Preadviezen

Migration? It's the economy stupid!

The Missing Link in the Migration Law Debate

Carolus Grütters and Karen Geertsema

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MIGRATION? IT'S THE ECONOMY STUPID! THE MISSING LINK IN THE MIGRATION LAW DEBATE*

Carolus Grütters and Karen Geertsema**

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Report on Migration Law at the request of the Royal Netherlands Society of International Law (KNVIR).

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ABBREVIATIONS

CAT	(UN) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CED	(UN) International Convention for the Protection of All Persons from Enforced Disappearance
CRPD	(UN) Convention on the Rights of Persons with Disabilities
CEDAW	(UN) Convention on the elimination of all forms of Discrimination against Women
CJEU	Court of Justice of the European Union
CMW	(UN) Committee on Migrant Workers
CoE	Council of Europe
CRC	(UN) Convention on the Rights of the Child
DEMIG	Determinants of Migration-project
ECHR	European Convention on Human Rights
ECHR-4P	Fourth Protocol to the European Convention on Human Rights
ECtHR	European Court of Human Rights
ESC	European Social Charter
EU	European Union
FRA	EU Fundamental Rights Agency
GCM	(UN) Global Compact for safe, orderly and regular Migration
GCR	(UN) Global Compact on Refugees
HRCt	(UN) Human Rights Committee
ICCPR	(UN) International Covenant on Civil and Political Rights
ICJ	(UN) International Court of Justice
ICMW	(UN) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ILO	(UN) International Labour Organization
IOM	(UN) International Organization for Migration
OACPS	Organisation of African, Caribbean and Pacific States
PICMME	Provisional Intergovernmental Committee for the Movement of Migrants from Europe
PNG	Papua New Guinea
RC	(UN) Refugee Convention
SBC	(EU) Schengen Border Code
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TWAIL	Third World approaches to international law
UNECE	United Nations Economic Commission for Europe
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNHCR	United Nations High Commissioner for Refugees
UNSD	United Nations Statistics Division

1. INTRODUCTION

1.1. **Subject**

About a year ago we received an invitation to address the KNVIR's annual meeting in 2024 on the topical and highly politicized subject of international migration law.* The most recent achievements on this issue are the Global Compacts on refugees and migration, two inter-governmentally negotiated agreements, prepared under the auspices of the United Nations, and the efforts to facilitate the implementation of these commitments.[1]

Although our first response was positive, we also recognised the versatility of the subject and its inherent pitfalls. To start with, international law contains two different doctrines about migration with opposing starting positions. In the first doctrine the right to migrate is a human right, and only under particular conditions may a state interfere with this right. The second doctrine starts with the right of states to control the entry (or the exclusion) of non-nationals into its territory, and migrants have to argue why they can trump the right of the state.[2] These two mutually exclusive doctrines are closely connected to the division Global South and Global North, where the doctrine of the Global South seems to be labelled as the *specific*, and the doctrine of the Global North as the *general*. Spijkerboer urges us as academics to realize this socio-political context and to make situatedness a conscious element of our work.[3] So, while we recognise these different views, we would like to underline that our academic education is dominated by a European view on migration law.

Subsequently, we would like to escape from the dilemma that international migration law is only about the unresolvable tension between rights of humans versus

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1 *The Global Compact on Refugees,* New York 2018, UN General Assembly resolution A/res/73/151; *Global Compact for Safe and Orderly and Regular Migration,* New York 2018, UN General Assembly resolution A/res/73/195. IOM, *International Dialogue on Migration, Global Compact for Migration, Implementation and Practice* 2022, <https://www.iom.int/sites/g/files/tmzbdl486/files/idm/final-file_v01.pdf>. IOM on the global compacts: <https://www.iom.int/global-compact-migration> and <https://www.iom.int/global-compact-refugees>.

2 Marie-Benedicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoin*t, Oxford, Oxford University Press 2015. Eva Hilbrink, *Adjudicating the Public Interest in Immigration Law: A Systematic Content Analysis of Strasbourg and Luxembourg Case Law on Legal Restrictions to Immigration and Free Movement*, PhD Thesis, Vrije Universiteit Amsterdam 2017. Thomas Spijkerboer, 'The Geopolitics of Knowledge Production in International Migration Law', in Catherine Dauvergne (ed.), *Research Handbook on the Law and Politics of Migration*, Elgar Online 2021, pp. 172-188, 2021, <https://doi.org/10.4337/9781789902266.00023>. Katharina Natter , 'Beyond the Dichotomy of Liberal and Illiberal Migration Governance', in E. Carmel, K. Lenner and R. Paul (eds.), *Elgar Handbooks in Migration, Handbook on the Governance and Politics of Migration*, Cheltenham 2021, pp. 110-122, <https://doi.org/10.4337/9781788117234.00015>.

3 Spijkerboer, *supra* n. 2 at, p. 183.

the rights of states. We would like to do so by including the economy as the 'missing link', and elaborate on the concept of a trilemma in the context of regulating migration. A trilemma is a choice between three options, only two of which are possible at the same time, or as Hein de Haas has put it: 'one has to go'.[4] This results in balancing acts between three different objectives: (a) rights of humans, (b) rights of states, and (c) the importance of the economy: three political objectives that seem impossible to reconcile in a satisfactory manner.[5]

A third issue is that political discussions on migration seem to be fully disconnected from the academic discussions on migration. Some politicians seem to distort aspects of migration to disguise the migration trilemma. The inconsistent use of terminology contributes to this distortion. This trend towards fact free – and even history free – politics is disturbing and should encourage us as academics to make ourselves heard in migration debates.[6] Not least by educating the media that their role is no longer that of a neutral messenger but that of a collaborator facilitating various political agendas.

Based on these initial considerations we will describe the balancing acts that occur using the situation of a specific territory: the Western Sahara. We think the situation in the Western Sahara is exemplary for the trilemma that comes with international migration law. The Western Sahara is subject of an international political debate regarding its population, its territory, and economic well-being in relation to Morocco, affecting EU external relations, effected by EU economic policies as well as EU migration policies. Rooted in Spanish and Moroccan colonisation,[7] the conflict resulted in large numbers of Sahrawi people fleeing the region since 1963.[8] Although the UN General Assembly has qualified the Western Sahara in 1960 as a non-self-governing territory,[9] Morocco has taken the position that the Western Sahara should be integrated into its territory and that Morocco has administrative power over the area. Thus, the Western Sahara case raises sovereignty issues, human rights issues and economic issues.

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4 Hein de Haas quoted by Alan Beattie, 'The Immigration Smokescreen Is Beginning to Lift', *New York Times* 11 January 2024, https://www.ft.com/content/2e1f5942-6735-4efc-85d4-4672e637f5a3.

5 James Hollifield, 'The Liberal Paradox: Immigrants, Markets and Rights in the United States', 61(1) *SMU Law Review* (2008) pp. 67-98. Hein de Haas, *How Migration Really Works. The Facts about the Most Divisive Issue in Politics*, London, UK, Penguin 2023, at p. 263.

6 Hein de Haas, 'Changing the Migration Narrative: On the Power of Discourse, Propaganda and Truth Distortion', *IMI Working Papers* (2024) nr. 181, at p. 5.

7 Advisory Opinion on Western Sahara, ICJ Reports 1975, p. 12, para. 49.

8 Silvia Almenara-Niebla and Carmen Ascanio-Sánchez, 'Connected Sahrawi Refugee Diaspora in Spain: Gender, Social Media and Digital Transnational Gossip', 23(5), *European Journal of Cultural Studies* (2020) pp. 768-783, <https://journals.sagepub.com/doi/10.1177/1367549419869357>.

9 *Report of the Committee on Information from Non-Self-Governing Territories*, UN Supplement No. 14, A/5514, 1963.

1.2. **Contents**

In Section 2 we will start with a few seemingly obvious terminological points. In order to refrain from the pitfalls mentioned above, we think it is important to clarify the terminology. Discussions about migration easily get blurred due to all kinds of misconceptions. So, we will focus on migration: what is migration, how is it defined, where and when does it occur, and what types of migration are there? Subsequently, we will try to provide some statistical data on migration.
In Section 3 we will elaborate on the origins of the different sets of rights and obligations that are linked to the concept of migration and its diverse appearances as defined in section 2, such as fundamental rights, bilateral (trade) agreements, international treaties, and global compacts. We will argue that the area of international migration law consists of a patchwork of agreements, best practices and principles, that do not fit seamlessly together, sometimes overlap but more often leave gaps in between. Also, we would like to draw attention to the importance of soft law, and the development from bilateral treaties to multilateral treaties, back to bilateral treaties.
In Section 4 we will contrast the legal dilemma between human rights and state sovereignty to the migration trilemma as described by Hein de Haas.[10] He elaborates the notion of a trilemma, first coined in the domain of macroeconomics.[11] In the context of migration, Hein de Haas states that 'governments cannot simultaneously: (a) maintain economic openness, (b) respect foreigners' human rights and (c) fulfil their own citizens' anti-immigration preferences'. We will elaborate on this trilemma implicating that in the discussion in the legal domain on migration, the economy should have a more prominent place next to human rights, state sovereignty and politics. It is, so to say, the missing link.
In Section 5 we will describe the case of the Western Sahara using the trilemma as an explanatory model. We will conclude in Section 6 with a few propositions to encourage the discussion.

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[10] De Haas, *supra* n. 5.

[11] Maurice Obstfeld and Alan Taylor, 'The Great Depression as a Watershed: International Capital Mobility over the Long Run', in Michael D. Bordo, Claudia D. Goldin and Eugene N. White (eds.), *The Defining Moment: The Great Depression and the American Economy in the Twentieth Century,* Chicago, University of Chicago Press 1998, pp. 353-402; Dani Rodrik, 'How Far Will International Economic Integration Go?', 14(1) *Journal of Economic Perspectives* (2000) pp. 177-196.

2. TERMINOLOGY

2.1. **Definition of Migration**

It may seem strange for such an important concept, but there is no universally accepted definition of migration (or migrant), and the ones that are available are rather divers; even the categorisations are contested.[12] We will first make a few comments on the most common definitions of migration and subsequently explain our choice.

2.1.1. Usual Descriptions

According to the Oxford English Dictionary, migration has at least six different meanings, with the common element appearing to be displacement, mobility, or moving elsewhere.[13] If that would be all, we would not have this discussion at all. The point is that migration in a legal context is often linked, at least in Europe, to a kind of permission from others: either permission to leave or permission to enter. In other areas of the world where nomadism is the norm, moving elsewhere without explicit permission is the normal situation.[14] As a consequence, in current Europe, or more broadly the Global North, migration requires rules.

The following observations are primarily linked to migration as situated in the Global North, as of the mid-nineteenth century with the dominance of the nation-state in an era where territories were disputed, new nations were formed, and rights of its citizens and rules about migration were set.

In 1891 the International Statistical Institute emphasized the importance of establishing a uniform definition of the term 'international migrant'.[15] Subsequently, in 1922, the International Labour Organization (ILO) recommended in the context of a terminological discussion on emigration and immigration:[16]

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[12] Heaven Crawley and Dimitris Skleparis, 'Refugees, Migrants, Neither, Both: Categorial Fetishism and the Politics of Bounding in Europe's "Migration Crisis"', 44(1) *Journal of Ethnic and Migration Studies* (2017) pp. 48-64, <https://www.tandfonline.com/doi/full/10.1080/1369183X.2017.1348224>.

[13] Oxford English Dictionary, <https://www.oed.com/dictionary/migration_n>. The first three are: (1) the move-ment of a person; (2) the action of passing of material; (3) the movement of an animal. The remaining three meanings refer to: embryology, chemistry and computing.

[14] Adam McKeown, *Melancholy Order: Asian Migration and the Globalization of Borders*, New York, Columbia University Press 2008. Ibrahim Awad, 'Concepts, Practices and Policies of International Migration in Africa', in 16(1) *African Yearbook of International Law* (2008) pp. 1-23. E. Odhiambo-Abuya, 'Revisiting Liberalism and Post-Colonial Theory in the Context of Asylum Applications', 24(2) *Netherlands Quarterly of Human Rights* (2006) pp. 193-227. Abdoulaye Hamadou, 'La gestion des flux migratoires au Niger entre engagements et contraintes', *La Revue des droits de l'homme* [Online], 14 | 2018, Online since 27 June 2018. https://journals.openedition.org/revdh/4378; https://doi.org/10.4000/revdh.437.

[15] Ellen Percy Kraly and K.S. Gnanasekaran, 'Efforts to Improve International Migration Statistics: A Historical Perspective', 21(4) *International Migration Review* (1987) pp. 967-995.

[16] International Labour Conference (1922, fourth session).

that each member of the ILO should make agreements with other members providing for the adoption of a uniform definition of the term 'emigrant' and the use of a uniform method of recording information regarding emigration and immigration.

This rather obvious recommendation was the result of the ascertainment of an ILO commission that the issue raised so many questions that "they could not be effectively discussed by the conference before full scientific preparation".[17] Despite this ancient recommendation there still is no uniformity on the terminology nor on the preferred statistics.[18] One of the main reasons for this lack of uniformity is the absence of a central population register in a substantial number of states. States without a population register depend for statistical data on national population and housing censuses. Thus, statistics based on these censuses are mostly an extrapolation of available data on other categories.[19] As a result, most government agencies just do not know how many people are housed in their country, region, or municipality, let alone migrants.[20]

Another reason is that migration is something which has traditionally only been addressed at the national level. Thus, the usage of related terminology not only varies from country to country but also varies according to a given perspective or approach:[21] "when migration involves the crossing of international borders, its measurement is usually coloured by the role that the nation state plays in controlling the entry and departure of individuals or, as appropriate, their stay within its territory".[22]

In 1953, the UN published some 'recommendations' on statistics of international migration, followed by a revision of these recommendations in 1976 and again in 1998. The following definition was suggested:[23]

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17 *Report of the International Emigration Commission* (August 1921), included in the Communication to the International Labour Office of Statistical and Other Information Regarding Emigration and Immigration and the Repatriation and Transit of Emigrants, October 1922.

18 See e.g., Concepts and Definitions in *International Labour Migration Statistics*, 2018. United Nations Statistics Division (UNSD), *Handbook on Measuring International Migration through Population Censuses*, 2022, para. 18, https://unstats.un.org/unsd/dnss/hb/default.aspx.

19 Censuses are generally conducted every ten years.

20 A majority of states has no central population register, according to the latest count in 2015. The following states have such a register: Mexico; Spanish speaking states in South America, states in Middle America except Nicaragua; Turkey; Russia; India; Japan; South Korea; and the EU member states except Portugal, France, Malta, Cyprus and Greece, <https://ourworldindata.org/grapher/population-register-implemented>.

21 IOM, *Glossary on Migration*, 2nd edn., Geneva, IOM 2011, p. 5. See also EU Regulation 862/2007 on statistics on migration and international protection.

22 Hania Zlotnick, 'Measuring International Migration: Theory and Practice', 21(4) *The International Migration Review* (1987) pp. v-xii.

23 UN, *Recommendations on statistics of international migration,* Statistical papers, series M No. 58, 1953. UN, Department of Economic and Social Affairs, Statistics Division, *First Revision (1998) of the Recommendations on Statistics of International Migration*.

an international migrant is any person who changes his or her country of usual residence.

This formula at least got rid of the distinction between *immigration* and *emigration* focussing on the change of residence, or in other words, it changed the until then dominant perspective of the state into the perspective of the person, i.e., the migrant. This definition added two new elements: *international* and *usual residence*.

International implied that there were two different forms of migration: international and non-international or internal migration. This internal migration was described as any kind of cross-country movement or a rural-urban *mobility* as long as it did not involve crossing international borders. From our legal point of view, the international aspect is crucial. Otherwise, moving next door would also count as migration. This choice, of the need to cross an international border, is to a certain extent arbitrary. The bigger the territory of a country the less likely a change of residence will result in the crossing of an international border.[24]

The term *usual residence* in the UN definition originates from Anglo-Saxon countries that do not have a central population register and therefore do not know where their inhabitants actually live. The term *usual* refers to the place where this person spends (or is supposed to spend) most of its time, i.e., "where he or she normally spends the daily period of rest. Temporary travel abroad for purposes of recreation, holiday, business, medical treatment or religious pilgrimage does not entail a change in the country of usual residence". This definition is almost identical to the one used in the EU regulation on statistics of migration:[25]

'usual residence' means the place at which a person normally spends the daily period of rest, regardless of temporary absences for purposes of recreation, holiday, visits to friends and relatives, business, medical treatment or religious pilgrimage or, in default, the place of legal or registered residence.

The term *usual* also introduced a time element creating new categories such as: long-term migrants, short-term migrants, circular migrants and return migrants.[26] This means in practice that migrants who have just arrived in their new residence are only counted *as migrants* from the moment they have lived there for a minimum period of time. This can be defended from the administrative point of view that the longer the stay, the more rights are acquired. But such a time requirement is irrelevant from a terminological point of the concept of migration. However, the

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[24] For example, in China alone almost 40% (295 million) of its labour force (768 million) in 2022 was labelled as internal migrants. 'Migrant workers and Their children', *China Labour Bulletin* (retrieved 19 June 2024).

[25] Art. 2(1)(a) Regulation 862/2007 (on statistics on migration).

[26] United Nations Economic Commission for Europe (UNECE), *Defining and Measuring Circular Migration,* New York, 2016.

