy. In one case, the interaction among a country’s geographic situation, history and current economic situation may be such that its legislators succeed in putting in place (and maintaining) a normative framework that harmoniously matches supply and demand in terms of foreign labour. Australia is a good example of a country that knows how to make the most
of its insular geography as well as its excellent economic position, and manages the international mobility of persons in line with its needs, with “heavy reliance on statistical and sociological data in shaping [its] immigration program” (Australia, p. 29). In another case, the result will be very different and the authorities will be unable to regulate migratory flows towards (and on) its territory as they would wish. This is the case today in countries such as Greece and, albeit to a lesser extent, also in Romania and Croatia. At worst, a State will find itself completely overwhelmed in the face of an influx and will resort to a policy of rescue operations and/or international solidarity, as we have seen for some times now in the case of Malta (“The EU should show real solidarity with Malta, going beyond merely giving money”).

The reports have identified at least four types of information, each of which has an impact on the manner in which a State today governs cross-border migration, either on its own territory or in its relations with other States. We identify these briefly here, before going on to study them in greater detail by means of information we have obtained from the reports: (1) the impact of history and of special relationships inherited from the past and that continue to make their mark today on the relations which a country maintains with certain other nations; (2) the economic situation of a country and the more or less urgent needs to which the latter gives rise; (3) the political climate in which a particular approach to migration should be situated: certain types of climate – hostile to the prospect of a foreign presence in the country – leave political decision-makers very little room for manoeuvre to be able to discuss in an enlightened way the need for greater flexibility to accommodate certain new, hitherto unseen forms of cross-border mobility. Finally, (4) the – greater or lesser – openness to human rights and their protective function in situations involving people of foreign nationality and in a migratory situation. These realities often place people in positions of great social, economic as well as legal vulnerability.

As a conclusion to this second part of the report, we will once again mention a number of specific challenges mentioned in the national reports and that add to the complexity of the question of how best to manage human migration today, in both domestic law and at the international level.

II. The impact of history

Migratory movements have marked the history of countries around the world. Certain countries go so far as to define themselves as owing their existence to successive waves of
migration: “A country literally made of and by migrants” (Australia, p. 28). The migratory flows that often come from very far away are at the foundation, at least in part, of their demography and thus of the ethnic, religious or cultural groups who have to coexist within a single State.

This observation has lost nothing of its pertinence today: human mobility has perhaps never been as intense as today, taking a variety of forms some of which are truly unprecedented. This is the case in particular for communities – increasingly numerous – who maintain close links simultaneously with several States. Depending on the way of life, this may involve the country of origin and that of residence, or contacts maintained with the various States where a person has spent longer or shorter periods of his or her life and with which the person maintains contacts and/or private interests. The literature describes these situations either as “circular migration” or as “transnational situations”. The rapid democratisation of air travel since the 1970s and the increased means of long-distance communication have rendered the political boundaries between States ever more porous.

Faced with this reality of ever greater international mobility, States adopt a variety of different migration policies. Migratory movements have marked the history of countries, we wrote above. But the observation also applies in reverse; the history of a country in turn goes a long way toward explaining its migration policy. The recent history of several countries has meant that after many years as a country of emigration, they suddenly find themselves obliged to adapt to a new reality, that of the arrival of populations from a wide range of different countries, even though these newcomers have not been actively encouraged or solicited. Greece and Malta have for the past few years found themselves in this situation.

Generally speaking, as regards migration policy, one can distinguish three types of position: the first position is reactive, defensive in nature, consists in reinforcing control of the country’s external borders and admitting new migrants only by way of an exception, for humanitarian reasons, for example. The democratic Republic of South Africa still has a policy of closed borders, for instance, out of fear that any other migration policy would harm its economic interests. This policy leads to various types of abuse, including the mass introduction of applications for recognition of refugee status. These applicants are then hired under dubious conditions on the labour market, where, in spite of themselves, they contribute to distorting the competition. “Failing to adapt the migration realities, South Africa’s migration policy retains many of the features of the apartheid system, particularly the restrictions on African migration”, the authors of the South African report conclude (p. 24).
A second position is equally restrictive in nature, but nevertheless entails authorising migrants who have been pre-approved and to whom the borders are open, in particular as best fits a state’s particular economic needs or diplomatic interests (good relations with certain countries). Permission to immigrate in such cases is dictated by a logic of particular advantages a country hopes to derive from a selective and discretionary migration policy, which explains why the priority is given at one point to skilled migration (high school diplomas and/or particular training), while at another to temporary and/or seasonal contracts, or else to the nationals of certain specific countries. This is the policy pursued today by, among others, Japan, Macau and, though less systematically, Colombia.

