Book review

Vincent Chetail (ed), *International Law and Migration*
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Migration is an ancient phenomenon. The ongoing Syrian war, the subsequent Mediterranean refugee crisis, and events like Brexit indicate that migration is still salient in the twenty-first century. The role of international law in the field of migration is complex as there is no comprehensive legal instrument governing migration. As a result, the field is characterised by a diverse set of human rights instruments protecting various facets of forced and voluntary migration. Thus, the international law governing migration is fragmented in nature and lacks a self-contained regime.

International Law and Migration, edited by Vincent Chetail, is a timely contribution as it successfully captures the great diversity of international legal scholarship on migration. The two-volume book is a compilation of thirty-three major essays dating from 1975 to 2014 that address multiple aspects of the impact of international law on migration. The first volume covers dominant areas like sovereignty, citizenship, alienage and globalisation, and explores broader issues such as the right to admission of aliens and treatment of non-citizens. The second volume engages with critical topics such as migrant workers and refugees in contemporary international law. The book draws upon heterogeneous sources, from works in critical legal studies and legal pluralism to feminism and Third World approaches to migration, in order to underline the diverse opinions in the field and provide an alternative perspective on migration and international law.

Volume I, Part I: 'Peoples on the Move, Sovereignty and Globalization', is dedicated to the central features of international migration law, that is, admission, expulsion, and emigration. In the contemporary era of globalisation, a universally accepted proposition has been set: namely, that a State has the right to exclude all aliens, as it is the 'last bastion of sovereignty'.¹ However, in 'The General Admission of Aliens under International Law' (Volume I, Chapter 1), James AR Nafziger underlines the fact that the rules, principles, and procedures governing aliens and the outright expulsion of aliens are of recent origin, developed in the period following World War I and the Great Depression of the 1930s. To support this claim, Nafziger and, separately, Satvinder S Juss in 'Free Movement and the World Order' (Volume I, Chapter 4) examine the literature of historians and publicists, curiously limited to the positivist tradition, to argue that the notion of the denial of admission to aliens has little foundation in history or jurisprudence. Traditionally, international law has always favoured the admission of aliens with limited restrictions. The claim of limited restrictions is based on *ordre public*, which qualifies a duty on the part of the State to admit aliens 'when they pose no serious danger to its public safety,

1. C Dauvergne, 'Sovereignty, Migration and the Rule of Law in Global Times' in V Chetail (ed), *International Law and Migration* (Edward Elgar, Cheltenham 2016) 215.

security, general welfare, or essential institutions'.² The *ordre public* also demands that the conditions of expulsion should be determined by law and not politically motivated, as the function of expulsion could be abused for concealed motives 'such as genocide, confiscation of property, [or] the surrender of an individual to persecution'.³

Subsequently, Juss and Chetail in their respective articles, 'Free Movement and the World Order' (Volume I, Chapter 4) and 'The Transnational Movement of Persons under General International Law-Mapping the Customary Law Foundations of International Migration Law' (Volume I, Chapter 6) argue that the right to freedom of movement has evolved as a general principle of international law through a systematic study of the literature produced by historians and publicists and its current legal status under general international law. Chetail examines the concept of the 'right to leave'⁴ and argues that the qualified admission of aliens has been recognised in the general customs of States, in all regional instruments, and in the case of special classes of aliens like refugees and stateless people, making it *opinio juris*. This has contributed to its classification as customary international law. This proposition finds support in the argument that the liberty of movement is an essential condition for the free development of persons. Thus, it undoubtedly remains a cardinal principle of international human rights.⁵

Volume I, Part II: 'Alienage, Citizenship and the Rule of Law', explores the composite and conflicting issues in the field of international migration law. Historically, nationality has been equated with identity, coinciding with particular cultural, ethnic, and religious demarcations, which in turn 'mapped into territorial spaces'.⁶ The deprivation of nationality presumes the alien as an enemy who is denied rights and duties as a citizen. In 'The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights' (Volume I, Chapter 7), Myres S McDougal, Harold D Lasswell, and Lung-chu Chen point out that the security of non-citizens was a core issue in international law's principle of State responsibility.

The norm underlying the protection of non-citizens was developed in the tension between the Latin American doctrine of national treatment and the Western doctrine of the international minimum standard. The doctrine of national treatment supported the claim for equal treatment of aliens and citizens. In contrast, the doctrine of the international minimum standard asserted that aliens should only be treated with minimum human rights standards. The modern international legal regime developed under the positivist tradition fused the traditional norm of State responsibility with the minimum standard principle, which is embedded in a large number of treaties and jurisprudence, thus becoming customary international law. David Weissbrodt and Stephen Meili in 'Human Rights and Protection of Non-Citizens: Whither Universality and Indivisibility of Rights?' (Volume I, Chapter 8) argue that international human rights law is grounded upon the premise that all human beings are entitled to human rights, irrespective of their nationality and immigration status. The principle of non-discrimination of aliens is grounded in the international legal framework through its codification in the Universal Declaration of Human Rights, core conventions of the United Nations (UN), and several UN Human Rights Committee reports.

