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International Migration Law in the Current Legal and Political Reality: Review of *Research Handbook on International Law and Migration*

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1. Introduction

The complex human phenomenon of migration is a challenging one, and throughout history has been considered by many disciplines, including, but not limited to, law,[1] international relations and political science,[2] sociology and anthropology,[3] philosophy,[4] economics,[5] geography and demography[6] and psychology,[7] as well as by multi-disciplinary scholarship.[8] All of this growing body of scholarship has attempted to come to grips with particular aspects of this phenomenon,

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[1] See, eg, Stephen Legomsky and Cristina Rodrigues, *Immigration and Refugee Law and Policy* (University Casebook Series, 6th edn, Foundation Press 2014); Susan F Martin, *International Migration: Evolving Trends from the Early Twentieth Century to the Present* (Cambridge University Press 2012); Thomas Alexander Aleinikoff and others, *Immigration and Citizenship: Process and Policy* (7th edn, Thomson West 2012).

[2] See, eg, Martin Gieger and Antoine Pecoud (eds), *The Politics of International Migration Management (Migration, Minorities and Citizenship)* (Palgrave Macmillan 2010); Alexander Betts and Gil Loescher (eds), *Refugees in International Relations* (Oxford University Press 2010); Alexandria Innes, *Migration, Citizenship and the Challenge for Security: An Ethnographic Approach* (Palgrave Studies in International Relations, Palgrave Macmillan 2015).

[3] See, eg, Stephen Castles, Hein de Haas and Mark J Miller, '*The Age of Migration: International Population Movements in the Modern World* (5th edn, The Guilford Press 2013); Yasemin Nuhoglu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago Press 1995); David Bartram, *Key Concepts in Migration* (Sage 2014).

[4] See, eg, Elizabeth W Collier and Charles R Strain (eds), *Religious and Ethical Perspectives on Global Migration* (Lexington Books 2014); Joseph Carens, *The Ethics of Immigration* (Oxford University Press 2015).

[5] See, eg, Leila Talani and Simon McMahon, *Handbook of International Political Economy of Migration* (Edward Elgar 2015); Timothy J Hatton and Jeffrey G Willamson, *Global Migration and the World Economy: Two Centuries of Policy and Performance* (The MIT Press 2008); Robert EB Lucas, *International Migration and Economic Development: Lessons from Low-Income Countries* (Edward Elgar 2008).

[6] See, eg, Joaquin Arango and others, *Worlds in Motion: Understanding International Migration at the End of the Millennium* (Oxford University Press 2005).

[7] See, eg, Stuart C Carr (ed), *The Psychology of Global Mobility* (Springer Verlag 2010); Laura Simich and Lisa Andermann, *Refuge and Resilience: Promoting Resilience and Mental Health among Resettled Refugees and Forced Migrants* (Springer 2014).

[8] To some extent, these sources are multi-disciplinary and the categorisation I suggest above is slightly misleading. However, there is a body of scholarship which purports to be a self-proclaimed multi-disciplinary approach: see, eg, Caroline B Brettell and James F Hollifield (eds), *Migration Theory: Talking across Disciplines* (3rd edn, Routledge 2014). Migration has also been considered by other disciplines such as linguistics, epidemiology, literature and history.

which has an impact on states, peoples, societies, spaces, cultures, mental states, international organisations and norms.

In the legal sphere, migration has been regulated by constitutional, administrative and international law. In each of these spheres of law migrants are divided into categories, set apart by the motivations and constraints which led them to emigrate or by the way through which they entered their destination.

The *Research Handbook on International Law and Migration*[9] offers a comprehensive overview of the current pressing international law aspects of migration. The contributions explore the different categories of migrants, the manner in which rights of migrants are dealt with, the mechanisms used by states to handle migration, and the efforts that international organisations invest in assisting and controlling migrants, migration and state migration policies.

In this review of the *Handbook*, I examine some of the themes that appear in the book, as it offers a rich and critical description of the normative environment of international migration law. Given this richness, I will not attempt to summarise the arguments of the various articles, all of which strongly deserve to be read; I suspect that such a summary would not do justice to the breadth of the views reflected in the work. In Section 2, I describe how the book explores the connection between migration and sovereignty. Section 3 examines the categorisation of migrants and of migration law. This section also explores whether it is justified to protect migrants through a separate normative framework: I examine whether international migration law plays a necessary or significant part in the protection of migrants, or whether other international law norms – namely those found in international human rights law – are as, if not more, important. The purposes of categorising different types of migrant are also discussed, and I argue that these categorisations are too rough and reflect misperceptions regarding concepts of choice in the process of migration, as well as superficial perceptions of the motivations of migrants in the process of their migration. Section 4 of this review details some of the 'truisms' about immigration which the book challenges. Section 5 examines whether the book outlines a narrative of progress towards more rights for more refugees. Section 6 comments on the fact that the book, like many studies on immigration, has a strong Eurocentric focus, and most of its articles deal with the phenomenon of non-European migration only in passing. Section 7 concludes the review.