It is rare, however, that countries limit themselves to only the first or the second stance. In practice, migration policies often combine the two, namely, the principle of a “padlock” on new migrations is upheld, but at the same time a country may be more flexible and understanding when it comes to certain humanitarian situations (notably as regards asylum, family reunification and/or regularization campaigns) and thus also allow people to come in to a certain degree where their presence – temporary or permanent - might be of benefit to the host country. This could be said to be the combination envisaged – ideally speaking – by the European Union in its migration policy and hence by most Member States. This combined form of migration policy, at once restrictive and flexible, constitutes in a sense a third type of response, one that is pragmatic and eclectic. It can take various forms, very often accompanied by bilateral or multilateral agreements between countries, committing them to pursue shared border control policies. There are three possible reasons for a State to seek to harmonize its policy with that of other States: the first is the concern to be able to maintain as effectively as possible its choice to restrict migration; this is behind for instance the Schengen Accords and/or the Dublin II instruments (and more recently Dublin III) as well as certain agreements signed between the European Union and the so-called transit countries.

A second reason is economic necessity. States agree among themselves on the quotas of immigrants they will allow and the conditions under which migration will be permitted. Sometimes the economic reason is accompanied by yet other motives, such as to contribute sustainably to the development of the country of emigration; this is the idea behind the “mobility partnerships” set up recently by the European Union. But we could also refer here to the 1990 United Nations Migrant Workers Convention, resulting from the work of the International Labour Organization, but which many States in the northern hemisphere still hesitate to ratify. Finally, a third reason is that of respect for human rights and dignity in
particular. The illustration that comes to mind here is the 1951 UN Refugee Convention, whereby States parties undertake to respect the right of every persecuted person to seek protection in another State. Today the majority of countries worldwide are thus bound by a series of agreements with other States, which complicates their migration policy and above all imposes considerable limits on their sovereignty: the decision-making power on migration issues is shared among several levels of competence and distributed across various decision-making areas. One might speak here of ‘multi-layered governance’, to use a term currently in vogue.

The economic backdrop of a State’s migration policy
In their analysis, the national reporters have taken account, among other things, of the economic context in which a country’s migration policy is situated. The dynamics of international migration has since the 1970s been increasingly seen as the effect of demographic and economic imbalances in the world. In a study conducted a few years ago by the ‘Population’ section of the Economic and Social department, the Secretariat General of the United Nations pointed out the demographic consequences of the ageing of the population in the industrialised world, as a result of which from 2025 onwards a pressing need for workers could arise. Therefore, according to the study, the industrialised world will have to look at immigration from a completely different perspective. The interim conclusion of the study is that a few decades from now, Europe, for example, will need 135 million new immigrants in order to maintain its active population. The International Labour Organization has also published studies of this problem, which similarly point to the increasing need for workers in the industrialised world in the coming years.

The conclusion of such studies is that the borders in countries with a demographic deficit will have to be reopened. Japan and Singapore fit into that category as well. The reasoning is first and foremost economic. The question is expressed in terms of how many (new) migrants the industrialised world can ‘use’ from an economic point of view in the coming years. In other words, migration is perceived, from this approach, in terms of the host country’s own economic and demographic standards, which in turn are determined on the basis of optimal growth criteria. It is a matter of the flexibility of one’s own labour market, rather than of a global concern for a balanced mobility policy on a worldwide scale. The discussion is in full swing. Countries such as Germany and Canada, for example, as well as the aforementioned countries - Japan, Singapore and Macau – have opted for highly educated immigrants, in areas where there is a shortage of workers over the short run. In some countries, such a selective
immigration policy using a point system is designed to help identify newcomers with the right ‘profiles’. Until recently, Spain admitted new workers via a broadly formulated regularization policy that was meant to supply the Spanish economy with cheap labour. As a result of the recent crisis, everything is now at a standstill. But other countries can continue to draw on this cheap labour force, and selective labour immigration can serve as a lever for economic growth. And in some countries, such as in Colombia, for example, this prospect is seen as a desirable future policy. The country sees itself as “slowly consolidating its regional position as one of the major regional economies” and has a clear preference for a qualified, mainly economy-driven immigration.

One may of course raise serious questions about what one might consider exploitation of the workforce, especially where workers from poorer countries are employed under questionable conditions. But it was ever thus: there is desirable and undesirable immigration. The reports of countries such as Argentina and Singapore make no bones of it: the abuse of defenceless, mainly unskilled migrants is lamentable. Domestic staff is often in the worst position, as there is rarely any control of their working situation.