European regulation on statistics on migration provides the following definition:[27]

> *'immigration' means the action by which a person establishes his or her usual residence in the territory of a Member State for a period that is, or is expected to be, of at least 12 months, having previously been usually resident in another Member State or a third country.*

And to confuse things even more, the same regulation provides a slightly different definition for emigration:[28]

> *'emigration' means the action by which a person, having previously been usually resident in the territory of a Member State, ceases to have his or her usual residence in that Member State for a period that is, or is expected to be, of at least 12 months.*

A related issue is that most if not all states register (or count, or estimate) people in their jurisdiction as either nationals or foreigners. But that qualification is not identical with the aspect of residence, its duration, or the question what counts as having a 'usual' residence. The qualification as a migrant is therefore a derivative of the available national statistics, and the minimum period of presence needed. Subsequently, nationality was incorporated in the definitions. For instance, Article 2 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW),[29] defines a 'migrant worker' as "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". Thus, this definition focusses on non-nationals rather than people who have changed their country of residence. This confusion is still there.
According to the European Commission a migrant is defined, in *global* context, as:[30]

> *a person who is outside the territory of the State of which they are nationals or citizens and who has resided in a foreign country for more than one year irrespective of the causes, voluntary or involuntary, and the means, regular or irregular, used to migrate.*

In the regional (inside the territory of the) EU context, however, a migrant according to the Commission is defined as:

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27 Art. 2(1)(b) Regulation 862/2007 (on statistics on migration).
28 Art. 2(1)(c) Regulation 862/2007 (on statistics on migration).
29 1990 UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW).
30 Website European Commission, Migration and Home Affairs, glossary, migrant. <https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary_en>.

> *a person who establishes their usual residence in the territory of a Member State for a period that is, or is expected to be, of at least 12 months, having previously been usually resident in another Member State or a third country.*

These two definitions differ substantially. While the first refers explicitly to the situation of nationals in a foreign country, the second focusses on persons, irrespective of their nationality, who have changed their country of residence.
The International Organization for Migration (IOM) simply recognizes that the term migration (and migrant) is an umbrella term, not defined under international law, reflecting a common lay understanding of a person who moves away.[31] The IOM therefore uses the following definition for an international migrant:[32]

> *Any person who is outside a state of which he or she is a citizen or national or, in the case of a stateless person, his or her state of birth or habitual residence.*

This definition, again, is far too broad. Firstly, it includes all people who move for whatever reason and wherever. Secondly, this definition of a migrant also applies to people born in a country of which they are not nationals. This confusion is strengthened by using an even more problematic and stigmatizing concept such as 'second (or third) generation migrant', which labels people as migrant as if they are an ethnic group.[33]

2.1.2. Objective of Migration

In some definitions a purpose, motive, intention or reason of migration, is included. However, neither of these terms are relevant for the definition, because they are primarily a *subjective* rationale for the person involved to migrate. Someone who migrates to study abroad, for example, might do this because he wants to escape poverty, or make his parents proud, or wants to explore the world, or just wants to learn. Regardless of these motives or intentions, such a migrant can be classified into the category of student migrants as the *objective* of migration is to study. Such an objective is relevant to all forms of migration, because the rules that apply depend on these objectives. A different objective means a different set of rules, regardless of the purpose, motive, intention or reason. Or, in other words, an

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[31] The IOM was founded in 1951 as the Provisional Intergovernmental Committee for the Movement of Migrants from Europe (PICMME), and born out of the chaos and displacement within Western Europe following the Second World War. In 1989 its name was changed into International Organization for Migration and in 2016 the IOM was transformed into an affiliated organization of the UN <https://www.iom.int/>.

[32] See: <www.iom.int/sites/g/files/tmzbdl486/files/documents/migration_factsheet_2_migrants.pdf>.

[33] The migrant is the person who changes his residence; children born in this new residence are not migrants.

objective refers to the categories available in the administration, whereas a motive or intention refers to the migrant himself, and these two do not have to coincide.[34]

2.1.3. Our Choice of Definition of Migration

In our view, the legal concept of migration has three defining elements: people, change of residence, and jurisdiction. First, migration is restricted to people, excluding all kinds of mostly seasonal movement of animals or objects from one place to another. Second, migration means to go live somewhere else: a change of residence. Therefore, going on a holiday or commuting is not included. And third, in order to qualify as migration, different rules should apply and that happens if one crosses an international border entering a different jurisdiction. This also means that nationality – and the concept of foreigner – comes into play, which we will address later on. Thus, moving to another city in the same state, or another neighbourhood, is excluded from our definition. Consequently, we would like to define migration as:

the situation where someone changes their country of residence.

Subsequently, any additional requirement in terms of a minimum duration of the residence is, in our view, irrelevant for the concept of migration. Such a time element might be relevant in the context of administrative formalities, or the qualification for certain services, or residence permits and so on, but it is not a necessary part of the concept of migration.[35] With reference to the previously mentioned descriptions, our definition is closest to the one defined by the UN for *international* migrants for statistical purposes:[36]

any person who has changed his or her country of residence.

2.2. **Categories of Migration**

Although migration refers to movement, practice shows that administrations tend to focus on the locality of migrants. The novelist Gabriel Josipovici has described this difference as: 'We are all of us migrants (...) Once we're in the world, we're on the move. And looking for a place to stop and settle down, at least for a while.'[37] Russell King goes a step further and questions the mobility paradigm:[38]

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[34] This it at odds with the terminology used in Research Directive 2016/801 of the EU, which uses in its title: "on the conditions of entry and (...) for the purposes of research (...)". In the context of the directory, *purpose* refers to an objective end such as research, study etc. The first meaning, however, of the word purpose, according to the Oxford Dictionary, is 'reason' or 'intention', which is subjective.

[35] King qualifies this as: "seeing such moves as part of a spectrum of mobility types sidesteps the dilemma of what exactly is conceptualised as migration". Russell King, 'Geography and Migration Studies: Retrospect and Prospect', 18(2) *Population, Space and Place* (2012) pp. 134-153.

[36] See: <https://www.un.org/en/global-issues/migration>.

[37] Gabriel Josipovici, *Migration: A Novel*, Hassocks, Harvester Press 1977.

[38] Russell King, *supra* n. 35, at p. 136.

> *in our supposedly globalised world, vast swathes of the world's people are not as free to move as they would like, because of an increasingly stringent regime of migration control imposed by the rich countries of the global north. Fine if you are a citizen of North America, Europe, or some other wealthy country or if you are highly educated and have some specialised skill or profession that is in demand on the global labour market, but if you are not in these categories, forget it. So we have to reinscribe into migration studies the geographies, not of belonging but of exclusion, poverty, and uneven development, as well as the political geography of international migration control.*

There are several ways of subdividing migration: distinctions between forced and voluntary, temporary and permanent, legal and illegal migration, and more. Such a division is an invitation for further subdivisions leading to a dichotomised field of study.[39] According to Russell, these distinctions remain heuristically useful to define the opposite poles of spectra, but one has to realize that these are just a compromised representation of the blurred reality of migratory phenomena and behaviour, or as Erdal and Oeppen state: "forced and voluntary migration are extremes on a continuum".[40]
This use of categories has even been qualified as 'categorical fetishism' by Crawley and Skleparis, arguing "that the dominant categories fail to capture adequately the complex relationship between political, social and economic drivers of migration or their shifting significance for individuals over time and space".[41]
Thus, taking these warnings into account, we will only mention a few of these categories as they are linked to a number of sets of legal rules, and different applicable rules imply different labels and different pathways.

2.2.1. Forced Migration

The most clear example of forced migration is trade in enslaved persons: the degradation of a human being into property.[42] In four centuries of slave trade

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[39] Anthony Richmond, 'Reactive Migration: Sociological Perspectives on Refugee Movements', 6(1) *Journal of Refugee Studies* (1993) pp. 7-24. Roger Zetter, *Protection in Crisis: Forced Migration and Protection in a Global Era*, Washington, Migration Policy Institute 2007. Alexander Betts, *Survival Migration: Failed Governance and the Crisis of Displacement*, Ithaca, NY, Cornell University Press 2013. Katherine Long, 'When Refugees Stopped Being Migrants: Movement, Labour and Humanitarian Protection', 1(1) *Migration Studies* (2013) pp. 4-26.

[40] Marta Bivand Erdal and Ceri Oeppen, 'Forced to Leave? The Discursive and Analytical Significance of Describing Migration as Forced and Voluntary', 44(6) *Journal of Ethnic and Migration Studies* (2018) pp. 981-998.

[41] Crawley and Skleparis, *supra* n. 12.

[42] Katy Waldman, 'The History of American Slavery. Slave or Enslaved Person? It's Not Just an Academic Debate for Historians of American Slavery', *Slate Magazine*, 19 May 2015, https://slate.com/human-interest/2015/05/historians-debate-whether-to-use-the-term-slave-or-enslaved-person.html.

millions of Africans were shipped across the Atlantic to the Americas.[43] Although slavery was abolished – formally – with the Convention of Brussels (1890),[44] it was deemed necessary to reconfirm this in several subsequent conventions: the 1926 Slavery Convention,[45] the 1930 Convention concerning Forced Labour,[46] the 1956 Supplementary Convention on the Abolition of Slavery,[47] and in article 4 of the 1948 Universal Declaration of Human Rights (UDHR).[48]

Contemporary slavery – or modern slavery – still occurs and comprises forced, or bonded,[49] labour and forced marriage.[50] In the definition of the ILO it refers to situations of exploitation where a person cannot refuse or cannot leave because of threats, violence, deception, abuse of power or other forms of coercion. Even when people move freely from one state to another hoping to be able to earn a decent living elsewhere, it can be qualified as forced migration if their move was motivated by deceit, fraud or coercion.

A second form of forced migration is refugeehood. Until 1951, there was no abstract legal definition of a refugee. A refugee, at the time, was a person who was part of a group for which a protection mandate had been approved by the High Commission for Refugees.[51] This High Commission was initiated by the International Committee of the Red Cross and created by the League of Nations.[52] One of the first international agreements on identity documents for a group of Russian refugees was signed in 1922 in Geneva after World War I.[53] Followed by a similar arrangement for Armenians,[54] and an arrangement for Turkish, Assyrian, and Assyro-Chaldean refugees.[55] In 1933 the League of Nations drew up the

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43 This is just an example. History describes all kinds of ownership of a person as early as ancient Egypt.

44 Brussels Anti-Slavery Conference 1889–1890.

45 1926 Convention to Suppress the Slave Trade and Slavery, Treaty Series Vol. 60, pp. 254-270.

46 1930 Convention concerning Forced or Compulsory Labour, revised in 1946, UN Treaty Series Vol. 39, No. 612.

47 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 7 September 1956, UN Treaty Series Vol. 266, No. 3822.

48 Art. 4 UDHR: 'No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.'

49 Bonded labour occurs when people give themselves into slavery as a security against a loan or when they inherit a debt from a relative, <https://www.endslaverynow.org/>.

50 Conny Rijken, 'When Bad Labour Conditions Become Exploitation', in Conny Rijken and Tesseltje De Lange (eds.), *Towards a Decent Labour Market for Low Waged Migrant Workers*, Amsterdam, Amsterdam University Press, pp. 189-206. Marlou Schrover, 'History of Slavery, Human Smuggling and Trafficking 1860–2010', in Gerben Bruinsma (ed.), *Histories of Transnational Crime*, New York, Springer 2015.

51 Fridtjof Nansen was in 1921 the first head of this Commission.

52 Gilbert Jaeger, 'On the History of the International Protection of Refugees', 83(843) *International Review of the Red Cross* (2001) pp. 727-737.

53 Arrangement of 5 July 1922 concerning the granting of identity certificates to Russian refugees.

54 Arrangement of 31 May 1924 concerning the granting of identity certificates to Armenian refugees.

55 Arrangement of 30 June 1928 concerning the extension of asylum to Turkish, Assyrian, Assyro-Chaldean and related refugees.

(first) Refugee Convention.[56] This convention was (only) ratified by 14 states and was restricted to the previously mentioned refugees.[57] After World War II, the League of Nations ceased to exist and was succeeded in 1945 by the United Nations. Following the proclamation of the UDHR in 1948, the UN adopted several conventions on human rights, including: the 1948 Genocide Convention,[58] and the 1951 Refugee Convention (RC).[59] This 1951 RC includes the very first general or categorical definition of a refugee:[60]

> *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 and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.*

It should be noted that the definition from the 1951 RC includes the extraterritoriality, which is essential to migration: 'is outside the country of his nationality'. Meaning that someone who has a well-founded fear of being persecuted for the exact same reasons just mentioned, but is still *within* his own state, does not qualify for the legal definition of a *refugee* but is labelled as a *displaced person*.[61] Or put differently, a displaced person is forced to move but not to migrate. The moment a displaced person crosses an international border he becomes a refugee.[62] In the international literature, the distinction between a displaced person and a refugee is linked to the aspect of crossing an international border into another jurisdiction, meaning that a displaced person is formally labelled as an *internally displaced person*. Apart from that, a displaced person is also forced to move "as a result of persecution, conflict, generalized violence or human rights violation".[63]
Asylum seeker is a procedural label: a person who seeks asylum and awaits the outcome of his request for international protection. When such a person is granted protection (based on the RC) that person is formally recognized as a refugee. Or, in other words, an asylum seeker is a refugee not yet recognized as a refugee.

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56 Convention Relating to the International Status of Refugees, Geneva, 1933.

57 The 1933 Refugee Convention was signed at the Intergovernmental Conference in Geneva by: Austria, Belgium, Bulgaria, China, Estonia, Finland, France, Greece, Latvia, Poland, Romania, Switzerland, Czechoslovakia, and Yugoslavia.

58 Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948.

59 Convention relating to the Status of Refugees (Refugee Convention or RC), Geneva, 28 July 1951; and the Protocol relating to the Status of Refugees, New York, 31 January 1967.

60 Art. 1A Refugee Convention. For reasons of simplicity, we have excluded the temporal and geographical limitations.

61 There are also other definitions of refugeehood, e.g., from the Organization of African Unity or in the Cartagena Declaration on Refugees, which include more generally people fleeing from war, natural disasters, poverty or even events seriously disturbing public order.

62 A refugee must be recognized as such in order to enjoy the legal rights associated with refugee status.

63 Definition of UNHCR. See, for instance, UNHCR Global Trends – Forced Displacement.

Along with this pragmatic approach we would like to refer to the explanation of Hemme Battjes of the definition of *asylum* as adopted by the Institut du Droit International:[64]

> *As the drafters of this definition undoubtedly tacitly intended, the term asylum applies only to protection offered to aliens. States owe protection to their nationals on account of that nationality, which protection hence needs no juridical category. Thus, an individual [seeking protection] should be understood as a person not possessing the nationality of the state he requests protection from.*

In 2011 the United Nations High Commissioner for Refugees (UNHCR) has extended the definition of a refugee to:[65]

> *persons who are outside their country of nationality or habitual residence and unable to return there owing to serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order.*

This extension implies that the original requirement of a well-founded fear of being persecuted is no longer a personal characteristic.[66] The 1969 African Refugee Convention expanded the definition of the 1951 RC even further:[67]

> *Every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in 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.*

In 1984 the Cartagena Declaration on Refugees was adopted by a series of Latin-American countries.[68] Although this declaration is non-binding by itself, is has been implemented by 14 American countries. The definition of refugees in this

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64 Hemme Battjes, *European Asylum Law and Its Relation to International Law*, PhD thesis, VU Amsterdam, 2006. He refers to the proceedings of the Bath Conference (1950) of the Institut du Droit International, <https://www.idi-iil.org/en/sessions/bath-1950/>.

65 UNHCR *Resettlement Handbook*, 2011, <www.refworld.org/policy/opguidance/unhcr/2011/en/97558>.

66 Anyone who would face a real risk of suffering serious harm if he returned to his country of origin, and does not qualify as a refugee, may be granted subsidiary protection, in EU law: Qualification Dir. 2011/95.

67 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted by the Organization of African Unity.

68 Belize, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and Venezuela adopted this Declaration at the Colloquium on International Protection for Refugees and Displaced Persons in Central America, Mexico and Panama, held in Cartagena, Colombia, November 1984.

declaration is, again, broader:

> *persons who have fled their country because their lives, security or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.*

A third form of forced migration is forced displacement, i.e., mass migration mostly on the basis of ethnicity. This type of migration has numerous examples in the history of mankind and will not be addressed here further.
A fourth form of forced migration is not related to persecution of a person, but to the situation where people leave their land because the land itself is threatened.[69] The clearest example of this is the situation of the inhabitants of Tuvalu, a small island country in the Pacific Ocean, which is confronted with the effects of rising sea levels. It is estimated that around 2050 a substantial part of the land will be flooded. The *Falepili Treaty* (2023) with Australia tries to deal with that situation and provides a pathway for a maximum of 280 citizens of Tuvalu per year to migrate to Australia.[70] In the context of climate change, the UN Declaration on Indigenous Peoples mentions the importance of the environment for indigenous peoples, *who sometimes are forced to move*.[71] More recently in fall 2023, the EU signed the Samoa Agreement (with 48 African, 16 Caribbean and 15 Pacific countries) a partnership agreement as the base for agreements on several topics, of which migration and mobility is one.[72]

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69 UN, *Paris Agreement* (or Paris Climate Accords of 2015), Treaty Collection, 4 November 2016, No. 54113; IOM, *Mapping Human Mobility (Migration, Displacement and Planned Relocation) and Climate Change in International Processes, Policies and Legal Frameworks*, report, August 2018. In particular para. 26 of this report: 'International Law Commission Draft Articles on the Protection of Persons in the Event of Disasters', <unfccc.int/sites/default/files/resource/WIM%20TFD%20II.2%20Output.pdf>.

70 Australian-Tuvalu Falepili Union Treaty (13/11/2023), <www.dfat.gov.au/geo/tuvalu/australia-tuvalu-falepili-union-treaty>. This treaty provides a pathway for a maximum of 280 citizens of Tuvalu per year to migrate to Australia. Since Tuvalu has about twelve thousand inhabitants it would take more than forty years for its current population to migrate to Australia.

71 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), New York, September 2007.

72 2024 Samoa Agreement between EU and member states of the Organisation of African, Caribbean and Pacific States (OACPS) on: (1) human rights, democracy and governance; (2) peace and security; (3) human and social development; (4) inclusive, sustainable economic growth and development; (5) environmental sustainability and climate change; and (6) migration and mobility. The provisional application of the Agreement will start on 1 January 2024. The Agreement will enter into force upon consent by the European Parliament and ratification by the Parties, i.e., all EU member states and at least two thirds of the OACPS Members, <https://www.consilium.europa.eu/en/policies/samoa-agreement/>.