2. Migration and the Connection with Sovereignty Explored

It is almost impossible to deal with the phenomenon of migration without exploring its relationship with state sovereignty, especially in the framework of this collection, which sets out the international law of migration. In a sense, this law, almost by definition, challenges sovereignty. Generally speaking, migration is currently perceived as one of the most important threats to sovereignty, with undocumented or irregular migration being the most challenging. An essential part

[9] Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014).

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of sovereign power is considered to be the power to (i) include or exclude; (ii) pick and choose who becomes part of the nation and who enjoys which rights and is burdened with which duties; (iii) prevent penetration of security risks; and (iv) handle the economy and the distribution of goods – all of which are affected by migration. Therefore, it is not surprising that migration control has been transformed into 'the last bastion of sovereignty'.[10] Efforts to assert control over migration are far-reaching and harsh, almost obsessive, and include legal and bureaucratic restrictions in the form of tougher immigration laws, visa restrictions, deportation proceedings and detention, as well as the application of military force, construction of physical barriers, and other means.[11]

One of the consequences of the attempt to retain sovereign power despite the reality of immigration is that states have tried to contain immigration by preventing access to their borders, thus creating a situation in which migrants remain outside their jurisdiction. A current and dramatic example of such an attempt is the European efforts to prevent Mediterranean asylum seekers from landing on the shores of Europe by carrying out operations on the high seas.[12] Thomas Gammeltoft-Hansen, in his article 'Extraterritorial Migration Control and the Reach of Human Rights', criticises such attempts as he tries to separate territoriality from sovereignty by arguing that states are responsible not just for occurrences within their territory but also for occurrences where they have effective control.[13] Accordingly, efforts to prevent migrant entry – such as push-backs on the high seas, return agreements, and extraterritorial detention during which sovereign power is undoubtedly applied upon migrants – must form state obligations to respect the human rights of those migrants.[14] It should be noted, though, that despite the fact that international law prohibits such measures, states do apply them, even as courts attempt to limit the use of sovereign power for the purpose of excluding migrants.[15]

Another method applied by states to preserve their sovereignty – or the illusion thereof – is immigration detention. Beth Lyon, in her article 'Detention of Migrants: Harsher Policies, Increasing International Law Protection', explains how states resort to detaining migrants in an effort to control, exclude and contain them, as they become unable to control their borders.[16] Lyon explains that the price of the illusion of maintained sovereignty is an increase in immigration detention[17] and deteriorating conditions of detention,[18] which interfere with the ability of

[10] Catherine Dauvergne, 'Irregular Migration, State Sovereignty and the Rule of Law', in Chetail and Bauloz (n 9) 75, 80.
[11] ibid 80–81.
[12] Council of the European Union, 'Justice and Home Affairs Council, 14/09/2015', http://www.consilium.europa.eu/en/meetings/jha/2015/09/14.
[13] Thomas Gammeltoft-Hansen, 'Extraterritorial Migration Control and the Reach of Human Rights', in Chetail and Bauloz (n 9) 113.
[14] ibid 130–31. Compare Tally Kritzman-Amir and Thomas Spijkerboer, 'On the Morality and Legality of Borders' (2013) 26 *Harvard Journal of Human Rights* 1.
[15] eg, Gammeltoft-Hansen (n 13) 130.
[16] Beth Lyon, 'Detention of Migrants: Harsher Policies, Increasing International Law Protection', in Chetail and Bauloz (n 9) 173.
[17] ibid 175.
[18] ibid 178–79.

immigrants to pursue their legal cases.[19] This is despite the fact that international law prohibits arbitrary detention[20] and places limitations on the detention of women and children.[21] Requirements imposed by international organisations to refrain from detention as a general rule, and to restrict detention only to cases in which it is strictly necessary and for as long as it is strictly necessary are also not complied with.[22] In other words, in the case of detention, as in the case of extraterritorial migration control, the desire to maintain a façade of sovereignty trumps even the international law limitations.

Stephen H Legomsky's article, 'The Removal of Irregular Migrants in Europe and America', indicates the way in which irregular migration challenges sovereignty, as it brings undesired persons into states.[23] Removal is a method states deploy to reassert their control. Legomsky describes the differences in removal strategies between Europe and the US. Essentially, European removal policies rely on international cooperation, whereas removals in the US are unilateral, and include offering incentives for people to cooperate with their removal.[24] Either way, both European and US removals are massive in quantity, amounting to hundreds of thousands per year.[25] Thus, irrespective of the manner in which states try to remove irregular migrants, they are trying to restore sovereign order or maintain a façade thereof.

To conclude, the collection highlights the tension between sovereignty, migration control and migrant rights, and demonstrates in various articles how each aspect retreats behind the other in different contexts.