The question is whether countries such as EU Member States, which in some cases are currently dealing with high domestic unemployment, should at the same time take up the suggestion of the Secretariat General of the United Nations to legalise a new wave of labour migration by the selective admission of migrants on a large scale (setting an annual quota is one options). The high unemployment, not only of those with low educational qualifications, and in certain countries the enduring discrimination against migrants on the labour market ought to be an argument to focus attention over the short term primarily on available but unused workers in their own labour market.

Young people from the so-called second and third-generation of migrants, among whom unemployment rates are worrisomely high in much of Europe, should therefore be given more solid prospects of entering the labour market. It is difficult to understand that policy-makers would overlook these young people, thousands of whom are living on the margins of our society, and give priority to the reintroduction of massive labour migration. Recently recognised refugees and newcomers under family reunification programmes, or the thousands of foreigners who have now been regularized (see below), are available on the labour market. In addition, there is the enlargement of the European Union, which makes possible migration

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from the new Member States. Reintroducing labour migration in the current economic context in Europe is to invite new problems if one does not first do some serious work on the expectation of the potential present among newcomers and migrants – especially of young people. It goes without saying that it will take some time before the language and training deficit that in (too) many cases characterises these groups is overcome. This is a matter of equal opportunities. A policy that does not give priority to hiring adults who are already legally in the country, and instead admits new waves of migrants, is to set the wrong priorities. That is all the more the case when the result would in effect be to create a drain on the economies of the poorer countries.

Policy-making demands that one take stock of as many facets as possible of a complex reality with which one must deal. This is also the case for migration policy. Regions such as Europe can only reopen the discussion of the possibility of new (labour) migration once a critical analysis of that reality and the expected developments in the near future has been made available. It is only under those conditions that the discussion can yield a fruitful reflection about migration, taking into account not only the demographic pressure of falling birth rates in one’s own country and its consequences for the economy and prosperity, but also the demographic pressures in poorer countries resulting from the enormous prosperity gap between the various countries in the world.

The political climate

The economic and political contexts are clearly closely linked. Several reports indicate that migratory flows and their consequences are at the centre of many public debates today. And yet, while the problem is of interest, it is often linked to the kinds of migratory flows involved: certain migrations are perceived as more problematic than others: Chinese living in New Zealand and in Japan, Venezuelans in Colombia, and Haitians in the Dominican Republic constitute ‘undesirable’ groups. This in turn explains the link made by several reports between the evolution of migratory flows – in terms of their nature and scale – and the migration policy currently being pursued by a country’s legislative, administrative and legal authorities. Certain forms of migration are encouraged, while others are avoided or strongly restricted. Depending on the priorities set, residence of foreigners (arriving/leaving) can be approached in a particularly restrictive way or, on the contrary, with more flexibility.

The arrival and settlement of populations with whom the (majority) society has no affinity – whether historical, social, cultural, ethnic, political and/or religious – or a tense relationship,
often simply increase the lack of understanding within society in relation to the phenomenon of migration, and risk giving rise to political choices intended to limit certain forms of migration as much as possible. Certain national reports provide some details, in particular statistics, which are enlightening and reveal the interactions between migratory patterns and the demographic dynamic of populations of immigrant origin: “The sudden uncontrolled and large migration flows of third country nationals in Greek territory; a country that had no experience with immigration policy before – apart from emigration of Greeks abroad and the reception of aliens of Greek origin – together with today’s devastating economic crisis, is enough to understand why an important part of the Greek society has a negative view regarding their reception/acceptance.” (Greece, p. 38)

Most countries resort to sanctions in order to uphold the distinction between desired and undesired migrations and thereby to reassure the public: “Recent immigration legislation shows a gradual erosion of rights through the introduction of restrictive methods” (United Kingdom, p. 70). In the literature, the expression ‘criminalization of migration law” is sometimes used. A striking development has been noted, namely, that in several countries the regulatory instruments for enforcing migration policy has been significantly expanded, principally since the mid 1980s, both with a view to managing migratory movements in general and in order to combat illegal immigration in particular.

The measures are diverse in nature. Infringements of the rules governing residence are mainly dealt with via the criminal law. In addition to making illegal residence a criminal offence, sometimes the targets of the measures are third parties (of bad faith ) who have in some way contributed to the illegal entry of a foreigner and/or the extension of their illegal stay: criminal sanctions and administrative fines for smugglers who bring foreigners with no right of residence into the country and the criminal prosecution of slum landlords, human trafficking and people smuggling as well as of employing foreign workers who are residing illegally in the country. Moreover, the (attempt to) contract a sham marriage – referring, in such situations, to a marriage entered into with the intention of obtaining a residence permit for one of the partners – is now also a criminal offence in several countries.