2.2.2. Voluntary Migration

Voluntary (or unforced) migration is at the other end of the scale. It is – again – an umbrella term for all kinds of migration in which any form of coercion or force is absent. The objective of this type of migration is mostly work, family reunification or study. Here also, there is no internationally accepted terminology to indicate persons who migrate because of work, study or love: labour migrant, migrant worker, expat, international staff, guest worker, foreign worker, posted worker, seasonal worker, and more.
This differentiation in terminology is not only historically determined, but also reflects the different attitudes towards these migrants, the contractual basis of their employment and the sometimes-intended limited duration of their presence. This diversity is also reflected in the vast number of declarations, conventions and covenants taken into account in the preamble to the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[73] Though relevant to all states, this convention has only 59 parties, out of a possible 193.[74] Martin Ruhs explains this:[75]

> *there is considerable evidence to suggest that the primary reason why high-income countries have not ratified the convention, and have no intention of doing so in the future, is that they consider the convention 'too demanding' in terms of the potential impacts and costs involved for the population of the host country.*

The definition of *migrant worker,* which the convention uses is (also) confusing:[76]

> *The term 'migrant worker' refers 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.*

This definition implies that a migrant worker always remains a *migrant worker* even if he has retired and is no longer part of the working population. It also shows that the requirement of changing one's residence to another state, is lacking: it only refers to non-nationals. This oddity might be explained by looking at Article 1(2) of the convention which states on the scope of the convention:

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[73] 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, or Convention on Migrant Workers, New York, Treaty Series Vol. 2220.

[74] Among the states that have ratified the convention there is not a single member state of the EU, or the UK or the USA.

[75] Martin Ruhs, 'Rethinking International Legal Standards for the Protection of Migrant Workers: The Case for a "Core Rights" Approach', *Symposium on Framing Global Migration Law – Part II* (2017), <https://doi.org/10.1017/aju.2017.35>.

[76] Art. 2(1) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

> *The present convention shall apply during the entire migration process of migrant workers and members of their families, which comprises preparation for migration, departure, transit and the entire period of stay and remunerated activity in the state of employment as well as return to the state of origin or the state of habitual residence.*

This description clearly assumes that migrant workers migrate back to their state of origin at the age of their retirement (therefore also called *retirement return* migration). However, there is no empirical evidence for this assumption.[77]
The second category of voluntary migration is often named international students, or foreign students, or students abroad: people who want to study in another state.[78] This category seems to have a straightforward definition, but that is not the case. For instance, the U.S. government uses the term *non-immigrant* to refer to foreign nationals admitted into the country temporarily for a specific purpose, e.g., study.[79] The European Union distinguishes between students from (other) EU member states, and students from outside the EU.
We will not go into details of other possible categories such as circular migration: migrants who move back and forth on a regular basis between two states.[80] In our opinion, this type of migration is characterized by its temporal aspect, which we just discarded as a useful criterion. However, based on the definitions of the EU regulation on migration and statistics, most of these circular retirement migrants fall outside the scope because both immigration and emigration rules prescribe a necessary period of residence of at least 12 months.[81]
Whatever boundaries are chosen, migration is a social phenomenon, which is described differently depending on the perspective of the migrant, the country of departure, or the country of destination, and recently also depending on the political perspective.[82]

2.3. **Occurrence of Migration: Statistics**

Based on the foregoing, it is not surprising that the UN states in its Methodology Report on International Migrant Stock, and its Handbook on Measuring International Migration, that it is rather difficult to gather clear and comparable data on migration.[83] The methodology report asserts that in estimating the international

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77 Deborah A. Cobb-Clark and Steven Stillman, 'Return Migration and the Age Profile of Retirement among Immigrants', 2(20) *IZA Journal of Migration* (2013) (SpringerOpen), <https://izajodm.springeropen.com/articles/10.1186/2193-9039-2-20>.
78 As always, the legal definitions of this category vary a greatly.
79 Homeland Security, International Student Life Cycle, <https://studyinthestates.dhs.gov/students/get-started/international-student-life-cycle>.
80 To live, for instance, for six months in one state and the remaining six months in another state.
81 Regulation 862/2007 on Community statistics on migration and international protection.
82 De Haas, *supra* n. 5.
83 UNSD, *supra* n. 18. The Population Division of the Department of Economic and Social Affairs of the United Nations (founded in 1946) provides population data for all countries on all three components of population change (fertility, mortality and migration), <https://www.un.org/de-

migrant stock, international migrants have been equated with the foreign-born population whenever this information is available. If that information was lacking, information on the country of citizenship of those enumerated was used, thus effectively equating international migrants with foreign citizens.
However, as the methodology report also states, this has important shortcomings. In countries where citizenship is conferred on the basis of *ius sanguinis*, people who were born in the country of residence may be included in the number of international migrants even though they may have never lived abroad. Conversely, persons who were born abroad and who were naturalized in their country of residence are excluded from the stock of international migrants when using citizenship as the criterion to define international migrants.[84] Also, the coverage of refugees in population censuses or population registers is uneven.[85] Another source of relevant data comes from the DEMIG research project at Oxford University, one of the few research projects that describe migration separately from and alongside regular political discourse in a wider historical context.[86]

Graph 1 shows the stock of migrants in the world, in absolute numbers and Graph 2 as a percentage of the world population between 1960 and 2017. These figures show that, although the absolute figures have increased, the share of the world's population consisting of migrants, has remained rather stable at around 3 per cent over the last six decades. Or stated differently: the number of migrants has grown at the same speed as the world's population. This is in stark contrast to the myth of mass migration, which uses terms such as *tsunami* framing migration as a disaster and an uncontrollable phenomenon, which increases in size very rapidly. Apparently, this is not the case.[87] It is important to emphasize this, because the arguments used to support or oppose certain statements are not only diverse but more often lack any empirical evidence. Hein de Haas calls this: *illusion politics*. Douglas Massey has described this practice of advocating often ineffective but symbolically powerful measures (such as border walls) as an appearance of control: "they serve an important political purpose: they are visible, concrete, and generally popular with citizen voters".[88]

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velopment/desa/pd/>.

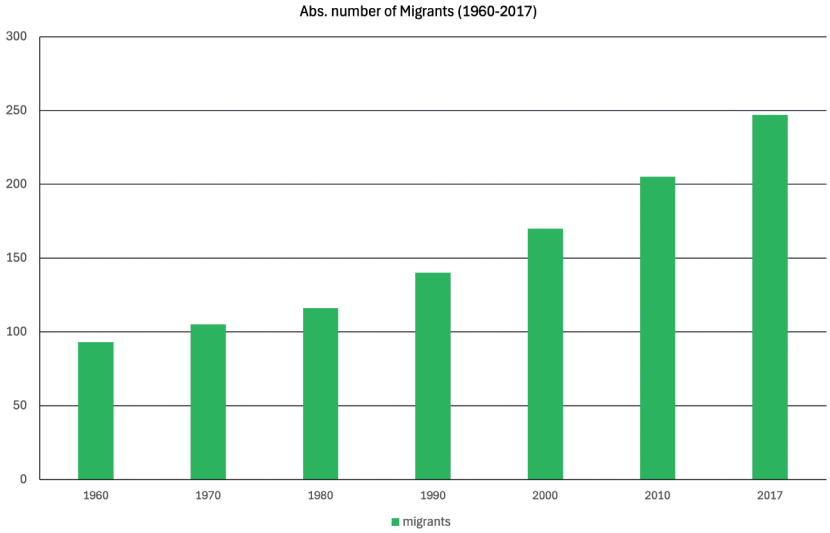
84 "If information by country of citizenship would have been ignored, it would have resulted in a lack of data for 46 countries or areas, equal to nearly 20% of all countries and areas of the world", UN Methodology Report, p. 4.

85 The UN Methodology Report states: "In countries where asylum seekers have been granted refugee status, they are normally covered by the population census as any other international migrant. In such cases, there is no reason to add the number of refugees to estimate the international migrant stock, because in these cases refugees would already be included in the census data. However, in many countries, refugees lack freedom of movement and are required to reside in camps or other designated areas. In these cases, population censuses may ignore refugees."

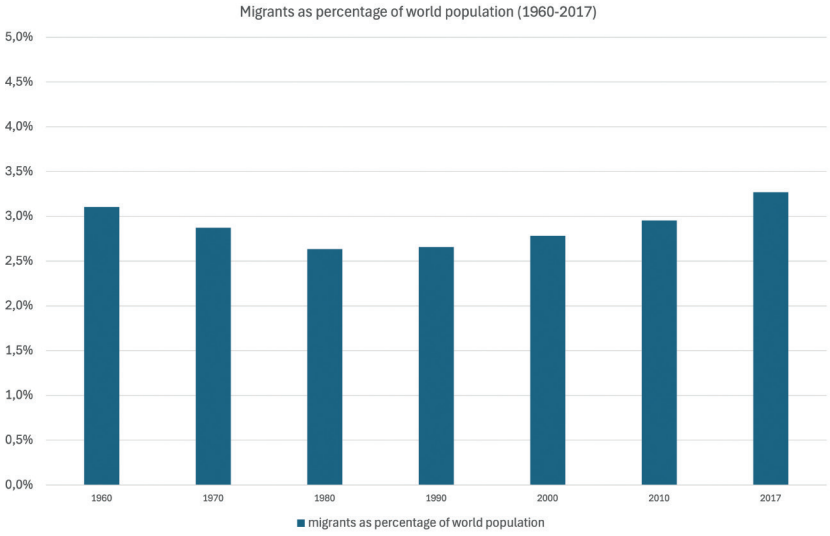
86 Data collection by Hein de Haas and his colleagues at Oxford University, in the Determinants of Migration-project (DEMIG), <https://www.migrationinstitute.org/completed-projects/demig>.

87 De Haas, *supra* n. 5, Myth #1.

88 Douglas Massey, 'International Migration at the Dawn of the Twenty-First Century: The Role of the State', 25(2) *Population and Development Review* (1999) pp. 303-322.

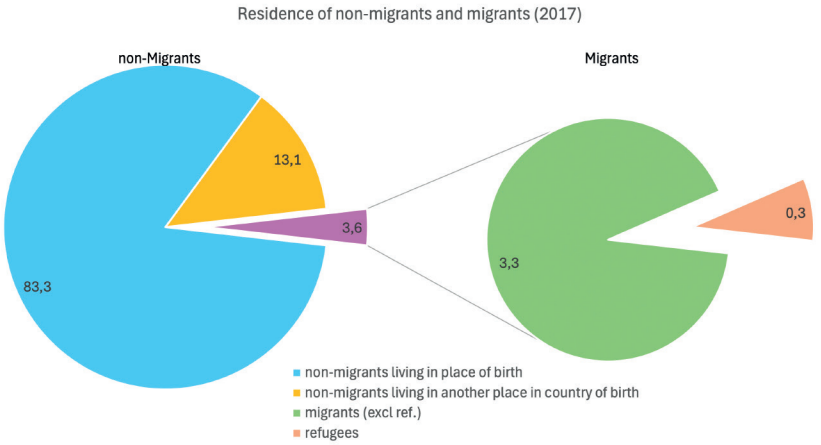


Graph 1: Stock of migrants in absolute numbers. Adapted from figures of Hein de Haas (2023).



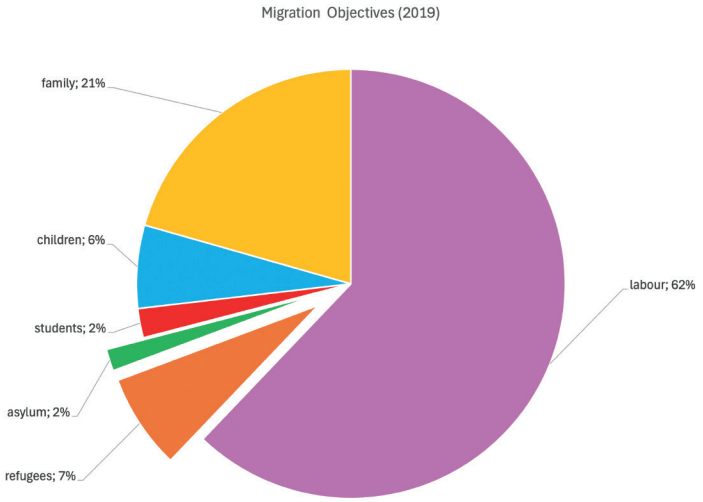
Graph 2: Migrants as a percentage of the world's population. Adapted from figures of Hein de Haas (2023).

In an attempt to break down the scarcely available figures into different categories based on migration objectives, we also used other databases from the ILO, UN and World Bank. Unfortunately, there are not many details to report due to the absence of clear definitions and available statistics. Thus, most of the following data are an approximation of reality.



Graph 3: Residence (in 2017).
Adapted from figures of Hein de Haas (2023).

Graph 3 shows the distribution of the world's population by country of residence. In 2017, 96% of the world's population has their permanent residence in the country where they were born. Or to be even more precise: 83% still live in their birthplace. Only 3.6% of the world's population can be labelled as migrants of which less than a tenth (0.3%) are refugees.[89]



Graph 4: Migration objectives (2019).
Adapted from figures of the ILO and UNHCR.

[89] Hein de Haas mentions data from 2017 because only extrapolations are known after that year.

Although the available figures are just an approximation, it is interesting to try to further break down the group of migrants based on the objective of their migration. Graph 4 shows that, according to the ILO and UNHCR (in 2019), there were approximately 272 million migrants worldwide, almost two-thirds of whom were labour migrants (62%).[90] Just over a quarter (27%) consists of family members, including children under 15 years of age. The remaining 11% consist of: students (2%), refugees (7%), and asylum seekers (2%).
Insofar as these graphs make anything clear, it is that almost 9 out of every 10 migrants consists of labour migrants (and their family) and they are mainly – if not exclusively – driven by economic development. That element is especially noteworthy when you look at the current public and political discussions about migration, which concentrate on the relatively small portion of asylum seekers (2%), and ignores the elephant in the room. Or as, Hein de Haas states:[91]

> *It is the symbolic function that counts, as a focus on border enforcement and belligerent rhetoric helps to project an image of decisiveness and boldness.*

Furthermore, there is remarkable little uniformly gathered historical statistical data available on migrants, whether in terms of their age, country of origin, country of destination, objective, or purpose. So the question where and when migration as such has happened in a historical perspective is very difficult to answer.[92]

2.4. **Concluding Remarks on Terminology**

We first tried to define what the term migration means. However, it turns out that this term is not a well-defined concept at all. We came across multiple discussions illustrating that it is not easy to tell the difference between a migrant, a foreigner and a non-national. The fact that there are no clear definitions clarifies the patchwork of legal instruments that govern migration rights, as we will elaborate on in the next section.

3. ORIGIN OF MIGRATION RIGHTS

Migration is closely connected to international law, i.e., public international law.[93] One might even say that the way migration is regulated, represents the state of affairs of international law, a domain which is regulated incompletely, has loose ends, and contains legal limbo. Or, according to the Third World Approaches

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[90] UN, *International Migration 2019: Report, Key Findings*. Figures are an estimation, particularly due to the lack of uniform definitions.
[91] De Haas, *supra* n. 5, at p. 264.
[92] If the concept of migration is applied uniformly.
[93] We will not dive into the implications of international private law for the development of migration law.

to International Law (TWAIL), it is illegitimate and a representation of colonial relations: a regime and discourse of domination and subordination, not resistance and liberation.[94]

In this section, we will describe the domain of migration from a legal perspective and take stock of what, we think, is missing. That will result in an effort to identify the gaps and legally qualify the need to close them or leave them in the context of international law. Because our definition of migration is determined by the change of residence between nations (inter-nations) we will start with a crucial part of that change, i.e., the right to leave a country and to enter another. So, we will try to focus on the rights related to migration, and try to prevent addressing all (other) rights that (should) belong to migrants. An obstacle in this context is that, although the concept of a migrant is different from that of a foreigner, most migration regulations use descriptions such as 'a working foreigner', which brings it close to the concept of nationality. Thus, as we have described in chapter two, it complicates our search for origins of rights.

In our analysis we include the regional legal framework of Europe, Council of Europe Conventions (Section 3.6) and European Union Law (Section 3.7). We are aware that other regional legal frameworks are missing and that there is therefore a risk that a dominant view of European perspectives will emerge.

3.1. **Magna Carta**

We would like to go back to the Magna Carta in which, in 1215, in England most likely for the very first time, the right to enter and to leave was formulated (clause 42):

> *It shall be lawful to any person, for the future, to go out of our kingdom, and to return, safely and securely, by land or by water, saving his allegiance to us, unless it be in time of war, for some short space, for the common good of the kingdom: excepting prisoners and outlaws, according to the laws of the land, and of the people of the nation at war against us, and Merchants who shall be treated as it is said above.*

Although this clause 42 contains the right to leave and to return to 'our kingdom', it does not explicitly state that such a person is allowed to stay, i.e., more than visit. Nor does it explicitly state that *everyone* has a right to enter, which is understandable considering that this document is only addressed at members of the English nobility and clergy, and foreign merchants, at the heyday of feudalism in medieval Europe. We give this historic example also because it illustrates that rights were

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[94] Third World Approaches to International Law (TWAIL) introduced in 2000: Makau W. Mutua, 'What Is TWAIL?', 94 *Proceedings of the American Society of International Law, Annual Meeting* (2000) pp. 31-38, <doi:10.1017/S0272503700054896>. Tendayi Achiume, 'Migration as Decolonization', 71(6) *Stanford Law Review* (2019) pp. 1509-1574. Tendayi Achiume, 'Race, Refugees, and International Law', in Cathryn Costello, Michelle Foster and Jane McAdam (eds.), *The Oxford Handbook of International Refugee Law*, Oxford, Oxford University Press 2021, pp. 43-59.

not intended for 'everyone', in any case not for slaves, serfs or vagabonds. It will take until the realisation of liberal democracies that everyone has rights.
Luca Scholz has explored the history of freedom of movement in the Holy Roman Empire, which starts before the era of the Magna Carta. However, he concludes that the focus (in that era) was not on the border or on anything close to the idea of migration, but explicitly on the concept of safe thoroughfare in order to facilitate commerce.[95]
Basically, we think that the following three aspects of free movement are essential to any kind of right to migration for everyone and should be addressed in every set of rules on migration: entry, stay, and leave.