3. Migrants as a Category and the Categorisation of Migrants

3.1. Migrants as a Category versus Other International Law Norms

Sovereignty is mitigated in a way that takes rights of migrants into account through various international legal norms. The articles in this collection point to the various legal resources that exist to regulate the rights of migrants and the correlating duties of states. Some of these resources are general and regional human rights norms; others are specific instruments to regulate rights of migrants. These make up the most important sources of migrant rights, but they are not the only norms which may serve to protect them. For example, Joel Trachtman, in his article 'Economic Migration and Mode 4 of GATS', points to trade norms as a potential source of protection for immigrants, but argues that the potential is limited to migrant workers in the service

[19] ibid 179–80.
[20] ibid 182–83.
[21] ibid 183–84.
[22] ibid 181–84, 188–89.
[23] Stephen H Legomsky, 'The Removal of Irregular Migrants in Europe and America', in Chetail and Bauloz (n 9) 148.
[24] ibid 168–69.
[25] ibid 148–49.

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sector and does not sufficiently benefit developing markets.[26] In other words, human rights law and migrant rights law prevail as the main normative bases, despite the fact that other sources exist. Those two types of resource complement each other, and sometimes overlap.

How do human rights norms relate to migrant rights norms in practice? It is often the case that *one type of instrument serves as a tool for the interpretation of the other*. An example of this can be found in the interpretation of the term 'being persecuted', which appears in the definition of 'refugee' in the Convention Relating to the Status of Refugees (Refugee Convention).[27] As explained in Hugo Storey's article, 'Persecution: Towards a Working Definition',[28] the term 'being persecuted' is often shaped by a human rights approach which relies on the hierarchy of rights specified in human rights instruments,[29] complemented by considerations derived from other international law frameworks, such as international humanitarian law and international criminal law.[30] A similar approach to the interpretation of the exclusion clause in the Refugee Convention is suggested by Geoff Gilbert in his article 'Exclusion under Article 1F since 2001: Two Steps Backwards, One Step Forward', in which he argues that it should be interpreted purposively in light of the general international human rights norms.[31]

In other cases *international human rights norms serve as the main or sole basis for potential claims for rights of migrants*. Helen O'Nions' article, 'Minority and Cultural Rights of Migrants',[32] refers to international and regional treaties (such as Article 27 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),[33] the Framework Convention for the Protection of National Minorities,[34] and several articles of the European Convention on Human Rights (ECHR)),[35] as well as decisions of international organisations and courts (such as the Committee on Economic, Social and Cultural Rights, the United Nations Educational, Scientific and Cultural Organization (UNESCO), and the European Court of Human Rights, which serve as the limited normative basis for claims of migrants to cultural and minority rights. Therefore, while none of these instruments or institutions are specific to migrants, they all serve as a basis (albeit of a limited nature) for claims for migrant rights. Similarly, Hemme Battjes' article, 'Subsidiary Protection and Other Alternative Forms of Protection',[36] shows that many of the substantive protections associated with the rights of refugees are in fact based on general

[26] Joel P Trachtman, 'Economic Migration and Mode 4 of GATS', in Chetail and Bauloz (n 9) 346, 367.
[27] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 137.
[28] Hugo Storey, 'Persecution: Towards a Working Definition', in Chetail and Bauloz (n 9) 459.
[29] ibid 469–78.
[30] ibid 515–16.
[31] Geoff Gilbert, 'Exclusion under Article 1F since 2001: Two Steps Backwards, One Step Forward', in Chetail and Bauloz (n 9) 519, 524.
[32] Helen O'Nions, 'Minority and Cultural Rights of Migrants', in Chetail and Bauloz (n 9) 239.
[33] UN General Assembly, International Covenant on Economic, Social and Cultural Rights (entered into force 3 January 1976) 993 UNTS 3.
[34] Council of Europe, Framework Convention for the Protection of National Minorities (entered into force 1 February 1998) ETS 157.
[35] European Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force 3 September 1953) 213 UNTS 222.
[36] Hemme Battjes, 'Subsidiary Protection and Other Alternative Forms of Protection', in Chetail and Bauloz (n 9) 541, 549.

human rights norms rather than on the Refugee Convention. For example, one of the main sources of socio-economic rights of refugees is the ICESCR, yet neither this Convention nor the Refugee Convention determines the precise scope of these rights.

Often there is an *overlap and redundancy between the human rights norms and the migrant rights norms.* Wouter Vandenhole's article, 'Migration and Discrimination: Non-Discrimination as Guardian against Arbitrariness or Driver of Integration', refers to a massive body of non-discrimination norms which are a part of the general set of international human rights norms, rendering the non-discrimination clauses in international migrant rights norms redundant.[37] This is especially true given the fact that racial discrimination is recognised as an *erga omnes* norm and that many states are not a party to the instruments which prohibit discrimination against migrants, such as conventions regulating migrant workers.[38] Despite the multiple norms, there are still various problems of discrimination against immigrants in, for example, criminal law, security matters, the labour market, housing, health care and social security. David Weissbrodt and Justin Rhodes, in their article 'United Nations Treaty Bodies and Migrant Workers', review the UN and International Labour Organization norms on migrant workers' rights, and show that they overlap to a large extent with general human rights norms. While the norms governing the rights of migrant workers have designated organisations to oversee their implementation, their effect on migrant rights is minimal as few receiving states are parties to these conventions.[39]