2. JAR Nafziger, 'The General Admission of Aliens under International Law' in Chetail (n 1) 28.

3. GS Goodwin-Gill, 'The Limits of the Power of Expulsion in Public International Law' in Chetail (n 1) 88.

4. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 99 UNTS 171 (ICCPR) art 12(3).

5. UNCHR 'General Comment 27' (1999) UN Doc CCPR/C/21/Rev.1/Add.9.

6. P Spiro, 'A New International Law of Citizenship' in Chetail (n 1) 537.

Nevertheless, non-citizens have always been the subject of policy-making of the State, not the subject of rights; their condition is exacerbated in circumstances like economic crisis, political change, and the present political climate in which the spectre of terrorism is ever-present. The State's discriminatory practices against aliens are implemented through restricting their movements in key areas. In the context of maritime interception by the European Union (EU), the EU's border security agency, FRONTEX, denies the extraterritorial application of the *non-refoulement* principle, non-citizens are denied the right to family unification, and separated migrant children are not allowed to claim asylum in EU States like Greece and Italy. These examples highlight the need for political action to be taken in the realm of international migration to encourage States to fulfil their responsibility of protecting the basic rights of citizens and aliens. Therefore, Weissbrodt and Meili, as well as Ryszard Cholewinski in 'Human Rights of Migrants: The Dawn of a New Era?' (Volume I, Chapter 9) demand a unified effort from States and civil society for the implementation of existing human rights instruments and effective monitoring of compliance, because non-citizens are also entitled to fundamental human rights.

Volume II, Part I: 'Migrant Workers under International Law', engages with the historical trajectories that have led to the increasingly blurred distinction between refugees and migrants. Richard Lillich argues that international migration law resembles 'a giant unassembled juridical jigsaw puzzle'.⁷ Similarly, the diversity of legal instruments in the field, erroneously depicts refugees as being entitled to international protection whereas migrant workers' destinies are left to the discretion of the State of destination. In 'How History Separated Refugee and Migrant Regimes: In Search of Their Institutional Origins' (Volume II, Chapter 1), Rieko Karatani illustrates the unswerving efforts of the government of the United States (US) to reject the International Labour Organization–UN international cooperation agenda over the US government's institutional framework based on intergovernmental negotiations. This agenda was succeeded by the creation during the historic 1950s Naples and Brussels conferences of the Provisional Intergovernmental Committee for the Movement of Migrants from Europe, later renamed the International Organization for Migration to 'maximise the autonomy of its migration and refugee policies'.⁸

The next section underlines the competing claims of territorial sovereignty and human rights in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW). This tension is evident in the structure of the ICRMW, which, despite being the most comprehensive instrument for migrant workers, presents two tiers of human rights for regular and irregular workers by reserving exclusive rights like family reunification and membership of trade unions to regular workers only. Further, Articles 35 and 79 respectively exclude States from regularising the informal sector and grant exclusive powers to sovereign States to establish the criteria governing the admission of migrant workers and members of their families. Antoine Pécoud and Paul de Guchteneire in 'Migration, Human Rights and the United Nations: An Investigation into the Obstacles to the UN Convention on Migrant Workers' Rights' (Volume II, Chapter 3) examine four major obstacles to the ratification of the ICRMW: administrative incapability, financial obstacles, misapprehension of the content of the treaty, and most importantly, the political context required

7. R Lillich, *The Human Rights of Aliens in Contemporary International Law* (Manchester University Press, Manchester 1984) 122.

8. R Karatani, 'How History Separated Refugee and Migrant Regimes: In Search of Their Institutional Origins' in Chetail (n 1) 26.

for implementation of the treaty irrespective of the balanced approach adopted by the drafting committee.

The rest of Volume II then shifts its focus to other issues. In 'People Are Not Bananas. How Immigration Differs from Trade' (Volume II, Chapter 7), and 'Migration and Trade: Prospects for Bilateralism in the Face of Skill-Selective Mobility Laws' (Volume II, Chapter 8) both Jennifer Gordon and Marion Panizzon illustrate how the conventional dynamics of labour migration in the era of globalisation has changed through the signing of bilateral agreements to facilitate the search for skilled workers. They argue that increasing bifurcation among immigrant labour emerges from the 'structural demand for highly skilled labour' where they occupy the same primary position as native workers, 'while the low-skilled migrants occupy the secondary status in labour market'.⁹ In their respective articles, Margaret L Satterthwaite and Chantal Thomas introduce the methodologies of intersectionality and legal pluralities, which aim to shift the focus from a single instrument of legal protection (ICRMW) to multiple legal instruments (International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights) to strengthen the scope of protection for all migrant workers.