3.2. **Bilateral (Trade) Agreements**

The introduction of passenger railways contributed to the mobility of people and goods. More in general, the industrial revolution not only introduced new manufacturing processes using machine tools, but also stimulated international trade.[96]
In order to secure their trade relations, countries made various arrangements, from colonial preferences to bilateral commercial treaties to broader multilateral agreements, and, over time, as a wave motion, back to more regional and bilateral agreements. And again back to multilateral agreements. These waves towards more regionalism were driven, "at least in part, by the desire to go further and faster than was occurring at the multilateral level".[97]
Next to trade itself, i.e., transport of goods, people could move to elsewhere more easily: they migrated to other countries. As a result, most trade agreements include provisions protecting nationals in the 'other' country, keeping out unwanted foreigners and simultaneously attracting a particular group of skilled migrants to take up work. In short, most trade agreements are also migration agreements.[98]
A typical example of a bilateral agreement is the 1875 Swiss-Dutch Treaty, which contains a number of articles on establishment and commerce.[99] This treaty has an additional protocol, which has only one article stating that no rights could be

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[95] Luca Scholz, *Borders and Freedom of Movement in the Holy Roman Empire*, Oxford, Oxford University Press 2020.

[96] From the mid-18th to mid-19th century in Europe. C. Bröllmann and Y. Radi (eds.), *Research Handbook on the Theory and Practice of International Lawmaking*, Cheltenham, UK, Edward Elgar Publishing 2016. See for all agreements of the Netherlands: A.M. Stuyt, *Het repertorium van door Nederland tussen 1813 en 1950 gesloten verdragen* [Overview of treaties concluded by the Netherlands between 1813 and 1950], The Hague, NL, Staatsdrukkerij- en Uitgeverijbedrijf, 1953.

[97] World Trade Organisation, *Historical Background and Current Trends*, World Trade Report, 2011, p. 85. See also Matthew Johnston, 'A Brief History of International Trade Agreements', Investopedia, <https://www.investopedia.com/articles/investing/011916/brief-history-international-trade-agreements.asp>.

[98] Tesseltje de Lange and Henri de Waele, 'The Constitutional Conundrums of Regulating Skilled Migration into the EU', 49(3) *European Law Review* (2024) pp. 237-255.

[99] 1875 Treaty of Friendship, Establishment and Commerce between the Kingdom of the Netherlands and Switzerland.

derived from the treaty by persons without sufficient means of subsistence.[100] This simple additional requirement, which illustrates the inequality of persons, can still be found, for example, in the 1849 Dutch Alien Act, which explicitly prescribes that non-nationals are only admitted if they have sufficient means of subsistence.

3.3. The Chinese Exclusion Doctrine vs the Right-to-enter Doctrine

The concept of free movement was for a very long period not up for debate. It was, at least in Europe, the self-evident prerogative of the upper-class: the wealthy, the travellers, the explorers. In the 19th century this freedom was gradually restricted probably as a result of the growing influence of the nation-state, an organization with a territorial basis, and the idea that its territory had to be protected against foreigners and thus immigration had to be controlled.[101] John Torpey argues that immigration control was an important aspect of the construction of the modern state and characterizes immigration laws as *the monopolization of the legitimate means of movement*.[102]

This viewpoint, however, that states have the right to exclude foreigners, is not uncontested. Spijkerboer argues convincingly that this doctrine, although presented as a well-established principle of international law particularly by the European Court of Human Rights (ECtHR), is rather new and geographically limited to the Global North.[103] It has its origins in the racist case law of the US Supreme Court on the Chinese Exclusion Act.[104] The US Supreme Court asserts in those judgments "the right of states to exclude foreigners of a different race because they are considered non-assimilating and dangerous to peace and security".[105] "Cleansed of explicit racial discrimination, the idea that state sovereignty entails the right to exclude foreigners at will, became the new normal in international law", meaning in the Global North.[106]

But until the mid-nineteenth century, i.e., before the introduction of the Chinese Exclusion Doctrine, quite another doctrine was dominant: the Right-to-enter Doc-

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[100] 1877 Additional Protocol to the Treaty of Friendship, Establishment and Commerce between the Kingdom of the Netherlands and Switzerland.

[101] Daniel Wilsher, *The Liberty of Foreigners*, PhD thesis (Nijmegen), Nijmegen, Wolf Legal Publishers 2009, p. 3.

[102] John Torpey, *The Invention of the Passport*, Cambridge, Cambridge University Press 2000, cited by Wilsher *supra* n. 101, at p. 4.

[103] Spijkerboer, *supra* n. 2 at, p. 172.

[104] Spijkerboer, *supra* n. 2 at p. 172. *Chae Chan Ping v. United States* 1889; cf. *Nishimura Ekiu v. United States* 1892; *Fong Yue v. United States* 1893. The 1882 Chinese Exclusion Act was a United States federal law, prohibiting all immigration of Chinese labourers for ten years. The Chinese Exclusion Act remained in force until the passage of the Magnuson Act in 1943, which repealed the exclusion.

[105] Spijkerboer, *supra* n. 2 at, p. 173.

[106] McKeown *supra* n. 14, at p. 318-48. Philippe Rygiel, 'Does International Law Matter? The Institut de Droit International and the Regulation of Migrations before the First World War', 1(1) *Journal of Migration History* (2015) pp. 1-6. Daniel Ghezelbash, 'Legal Transfers of Restrictive Immigration Laws: A Historical Perspective', 66(1) *International and Comparative Law Quarterly* (2017) pp. 235-255. Spijkerboer, *supra* n. 2 at, p. 173.

trine, which was based on "the right of people to enter the territory of other states for peaceful commerce".[107] This earlier 'Right-to-enter Doctrine' had legitimized colonization. The Right-to-enter Doctrine is a more clear name for the Doctrine of Discovery, which was based on Papal Bulls issued in the 15th century.[108] This doctrine, using the concealed terminology of *discovery*, was used for centuries as a legal and moral justification for colonial dispossession (or plain robbery) of sovereign indigenous nations.[109] We would like to update the meaning of this doctrine emphasizing rights of a human being as the starting point as opposed to the right of a sovereign state.

Two doctrines with two different viewpoints. Spijkerboer shows how these two viewpoints are reflected in case law. He compares a judgment of the European Court of Human Rights (reflecting the Chinese Exclusion Doctrine), with a judgment of the Papua New Guinea Supreme Court, which reflects the Right-to-enter Doctrine.

Spijkerboer starts with case law of the ECtHR in general, where, only in cases of migration, the Chinese Exclusion Doctrine is used:[110]

> *In all cases except those concerning migration, the Court follows the structure of the provisions it applies: people have particular rights (to life, to liberty) and under particular conditions, the state may limit these. Humans are thus entitled to the enjoyment of fundamental rights, but in some situations the state can interfere with these rights in order to protect the rights of others, or for the public good. The burden of justification for such infringements rests with the state.*
>
> *Therefore, the Court begins a legal analysis by asking the question whether the situation is covered by the right that is being invoked (for example: is there family life between the relevant persons?), then proceeds to enquire as to whether there is an interference; if so, the Court looks at whether the interference has a legal basis and a legitimate aim; and finally it asks whether the interference is proportionate in light of its aim.*
>
> *However, in migration cases the Court does the opposite. It starts out*

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[107] Spijkerboer, *supra* n. 2 at, p. 173.

[108] Papal Bulls are decrees of the pope of the Roman Catholic church. Pope Nicholas V (1452), *Dum Diversas*; Pope Nicholas V (1455), *Romanus Pontifex*; Pope Alexander VI (1493), *Inter Caetera*; Pope Julius II (1506), *Ea quae pro bono pacis*. Tonya Gonnella Frichner, *Preliminary Study of the Impact on Indigenous Peoples of the International Legal Construct Known as the Doctrine of Discovery*, New York, United Nations Economic and Social Council, 27 April 2010. It took until 2023 for the Vatican to repudiate the Doctrine of Discovery as 'not part of the teaching of the Catholic Church'.

[109] Robert J. Miller, Jacintha Ruru, Larissa Behrendt and Tracey Lindberg, *Discovering Indigenous Lands, the Doctrine of Discovery in the English Colonies*, New York, Oxford University Press 2010. Mark Charles and Soong-Chan Rah, *Unsettling Truths: The Ongoing, Dehumanizing Legacy of the Doctrine of Discovery*, Westmont (Illinois), InterVarsity Press.

[110] ECtHR 25 Jan. 2018, 22696/16, *J.R. et al. v. Greece*, Spijkerboer, *supra* n. 2 at, p. 173. Dembour, *supra* n. 2. Hilbrink, *supra* n. 2.

with the right of states: 'as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory.' It then looks at whether the migrant has such a strong claim under a Convention provision that they can trump the right of the state to control migration.

The opposing viewpoint is shown in the Papua New Guinea Supreme Court Judgment concerning Australian offshoring asylum procedures on Manus Island, in which this Court emphasizes the unity of human rights protection in the PNG Constitution and in international law, instead.[111] The Papua New Guinea (PNG) constitution was amended (in 2014) to facilitate and allow the detention of foreign nationals under arrangements made by the PNG with another country, i.e. Australia.[112] However, the PNG Supreme Court ruled that the transfer and detention of asylum seekers were unconstitutional.[113] Still today, courts in the Global South apply this doctrine in the context of migration issues.
Apparently, for some situations the *rights of a human being* are the starting point, whereas in other situations, the *rights of (nation) states* are the starting point. We will get back to this duality in Section 4.

3.4. **Universal Declaration of Human Rights**

Our next stop in time is the UDHR of 1948.[114] Article 13 UDHR contains two different rights:

(1) Everyone has the right to freedom of movement and residence within the borders of each State.
(2) Everyone has the right to leave any country, including his own, and to return to his country.

The first limb represents 'internal' rights: the freedom of movement within the borders of a State and the right to choose one's residence. The second limb represents an 'external' right: the right to cross the borders back and forth. Noteworthy is that this second right is not conditional or dependent on the goal of the border crossing. Therefore Article 13(2) UDHR suggests a right to migrate. However, this right to leave one's own country is only connected with a right to return to one's own country. Thus, this right to leave one country is not connected with a right to enter another country. Article 13 UDHR therefore does not contain a right to migrate.[115] The only right that comes close to entering another country, is set out in Article 14(1) UDHR:

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[111] *Namah v. Pato* 2016, SC1497 (Papua New Guinea).
[112] Spijkerboer, *supra* n. 2 at, p. 176.
[113] Spijkerboer, *supra* n. 2 at, p. 176.
[114] Universal Declaration of Human Rights, adopted by the UN General Assembly, 10 December 1948.
[115] At most this might be a right to remigrate, or to get back to the country you came from.

(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

This right to seek protection against persecution, however, can only be invoked in a particular country if one is physically present in that country.[116] Simply knocking on the door while still standing outside is insufficient, which means that the right to leave a country (Article 13 UDHR) does not entail a complementary right of entry into another country, and is only 'linked' to a right to stay outside; if, for whatever reason, this could be labelled as a right.

From a historical point of view this situation (of being outside a country and not simultaneously being inside another country) can be explained, as not all territory was claimed or at least undisputed. The term *no man's land* originally refers to spaces that were beyond rules or a regime of power.[117] Nowadays, *no man's land* merely refers to land that is disputed or territory that lies between two countries as a buffer zone. From a practical perspective this means that the exit out of a country is not directly connected with the entry into another country because there is a stage in between: a piece of land or a barrier either created by chance or deliberately.

These barriers, transit zones or buffer zones are used by state authorities to control the access to its territory, either by installing physical obstacles, such as fences, or by using formal selection criteria for entering the country. The legal basis for this is state sovereignty. Although the UDHR proclaims that member states have pledged themselves to promote respect for human rights and freedoms, the practice is different. The concept of state sovereignty in particular, is a disputed legal argument *to limit the rights* mentioned above or at least to make it difficult to exercise these rights connected to migration.[118] Or stated otherwise, the concept of state sovereignty is an argument *to limit the duties* of countries towards migration. An interesting example is the American 'wet-foot/dry-foot' policy. It refers to an understanding under which Cuban migrants traveling to the United States who are intercepted at sea ('wet foot') are returned to Cuba or resettled in a third country, while those who make it to U.S. soil ('dry foot') are able to request parole and, if granted, lawful permanent resident status under the 1966 Cuban Adjustment Act.[119]

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[116] This also covers the situation of diplomatic asylum where the territory of an embassy is seen as inviolable by the receiving state, but not as foreign soil.

[117] Terra Nullius (No Man's Land) refers in international law to territory which is not subject to the sovereignty of any state. Peter Adey, Janet C. Bowstead, Katherine Brickell, Vandana Desai, Mike Dolton, Alasdair Pinkerton and Ayesha Siddiqi , *The Handbook of Displacement*, London, Palgrave Macmillan 2020.

[118] Spijkerboer, *supra* n. 2. Natter, *supra* n. 2m at pp. 110-122. Vincent Chetail,, *International Migration Law*, Oxford, Oxford University Press 2019. Richard Perruchoud, 'State Sovereignty and Freedom of Movement', in Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds.), *Foundations of International Migration Law*, Cambridge, Cambridge University Press 2012, pp. 123-151.

[119] In 2017 this policy was ended by the US government.

Though we mentioned *rights* in this section, we probably should rename this into *promises*. Primarily because the UDHR is not a treaty but a declaration: a solemn pledge by the members of the United Nations.[120] Though not legally binding, the human rights mentioned in the UDHR have been elaborated into subsequent treaties and national constitutions, mostly referred to as freedom of movement.
After this ultra-short chronological overview, we will continue with relevant rights as formulated in conventions of the International Labour Organisation, Council of Europe, European Union, and United Nations.[121]

3.5. International Labour Organisation Conventions

The ILO, founded in 1919, aims at promoting social justice and internationally recognized human and labour rights.[122] The first ILO convention about migrants was adopted in 1926 and deals with the inspection of emigrants on board ship.[123] Another one (number 48 of 1935) deals with the pension rights of migrants. Noteworthy is that these conventions handle all kinds of rights or obligations of migrants, but a definition of what defines a migrant is absent.
In 1949 the ILO established the employment convention (number 97) for migrant workers.[124] This convention prescribes that member states shall facilitate the departure, journey and reception of migrants for employment.[125] It also mentions that immigrants, who are lawfully within a state's territory, should have treatment no less favourable than the treatment applied to its own nationals.[126] In 1975, supplementary provisions were concluded, which try to eliminate abuses such as clandestine trafficking in labour.[127]

3.6. Council of Europe Conventions

3.6.1. European Convention on Human Rights

One of the first achievements of the Council of Europe was the establishment of the 1950 European Convention on Human Rights (ECHR).[128] This also created the ECtHR, which may receive individual complaints from any person about violations of the rights in the convention.[129]
Although a right of residence is not mentioned in the ECHR itself, the case law

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[120] In 1948 the UN had 58 members, of which 48 voted in favour of Resolution 217, none against, 8 abstained and 2 did not vote.
[121] We are aware of the incompleteness of our overview particularly regarding non-European regional legal instruments.
[122] About the ILO: <https://www.ilo.org/about-ilo>.
[123] 1926 ILO Inspection of Emigrants Convention (No. 21).
[124] 1949 ILO Migration for Employment Convention (No. 97). This convention is a revised version of the 1939 convention (no. 66) which was never ratified due to World War II.
[125] Art. 4 ILO Convention No. 97.
[126] Art. 6 ILO Convention No. 97.
[127] Preamble 1975 Migrant Workers (Supplementary Provisions) Convention (No. 143).
[128] 1950 European Convention on Human Rights and Fundamental Freedoms.
[129] Arts. 19 and 34 ECHR.

of the ECtHR shows that under certain conditions Article 8 in conjunction with Article 14 ECHR (on non-discrimination) includes a right of residence.[130]
A provision on the freedom of movement can, however, be found in Article 2 of the 1963 Fourth Protocol to the European Convention on Human Rights (ECHR-4P):[131]

> *(1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*
> *(2) Everyone shall be free to leave any country, including his own.*

The rights in Article 2 ECHR-4P are restricted with reference to the law. In these limbs the requirement of necessity is restricted to 'necessary in a democratic society':

> *(3) No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of public order, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*
> *(4) The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.*

The ECHR has been ratified by all 46 member states of the Council of Europe, and is of special importance to the legal order of the EU and its 27 member states.[132]

3.6.2. European Convention on Establishment

One of the first treaties on entry and residence (and expulsion) of the Council of Europe, is the 1955 European Convention on Establishment.[133] It prescribes that the contracting parties, i.e., the member states of the Council of Europe:

> *art. 1: shall facilitate the entry into its territory by nationals of the other parties (...)*

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[130] This right is derived from Art. 8 ECHR and includes a right of residence for the 'post-flight spouse', in the same way as was allowed for the 'prior-to-the-flight spouses' of a refugee with temporary status. CoE/ECHR, *ECHR Guide on case-law of the Convention – Immigration* (version 29/2/2024), <ks.echr.coe.int/documents/d/echr-ks/guide_immigration_eng>.
[131] The ECHR originates from 1950. The 4th Protocol (ECHR-4P) was signed on 16 September 1963.
[132] Jan Wouters and Michal Ovádek, *International Law, the ECHR and the EU,* Oxford, Oxford Academic 2021.
[133] 1955 European Convention on Establishment.

and:

> *art. 2: shall, to the extent permitted by its economic and social conditions, facilitate the prolonged or permanent residence in its territory of nationals of the other parties.*

Noteworthy is the clause that the facilitation of permanent residence is limited to the extent permitted by economic and social conditions, which is a broadly formulated escape option (for states).