At the same time, however, the book discusses the *limits of the instruments governing migrant rights and human rights*. In Catherine Dauvergne's article, 'Irregular Migration, State Sovereignty and the Rule of Law', for example, the author shows the limited promise of migrant rights instruments by pointing to the fact that these instruments differentiate between documented and undocumented migrant workers, guarantee more rights to the former and accordingly provide only partial protection for the latter.[40] Dauvergne also points out that the migrant rights instruments are limited in the rights they guarantee as, for example, they do not include the right of refugees to enter the country of asylum, but rather merely make do with preventing the criminalisation of their undocumented entry.[41] In addition, the most important legal precedents on migrant rights rely not on international migrant rights laws but rather on general international human rights norms.[42] Migrant rights instruments are less significant in this respect. It is not just these instruments that are limited, but also the human rights instruments applied in migrant-related contexts are often ineffective. Beth Lyon, in her article 'Detention of Migrants: Harsher Policies, Increasing International Law Protection', for example, points out that despite prohibitions on immigration detention contained in various international law

[37] Wouter Vandenhole, 'Migration and Discrimination: Non-Discrimination as Guardian against Arbitrariness or Driver of Integration', in Chetail and Bauloz (n 9) 216, 216–17.
[38] ibid 218.
[39] David Weissbrodt and Justin Rhodes, 'United Nations Treaty Bodies and Migrant Workers', in Chetail and Bauloz (n 9) 303, 308–28.
[40] Dauvergne (n 10) 78.
[41] ibid 84.
[42] ibid 91.

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instruments, including conventions and soft law instruments,[43] states do not abide by those requirements and that, in fact, international human rights law also prohibits arbitrary detention,[44] as well as setting limitations on the detention of children and women.[45]

This requires consideration of whether the focus on migrants as a discrete category of the rights-bearing population is indeed justified. Admittedly, some of the migrant rights international law instruments historically preceded the general human rights instruments and, as such, were of great importance in the litigation of migrant rights matters. It is not clear whether they contribute much today, in light of the massive development of human rights instruments and the formation of international customary norms in the field, and whether they are still relevant. If we accept that states have an obligation to uphold the human rights of all those who are under their effective control, then we should also hold them obligated to protect the rights of immigrants under their effective control.

It is possible to argue that the framework of migrant rights norms allows us to balance the rights of migrants with those of others, such as citizens.[46] I believe the existence of this balance is overstated and misleading. All rights and interests of all human beings are intertwined, yet this should only rarely serve as a justification for systematically refraining from granting or acknowledging the rights of a particular group.

In fact, it is possible to argue that the existence of migrant rights norms is somewhat counterproductive. This is because a focus on migrant rights comes at the risk of overlooking the fact that such rights are, in fact, human rights, and that states have responsibilities and duties to all humans under their effective control, whether they are migrants, citizens or others. In practice, however, the promise of human rights does not always extend to all migrants. For example, some rights are extended only to immigrants 'lawfully in the territory', as Jens Vedsted-Hansen notes in 'The Asylum Procedures and the Assessment of Asylum Requests'.[47] This is despite the fact that migrants are sometimes ejected from their countries and have no choice but either to enter a state illegally or to remain illegally where they are.[48]

Vedsted-Hansen describes a different approach that could be taken:[49] to protect the rights contained in general human rights instruments more rigorously when applied in the context of a volatile population of immigrants.[50] While this approach justifies looking at migrants as a discrete category of rights bearers in order to apply the logic of affirmative action, it is rarely the case that this logic is actually applied. It does seem that the need for a separate body of international migrant rights law should be explored.

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[43] Lyon (n 16) 181–93.
[44] ibid 182–83.
[45] ibid 183–84.
[46] Hiroshi Motomura, 'Federalism, International Human Rights and Immigration Exceptionalism' (1999) 70 *University of Colorado Law Review* 1361, Pt III, especially Pt III.B.
[47] Jens Vedsted-Hansen, 'The Asylum Procedures and the Assessment of Asylum Requests', in Chetail and Bauloz (n 9) 439, 449.
[48] ibid 449.
[49] ibid 439.
[50] ibid 446–47. This is in respect of art 3 ECHR as it applies in the context of asylum procedures.

3.2. CATEGORIES OF MIGRANTS AND ATTACHED PROTECTION OF RIGHTS

The collection does not deal only with the categories of law (human rights law or migrant rights law) but also with categories of migrants. Some of the articles in the book cover various categories of migration that we have grown used to over the years, such as the migration of trafficking victims,[51] stateless persons,[52] family reunification migration,[53] migration for employment,[54] migration of refugees,[55] and internal displacement.[56]

The reality, however, is that migrant categories are far from being mutually exclusive or clear cut. The borderlines between them are blurred, even though there are often attempts to establish the essentialism of migrants' motivations, choices and constraints in the immigration process. It is difficult to distinguish refugees from migrant workers, since typically both have a mixture of economic choices and constraints behind their migration. In the case of internally displaced persons (IDPs), it is sometimes even difficult to know who are the IDPs and who are the locals, and active steps towards the collection of information on their numbers, locations and conditions are required in order to identify and reach out to them.[57] In addition, as O'Nions points out, it is difficult to tell which migrations are voluntarily undertaken and which are not:[58]

> Clearly it would be erroneous to regard refugees as 'voluntary' migrants; similarly spouses and children who migrate to join established family members are not strictly 'voluntary' migrants. Indeed it could be argued that very little migratory movement is truly 'voluntary' given the range of factors: economic, social and political which motivate migration.