Volume II, Part II: 'Refugees under International Law' addresses one of the most controversial issues of recent times. The legal framework governing refugee rights represents one of the most highly politicised fields in international law. The first reflections on refugee law developed in the beginning of the twentieth century post-World War I, fundamentally aimed at protecting European refugees. The legal instruments of this regime, the UN Convention Relating to the Status of the Refugees adopted in 1951, and the 1967 Supplementary Protocol specifically drafted for Third World refugees, are grounded in the principles of humanitarianism and basic human rights. In 'The Politics of Refugee Protection' (Volume II, Chapter 9) and 'A Reconsideration of the Underlying Premise of Refugee Law' (Volume II, Chapter 10) both Guy S Goodwin-Gill and James C Hathaway stress that, although the legal regime aims to provide assistance to refugees, State practice and the institutional framework evolved 'in a period of growing ideological divide'.¹⁰

To further illustrate this, Bhupinder S Chimni in 'The Geopolitics of Refugee Studies: A View from the South' (Volume II, Chapter 12) argues that before the adoption of the 1967 Protocol, in the period from 1945 to 1989 the UN High Commissioner for Refugees encouraged and legitimised the political consensus of rich Western States which normalised the image of a refugee as a 'white, male and anti-communist' fleeing socialist States that violated liberal and democratic rights.¹¹ The strategy of the Global North in the post-Cold War era has focused on the containment of refugees. Thus, Chimni calls for the need to frame a new approach towards refugee protection, based on the principles of solidarity and internationalism, which take cognisance of the North–South divide.

The latter half of the volume takes a progressive stance and revisits refugee law through the prism of a human rights approach, although it turns a blind eye to the contributions of regional conventions and declarations to the advancement of refugee rights. The essays in

9. Marion Panizzon, 'Migration and Trade: Prospects for Bilateralism in the Face of Skill-Selective Mobility Laws' in Chetail (n 1) 247.

10. JC Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' in Chetail (n 1) 337.

11. BS Chimni, 'The Geopolitics of Refugee Studies: A View from the South' in Chetail (n 1) 406.

this latter half primarily address the limitations in the definition of the ‘refugee’ based on the notion of persecution set out in the Geneva Convention relating to the Status of Refugees. In ‘Flight in Times of War’ (Volume II, Chapter 14) and ‘Human Rights, Refugees, and the Right “To Enjoy” Asylum’ (Volume II, Chapter 16), Walter Kälin and Alice Edwards surge for the extension of the scope of the refugee law through cross-fertilisation between human rights law, humanitarian law, and refugee law. These include an argument to incorporate internally displaced people in the protection regime, and to grant the rights of family reunification and the right to work to facilitate better protection of refugees.

International Law and Migration presents a wide range of issues surrounding international law in the contemporary era. The book predominantly relies on positivist literature, as it is indispensable in describing the current state of international law, and covers a diverse range of issues by incorporating multiple approaches to the problem of migration law. As CJ Harvey reminds us in ‘Talking about Refugee Law’ (Volume II, Chapter 13), the pluralism of legal regimes represents a progressive effort for reforming and reinforcing the norms governing the protection of migrants.

However, the book is not free of limitations. The first volume explores the core notions of sovereignty, alienage and globalisation, and addresses the sovereign’s limitations on the outright expulsion of aliens. However, the volume does not incorporate any article attempting to redefine the concept of sovereignty to provide an alternative to the liberal discourse. A major gap in the literature in the second volume is its failure to include articles indicating the shortcomings of ICRMW, the expanding informal sector, the smuggling of low or unskilled workers, and the role of international law, particularly the Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the UN Convention against Transnational Organised Crime, to combat these problems. There is also a lack of engagement with the importance of regional conventions on refugee studies to enhance the scope of refugee protection beyond a Euro-centric definition of ‘refugee’.

Considering all the major themes of the book, the most striking aspect of this work lies in its recognition of the legal pluralities in the field, by highlighting a diverse set of international human rights instruments, instead of the traditional compartmentalised focus on a particular treaty, and discussing an extended scope of the law governing migration. The underlying argument of this book is that customary international law should be established as the standard for the recognition of a global set of norms, since it regulates all facets of migration and provides an avenue for better migration governance. Thus, Chetail’s illustration of the core areas and the complex issues of migration offers an insightful approach to widen the ambit of international migration law and will provide a useful resource for academics, research scholars, students of international law, and policy-makers equally.