3.6.3. European Social Charter

In 1961 the European Social Charter (ESC) was established as the counterpart to the ECHR.[134] Article 19 ESC grants migrant workers (and their family) a right to protection and assistance. Interestingly, Article 19(1) imposes an obligation on the state:

> *to take all appropriate steps, so far as national laws and regulations permit, against misleading propaganda relating to emigration and immigration.*

Apparently, it was necessary to include this obligation in 1961 and it was not changed in 1996. The background of this formula is the racist and xenophobic propaganda relating to minorities. An Italian case, for example, was brought to the European Committee of Social Rights. It concerned Italian legislation in which the presence of Roma and Sinti in certain areas was defined as "a cause of great social alarm with possible grave repercussions in terms of public order and safety".[135] However, the European Social Charter "does *not* grant foreign nationals in general a right of entry or freedom of movement in the territory of other state parties".[136] It only grants rights to those who are already lawfully present.

3.6.4. European Convention on the Legal Status of Migrant Workers

In 1977, finally a convention was completely dedicated to the legal status of migrant workers.[137] It even contained in Article 1(1) a definition of the term *migrant worker*:

> *a national of a Contracting Party who has been authorised by another Contracting Party to reside in its territory in order to take up paid employment.*

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[134] 1961 European Social Charter; revised in 1996.

[135] Unanimous Decision on the merits of the European Committee of Social Rights 25 June 2010, 58/2009, *Centre on Housing Rights and Evictions versus Italy*, <https://hudoc.esc.coe.int/eng?i=cc-58-2009-dmerits-en>. Violation of art. E in conjunction with art. 16, 19, 30 and 31 of the revised Charter.

[136] Karin Lukas, *The Revised European Social Charter – An Article by Article Commentary*, Cheltenham, UK, Edward Elgar Publishing 2021, para. 1.3.3 (Personal Scope of the Charter).

[137] 1977 European Convention on the Legal Status of Migrant Workers (ETS No. 093).

However, this rather broad description was considerably limited in its scope by Article 1(2) stating that the convention shall not apply to frontier workers, members of a liberal profession, seamen, seasonal workers, and workers who are nationals of a Contracting Party, and who work for an undertaking that has its registered office outside the territory of the contracting party.
Article 4 of this convention explicitly guarantees the right to leave (the territory of the contracting party of which they are nationals), and guarantees the right to admission to the territory of a contracting party in order to take up paid employment. The first right (to leave) seems unnecessary as the right to leave one's own country is already guaranteed in Article 2(2) of the 4th protocol of the ECHR.

3.6.5. Istanbul Convention

The 2011 Istanbul Convention, which deals with the prevention of and combating violence against women, has a separate chapter (VII) on migration and asylum.[138] It introduced in Article 59(1) that victims whose residence status depends on that of the spouse (or partner), are granted, in the event of particularly difficult circumstances, an *autonomous residence permit*, irrespective of the duration of the marriage (or relationship).

3.6.6. Special Representative

Despite all these treaties of the Council of Europe it was felt necessary that in 2016 a mandate of a Special Representative (of the Secretary General of the CoE) on Migration and Refugees was established in order to "seek, collect and analyse information (...) on the human rights situation of refugees and migrants".[139] Apparently, there is a substantial difference between formal promises on the one hand and their practical implementation on the other. And officials like the Special Representative were called into being to narrow the gap.

3.7. **European Union Law**

Title V of the Treaty on the Functioning of the European Union (TFEU) formulates the objectives on border checks, asylum and immigration, thus focussing on the 'entry' into the EU.[140] Since the Treaty of Lisbon in 2007, European Union Law is the most important legal source for EU member states in governing migration.[141] In her inaugural speech, Tineke Strik elaborated on the constitutional challenges in the external cooperation on migration connecting to the EU values

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[138] 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence (COE No. 210).
[139] CoE, Mandate of the Secretary General's Special Representative on Migration and Refugees, 2020.
[140] Arts. 77-80 TFEU.
[141] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (OJ C 306, 17.12.2007); entry into force on 1 December 2009.

and principles that apply in every EU action,[142] with Article 3(5) TEU as important legal base:

> *Art. 3(5) TEU: In its relations with the wider world, the Union must uphold and promote its values and interests and contribute to the protection of human rights, in particular the rights of children, with strict observance to international law and its development, including with respect for the principles of the United Nations Charter.*

The emphasis in EU policymaking, through secondary EU legislation, and public debate has been on the category of irregular migrants, which consists of *everyone* who does not have a residence permit, or permission to enter, but is present on the territory of one of the member states.[143] And because it is no longer possible to apply for (a visa for) asylum at an embassy, or take a plane to a safe place without a visa, physical access to the territory of a member state is crucial.[144]

3.7.1. Charter of Fundamental Rights

The special (*sui generis*) legal order of the EU has formulated again a right to freedom of movement in Article 45 of the Charter of Fundamental Rights of the European Union (Charter):

> *(1) Every citizen of the Union has the right to move and reside freely within the territory of the Member States.*
> *(2) Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.*

There is, however, a fundamental difference between the formula in Article 12 International Covenant on Civil and Political Rights (ICCPR) and Article 2 ECHR-4P, if compared to the Charter. The ICCPR (and ECHR-4P) grants *everyone* lawfully present certain rights, whereas the Charter reserves these rights to *citizens of the Union*. Subsequently, these rights *may be granted* to third-country nationals legally resident in a member state: it does not say *shall* be granted. This might have to do with the circumstance that freedom of movement in the EU context means much more than just the right to travel freely. Groenendijk, Guild and Carrera state on this:[145]

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[142] Tineke Strik, *Dealing with Migration. Constitutional challenges in the external cooperation on migration*, Inaugural lecture, 17 June 2022, Radboud University, Nijmegen, The Netherlands.

[143] As defined in Art. 3(2) Return Directive 208/115.

[144] Strik *supra* n. 142, at p. 6: "CJEU 7 March 2017, C-638/16 (PPU), *X. Y X.*, EU:C:2017:173, reaffirmed that refugees cannot invoke a right to a safe and legal travel to the EU, even if a refusal would lead to inhumane and degrading treatment".

[145] Kees Groenendijk, Elspeth Guild and Sergio Carrera, *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU,* Oxfordshire, UK, Routledge 2013, p. 206.

Freedom of movement did not only amount to the right to travel freely, to take up residence and to work, but also involved the enjoyment of a legal status characterised by security of residence, the right to family reunification and the right to be treated equally with nationals.

This reference to equal treatment is an important extension of the rights just mentioned and explains why the full meaning of this right is restricted to nationals of member states, i.e., Union citizens, and *may* also be granted to others (i.e. third-country nationals) legally *resident* in the territory of a member state.[146] Consequently, the presence (or stay) on the territory of a member state is not enough to qualify for these rights; one has to be a *resident* of one of the member states in order to become eligible for all the rights connected to freedom of movement, i.e., the freedom to move *within* the EU.

The right guaranteed by Article 45(1) Charter is the same right guaranteed by Article 20(2)(a) of the Treaty on the Functioning of the EU (TFEU)[147] as explained in the judgment of the Court of Justice of the European Union (CJEU) in *Baumbast*,[148] and elaborated in the Citizens Rights Directive of the EU.[149]

A complicating factor, in the context of migration, is, again, its terminology and the legal basis.[150] Title IV of the TFEU is on the free movement of persons.[151] However, this title grants free movement only to all nationals of a member state who migrate to another member state. Title V of the TFEU is about the area of freedom, security and justice and concerns also third- country nationals.[152] In particular, Article 67 TFEU shall frame "a common policy on asylum, immigration and external border control, based on solidarity between member states, which is fair towards third-country nationals".

Based on the freedom of movement of Union citizens, the EU consistently mentions that Union citizens may freely move around in the EU; it does not say that its citizens can migrate freely to other member states. Consequently, a Union citizen who changes place of residence, moving from one member state to another, is not labelled as a *migrant* but as a mobile citizen, as it concerns a change of residence *within* the EU. Although this is understandable from an EU point of view, we think the arguments are not convincing, primarily because also within the EU citizens migrate from one country (member state) to another country (member state).

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146 We will not go into the subtle differences between 'lawfully' and 'legally'.

147 Treaty on the Functioning of the European Union (TFEU), 2007, as explained by the European Union Agency for Fundamental Rights (FRA).

148 CJEU 17 September 2002, C-413/99, *Baumbast*, EU:C:2002:493, on the concept of derived rights of Union citizenship.

149 Directive 2004/38 of the European parliament and of the council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states.

150 De Lange and De Waele, *supra* n. 98.

151 2007 Treaty on the functioning of the EU.

152 Title V TFEU is a field of shared competence of the Union with the member states (Art. 4(2)(j) TFEU).

One of the arguments is that the so-called internal border controls are not permitted by the Schengen Border Code (SBC).[153] That, however, only means that these controls are not carried out. It does not mean that the internal borders have disappeared. Besides, the SBC provides member states with the capability of temporarily reintroducing border control at the internal borders in the event of a serious threat to public policy or internal security.[154] Although this reintroduction must be applied as a last resort in exceptional situations, practice shows that a substantial number of member states have repeatedly reintroduced internal border controls for a short period, which has raised serious discussions about the exceptionality of these situations.[155]

The second argument is that the EU should be seen as a separate legal entity. That, however, does not make it a separate state. Third, crossing internal borders (between EU member states) in the context of a change of residence, means a change of applicable rules, i.e., rules of the other member state.[156] Thus, a change of residence of an EU citizen from one member state to another is a form of migration, at least in our terminology.

3.7.2. EU Framework on Migration

Almost all regulation on residence rights within the European Union is EU secondary law. After harmonizing rules on the freedom of movement for EU citizens, the EU has set rules for migrants from outside the EU (third-country nationals) regarding labour, study, family reunification and asylum. The interpretation of these rules by the CJEU shows that international legal norms provide a mandatory framework for EU law.[157]

In May 2024 the EU agreed upon a new set of rules referred to as the Pact on Migration and Asylum, which will reform the existing common European asylum system.[158] Nine regulations and one directive have been adopted in order to secure

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[153] Schengen Borders Code, Regulation 2016/399 (codification of rules governing the movement of persons across borders, firstly in the 1985 Schengen Acquis and subsequently in Regulation 562/2006, Regulation 2013/610).

[154] As was done due to the COVID pandemic in 2020-2021, during the 2024 European Championship football, or the 2024 Olympic Games.

[155] The full list contains (over 18 years) 434 notifications: Member States' notifications of the temporary reintroduction of border control at internal borders pursuant to Arts. 25 and 28 of the SBC, <home-affairs.ec.europa.eu/document/download/11934a69-6a45-4842-af94-18400fd274b7_en>.

[156] After a period of three months, Union citizens have to register in the host member state, Art. 8 Citizens Directive.

[157] CJEU 16 January 2024, C-621/21; CJEU 11 June 2024, C-646/21 on the interpretation of the Convention on the elimination of all forms of Discrimination against Women (CEDAW) on refugee protection; CJEU 27 June 2006, C-540/03 (Parliament/Council) on international norms on family life.

[158] The European Parliament voted in favour on 10 April 2024, followed by the adoption by the Council of the EU on 14 May 2024.

external borders,[159] to facilitate fast and efficient asylum procedures,[160] to create an effective system of solidarity and responsibility regarding asylum claims,[161] and to establish a framework for resettlement of third-country nationals.[162] Besides these legal instruments the European Commission sees the embedment of migration in international partnerships as important pillar of the Pact. Although tempting and most relevant for our subject, we have not yet been able to analyse the contents and its implications.[163] Consequently, we will not reflect on the technical legal implications of this pact.[164] We note, however, that embedding migration in international partnerships, as part of the Pact on Migration and Asylum, dovetails part of the entry into force of the aforementioned Samoa Agreement, which provides the EU with a legal basis for bilateral agreements with non-EU countries on migration issues, as an example of the transformation from soft law to hard law. As the European Council states:[165]

> *The agreement aims to strengthen the capacity of the EU and the ACP countries to address global challenges together.*

3.8. **United Nations Conventions**

Most UN conventions refer to certain rights of persons and the duties of states to promote and ensure the full realization of the obligations of states under a convention. As far as the rights of migrants are concerned, most of these rights are not explicitly mentioned but are derived from other rights, e.g., a right to stay derived from the principle of non-refoulement, or derived from the right to family life.[166] We will only elaborate on a few of these UN conventions.

3.8.1. Refugee Convention

One of the first treaties that confers rights on *individuals* is the 1951 Refugee

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[159] Screening Regulation 2024/1352 and 2024/1356, Border Return Procedure Regulation 2024/1349, Crisis Regulation 2024/1359, Eurodac Regulation 2024/1358.

[160] Qualification Regulation 2024/1347, Procedures Regulation 2024/1348, Recast of Reception Conditions Directive 2024/1346.

[161] Asylum and Migration Management Regulation 2024/1351.

[162] Resettlement and Humanitarian Admission Framework Regulation 2024/1350, preamble 4 refers to the Global Compacts on Refugees.

[163] The Pact entered into force in June 2024 and will be applicable from June 2026. The European Commission is working on a Common Implementation Plan.

[164] See the comments by Steve Peers in eight blogs on <https://eulawanalysis.blogspot.com/2023/12/the-new-eu-asylum-laws-part-1.html>.

[165] <www.consilium.europa.eu/en/policies/samoa-agreement>.

[166] For example: 1985 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); 1979 UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW); 1989 UN Convention on the Rights of the Child (CRC); 2010 UN International Convention for the Protection of All Persons from Enforced Disappearance (CED); 2006 UN Convention on the Rights of Persons with Disabilities (CRPD).

Convention (RC).[167] The apparent peculiarity of this is expressed in Article 2 RC which does not start with the rights of refugees but the duties:

> *Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.*

A bit further, Article 10 RC declares that a refugee, who is removed to the territory of a contracting state, shall be considered to have been a lawful resident within that territory. Only in chapter V (titled: administrative measures) does Article 26 RC mention the right of freedom of movement.[168] Interestingly, this right entails the right to 'choose their place of residence' but emphasizes that this is "subject to any regulations applicable to *aliens* generally in the same circumstances".
In the context of the protection of the territory, and the apparent need of travel documents for crossing international borders, Article 31 RC explicitly states that a contracting state shall *not* impose penalties on account of their [refugees'] illegal entry or presence. Finally, the refugee *shall* not be expelled or returned "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".[169] This prohibition of refoulement is the cornerstone of international refugee and asylum law and is enshrined in several UN conventions.[170]

3.8.2. International Covenant on Civil and Political Rights

Another UN treaty which grants rights to peoples and individuals, and imposes duties on State Parties in the context of freedom of movement, is the 1966 ICCPR.[171] In Article 12(1) and (2) it says:

> *1. Everyone lawfully within the territory of a State shall, within that*

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[167] See *supra* n. 59.

[168] Art. 26 RC: "Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances".

[169] Art. 33 RC: prohibition of refoulement. This principle of non-refoulement is embedded in customary international law: Declaration of States Parties to the 1951 Convention or its 1967 Protocol, UN Doc. HCR/MMSP/2001/09, 2002.

[170] Cees Wouters, *International Legal Standards for the Protection from Refoulement: A Legal Analysis of the Prohibitions on Refoulement Contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture* (diss. Leiden), Antwerp, Intersentia 2009.

[171] The ICCPR was adopted by the General Assembly of the UN 16 December 1966. Ratification status (February 2023): State Parties (173); Signatory (6); No Action (18 States: Bhutan, Brunei, Cook Islands, Holy See, Kiribati, Malaysia, Micronesia, Myanmar, Niue, Oman, Saint Kitts and Nevis, Saudi Arabia, Singapore, Solomon Islands, South Sudan, Tonga, Tuvalu, and United Arab Emirates), <https://indicators.ohchr.org/>.

territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.

This article contains the right of free movement within a state, the right to leave a state and the right to enter his own, but not another state. In the same way as the rights in Article 2 ECHR-4P mentioned above are restricted, the rights in Article 12 ICCPR are restricted in several ways. Article 12(3) and (4) ICCPR reads:

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

These limbs offer all kinds of restrictions but the only requirement for such a restriction is that it is provided by law and necessary to protect the state, which is described, again, as relating to one of the container concepts: national security, public order, public health, or public morals.[172]
Article 12(4) raises another question we just want to touch on briefly: what is the meaning of 'his own country'? It seems that this concept of 'own country' is broader than the concept of country of nationality, based on recent adopted views of the Human Rights Committee.[173]

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

The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families [174] is a legal instrument that codified most if not all of the rights that were scattered over a series of different treaties.[175] Notably, the very first article in the this convention – after those on the scope – prescribes that all migrant workers (and their family members within the territory of the contracting state) have the same rights, i.e., the principle of non-

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[172] Interestingly, it only says *morals* whereas there is a relevant distinction between *public* morals and *private* morals. We think that *morals,* at least in 1963, was intended to refer to public morals.
[173] HRC 21 July 2011, 1959/2010, *Warsame v. Canada*. The HRC expresses the view 'that the author has established that Canada was his own country within the meaning of Art. 12(4) of the Covenant, in the light of the strong ties connecting him to Canada, the presence of his family in Canada, the language he speaks, the duration of his stay in the country and the lack of any other ties than at best formal nationality with Somalia'.
[174] See *supra* n. 73.
[175] Such as: 1949 Migration for Employment Convention (ILO Convention 97); 1975 Migrant Workers (Supplementary Provisions) Convention (ILO Convention 143).

discrimination with respect to rights:[176]

> *Art. 7: States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.*

Although the convention was signed in 1990, it only entered into force in 2003. Meanwhile, none of the industrial (or high-income) countries have ratified it.[177] One explanation by Martin Ruhs could be that the rights articulated in the convention are too many and too broad, for example because they also include rights for migrants who are illegally present. According to Ruhs, the convention is based on the principle of *equal treatment* of migrants and nationals rather than on a *minimum standards* approach, which characterizes many other international legal instruments.[178] Consequently, the convention failed to regulate the rights of migrant workers, simply because the convention is too ambitious; not because some rights are lacking.