Ryszard Piotrowicz, in his article 'Smuggling and Trafficking of Human Beings', points out the often confusing difference between trafficking and smuggling.[59] Catherine Dauvergne's article,

[51] Ryszard Piotrowicz, 'Smuggling and Trafficking of Human Beings', in Chetail and Bauloz (n 9) 132.
[52] Peter J Spiro, 'Citizenship, Nationality and Statelessness', in Chetail and Bauloz (n 9) 281.
[53] Hélène Lambert, 'Family Unity in Migration Law: The Evolution of a More Unified Approach in Europe', in Chetail and Bauloz (n 9) 194.
[54] Weissbrodt and Rhodes (n 39) 303; Lori A Nessel, 'Human Dignity or State Sovereignty? The Roadblocks to Full Realization of the UN Migrant Workers Convention', in Chetail and Bauloz (n 9) 329; Trachtman (n 26) 346; Elspeth Guild, 'Labour Migration and the European Union', in Chetail and Bauloz, ibid 368.
[55] T Alexander Aleinikoff, 'The Mandate of the Office of the United Nations High Commissioner for Refugees', in Chetail and Bauloz (n 9) 389; Rebecca MM Wallace, 'The Principle of Non-Refoulement in International Refugee Law', in Chetail and Bauloz, ibid 417; Vedsted-Hansen (n 47) 439; Storey (n 28) 459; Gilbert (n 31) 519; Battjes (n 36) 541; Marjoleine Zieck, 'The Limitations of Voluntary Repatriation and Resettlement of Refugees', in Chetail and Bauloz, ibid 562.
[56] Roberta Cohen, 'Protection of Internally Displaced Persons: National and International Responsibilities', in Chetail and Bauloz (n 9) 589; Walter Kälin, 'The Guiding Principles on Internal Displacement and the Search for a Universal Framework of Protection for Internally Displaced Persons', in Chetail and Bauloz, ibid 612; Stephane Ojeda, 'International Humanitarian Law and the Protection of Internally Displaced Persons', in Chetail and Bauloz, ibid 634; Moetsi Duchatellier and Catherine Phuong, 'The African Contribution to the Protection of Internally Displaced Persons: A Commentary on the 2009 Kampala Convention', in Chetail and Bauloz, ibid 650.
[57] Cohen (n 56) 593, 596.
[58] O'Nions (n 32) 241.
[59] Piotrowicz (n 51) 132–42.

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'Irregular Migration, State Sovereignty and the Rule of Law', argues that there is a blurred overlap between categories of migrants and methods of migration. For example, persons who wish to cross a border but are unable to obtain visas are forced to couch their immigration in terms of the language of refugees.[60]

David Weissbrodt and Justin Rhodes mention in their article, 'United Nations Treaty Bodies and Migrant Workers', that the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[61] applies to 'a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national'.[62] Thus the Convention applies not only to migrant workers but also to refugees, asylum seekers, trafficking victims and others as long as they are employed outside their country of nationality.[63]

Alexander Aleinikoff, in his article 'The Mandate of the Office of the United Nations High Commissioner for Refugees', discusses the fact that the UNHCR was asked to assume responsibility for various categories of migrants, in addition to its 'traditional' role with regard to the refugee population, as defined in the Refugee Convention. Aleinikoff describes how the UNHCR was asked to provide a solution for victims of natural disasters;[64] persons defined as refugees in regional instruments, which include a broader category;[65] and to IDPs, stateless persons, asylum seekers and returnees.[66] This shows that the blurred lines between the categories of migrants are also reflected in and have an impact on institutional roles.

Delineation of the various categories, while legally reasonably well established, should be taken with a grain of salt, as it represents a set of political and economic motivations. States have different political and economic interests in the protection of some types of migrant and not others. The categorisation of migrants always serves as a basis for decisions to include and exclude, which change according to varying constraints and preferences. Geoff Gilbert highlights this point concerning the changing scope of the category of protected persons against the category of excluded persons.[67] Gilbert demonstrates that since 11 September 2001 governments have become more inclined to exclude asylum seekers in an atmosphere which suspects them of involvement in security-related crimes, but recent court decisions have alleviated that tendency.[68] Similarly, Elspeth Guild's article, 'Labour Migration and the European Union', points to the hyper-categorisation of migrant workers in the European Union (EU), which leads to differential treatment of non-EU nationals (third country nationals) in the member states, thereby impeding their employment rights, mobility and family life.[69]

[60] Dauvergne (n 10) 85.
[61] UN General Assembly (entered into force 1 July 2003) UN Doc A/RES/45/158, 2220 UNTS 3.
[62] ibid art 2.
[63] Weissbrodt and Rhodes (n 39) 303.
[64] Aleinikoff (n 55) 389.
[65] ibid 396–97.
[66] ibid 402–10.
[67] Gilbert (n 31) 519.
[68] ibid 523.
[69] Guild (n 54) 368.