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In addition to criminal sanctions, administrative penalties have also been introduced. Some countries have, over the past few years, expanded widely the possibility of detaining a number of categories of unauthorized (or not yet authorized) foreigners for a fixed period of time (up to a few months) under administrative authority, with a view to removing them from the territory. In South Africa, for example, the problem arises that there is very little oversight of the practice of frequent administrative detentions, leading to the risk of abuse. Courts have already ruled against such abuses, but their rulings have little effect in practice. In addition to criminal and administrative action, those countries that have a social security system have in recent years imposed more and more restrictions on ‘undesired’ foreigners’ social rights. Since the outbreak of the economic crisis, Greece has seen the problem of foreigners who suddenly find themselves no longer insured and therefore cannot renew their work permit. In countries that are not overly concerned with human rights, the sanctions can take a variety of often very harsh forms: in Singapore, for example, foreigners who have not yet obtained a long-term residence permit are not permitted to marry a Singaporean national or permanent resident without the permission of the authorities, and women who get pregnant while holding only temporary residence are threatened with repatriation (“This drives women to undergo illegal abortion”).

According to the Dutch sociologist of law G. Engbersen, the stricter admission policy of prosperous countries not only leads to increased border controls and the guarding of physical national borders, but also increasingly to the monitoring of access to the social welfare system. This means the payment of benefits to a foreigner often disappears, and instead a limited amount of material assistance is provided. This mainly affects foreigners in a precarious legal status and/or so-called undocumented foreigners. In other words, the possession of a legal residence permit is increasingly the explicit prerequisite for access to the regular labour market, classic social security benefits, the social assistance system and other (semi-)public government services (including in the area of welfare law and social housing). This situation is referred to as a ‘logic of connectedness’ (in Dutch: ‘koppelingslogica’). Foreigners without legal residency are, as it were, ‘disconnected’ from the social security

system: they are denied the right to perform legal paid work, and as a result they have even less opportunity to acquire the classic social security rights.

The general trend is thus to pursue a policy that keeps undesired migration out of the country. The aim in so doing is to protect their own economy and social solidarity systems, where these exist, and thus to avoid unsettling public opinion. The report on migration policy in the United Kingdom is not very explicit in this regard, but at the same time takes a highly critical stance.

But reality is often far from these intentions. The migratory pressure is so great today, especially in the more prosperous countries of the world, that restrictive legislation and measures in those countries have scarcely any effect in substantially reducing that pressure. They serve mainly as symbols, both for domestic use (reassuring their own public opinion: ‘we have matters under control’) and for foreign consumption (to prevent a pull effect on potential newcomers). As a result, a gulf develops between, on the one hand, an increasingly restrictive legislative framework, and, on the other, the empirical reality. And in countries where such a gulf widens over the years, a situation of ‘tolerance’ may emerge.

Sociologists of law distinguish two type of situation in this regard: on the one hand, a policy of tolerance and, on the other, informal practices of tolerance. The first refers to the legislative or executive power itself, which depending on the case, turns a blind eye either openly (officially) or in a more hidden (unofficial) manner to certain situations under given circumstances, for fear that intervening would make no difference in any case. In informal practices of tolerance, the bodies responsible for implementing policy do intervene, but do so in a rather resigned, accommodating manner; they do so sometimes out of compassion, at other times due to powerlessness or incapacity (for instance, because of a lack of capacity at detention centres) or because in their view the legislation in place cannot be enforced. In some cases, professional considerations come into play: thus physicians sometimes decide to treat a person (without residence documents) who by law is not entitled to publicly funded medical care.

Tolerance as a result of powerlessness is of course something that the government would prefer not to announce to all and sundry. And yet, these illustrations are the daily reality in certain countries: insufficient capacity to house undocumented migrants who are detained (and therefore are not kept in detention); the difficulty in effectively combating human

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trafficking or sham marriages; the impossibility of repatriating people if their country of origin refuses to cooperate (these are labelled ‘unremovable’ foreigners); and last but not least the aforementioned abuses in the workplace, where foreigners with precarious status are often hired to do heavy labour and to work under the table.

The continuing presence of relatively large groups of irregular and clandestine foreigners, albeit contrary to the law, impelled a number of countries in the 1990s, including in Europe, to move to an active policy of tolerance, which sounds like a paradox: various countries have ultimately allowed some foreigners, via regularization campaigns, to obtain a residence permit. Although the concrete modalities of such campaigns differ from one country to the next, the total number of undocumented migrants who between 1980 and 2000 were able, via such a campaign, to obtain the legal right to reside has been estimated as more than two million for the entire European Union.