3.9. **United Nations Global Compacts**

There is a stark contrast between the reluctance to sign the migrant worker convention and the unanimously adopted declaration by the UN General Assembly in 2016,[179] which paved the way for two global compacts: (a) the Global Compact on Refugees (GCR),[180] and (b) the Global Compact for Safe, Orderly and Regular Migration (GCM).[181] These global compacts are primarily non-binding instruments and political instruments.[182]

The label *compact* has no clear meaning in international law, and illustrates the difficult position in which authors find themselves to clarify what these compacts actually mean. Consequently, authors who have commented on the compacts, use cautious formulas expressing the hope that this soft law instrument will lead to legal embedding within the existing frame works, or "a road map to frame the international agenda".[183] This development of soft law instruments fits the general

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[176] Art. 7 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.
[177] Ruhs, *supra* n. 75, at p. 172.
[178] Ruhs, *supra* n. 75, at p. 173.
[179] New York Declaration for Refugees and Migrants, 19 September 2016.
[180] The Global Compact on Refugees, New York, 2018.
[181] The Global Compact for Safe, Orderly and Regular Migration, New York 2018.
[182] Preamble of the compact and section 7.
[183] Vincent Chetail, 'The Global Compact for Safe, Orderly and Regular Migration: A Kaleido-

development in international law since the 1990s of global governance without binding instruments.[184] Guild underlines that there is agreement compacts are not about creating new obligations, but that they "[are] capable of aiding the interpretation of existing international human rights conventions as regards their application to migrants".[185]

3.9.1. Global Compact on Refugees

The Global Compact on Refugees states four objectives: (1) ease pressures on host countries; (2) enhance refugee self-reliance; (3) expand access to third-country solutions; and (4) support conditions in countries of origin for return in safety and dignity.

The first objective of the Global Compact on Refugees means to strengthen burden- and responsibility-sharing. This is most important. A simple look at the figures shows that refugees are still very unevenly distributed across the world. The second objective refers to the definition of self-reliance by the UNHCR: the ability to meet essential needs in a sustainable manner and with dignity.[186] That too is highly problematic in reality: whatever reception centres or refugee camps are realized, there are too few and the capacity is too limited. The third objective is closely linked to the first: the realisation of resettlement of refugees in third countries. Again, numbers show that only a few percent of the refugees were resettled in third countries.[187] And the fourth objective actually implies the ending of war and conflicts that are the cause of refugeehood.

The Preamble of the recently adopted Resettlement and Humanitarian Admission Framework Regulation refers to the Global Compact on Refugees providing a first step of transformation of this soft law instrument into hard law.[188]

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scope of International Law', 16(3) *International Journal of Law in Context* (2020) pp. 253-268, https://ssrn.com/abstract=3589213.

[184] Jürgen Bast, Janna Wessels and Anuscheh Farahat, *The Dynamic Relationship between the Global Compact for Migration and Human Rights Law*, 2022, https://doi.org/10.5281/zenodo.7688290.

[185] Elspeth Guild and Raoul Weiland, 'The UN Global Compact for Safe, Orderly and Regular Migration: What Does It Mean in International Law?', in Giuliana Ziccardi Capaldo (ed.), *The Global Community Yearbook of International Law and Jurisprudence*, Oxford, Oxford University Press 2019. Elspeth Guild, Kathryn Allinson and Nicolette Busuttil, 'The UN Global Compacts and the Common European Asylum System: Coherence or Friction?', in Marion Pannizon, Daniela Vitiello and Tamas Molnar (eds), *Rule of Law and Human Mobility in the Age of the Global Compacts* Basel (CH) *MDPI Laws* (2022) at pp. 11, 35.

[186] The full definition is: "the social and economic ability of an individual, a household or a community to meet essential needs (including protection, food, water, shelter, personal safety, health and education) in a sustainable manner and with dignity", <www.unhcr.org/sites/default/files/legacy-pdf/4ec230eb16.pdf>.

[187] The World Migration report of 2024 mentions over the period 2005-2022 a range between 2% and 15% of the needed resettlement which has been realised.

[188] Resettlement and Humanitarian Admission Framework Regulation 2024/1350, preamble 4 refers to the Global Compacts on Refugees.

3.9.2. Global Compact for Safe, Orderly and Regular Migration

The Global Compact for Migration has 23 objectives and restates, according to Chetail: "the typical balancing act of international migration law between the national sovereignty of states and the human rights of migrants".[189] Chetail summarizes this further as follows:

> *The commitment of states to international law permeates the whole Compact: due respect for international law in general and for human rights law in particular is reaffirmed fifty-six times (...). Although there is nothing comforting in this, the renewed commitment of states towards binding rules of international law represents an important acknowledgement on its own and one of the main achievements of the Compact. In some countries, abuses committed against migrants and violations of international law have even become an integral component of their national migration policies. The gap between law and reality is so important that positivists may appear as activists for the better and the worse. Against this background, reaffirming due respect for the rule of law and human rights is all but trivial.*

However, at least some essential pieces are missing: (a) objective #8 to save lives and prevent migrants' deaths, through search-and-rescue operations, fails to mention the Law of the Sea;[190] (b) objective #14 to enhance consular protection, assistance and co-operation, does not refer to the 1963 Vienna Convention on Consular Relations adopted in 1963;[191] (c) the right to leave any country is not mentioned at all.[192] In that context, it is not surprising that several states emphasized that the compact "does not establish a human right to migrate".[193]

Bast, Wessels and Farahat qualify the GCM as having "the potential both to strengthen and to circumvent human rights law, at the level of its substantive provisions as well as at the institutional level".[194] In other words, it depends on the implementation in practice.

We would like to conclude with the observation that, despite its legal limitations: "the compact is more necessary than ever as a counter-narrative to the politically toxic debates surrounding migration at the domestic level".[195]

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[189] Chetail, *supra* n. 183, at p. 254.

[190] Including the time-honoured customary-law duty to rescue persons in distress at sea, as codified in the 1974 Convention for the Safety of Life at Sea, the 1979 Convention on Maritime Search and Rescue, and the 1982 Convention on the Law of the Sea.

[191] The 1963 Vienna Convention on Consular Relations.

[192] The objectives in the compact only mention that people might be compelled to leave their country of origin.

[193] Chetail, *supra* n. 183, at p. 256) refers to separate declarations by: Denmark, Iceland, Lithuania, Malta, and the Netherlands; UN General Assembly, A/73/PV.60 (2018), 24.

[194] Bast et al., *supra* n. 84.

[195] Chetail, *supra* n. 193, at p. 267.

3.10. **Concluding Remarks on the Origin of Migration Rights**

So, what have we got so far? Binding international norms, bilateral agreements, conventions, international agreements, trade agreements, and EU law. Second, we have soft law, such as the global compacts, containing an incomplete set of rights and promises that partly overlap and still contains serious gaps, accompanied by political statements about intentions and the importance of national interests.[196] Third, we signal a trend to include in all kinds of agreements, such as the Samoa Agreement, paragraphs with relevance to migrants. Fourth, the more rules or intentions that are agreed upon, the more complex the domain gets, which tends to 'ask' for new agreements and explanatory memorandums: a so-called reinforcing loop.[197] To conclude, we think that these elaborations on a number of legal perspectives are not enough and at least incomplete. They are reduced to two positions: the right of the human (the migrant) versus the right of the state (to control entry). Thus, the legal discourse is lacking an important third viewpoint in order to grasp the essence of migration.

4. FROM DILEMMA TO TRILEMMA

The discussion in the legal field on issues regarding migration seems to be restricted to a choice between two excluding options: human rights versus rights of states. We would like to elaborate on this dilemma in order to open up for other viewpoints.

4.1. **Dilemma**

Guild et al. (2022) signal in the application of the non-discrimination principle (greater) tension between the compacts and the EU framework:[198]

> *It is in the application of the non-discrimination principle that we see greater tension between the Compacts and the EU framework. The Compacts make clear that the human right to non-discrimination should apply irrespective of nationality or migration status, and that these are legitimate grounds for challenging differential treatment. Bringing this approach into EU law is far from straightforward, because non-discrimination on the basis of nationality is reserved for EU nationals, whereas for migrants, EU primary law calls for fair treatment, a term which is certainly not synonymous with non-discrimination.*

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[196] Chetail, *supra* n. 183. Elspeth Guild, Kathryn Allinson and Nicolette Busuttil, 'The UN Global Compacts and the Common European Asylum System: Coherence or Friction?', 11(2) *Laws* (2022) p. 35, <https://doi.org/10.3390/laws11020035>.

[197] A simple escape from such a reinforcing loop is when countries would actually transform their promises into actual actions.

[198] Guild et al., *supra* n. 196, at pp. 14-15.

This is a serious problem. In our view, this approach is exemplary for the Chinese Exclusion Doctrine according to which the issue of migration is framed as a threat to state sovereignty.[199] The result, however, is a dilemma: the sovereign state with an emphasis on control of entry on the one hand, and human rights as an obligation to migrants on the other; or simply put: the right of a human versus the right of a nation state, and nothing in between.
As mentioned in Section 3.3, this two-sided approach is reflected in national and international case law. Hilbrink showed how the ECtHR applies this approach as a balancing test in immigration cases which is determined by the interest of states in controlling immigration.[200] In its case law the ECtHR has reiterated now for almost four decades that:[201]

> *a state is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there.*

Apart from the consideration that this claim is not so self-evident,[202] the dilemma (on migration) is only seen, in this way, as a choice between opposing legal perspectives: yes or no. But, if we look at this not as a binary choice but as a balancing act between two positions, like a regular two-way seesaw, we can distinguish between different weights, which depend on the actual values of the positions (or rights) on both sides of the seesaw.

In Diagram 1 (see below) the different aspects of these rights are described and formulated (in red and green blocks) as extremes on a scale of values (or weights) of these aspects. A red block contains aspects (of a certain right) with a small weight, whereas a green block contains comparable aspects but then of a large weight. For instance, equal treatment can be seen as a realisation of rights of humans to a great extent or with great weight, whereas unequal treatment can be

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[199] Daniel Thym, 'European Migration Law between "Rescuing" and "Taming" the Nation State: A History of Half-Hearted Commitment to Human Rights and Refugee Protection', in Carina Cannizzaro et al. (eds.), *Are the EU Member States Still Sovereign States under International Law*, 8(3) *European Papers* (2023) pp. 1663-1678.
[200] Hilbrink, *supra* n. 2.
[201] Starting with ECtHR 28 May 1985, 9214/8l0, *Abdulaziz v. UK*, para. 67.
[202] Spijkerboer, *supra* n. 2.

seen as a realisation to a limited extent or with a small weight, of such a human right. The same goes, e.g., for the two (opposing) values of rights of states in terms of a large weight of national law versus a small weight of national law, corresponding with a high weight of international (or supranational) law.
In the context of the balance, a greater weight on one side (green block) is accompanied by a smaller weight on the other side of the seesaw (a red block) and vice versa. In reality, the most extreme values will seldom occur but we think it is useful to provide these to clarify the arguments. The extremes then function as the highest or lowest positions on a sliding scale. For example, in order to realize the highest form of entry control by a state at its borders (i.e., closed borders), human rights protection will drop to a very low level (i.e., push backs). Another example could be, in order to realize the highest form of equal treatment (human right), that a state should drop at its borders the entry control to its lowest possible level.

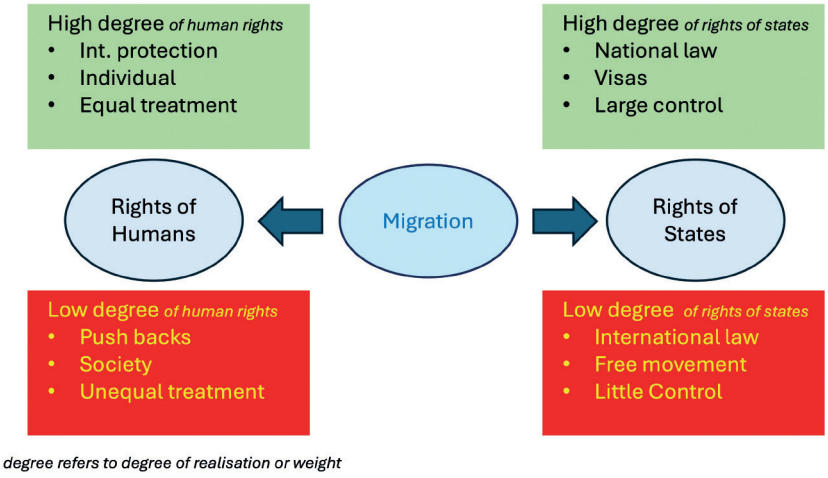

Diagram 1. Dilemma

4.2. **Trilemma**

However, there are other ways of describing competing interests. Hollifield has argued that modern democracies are trapped in a 'liberal paradox': the tension between the economic push toward greater openness, and security concerns pushing toward greater closure of the state.[203] He called this a liberal paradox because "it highlights some of the contradictions inherent in liberalism, the quintessentially modern political and economic philosophy and a defining feature of globalization".[204]

[203] James F. Hollifield, *Immigrants, Markets, and States: the Political Economy of Postwar Europe*, Harvard, Harvard University Press 1992.
[204] Hollifield, *supra* n. 5, pp. 67-98.

Hein de Haas has elaborated on this.[205] He states that the balancing act between (what we would call) state sovereignty and human rights is a false dilemma as it overlooks the economy, i.e., the missing link. If that third essential viewpoint is drawn into the equation, we get the *trilemma of migration*, which states that it is impossible to have all three preferences or choices realised at the same time.[206] Subsequently, Hein de Haas formulates his trilemma as:[207]

> *Governments can't simultaneously (1) maintain economic openness and prosperity, (2) respect foreigners' basic human rights and (3) fulfil their own citizens' anti-immigration preferences. One of the three has to go.*

In our translation into the legal domain, we would refer to the latter option as the concept of state control of entry. Such a trilemma is best depicted as a three-way seesaw:

It is exactly this approach of a three-way seesaw that shows, in the context of migration, the connections between (a theory on) the welfare state, human rights, and the nation state.[208] The great advantage of this approach, using a trilemma, is that it visualizes strongly that there are more solutions, and that not all of these solutions can be realised at the same time. That is why Hein de Haas's description ends with: 'one has to go'.
But unlike a dilemma (Diagram 1), which has only two mutually exclusive solutions, the trilemma (Diagram 2) offers (at least) three options to 'handle' the problem, which emphasizes the importance of a balancing act between three equally important aspects of migration. This might also offer a broader approach to discussions in the legal domain which tend to be restricted to 'legal aspects only'.[209]

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[205] De Haas, *supra* n. 5, at p. 322.
[206] Robert Mundell, 'Capital Mobility and Stabilization Policy under Fixed and Flexible Exchange Rates', 29(4) *Canadian Journal of Economics and Political Science* (1963) pp. 475-485. In the original context of macro-economy the choices were: (a) a foreign exchange rate, (b) free capital movement, and (c) an independent monetary policy. Only two of these three can be realised at the same time. Rodrik, *supra* n. 11, at pp. 177-196.
[207] Hein de Haas 26 April 2024, <https://x.com/heindehaas/status/1783757835450376409>.
[208] Mariana Gkliati, Tesseltje De Lange and Sandra Mantu, 'Progress in Migration and Asylum Law Scholarship – International, Intersectional, and Interdisciplinary', in Marnix Snel, Sanne Taekema and Gijs van Dijck (eds.), *Special Issue Progress in Legal Scholarship, Law and Method* (2023), doi: 10.5553/REM/.000077.
[209] Adel-Naim Reyhani and Gloria Golmohammadi, 'The Limits of Static Interests: Appreciating Asylum Seekers'Contributions to a Country's Economy in Article 8 ECHR Adjudication on Ex-

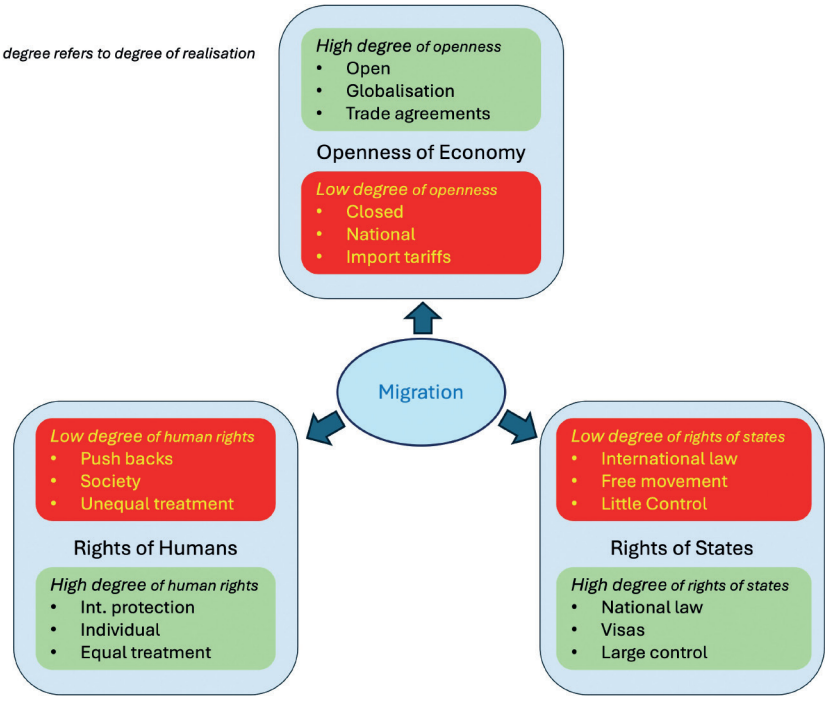

Diagram 2. Trilemma

Interestingly, the interest for economic growth is mainly driven by the (private) market, with global interest in trade and (raw) materials and in low-waged practical as well as highly skilled labour. The role of the private market is relevant from three perspectives: (a) the perspective of the employer who is in need of labour migrants, (b) the perspective of states who want to protect their local economy from the global market, and (c) the perspective of states who want to protect their labour market from immigrants because of social welfare reasons. But as Hein de Haas notes:[210]

> *The adoption of the human rights and refugee conventions and their subsequent enshrinement in national and internation law had unforeseen implications for immigration policies, as it tied governments' hands by limiting their own freedom in terms of migration policymaking.*

4.3. **Politics**

Before we get to our case study of the Western Sahara, it is necessary to quote

pulsion', 33(1) *International Journal of Refugee Law* (2021) pp. 3-27.