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Helen O'Nions' article, 'Minority and Cultural Rights of Migrants', explains how migrants are sometimes viewed differently from the indigenous population in the context of minority rights, on the presumption that 'while national minorities merit rights to special representation and devolved self-government, ethnic groups deserve only rights to help them integrate on terms that are fair'.[70]

Nevertheless, it is important to remember that there are groups of migrants who do not fall precisely into any category. These include persons fleeing from general aggression, massive violations of human rights, civil wars, and similar situations. As described in Hemme Battjes' article, 'Subsidiary Protection and Other Alternative Forms of Protection', since the 1980s alternative forms of protection have been developed, side by side with the protection of refugees and other migrants, with the aim of protecting persons fleeing from the above situations. Such forms of protection extend to a group of migrants which Battjes places in a category of 'a hybrid between human rights law and the refugee definition'; it does not quite meet the definition of 'refugee' but still runs the risk of exposure to serious harm.[71] Yet the law allows for a lower threshold of treatment for those who do not qualify as refugees.[72]

The question remains whether it is justifiable to divide the migrant population into categories and whether this categorisation has any intrinsic meaning, or whether it should influence the scope of the rights protected. In a different context, I have suggested that there is an unprotected and overlooked category of migrant: those who are fleeing from their countries because of socio-economic necessity.[73] I argue that there are no morally compelling reasons to distinguish between them and other types of migrant who are offered protection and a set of rights. I have also suggested forming a category of 'socio-economic refugees' and granting them a set of rights and protections similar to those given to refugees.[74] It seems that the book, especially in Battjes' article, accepts the fact that categorisation of migrants and the rights that derive from such categorisation are sometimes arbitrary, and should be questioned.[75] Nevertheless, this project embraces the existing categories as meaningful reference points for the understanding of the relevant legal norms. Also, it does not look beyond those categories to identify gaps in protection and to spot those who remain unprotected, despite the fact that it is possible to argue that they are morally deserving of protection.

4. THE 'TRUISMS' OF IMMIGRATION LAW

The book suggests that we should examine the truisms that we have been led to believe when it comes to immigration law. It is not just that we have been led to believe that there are discrete categories of immigrants, distinguished and distinguishable by the causes and constraints which

[70] O'Nions (n 32) 11, quoting Stephen May, Tariq Modood and Judith Squires (eds), *Ethnicity, Nationalism and Minority Rights* (Cambridge University Press 2004) 5.
[71] Battjes (n 36) 550.
[72] ibid 560.
[73] Tally Kritzman-Amir, 'Looking Behind the "Protection Gap": The Moral Obligation of the State to Necessitous Immigrants' (2010) 13(1) *The University of Pennsylvania Journal of Law and Social Change* 47.
[74] Tally Kritzman-Amir, 'Socio-Economic Refugees', PhD Thesis, Tel Aviv University, 2008.
[75] Vincent Chetail, 'The Transnational Movement of Persons under General International Law: Mapping the Customary Law Foundations of International Migration Law', in Chetail and Bauloz (n 9) 1, 56.

caused their immigration as well as by their methods of immigration. There are other common truisms that are often used in the immigration context, which the book iterates while suggesting that a critical examination of them is required.

For example, Idil Atak and Francois Crépeau, in their article 'National Security, Terrorism and Securitization of Migration', examine the truism concerning the involvement of migrants in terrorism. We have been led to believe that terrorism is a major security threat and that migrants are disproportionately more involved in terrorism. In fact, given the frequent mobility of goods, capital, information and persons across borders, non-immigrants can be and are involved in terrorism just as much and possibly even more.[76] Yet states have had a sovereignty-related interest in suggesting a linkage between migration and terrorism, and thus justifying the formation of administrative bodies to fight terrorism with jurisdiction in the field of immigration.[77] The seeping of technologies, measures and information from the field of security into the field of immigration and back is one that should be carefully examined, rather than taken as a given or desirable fact.[78]

Another truism that the book challenges is that of voluntary repatriation of refugees as a durable solution, one of a few possible solutions, such as local integration and resettlement. Marjoleine Zieck, in her article 'The Limitations of Voluntary Repatriation and Resettlement of Refugees', argues that voluntary repatriation is no longer a viable solution, as in many countries of origin the political situation is not likely to change and refugees will end up in 'protracted refugee situations'.[79] The article calls for developing resettlement as an alternative to the limited option of repatriation, an option which also has responsibility sharing and solidarity benefits.[80]

Perhaps a third truism that is challenged, albeit not explicitly, in the book is that migration is a phenomenon which involves the crossing of international borders. The book makes it clear that internal displacement is also a form of immigration worthy of national and international regulation. We are also reminded that, more often than not, 'most people cannot, or do not want to leave their countries'.[81] While the most frequently heard stories of immigration these days deal with migration from the developing countries to the developed countries, we are reminded that[82]

> in times of tension and conflict, most people flee to safer parts of their own country in order to remain in relatively familiar surroundings or to stay close to their land. Others may be discouraged from crossing borders by mountains and rivers or simply by a language barrier. Those with minimal resources may not have the transportation or funds needed to cross into another country or bribe border guards. Some may be prevented from leaving by national authorities or non-state actors. Efforts to protect only those who can make it across the border have come to be seen as an ineffective and unjust international response.