The political context is significantly different for countries that attract migration and those countries that – sometimes against their will – are sources of emigration; within the former group, a further distinction should be made between attracting desirable and undesirable migration. It is principally in the countries that attract migration that one sees how policy seeks to navigate between, on the one hand, a tough approach to infractions against the law governing the admission and residence of foreigners on their territory, and on the other hand, the reality of these infractions, which cannot easily be combated simply by more restrictive measures. The matter is highly sensitive politically, in particular in countries that are attracting ‘undesired’ migration; the sensitivity is further increased by a public opinion that sees migration first and foremost as a ‘problem’ and that fears that a continued, large-scale migration will over the long term undermine a (prosperous) society. This position stands in sharp contrast with the standpoint of the Secretary General of the United Nations. Policy-makers in countries that attract undesired migration are thus faced with having to find the right balance between a restrictive legislation that is to ensure that migration does not threaten the country’s well-being and social cohesion, and the realism that a certain degree of flexibility is necessary. The latter is increasingly linked with the protection of the human rights of foreigners, a concern that in the past 50 years has helped shape the debate on ‘law and migration’ worldwide.
III. The role of human rights and humanitarian protection

The underlying principle behind the majority of legislative instruments that seek to regulate migration is to optimise control of cross-border personal mobility. Therefore it is first and foremost a functional approach to migration. Depending on the political and economic agenda of a given country, that control is intended both to counter migration, especially of the undesired kind, and to promote migration, that is, of the desirable kind. Within this logic of the governance of migration, the human aspect comes in second place. Fortunately, thanks to the growing impact of human rights protection on national migration policies, an overly functional approach to migration has come under fire.

As already indicated, the protective role of respect for the fundamental rights of foreigners, through international instruments and case law, has grown in recent years. The observation applies to the majority of the countries reported on. Exceptions are countries like Singapore, which do not deny privileging economic efficacy over respect for the rights of non-nationals. The migrant thus finds himself- or herself in a precarious position as regards, among other things, the right of residence: the invocation of human rights, where it is taken seriously, offers the framework to put into place a policy that engages the authorities (local, regional and central) and other competent public services on the one hand, and of course the migrants and their defenders, on the other. This commitment to respect for the rights of the migrant cannot be taken for granted, however, but must be negotiated and is often imposed by judicial means. Courts and tribunals can intervene with regard to several different aspects of the (frequently intricate and difficult) situation in which foreigners find themselves: 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 reporters have carefully shown how this commitment to the cause of human rights has, to date, been implemented in practice 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 foreigners have been transposed. As regards residence, the principle of respect for human rights in relation to migration makes it possible, depending on the particular circumstances of a case, either to classify a foreign national administratively as ‘unreturnable’, or to grant him or her subsidiary or temporary protection, to name but these two examples. In other countries, migrants are fleeing environmental disasters and are qualified as environmental and/or economic refugees.
Examination of the role played by criteria based on protection of human rights in general within migration policy and/or based on certain individual agreements between countries focuses, in the majority of the national reports, on case law, with particular attention to court decisions that have denounced certain dysfunctions within the public administration and opened the way to new interpretations of specific legal texts.

In countless proceedings before the courts, both national and supranational or international fora, one can see how foreigners – or the organisations that defend their rights – the world over invoke human rights to challenge the ‘logic of connectedness’ in social legislation, or to appeal against an administrative measure such as detention or repatriation. The case law on fundamental rights does not proceed in abstracto but investigates, case by case, the extent to which a fundamental right has been violated; in other words, the question asked is what takes precedence: the aims of a policy and its practices, or on the contrary, the fundamental rights invoked by the foreigner(s) concerned. The case law in recent years shows, more particularly in Europe, a significant breakthrough for human rights protection with regard to minors and foreigners in a situation of medical necessity, among others. Especially when it comes to minors, courts have repeatedly ruled that a straightforward application of restrictive measures is incompatible with human rights standards. This applies, among other things, to the possibility to detain minors without a (valid) residence permit in a closed centre on administrative grounds. In some countries, foreign minors without a valid residence permit are now admitted to school. In some cases, principles developed by the case law on fundamental rights are subsequently enshrined in law, but this is not systematically the case. The impact of the case law on human rights protection, including in this area, is thus somewhat ad hoc in nature. This is of course regrettable.