[210] De Haas, *supra* n. 5, at pp. 260-263.

Hein de Haas (again). He made clear that despite the clarity of the trilemma, politicians have tried to "find a path around this trilemma".[211] For instance by

> *preventing the spontaneous arrival of asylum seekers and illegal immigrants, in an effort to escape the fundamental human rights they are entitled to once they have reached the national territory. Ironically the expansion of rights to protection for refugees and other vulnerable groups such as minors has therefore strengthened the incentive for states to prevent their arrival in the first place, and to collaborate with countries of origin and transit to prevent this from happening.*

In other words, even a nuanced representation of arguments and interests on the issue may get lost in the logic of politicians. At the same time we are confronted with the way some politicians distort aspects of migration to disguise the migration trilemma, which adds a double layer to the discussion. Arguments for either one of the viewpoints are not made explicit in public debates. It leads to what Katharina Natter calls 'Ad-hocratic immigration governance': states use intentional ambiguity to secure their power over immigration.[212]

4.4. **One Has to Go Options**

In the 'one has to go' terminology of Hein de Haas, there are three different conjunctions as depicted below (see Diagrams 3, 4 and 5). In each of these, the interest of one of the three options is 'gone', meaning that one of the three has the smallest weight, or the lowest degree of realisation, leaving two remaining aspects with more weight.

In the first situation the 'openness of the economy' is gone. This can be found in a closed economy with high import tariffs and a focus on national production. That would leave some room for a high degree of protection of those already present in the country, and a high degree of control on those who want to enter.

In the second situation the 'rights of humans' have gone, or have at least been extremely minimized: unequal treatment is the norm. This can be found in a situation where the economy is completely open to the outside world and has no import tariffs or obstacles for investors. At the same time, there is a high degree of control on those who want to enter. A free flow of capital but not of people.

In the third situation, states have externalised many of their national competences to supra-national or federal levels. That implies little control on the entry of mi-

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[211] De Haas, *supra* n. 5, at p. 264.

[212] Katharina Natter, 'Ad-hocratic Immigration Governance: how States Secure Their Power over Immigration through Intentional Ambiguity', 11(4) *Territory, Politics, Governance* (2023) pp. 677-694.

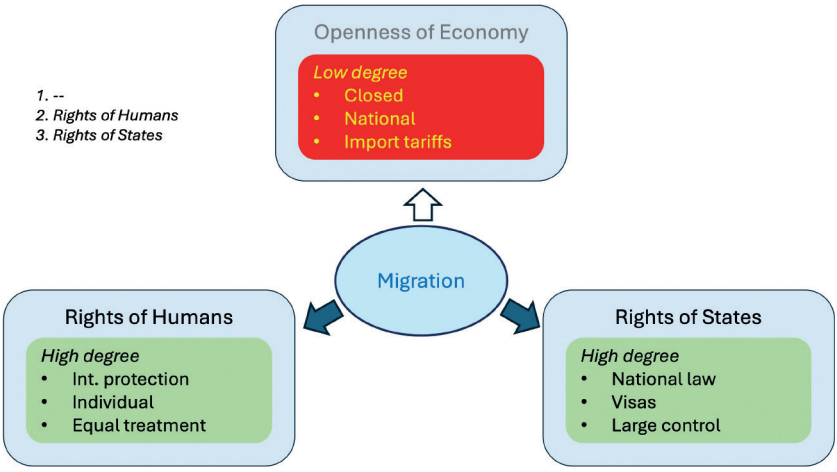

Diagram 3. Low degree of openness of the economy

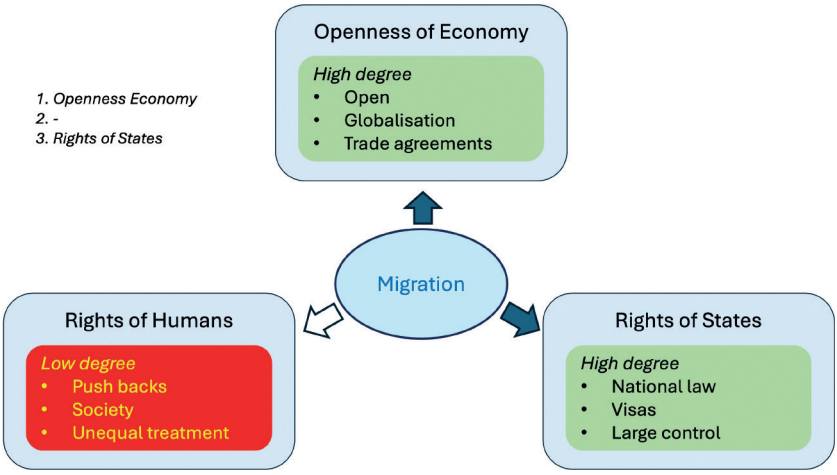

Diagram 4. Low degree of Rights of Humans

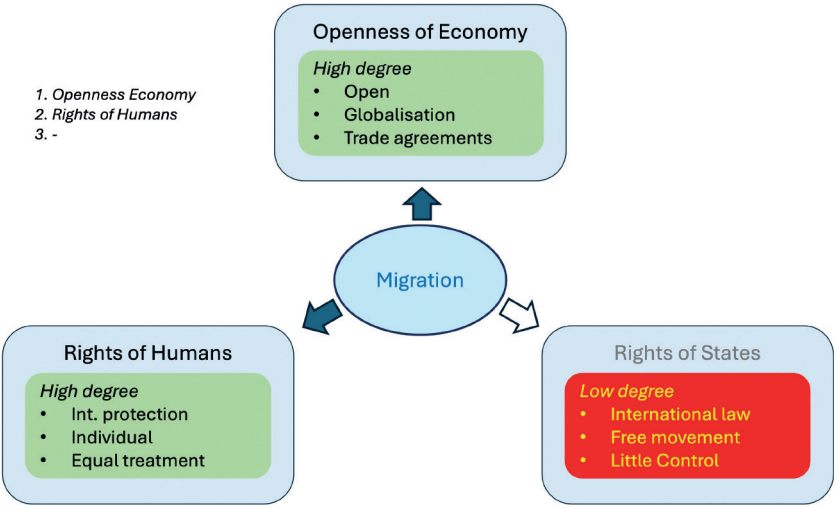

Diagram 5. Low degree of Rights of States

grants at the national level. However, it does mean that international obligations, such as those in the areas of human rights and equal treatment, can be more easily fulfilled, on the condition that the implementation is strictly monitored.

5. THE CASE OF THE WESTERN SAHARA

If we apply this trilemma to the international law framework in which states have to operate to accomplish their migration policies, we see how useful it is to include the economic well-being as a factor next to the rights of humans and the rights of (nation) states in the legal balancing act. It offers the possibility to have a deeper debate on current trends in migration as perceived by European states, and how the gravity of two of the three viewpoints, i.e., the openness of the economy and the rights of states, is prioritized by these states, while the rights of migrants are given a low weight. However, it also draws our attention to the simple question which entity is in charge if we are talking about states and territories.

We would like to illustrate this with the situation of the territory of the Western Sahara, a former colony of Spain and Morocco. In 1963 it was on the UN list of non-self-governing territories with the intention of realising self-determination by its (nomadic) population.[213] However, after the Spanish decolonisation in 1976, the referendum (scheduled finally for 1992) stalled, because parties could not agree on who would be entitled to vote: the original population or (also) the immigrants from neighbouring countries (i.e. Morocco and Mauritania) and their descendants.

[213] Report of the Committee on Information from Non-Self-Governing Territories, *supra* n. 9.

Subsequently, Morocco has taken the position that the Western Sahara should be integrated into its territory, and that Morocco has administrative power over the area.

5.1. Is the Western Sahara a Nation State?

Interestingly, the International Court of Justice (ICJ) gave an advisory opinion in 1975 on the issue stating that both Morocco and Mauritania had not provided sufficient proof that they had (partial) sovereignty over the territory at the time of the Spanish Colonization.[214] The conclusion therefore had to be that the population of the territory possessed the right of self-determination.[215]
The anti-colonial movement *Front Polisario* has been active since 1973 to obtain the right to self-determination for the Sahrawi people in the Western Sahara. The armed conflict within the Western Sahara between Morocco and the Polisario Front, between 1975 to 1991 and the period after the ceasefire (from 1991 to the present), resulted in Sahrawi people fleeing and finding refuge in refugee camps in Algeria, or trying to reach other destinations like Spain. It is estimated that about 174,000 Sahrawi people live in the Algerian refugee camps.[216] The Polisario Front runs one of the biggest refugee camps funded, among others, by the EU.
The existential question has been discussed in international law debates,[217] and boils down to the question whether the Western Sahara holds the right of a nation state, or is a part of Morocco. The first option implies that an elected or recognised representative of the Sahrawi people is the authority to set the rules for the Western Sahara and its inhabitants. The second option implies that Morocco is the authority for the territory of the Western Sahara and its people.
The first option is in line with the Chinese Exclusion Doctrine meaning that Western Sahara, as a state, should be entitled to control the entry of aliens into its territory and their residence there. That position is in line with the United Nations, which has declared the Western Sahara a non-self-governing territory, and the above-mentioned advisory opinion of the ICJ. This approach qualifies the Moroccans as immigrants and the Sahrawi people as residents: nationals (to be) of the Western Sahara.[218]
In the second option, however, the Right-to-enter Doctrine legitimizes the entry of Moroccans into the Western Sahara and the subsequent exercise of administrative power. That would qualify the Moroccans as nationals and legitimizes the

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[214] <www.icj-cij.org/case/61>.
[215] UN resolutions on the Western Sahara: Res. 1514 (XV) 14/12/1960; Res. 2229 (XXI) 20/12/1960; Resolution 2625 (XXV) 24/10/1970; Resolution 3292 (XXIX) 13/12/1974.
[216] Algeria has hosted five Sahrawi refugee camps for fifty years, <www.unhcr.org/countries/algeria>.
[217] Stephen Allen and Jamie Trinidad, *The Western Sahara Question and International Law. Recognition Doctrine and Self-determination,* Routledge, Oxford 2024.
[218] Meriem Naili, *Peacekeeping and International Human Rights Law: Interrogating United Nations Mechanisms through a Study of the UN Mission for the Referendum in Western Sahara* (diss. University of Exeter) 2022.

qualification of the Polisario Front as a terrorist organisation.
The choice of the applicable doctrine has a profound influence on the concrete interpretation of the possible trilemmas. With the first option, the Western Sahara is the relevant nation that should but, in practice, cannot exercise its rights as a state, leaving the Sahrawi people outside of the Western Sahara as refugees, or on the territory of the Western Sahara as natives. With no actual power for self-determination there is also no policy on migration to implement. The applicable diagram (Diagram 6) is empty or non-existent.

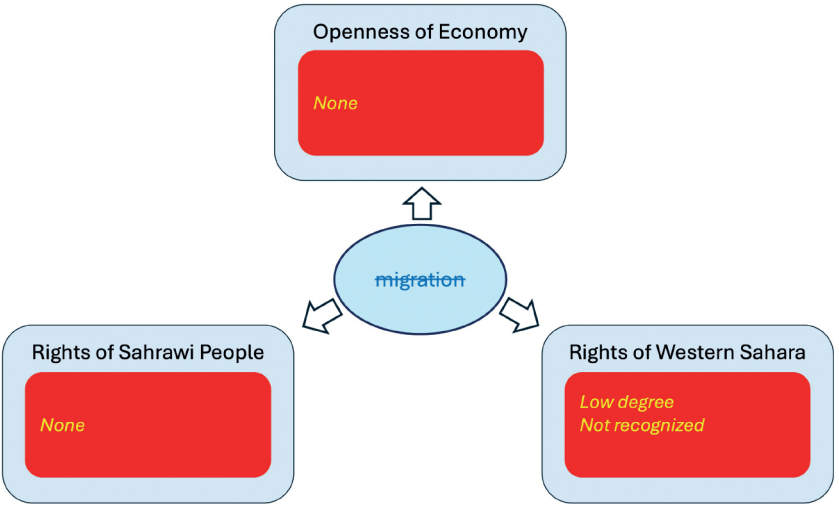

Diagram 6. No recognition

5.2. **Morocco instead of the Western Sahara**

So, although the Western Sahara has rights, these are not acknowledged and Morocco acts instead. The combination of the *de facto* authority of Morocco, the shared interests of the EU and Morocco in both economy and migration policies, results in a situation where the rights of the Sahrawi people are ignored, or 'sold' in bilateral agreements between EU and Morocco (see Diagram 7).

In its cooperation with Morocco, the EU becomes an actor in the Western Sahara case. The Polisario Front finds that the EU is not respecting the right to self-determination and the principle of the relative effect of treaties when it amended the association agreement with Morocco, with a view to extending tariff preferences to goods originating from the territory of the Western Sahara. In this complex situation it is interesting so see what the CJEU has decided, and will decide in a still pending appeal on the legality of certain economic aspects of agreements

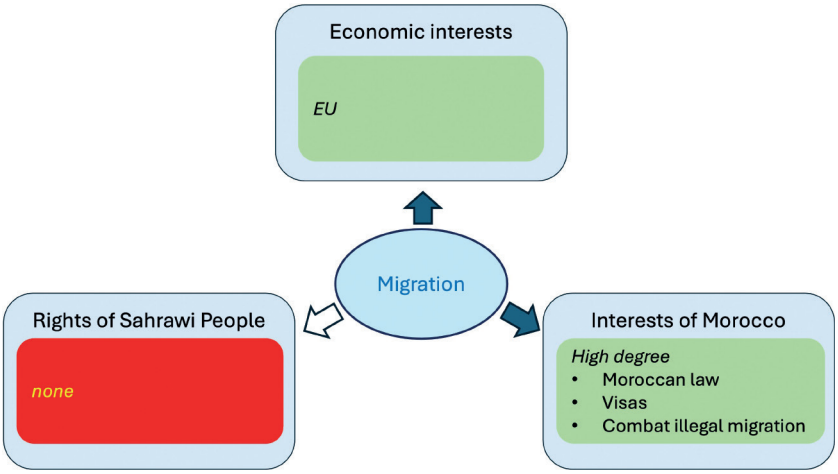

Diagram 7. Morocco in charge

between the EU and Morocco affecting the Western Sahara.[219]
The Grand Chamber of the CJEU ruled that "the expression 'Moroccan fishing zone' (...) does not include the waters adjacent to the territory of Western Sahara".[220] Subsequently, the General Court annulled the Council Decision establishing an association between the EU and Morocco.[221] The latter judgment was appealed to the CJEU. The European Commission and the Council of the EU asked the CJEU to set aside the judgment of the General Court, which, more or less, recognized the Western Sahara as a separate entity and denied the EU and Morocco the right to make arrangements about territories which are not theirs. Recently the AG concluded that the case should be referred back to the General Court,[222] because a crucial question was not discussed: "what is understood under the term 'inhabitants of the territory' in Article 73 of the UN Charter", and whether the people of the Western Sahara have given their 'consent' to the agreement?

5.3. Trilemma Conjunction: Human Rights Has to Go

That these EU actions regarding trade also relate to migration, is because of the

[219] CJEU 21 December 2016, C-104/16 *Council v. Front Polisario*; CJEU (GC) 27 February 2018, C-266/16 *Western Sahara Campaign UK*, EU:C:2018:118.
[220] CJEU (GC) 27 February 2018, C-266/16, *Western Sahara Campaign UK,* EU:C:2018:1, para. 73-79.
[221] CJEU 29 September 2021, T-279/19, T-344/19 & T-356/19, *Front Polisario v. Council,* EU:T:2021:639 (annulment of the EU-Morocco agreement amending tariff preferences granted by the EU to products of Moroccan origin and the Sustainable Fisheries Partnership Agreement, OJ 2019L34 and OJ 2019L77), appeal is still pending (C-778/21, C-779/21, C-798/21 & C-799/21). Alina Carrozzini, 'Working Its Way Back to International Law? The General Court's Judgments in Joined Cases T-344/19 and T-356/19 and T-279/19 Front Polisario v. Council', 7(1) *European Papers* (2022) at pp. 31-42.
[222] CJEU (AG) 21 March 2024, C-779/21, *Commission vs Front Polisario,* EU:C:2024:260.

crucial geographical position of Morocco as a country bordering on the EU. If we analyse the status quo regarding the Western Sahara along the lines of the migration trilemma, it becomes clear how for both Morocco and the EU the gravity of the right of the state and the open economy means letting go up on the right of migrants.

5.3.1. A High Degree of the Right of States

From the Western Sahara it is less than a 100 km journey over sea to the Spanish territory of the Canary Islands, making the coast of the Western Sahara attractive for migration to the EU. This so-called 'Western African route' has the attention of the EU in combatting illegal migration, resulting in intensified border control, sea patrol and migration control support for Morocco.[223] Negotiations on a migration deal are still ongoing, following other agreements with North African countries, in which the EU gives financial aid in return for restricting migration to Europe and making deals on trade and labour.[224] The EU budget seems endless: within the multi-annual financial framework more than 10 billion euros are reserved for agreements like this to provide in the area of migration and border management.[225] Through these negotiations, Morocco became an important player in the development of migration policies.[226] The Moroccan government is aware of its important geographical position, and uses migration in their negotiations with the EU as leverage to uphold their claim to sovereignty over the territory of the Western Sahara.[227]

These agreements are the perfect example of the working of the migration trilemma for the EU: the economic incentive – creating jobs by offering legal migration pathways – is combined with the control incentive – preventing migrants from arriving at the EU, and the human rights incentive is left out. And likewise for Morocco the economic incentive is reached by trade agreements.