[76] Idil Atak and François Crépeau, 'National Security, Terrorism and the Securitization of Migration', in Chetail and Bauloz (n 9) 93, 94–96; see also Gilbert (n 31) 519.
[77] Atak and Crépeau, ibid 98.
[78] ibid 100–02.
[79] Zieck (n 55) 562.
[80] ibid 582.
[81] Cohen (n 56) 592.
[82] ibid.

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Analysis of internal displacement as a part of the phenomenon of migration, and not as a separate issue, is therefore important.

Challenging these truisms is, in my opinion, essential in order to hold an informed discussion on the phenomenon of migration, free from the political considerations that surround this subject.

5. A NARRATIVE OF PROGRESS?

It is tempting to tell the story of the international law of migration with a simple narrative of progress. For many years migration was not perceived as a concern or a burden for states.[83] As states' attitudes towards immigration have changed, and the costs and burdens of assimilating migrants into local society and the labour market and protecting their rights were recognised, states started to apply their sovereign power to limit migration. A state was generally perceived as being authorised to control its population and borders and, to some extent, being obligated to do just that: to limit admission and make decisions about inclusion and exclusion in the interests of its members. However, the efforts of states to control immigration of refugees have been, at best, partially successful from the states' point of view. With globalisation, it has become increasingly hard to limit the movement of people, which has increased with the movement of capital and goods. As control has been virtually lost and borders have become porous, states have sought the cooperation of others in an attempt to regain control, through bilateral and then multilateral agreements.[84] In parallel with these instruments, the international norms relating to migrant rights, described in detail in this collection, came into being.

This is the case with the right to family life of migrants, it seems. Helene Lambert's article, 'Family Unity in Migration Law: The Evolution of a More Unified Approach in Europe', explains the gradual process whereby substantial forms of protection of the nuclear family (rather than the extended family) were created in treaty law, soft law and through judicial decisions.[85] These forms of protection include not only duties imposed on states to refrain from interfering with the family life of migrants, but also positive duties.[86] The progress described is twofold: more rights and a more harmonised approach between states.

What this collection offers is a much more complex narrative. On the one hand, as mentioned above, the book shows that the abundance of norms does not mean that migrant rights are necessarily more protected, as the norms overlap with significant redundancy within them. This is the case with the norms on anti-discrimination.[87]

In other cases, the multiplicity of instruments does not produce effective normative protection. Both international human rights law and international migration law fall short from actually

[83] James C Hathaway, *The Law of Refugee Status* (Butterworths 1991) 1.
[84] Rieko Karatani, 'How History Separated Refugee and Migrant Regimes: In Search of Their Institutional Origins' (2005) 17 *International Journal of Refugee Law* 517, 520–21.
[85] Lambert (n 53) 195–200.
[86] ibid 204–06.
[87] Vandenhole (n 37) 216–17.

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offering effective protection to most migrants.[88] This is the case with the instruments dedicated to the protection of the rights of migrant workers. They have evolved to provide important protection for migrant workers, extending not just to employment rights but also to cultural, social and political rights, and protecting undocumented migrant workers too. However, this narrative of progress is only partial in that the instruments overlap with general human rights norms, only a few states are parties to those conventions, and these mostly tend to include the migrants' countries of origin.[89] Because sovereignty remains the superseding consideration, this trumps that of human rights.[90] The result is that while migrants benefit and contribute 'to the economic growth and human development both in countries of origin and destination', many others are still forced to 'endure human rights violations, discrimination and exploitation'.[91]

In other immigration contexts there has simply not been enough progress. IDPs, for example, have been left out of international law instruments, despite the awareness that some of them, such as the Refugee Convention, may deal with similar phenomena.[92] Therefore, only the Guiding Principles on Internal Displacement[93] and a Framework for National Responsibility[94] – both of which are non-binding – and a binding regional African Convention (Kampala Convention)[95] are in place.[96]

Finally, in other contexts it appears that the rights situation is actually moving backwards. While, as some of the articles in this collection suggest, different components of the definition of 'refugee' have been expanded through interpretation (in soft law and court decisions) to include and protect more refugees, the reality is one of 'compassion fatigue'[97] and 'more refugees but less asylum'.[98]

Therefore, despite the normative development and growth in various aspects of international migration law, it is inaccurate to set out a simple narrative of progress in the field of refugee rights.