The national reporters could not, of course, cover all aspects of the subject, not only because of the great diversity of situations to which human rights and the requisite respect for foreigners are applied, but also because these reports – most of which concentrate on the study of the available legislation and case law – do not make it possible to take stock of all the practices that may risk posing problems for the protection of human rights: for example, are fundamental rights systematically taken into consideration in the legal aid offered to any foreigner when he or she makes a request or lodges a complaint? Are migrants correctly informed of their rights and obligations, and of the appropriate procedures and forms of recourse? Are they, where applicable, directed to specialized institutions or services? The reports concentrate their analysis on court decisions that have made it possible to denounce
certain dysfunctions in the public administration, or have opened up the possibility of new interpretations of individual laws. A number of reports, such as that of Argentina, are nevertheless quite explicit: the situation on the ground for certain migrants when it comes to employment – and in particular for undocumented migrants or other persons in a precarious legal situation – is far from what the legislative texts imply. “Argentina is a pioneer in granting a human right to migration”, the report states, yet the report also takes stock of serious abuses by certain employers. The reports denounce other situations which, in the light of human rights, are alarming and cry out for justice: 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; the severe restrictions imposed by various laws on workers with a temporary residence permit (Macau, Japan, Singapore), to give but a few examples.

IV. A few specific challenges

Migration constitutes an extremely complex issue, and takes on ever new forms. The law is sometimes at pains to keep up with the development – often very rapid – of new forms of mobility. In recent years migratory movements have revealed new profiles of cross-border migration, including that of the migrant – as briefly mentioned – who maintains ties simultaneously with several countries. The latter profile in particular is becoming increasingly frequent, either in the form of possession of several nationalities simultaneously (multiple citizenship) or in a variety of other forms that involve a person combining several centres of interest and spreading them across several countries: the person may move between residing in two different countries, maintaining a family and/or assets, for example, in a country which is not that of his or her habitual residence, etc. The scientific literature confirms this tendency, qualifying it either as ‘transnational’, or suggesting other terms such as ‘external citizen’, to name but two. Here and there, new legal statuses are put in place in order to help manage the situation, specifying the rights a person may expect to enjoy in one and/or the other legal order without fear of losing all protection in the other country. But these legal innovations are often still in an experimental stage. We have in mind notably the status of ‘long-term resident’ which in European law is reserved to third-country nationals who wish to exercise the right to freedom of movement, or to the status of a person in ‘circular migration’.

By way of a conclusion to their report, we have asked the national reporters to identify the particular challenges that remain unresolved in the domestic law of their country. The aim of
this question was to give them an opportunity to focus more closely on the capacity of the
domestic law to adapt to certain new situations, while trying at the same time to put into
perspective the legal solutions that might be available: what legal basis is granted to certain
new forms of protection? Are these temporary protections, created on an ad hoc basis without
any intention of extending them over the long term, or can one speak of a new direction taken
in law vis-à-vis the growing complexity of the migratory phenomenon around the world?
The list of challenges identified is impressive, not only in its length, but in the variations by
country; they would merit more detailed study as they show certain particularly problematic
failings in the law, to provide viable solutions for certain situations that are indisputably
unfair to migrants. We can only mention a few of these here: administrative detention of
families; the absence of civil registration documents; the legal protection of unaccompanied
minors; the fate of persons who are unable to return to their country of origin; the
unwillingness on the part of some countries to ratify the ILO Convention on the rights of
migrant workers, etc. The list can be further extended, and after the discussions in Vienna, we
will ask the national reporters to devote particular attention to these in the final reports for
publication.

Conclusion
And now, where to go from here? Almost everyone interested in the subject of “law and
migration” can observe the following paradox today. On the one hand, these are unusually
challenging times for legal technicians. It is almost impossible to keep up with the growing
complexity of the legislation: at least three areas of legal expertise increasingly come together
around the issue of migration: national (administrative) law governing residence, that is, the
national legislation around foreigners’ right of residence and the procedural aspects thereof;
public international law (the increasing number of engagements agreed upon among States);
and since the past few years, the growing impact of human rights protection. On the other
hand, many are becoming aware of the powerlessness of the law. Not only is there insufficient
knowledge of the legal rules that apply, but more importantly, as long as the deeper causes of
undesired migration on a global scale – the growing gap between the prosperous countries and
the rest – are not seriously addressed, the law will be called upon in at least two different
ways. For some, the legal rules drawn up by sovereign nation-states will continue to make
selective flows of labour migration possible, namely of workers who benefit the most
successful sectors of the global economy. But the law must also serve to ensure that the
borders of those same States are reinforced against undesired migration, if necessary via agreements between countries. The law as border guard, as it were.

For others, by contrast, the law must in the first place serve as an instrument of protection, to ensure that, in situations of exploitation and exclusion, at the very least the human rights of each person are safeguarded. Migration in many cases places the migrant in a position of great vulnerability; human rights may in such a situation serve as a lifebelt, though sadly often no more than that.