Similar effects can be seen in agreements the EU has made with other countries. During the EU-Turkey deal in 2016 it was clear that human rights for migrants in Turkey would be at risk, but authorities nevertheless went ahead. In this deal Turkey received funding for the reception of Syrian asylum seekers, which required an effort by the Turkish authorities. The more recent migration deals between the EU and third countries are without this obligation for an effort, and a high risk of

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[223] Mobility Partnership Agreement 2013 and EU (financial) support for implementation of Morocco's National Strategy on Migration and Asylum.

[224] 16 July 2023, EU-Tunisia, 17 March 2024 EU-Egypt, 10 May 2024, EU-Lebanon.

[225] Thym, *supra* n. 199.

[226] Younous Arbaoui, 'The Impact of the Marrakech Compact for Migration in Morocco: The Role of the Government and of Civil Society', 55(1) *Verfassung und Recht in Übersee* (2022) pp. 19-43; Natter, *supra* n. 212.

[227] Stephen Allen and Jamie Trinidad, *The Western Sahara Question and International Law. Recognition Doctrine and Self-determination*, Routledge, Oxford 2024, chapter 5: Implications of Growing Support for the Moroccan Position on Western Sahara.

breach of human rights for migrants.[228]
Interestingly, in 2023 Niger ended the agreement establishing the legal basis for the EUCAP Sahel Niger mission, of which migration management formed an important aspect. The ending followed after the EU condemned the military coup in Niger.[229] The EU-funded multi-purpose centre in the middle of Niger is left unused, and migrant 'smugglers' got back to work again.[230] It shows the tension between the economic incentive of one state and the control incentive of the other. The development that human rights are given less weight in this trilemma, as illustrated by these types of agreements, implies an undermining of the effectiveness of international legal norms.

5.3.2. High Degree of Openness of the Economy

The interest in economic growth for both the EU and Morocco resulted in agreements on labour migration and trade. Although these agreements do not include border and migration management, trade agreements between the EU and third countries, or bilateral agreements, often do contain migration rules on visa and residence rights for labour migrants and their families.[231] Also in the negotiations on these trade and labour agreements the Moroccan authorities require EU member states to recognize the Western Sahara as Moroccan territory.[232]
The German authorities nevertheless came to an agreement with the Moroccan authorities to combat labour shortage.[233] EU Talent Partnerships, an EU labour migration vehicle, have also been closed with Morocco,[234] albeit on a nonmemorable scale. However, the nationalistic approach of EU states regarding legal pathways

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[228] Not EU but the same mechanism in the UK-Rwanda deal, in which human rights litigation was explicitly excluded.

[229] <https://www.consilium.europa.eu/en/press/press-releases/2024/05/27/eumpm-niger-council-decides-not-to-extend-the-mandate-of-the-mission/>.

[230] Statewatch, 'EU: Commission Halts Migration Cooperation with Niger, But for How Long?', 7 September 2023, <https://www.statewatch.org/news/2023/september/eu-commission-halts-migration-cooperation-with-niger-but-for-how-long/>. Amanda Bisong, Leonie Jegen and Harouna Mounkaila, 'What Does the Regime Change in Niger Mean for Migration Cooperation with the EU?, Briefing Note No. 168, ECDPM, <ecdpm.org/application/files/8516/9443/6589/What-Does-Regime-Change-Niger-Mean-Migration-Cooperation-With-EU-ECDPM-Briefing-Note-168-2023.pdf>.

[231] Tesseltje De Lange and Henri De Waele, *supra* n. 98; Tesseltje de Lange, Simon Tans and Amy Azhar, *The Interaction between EU Trade Commitments and Immigration Rules in EU member states*, Report for European Commission, 2021, <https://www.ru.nl/publish/pages/1029441/radboud_university_trade_migration_final_report_home_trade_13-12-2021_1.pdf>.

[232] See the ongoing negotiations between the Netherlands and Morocco, on social security and readmission, Tweede Kamer, vergaderjaar 2015/16, 34 052, 34 052, nr. 17, <zoek.officielebekendmakingen.nl/dossier/kst-34052-17.pdf>. A Dutch court ruled earlier that the bilateral treaty on social security did not apply to habitants of the Western Sahara, as this is not Moroccan territory according to the Dutch authorities, CRvB 5 August 2011, ECLI:NL:CRVB:2011:BR4268.

[233] 24 January 2024, Partnership to reduce irregular migration and strengthen labour migration.

[234] Kate Hooper and Ravenna Sohst, 'Competing for Talent. What Role Can Employment- and Skills-Based Mobility Projects Play?', *MPI Policy Briefs*, April 2024, <https://www.migrationpolicy.org/research/competing-talent-mobility-projects>.

differs, often resulting in high budgets for security and border management, and little budget for talent development.[235] These partnerships relate to so-called *complementary pathways* for the admission of refugees, based on labour migration or education opportunities as called for in the earlier mentioned global compacts.[236] Only a few EU member states experiment with such complementary pathways.[237] We cannot underestimate though how existing legal pathways already are used by possible refugees, as a case on a Western Saharan refugee shows us. *E.H. v. France* concerns the migration trajectory of a Sahrawi national who obtained a student visa for Ukraine in Rabat, then travelled to France to ask for international protection.[238]

Next to the agreements on labour migration, the trade agreements show for both EU and Morocco the gravity of the open economy in the migration trilemma. Here again the pending cases for the EU Court of Justice on a fishery agreement and the association agreement on extending tariff preferences are of relevance.[239] According to the Advocate General the membership of the EU to United Nations Convention on the Law of the Sea (UNCLOS)[240] obliges the EU to implement provisions for the benefit of the people of the Western Sahara with a view to promoting their well-being and development.[241] This reasoning is based on an interpretation of international law within the EU legal system, based on Article 3(5) Treaty on the Functioning of the European Union (TEU), obliging the EU when adopting an act to observe international law in its entirety, including customary international law (such as the right to natural resources).[242] Although this reasoning touches upon

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[235] Germany though does invest in talent development, see Anita Böcker, 'Het Duitse vakkrachten-immigratiebeleid' [The German migration policy on skilled workers], *Nijmegen Sociology of Law Working Paper* (2023/1), <repository.ubn.ru.nl/bitstream/handle/2066/296956/296956.pdf>.

[236] GCR calls for (para. 95) "labour mobility opportunities for refugees, including through the identification of refugees with skills that are needed in third countries" and GCM promotes "availability and flexibility of pathways to regular migration" (objective 5).

[237] Joanne van Selm, 'Complementary Pathways to Protection: Promoting the Integration and Inclusion of Refugees in Europe?', 690(1) *The Annals of the American Academy of Political and Social Science* (2020) pp. 136-152, <https://doi.org/10.1177/0002716220935868>. Sirkku Varjonen, Amanda Kinnunen, Juho-Matti Paavola, Farid Ramadan, Mika Raunio, Joanne van Selm and Tuuli Vilhunen, *Student, Worker or Refugee? How Complementary Pathways for People in Need of International Protection Work in Practice*, Report of Finish government 2021, <http://urn.fi/URN:ISBN:978-952-383-225-1>; Zvezda Vankova, 'Refugees as Migrant Workers after the Global Compacts? Can Labour Migration Serve as a Complementary Pathway for People in Need of Protection into Sweden and Germany?', 11(6) *Laws* (2022) p. 88, <https://doi.org/10.3390/laws11060088>.

[238] ECtHR 22 July 2021, 39126/18, *E.H. v. France*, para. 17.

[239] CJEU (AG) 21 March 2024, C-778/21 & C-798/21, *Commission vs Front Polisario*, EU:C:2024:258.

[240] United Nations Convention on the Law of the Sea 1982.

[241] CJEU (AG) 21 March 2024, C-778/21 & C-798/21, *Commission vs Front Polisario,* EU:C:2024:258, para. 160.

[242] CJEU 21 December 2011, C-366/10, *Air Transport Association of America a.o.*, EU:C:2011:637, para. 101.

another branch of international law,[243] it is interesting to think about the connection to migration and the migration trilemma for two reasons.
First, the right to natural resources could serve as a way to strengthen the position of local people and deepen the debate on migration law, as it would acknowledge one of the roots of migration: destabilizing areas through the use of natural resources, resulting in economic and political chaos. In a way this is mentioned in the Samoa Agreement and therefore enshrined in international law.[244] Could this angle of international customary law serve as a balancing factor for the migration trilemma? A second connection to migration law is the meaning of Article 3(5) TEU for migration agreements between the EU and third countries, and the obligation for the EU to respect international law in these agreements.[245]

5.3.3. Low Degree on Human Rights

A good example of how international human rights norms are low because of increased border management policies resulting in neglecting access to asylum procedures and pushbacks (red block, see Diagram 7 above) is provided by the Spanish (non)migration policies regarding the Canary Islands, which can be accessed from the Western Sahara by boat. In 2014, a group of thirty Sahrawi people fled from a refugee camp, after its brutal closing by Moroccan police, and crossed the sea in small boats to the Canary Islands, where they applied for asylum. Their applications were rejected without them having access to judicial review. The ECtHR came to the conclusion that Article 13 ECHR was violated, as none of them had access to an effective remedy, while the expulsion was about to take place without a proper assessment of the risk of a breach of Article 3 ECHR.[246] Interestingly, in the case of *A.C. a.o. v. Spain,* the ECtHR recognized the difficulties for states.to organize their legal system when *large numbers* of asylum seekers file an application, but upholds the minimum guarantees the treaty obliges them to.[247] This group-based approach unravels the difficulties EU member states face in protecting their external borders and explains their call for help from a state like Morocco in making this happen, for which the EU and its member states are highly critiqued in migration literature.[248] In the years that followed, border

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[243] Daniëlla Dam-de Jong, 'Sovereignty as Responsibility. Exercising Permanent Sovereignty over Natural Resources in the Interest of Current and Future Generations', in *Furthering the Frontiers of International Law: Sovereignty, Human Rights, Sustainable Development – Liber Amicorum Nico Schrijver*, The Hague, Brill / Martinus Nijhoff 2021, p. 21.

[244] "The Parties shall cooperate to prevent and address the root causes of conflict and instability holistically. They shall pay special attention to the effective governance of natural resources, notably in relation to raw materials, so as to sustainably benefit society as a whole and ensure that illegal exploitation and trade do not contribute to causing and sustaining conflict."

[245] Strik *supra* n. 142.

[246] ECtHR 22 April 2014, 6528/11 (*A.C. a.o v. Spain*).

[247] ECtHR 22 April 2014, 6528/11 (*A.C. a.o v. Spain*), para. 104. See a similar reasoning in ECtHR 2016, 16483/12 (*Khlaifia v. Italy*) and ECtHR 2018, 22696/16 (*J.R. a.o. v. Greece*).

[248] Tineke Strik, 'EU External Cooperation on Migration: In Search of the Treaty Principles'. 8(2) *European Papers – A Journal on Law and Integration*, 2023, pp. 906-929, <https://doi.

management increased, resulting in more pushbacks at sea. The ECtHR case law on collective expulsion has also grown since, and developed around the concept of the *own culpable conduct* of migrants trying to enter the EU in an irregular way.[249] EU member states have thus used the existing rights-framework to diminish individual responsibility for asylum claims, empowering their argument for control. For the route to the Canary Islands it has not resulted in a decrease in arrivals,[250] but instead in a rise of deaths at sea.[251]
Also in individual asylum claims of Sahrawi people lodged in EU member states, the background of the case of the Western Sahara influenced the individual decision-making process. EU member states are asked to take a stand on the human rights situation in the Western Sahara, being aware that their position is affecting negotiations with the Moroccan authorities on trade and migration agreements. In the earlier mentioned case of *E.H. v. France*, the ECtHR ruled that the applicant did not adduce evidence capable of proving that he was at a personal risk of treatment by the Moroccan authorities contrary to Article 3 ECHR, although it was recognised that people of Sahrawi origin who were activists for the cause of independence, could be regarded as being at particular risk.[252]

5.4 The Western Sahara and Protection Limbo

Over the years the EU-position towards the Polisario Front became vulnerable, because of Moroccan pressure to frame the Front as a terrorist organisation.[253] At the same time, the refugee population in the camps is becoming more vulnerable because of the heat and drought. The Polisario Front is an important partner for the EU and international organisations like UNHCR to manage these refugee camps. If global warming increases further, life is not sustainable in these camps and it is likely that these people will move at some point because of the harsh conditions. In 2019 the Human Rights Committee gave its decision on the merits in a related case: not about the Western Sahara but about Kiribati, an island state near New Zealand. In its adopted view the HRC took the global compacts into account, stating:

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org/10.15166/2499-8249/694>.

249 ECtHR 13 February 2020, 8675/15, *N.D. and N.T. v. Spain*, on border Melilla and Ceuta and Spain, no violation of Art. 4-P4 ECHR; see also ECtHR 30 June 2022, 42907/17, *A.B. v. Poland*; ECtHR 4 April 2024, 54029/17, *Sherov ao v. Poland*, about border Poland and Belarus, violation of Art. 4 ECHR-4P; ECtHR 5 July 2022, 55798/16, *A.A. a.o. v. North Macedonia*, about border; ECtHR 8 July 2021, 12625/17, *Shahzad v. Hungary*; and ECtHR 12 October 2023, 56417/19, *S.S. a.o v. Hungary* (on border Hungary-Serbia; violation of Art. 4 ECHR-4P.

250 Nearly 40,000 people completed the journey in 2023, a 154% rise compared to 2022; source Interior Ministry; 'Walking Borders,' *Groene Amsterdammer* 28 June 2024.

251 Anadolu Agency: in 2023 6,007 people lost their lives on the route from north-western Africa to the Canary Islands.

252 ECtHR 22 July 2021, 39126/18, *E.H. v. France*; see also ECtHR 8 July 2008, 13508/07, *A.J. v. Sweden.*

253 Terrorist attacks in Smara, Parliamentary question E-003588/2023, <https://www.europarl.europa.eu/doceo/document/E-9-2023-003588_EN.html>.

that without robust national and international efforts, the effects of climate change [...] may expose individuals to a violation of their rights under articles 6 or 7 of the ICCPR, thereby triggering the non-refoulement obligations of [...] States.[254]

However, no international instrument exists to solve this problem,[255] resulting in regional or national legal instruments.[256] Neighbouring countries of the Western Sahara signed the Samoa Agreement, which offers a legal base for a possible durable solution for the future, but it is unclear whether the Western Sahara and the Sahrawi people living in the refugee camps in Algeria may benefit from that.

6. CONCLUSION

Our effort to describe the domain of migration law shows an area in international law full of gaps. These gaps become clear in our analysis of the terminology of migration, showing a blurred patchwork of definitions, which is not helpful in public or academic debates on migration. We described how migration law started with bilateral agreements, followed by multilateral and international treaties, after which now again bilateral and multilateral agreements are developing migration law. The international law perspective as outlined in our analysis shows the more general development of non-binding instruments for global governance. The global compacts are exemplary soft law instruments paving the way for (bilateral and multilateral) legal agreements affecting migration.

The enforcement of international law in general and migration law specifically is a characteristic of international law that is divided among different actors and different levels: national states and international committees. Global norms are applied by national and regional courts. This can be seen as positive in the context of the effectiveness of international law, but negative in terms of a continuation of an incoherent framework. Exemplary for this aspect is the development of two opposed doctrines on migration rights: the Chinese Exclusion Doctrine and the Right-to-enter Doctrine. Where the Chinese Exclusion Doctrine seems to justify the right of states to control entry and therefore intensify border controls, the Right-to-enter Doctrine takes the rights of migrants as starting point in legal reasoning on migration issues.

We have shown how within migration law the traditional (legal) balancing act

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254 HRCt 24 October. 2019, CCPR/C/127/D/2728/2016, *Teitiota v. N.Z.*, para. 9.11.

255 So-called: *Protection Limbo*, Lisa Carroll, 'Not Quite Migrant, Not Quite Refugee: Addressing the Protection Gap for Climate-Induced Movement; Conceptualisation, Governance, and the Case of Mr. Ioane Teitota', 47 *Politikon: The IAPSS Journal of Political Science* (2020) pp. 36-59, <https://doi.org/10.22151/politikon.47.2>.

256 The Australia-Tuvalu Climate and Migration Agreement, <www.dfat.gov.au/geo/tuvalu/australia-tuvalu-falepili-union-treaty>; the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, and the African Guiding Principles on the Rights of All Migrants, Refugees and Asylum Seekers, October 2023.

between the interests of the state and the interests of humans does not give a full picture of the (political) balancing that takes place. The missing link in this balancing act is the economy. The migration trilemma is a helpful narrative to explain the current situation as well as to shape the future of migration law.[257]
Our case study of the Western Sahara exemplifies how economic goals are connected to European migration policymaking, not only affecting international (i.e. bilateral and multilateral) agreements but also finding its way into legal reasoning in case law. We wonder whether taking into account this economic aspect of migration, will improve the public political debate on migration, its policy making and legal reasoning in case law on migration.

7. PROPOSITIONS AND POINTS FOR DISCUSSION

Based on our findings we would like to state the following:

1. We should try to reformulate each and every dilemma as a trilemma.
2. The current debate on migration lacks clarity, which favours all but the migrant.
3. More rights for migrants can only be achieved through the strict monitoring of the implementation of these rights.
4. The Samoa Agreement is a good example of the transformation of soft law norms into hard law.
5. The effectiveness of international legal norms is undermined by the parallel development of bilateral agreements on migration.
6. The effect of the economy on the development of migration is a blind spot for both international lawyers and politicians.
7. The Chinese Exclusion Doctrine should be rejected by the ECtHR and the CJEU.

[257] De Haas, *supra* n. 6.

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