6. INTERNATIONAL MIGRATION LAW OR WESTERN MIGRATION LAW

The book aims to discuss international migration law but, like many prominent publications dealing with migration, it focuses mainly on migration to Europe, North America, Australia and New

[88] Dauvergne (n 10) 75–92.
[89] Weissbrodt and Rhodes (n 39) 311.
[90] Nessel (n 54) 345.
[91] Weissbrodt and Rhodes (n 39) 303.
[92] Cohen (n 56) 590.
[93] UN High Commissioner for Refugees (UNHCR), 'Guiding Principles on Internal Displacement', 22 July 1998, UN Doc E/CN.4/1998/53/Add2, Annex.
[94] Brookings-Bern Project on Internal Displacement, 'Addressing Internal Displacement: A Framework for National Responsibility', April 2005, http://www.brookings.edu/fp/projects/idp/20050401_nrframework.pdf.
[95] African Union, Convention for the Protection and Assistance of Internally Displaced Persons in Africa (entered into force 6 December 2012) (Kampala Convention).
[96] Cohen (n 56) 595–96.
[97] Maryellen Fullerton, 'The International and National Protection of Refugees', in Hurst Hannum (ed), *Guide to International Human Rights Practice* (4th edn, Hotei 2004) 247.
[98] Adam Roberts, 'More Refugees, Less Asylum: A Regime in Transformation' (1998) 11 *Journal of Refugee Studies* 375–95.

Zealand. This may be as a result of methodological constraints, language barriers, or other reasons. However, it is important to remember that while there is a significant body of scholarship dealing with migration to the developed states, there is an equally important phenomenon of migration to the developing states. It is crucial to remember that while migration to the West attracts much public and media attention, most of the migration movements occur in the developing nations. This was especially apparent in the summer of 2015 when there was much discussion regarding the migration of Middle Eastern and African migrants to Europe, although their number was just a small fraction of the number of migrants within Africa and the Middle East.[99] The responsibilities and burdens of providing for migrants are unevenly distributed, with a larger share of the responsibility placed on developing states.[100]

It is also important to note that shifts and innovations in migration regimes are not unique to the global North. Europe and North America are often considered the epitome of free movement, with the EU allowing free movement across (virtually meaningless) borders to its citizens, and the North American Free Trade Agreement (NAFTA) serving as a basis for large-scale migration in North America. This collection reminds us that there are similar free movement regimes in other parts of the world, including Central, East, West and South Africa; Asia; and South and Central America.[101]

The geographical focus has tremendous impact on the exact content of the rights and legal categories and terms. Since many of the rights of migrants are undefined or loosely defined in international law, or elaborated in soft law mechanisms, much is left to state discretion. It is possible to say that developing countries generally provide better protection for migrant rights. Jens Vedsted-Hansen, in his article 'The Asylum Procedures and the Assessment of Asylum Requests', mentions that the procedural rights of asylum seekers are much better protected in the developed states.[102] This is because, as the article iterates, the procedural norms are set out in the UNHCR ExCom conclusions[103] as well as in regional instruments; the most elaborate of these are the European instruments, which the article critically examines.[104]

African regional norms, on the other hand, provide wider protection for a larger group of refugees,[105] and include independent prohibitions on their

[99] 'Syrian Regional Refugee Response', http://data.unhcr.org/syrianrefugees/regional.php.
[100] eg, Tally Kritzman-Amir, 'Not in My Backyard: On the Morality of Responsibility Sharing in Refugee Law' (2009) 34 *Brooklyn International Law Journal* 355–93.
[101] Chetail (n 75) 1, 33–34.
[102] Vedsted-Hansen (n 47) 443.
[103] UNHCR, 'ExCom Conclusions on International Protection', http://www.unhcr.org/pages/49e6e6dd6.html.
[104] Vedsted-Hansen (n 47) 443.
[105] Art 1 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 UNTS 45, reads: '1. For the purposes of this Convention, the term "refugee" shall mean every person who, owing to a 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 and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. 2. The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in

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detention.[106] Also, as explained in the article by Moetsi Duchatellier and Catherine Phuong, 'The African Contribution to the Protection of Internally Displaced Persons: A Commentary on the 2009 Kampala Convention', there exist specific binding African instruments governing the protection of the internally displaced as internal displacement is such a massive problem in Africa, which has close to half of the population of IDPs.[107] Implementation of these norms remains a challenge, especially as it requires allocation of resources.

It is safe to say that migration in the global South does matter, and deserves scholarly attention, not just because of its impact on the global North,[108] but as a phenomenon that is important in its own right.

7. CONCLUSION

The collection *Research Handbook on International Law and Migration* offers a comprehensive, analytical overview of the relevant international law instruments pertaining to various aspects of migration. In the ongoing heated debate over migration – a debate which tends to be ill-informed and political rather than academic and legal – taking a broad perspective is of practical importance. The collection challenges the existing scholarship not merely by being comprehensive, but also because it touches on the most timely dilemmas of migration law and policy. It therefore makes important reading for anyone immersed in the field of migration and refugee law, whether in academia or in practice.

either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality'.

[106] Lyon (n 16) 190.

[107] Cohen (n 56) 597; Duchatellier and Phuong (n 56) 650.

[108] eg, Dauvergne (n 10) 83.

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