Where the law can continue in the coming years to play a crucial role as an instrument for balancing different interests is in the stage following that of migration, namely, when it comes to guaranteeing real opportunities for participation by foreigners in the new society where they will henceforth be living. Migrants often sacrifice everything in the hope of improving their living conditions and those of their children, and have to start over from scratch in another country. Less attention has been paid to the role of the law in this regard, since the focus here was specifically on migration. But it goes without saying that the law must remain a firm foundation even after the migration stage and must continue systematically to help people in the essential areas of life and to offer a structural answer to problems that (will) arise. But that would be the subject of another study.
Annex 1. Questionnaire for the preparation of the national reports

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 democratization 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 regularization campaigns) and also authorizes, 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 European Union 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 authorized to migrate, and on the conditions for such authorization. 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 European Union. 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 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 emphasize 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 European Union, 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 the death penalty or execution, torture or inhuman or degrading punishment, or 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. **Regularization:** 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; criminalization; recent statistics.
12. **People smuggling** (smuggled migrants): consists of assisting the illegal immigration of foreigners in order to make a profit. Punishment; identification; protection; criminalization; recent statistics.
13. **Economic migration:** authorization; 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; criminalization; 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 a citizen. It may be acquired through one or both parents (*ius sanguinis*), by connection to one’s place of birth (*ius 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. As regards 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.

a) *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, as regards 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?

b) 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 specialized 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?

c) 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 takes ever new 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 as regards the growing complexity, the world over, of the phenomenon of migration?

d) 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 socialized in the country to which they have migrated and no longer have any ties to their ‘country of origin’;
- legal protection for unaccompanied minors;
- regularization 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 2. Table of the principal texts of secondary European legislation relating to migration policy.⁴⁸

<table>
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<tr>
<th>European text</th>
<th>Publication in the OJ</th>
<th>Deadline for transposition</th>
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<tr>
<td><strong>A. Visa and external borders</strong></td>
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<td>A.1. R. 539/2001 of 15 March 2001, fixant la liste des pays tiers dont les ressortissants sont soumis à l’obligation de visa pour franchir les frontières extérieures des États membres et la liste de ceux dont les ressortissants sont exemptés de cette obligation modifié par</td>
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<tr>
<td>- R. 2414/2001 of 7 December 2001</td>
<td>2001/L327/1</td>
<td>No transposition necessary</td>
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<td>- R. 851/2005</td>
<td>2005/L141/3</td>
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<td>- R. 1791/2006</td>
<td>2006/L363/1</td>
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<td>- R. 1932/2006</td>
<td>2006/L1405/23</td>
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<td>- R. 1244/2009</td>
<td>2009/L336/1</td>
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<td>- R. 1091/2010</td>
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<td>- R. 1211/2010</td>
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<td>- R. 610/2013</td>
<td>2013/L182/1</td>
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<td>- R. 1289/2013</td>
<td>2013/L347/74</td>
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<td>- R. 509/2014</td>
<td>2014/L149/67</td>
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<tr>
<td>A.2. R. 1683/95 of 29 May 1995 établissant un modèle type de visa modifié par</td>
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<td>- R. 334/2002 of 18 February 2002</td>
<td>2002/L53/7</td>
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⁴⁸ On the eur-lex.europa.eu website, the latest consolidated version is available for amended texts, indicating the text number. The texts are also accessible, with references to case law, on the site of sur le site europeanmigrationlaw.eu.
| A.4. | Dir. 2004/82 of 29 April 2004 concernant l’obligation pour les transporteurs de communiquer les **données** relatives aux passagers  
See also:  
Proposition de directive relative à l’utilisation des données des dossiers passagers (Passenger Name Record – **PNR**)  
(2011/0023 COD, 23 avril 2012) | 2004/L261/24 | 5/9/06 |
Agence européenne pour la gestion de la coopération opérationnelle aux frontières extérieures des États membres de l’Union européenne (**FRONTEX**) modifié par  
- R. 863/2007  
- R. 1168/2011 | 2007/L199/30 | No transposition necessary |
| A.6. | R. 562/2006 of 15 March 2006 establishing a **Code communautaire** relatif au régime de franchissement des frontières par les personnes (**Code frontières** Schengen) modifié par  
- R. 296/2008  
- R. 81/2009  
- R. 810/2009  
- R. 265/2010  
- R. 1051/2013 | 2008/L197/60 | No transposition necessary |
| A.8. | R. 767/2008 of 9 July 2008 concernant le système d’information sur les visas (**VIS**) et l’échange de données entre les États membres sur les visas de court séjour (règlement **VIS**) modifié par  
- R. 81/2009 | 2009/L35/56 | No transposition necessary |
- R. 509/2014 | 2009/L243/1 | No transposition necessary |
<p>| A.10. | R. 1931/2006 of 20 December 2006 fixant des règles relatives au petit trafic transfrontalier aux frontières terrestres extérieures | 2006/L243/1 | No transposition necessary |</p>
<table>
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<tr>
<td>A.11. R. 1052/2013 of 22 October 2013 portant création du système européen de surveillance des frontières (<strong>EUROSUR</strong>)</td>
<td>2013/L295/11</td>
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</table>

**B. Asylum**

| B.2. Dir. 2011/95 of 13 December 2011 concernant les normes relatives aux conditions que doivent remplir les ressortissants des pays tiers ou les apatrides pour pouvoir bénéficier d'une protection internationale, à un statut uniforme pour les réfugiés ou les personnes pouvant bénéficier de la protection subsidiaire, et au contenu de cette protection (recast) (dite dir. **qualification**, abrogeant et remplaçant la dir. 2004/83) | 2011/L337/9 21/12/13 |
| B.3. Dir. 2001/55 of 20 July 2001 relative à des normes minimales pour l'octroi d'une protection temporaire en cas d'afflux massif de personnes déplacées et à des mesures tendant à assurer un équilibre entre les efforts consentis par les États membres pour accueillir ces personnes et supporter les conséquences de cet accueil, appelée directive **protection temporaire** | 2001/L212/12 31/12/02 |
| B.5. Dir. 2013/32 of 26 June 2013, relative à des **procédures** collectives pour l'octroi et le retrait de la protection internationales (recast Dir. 2005/85) | 2013/L180/60 20/07/2018 |
C. Immigration

1° Regular immigration

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<td>2011/L132/1</td>
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<td>C.4.</td>
<td>Dir. 2004/114 of 13 December 2004 relative aux conditions d’admission des ressortissants de pays tiers à des fins d’études, d’échanges d’élèves, de formations non rémunérées ou de volontariat</td>
<td>2004/L375/12</td>
<td>12/01/2007</td>
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<td>C.5</td>
<td>Dir. 2005/71 relative à une procédure d’admission spécifique des ressortissants de pays tiers aux fins de recherche scientifique</td>
<td>2005/L289/15</td>
<td>12/10/2007</td>
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<td>C.7.</td>
<td>Dir. 2011/98 of 13 December 2011 établissant une procédure de demande unique en vue de la délivrance d’un permis unique autorisant les ressortissants de pays tiers à résider et à travailler sur le territoire d’un État membre et établissant un socle commun de droits pour les travailleurs issus de pays tiers qui résident légalement dans un État membre</td>
<td>2011/L343/1</td>
<td>25/12/2013</td>
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2° Irregular immigration

l'entrée, au transit et au séjour irréguliers, complété par
- Décision-cadre 2002/946 visant à renforcer le cadre pénal

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<tr>
<td>C.12. Dir. 2004/81 of 29 April 2004 relative au titre de séjour délivré aux ressortissants de pays tiers qui sont victimes de la traite des êtres humains ou ont fait l'objet d'une aide à l'immigration clandestine et qui coopèrent avec les autorités compétentes</td>
<td>2004/L261/19</td>
<td>6/08/2006</td>
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<td>C.13. Décision 2004/573 of 29 April 2004 relative à l'organisation de vols communs pour l'éloignement à partir du territoire de deux États membres ou de plusieurs de ressortissants de pays tiers faisant l'objet de mesures d'éloignement sur le territoire de deux États membres ou plus</td>
<td>2004/L261/28</td>
<td>No transposition necessary</td>
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<td></td>
</tr>
</tbody>
</table>
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Crépeau, F., Droit d'asile, de l'hospitalité aux contrôles migratoires, Bruxelles, Bruylant, 1995.


**Online Sources**

*General sites*

www.echr.coe.int/echr/

curia.europa.eu/

www.refugeecaselaw.org/

ulb.ac.be/assoc/odysseus/

www.europeanmigrationlaw.eu/

www.iom.int

www.un.org/esa/population/migration

www.oecd.org/migration

*Case law sites*

www.refugeecaselaw.org/ (Hathaway)

www.unhcr.ch/ (Refworld)

www.cnda.fr/ (Cour nationale du droit d’asile, France)

www.cce-rvv.be/ (Conseil du contentieux des étrangers/Raad van Vremdelingenbetwistingen, Belgium)

www.cgvs.be/ (Office of the Commissioner for Refugees and Stateless Persons, Belgium)

**II. By country**

[To be completed]