2010

From Status to Agency: Defining Migrants

Avinoam Cohen
Tel Aviv University, Faculty of Law, avinoa1@post.tau.ac.il

This paper can be downloaded free of charge from:
http://scholarship.law.georgetown.edu/imbr_2010/7

Part of the Human Rights Law Commons, and the Immigration Law Commons
FROM STATUS TO AGENCY: DEFINING MIGRANTS

AVINOAM COHEN*

I. MIGRANT CONCEPTIONS AND MIGRANTS’ RIGHTS

Theorists of migration provide a variety of explanations for the phenomenon they study, tracing different causes and motivations for migration. Studies focusing on particular migrant groups further complicate the picture by portraying a wide range of images of “the migrant.” Against this compound reality, the legal characterization of migrants appears dull, even superficial. However, the law also provides the principal common characteristic that allows us to think and speak collectively of people with markedly different life experiences.

Migrants share an intricate relationship with the law. Identifying a person as a migrant implies, in ordinary language, that she has crossed legally defined territorial boundaries. In legal terminology, invoking the term migrant usually alludes to a particular legal status that entails a specific set of rights, distinguished from those of the citizen. Acknowledging the role of law in identifying and classifying people that move across national frontiers, migrants appear as legal constructs, structured by and within the law. Regulatory mechanisms designed to direct and control migration are deeply intertwined with the phenomenon they strive to govern. In itself, this

---

* PhD Candidate and Zvi Meitar Fellow, Tel Aviv University and International Migrants Bill of Rights (IMBR) Workshop Director, Minerva Center for Human Rights, Hebrew University of Jerusalem. The author wishes to thank student participants in the IMBR workshop at the Hebrew University for thoughtful conversations, Guy Mundlak for insightful guidance, Ian Kysel and participants of the IMBR symposium at Georgetown University Law Center for comments, the Zvi Meitar Center for Advanced Legal Studies, Tel Aviv University, for ongoing support and the Minerva Center for facilitating the project. Finally, thanks are due to the journal staff for gracious editing. © 2010, Avinoam Cohen.

1. See DOUGLAS MASSEY, JACQUIN ARANDO, GRAEME HUGO, ALI KOUAOUCI, ADELLA PELLEGRINO & EDWARD TAYLOR, WORLDS IN MOTION: UNDERSTANDING INTERNATIONAL MIGRATION AT THE END OF THE MILLENNIUM 17-59 (1998) (reviewing contemporary theories of migration). Among contemporary theories of migration, the role of direct legal regulation of migration is often downplayed. However Massey et al. critically account for the minimal attention that has been given by the standard literature to the role of states and political actors. Id. at 287-90. Furthermore, it is important to point out that the law may play a significant role in constructing push and pull factors that do not address migration directly (such as the structure of markets, labor markets, land division, creation of ethnic enclaves, etc.).

2. See MICHAEL PETER SMITH & MATT BAKKER, CITIZENSHIP ACROSS BORDERS: THE POLITICAL TRANSNATIONALISM OF EL MIGRANTE (2008) (discussing translocal political activity of migrants). Smith and Bakker posit that in this context “el migrante should not be regarded as a single unitary actor.” Id. at 213.
circularity is not immanently flawed. Once the constitutive role of law is exposed, the self-referential nature of legal systems appears to be one of its inherent characteristics. Yet simply recognizing this is insufficient. Specific rules and standards are generated in light of particular conceptual foundations. Such conceptual underpinnings should be overtly recognized and scrutinized, given the implicit justification they provide for consequential normative outcomes.

For the evaluation of legal classification of migrants, it is important to understand the role of law in constructing the meaning of “migrants.” As the identification of migrants becomes commonplace, the concept of the migrant is distanced from its normative foundations. Understandings of migration are decoupled from constitutive legal and political decisions that are at the heart of the normative classification and the regulation of migration proceeds without accounting for its underlying assumptions.

The conventional discourse on migrants’ rights provides no exception to this practice. Legal formulations within this realm are often conceived as a balance between two competing normative commitments: protecting migrants’ rights and preserving states’ privileged sovereignty in core immigration-related matters. Different balances are correspondingly contributed to differences in attitudes towards migrants and the significance ascribed to each of these commitments. However, attitudes towards migrants already presuppose conceptions of migrants. Such conceptions are neither value neutral nor inconsequential. They shape “spaces of possibles” that underlie attitudes toward migrants and influence the scope and order of substantive claims for migrants’ rights. As opposed to policy choices and substantive rules concerning migration, which are usually subject to multifaceted normative debates, the constitutive elements and their conceptual underpinnings are normally ignored. Seldom is the meaning infused within the objects of

6. The “space of possible” is a term borrowed from Pierre Bourdieu, The Field of Cultural Production: Essays on Art and Literature 30-32, 177 (1993). Obviously, and perhaps more importantly, the term denotes the space of impossibles.
7. In a closely related context, conceptions of citizenship were not exempted from scrutiny. Such inquiries, usually originating within the burgeoning literature on citizenship in other disciplines, have already made their way into legal scholarship. See Herman van Gunsteren, Four Conceptions of Citizenship, in The Condition of Citizenship 36, 43-48 (Bart Van Steenbergen ed., 1994) (critiquing the three traditional conceptions of citizenship and proposing “to build a conception of citizenship that is meaningful for the present day” Id. at 44); Rogers Brubaker, Citizenship and Nationhood in France and Germany (1992) (generally exploring how “conceptions of nationhood . . . have determined the tracks along which the politics of citizenship has been driven” in France and Germany. Id. at 17); Linda Bosniak, Citizenship Denationalized, 7 Ind. J. Global L. Stud. 447,
migration regulation considered a subject for a reflective normative discussion. It is here that circularity risks turning vicious. The legal regulation of migration and membership could be legitimated by particular conceptions of migrants that regulation, perhaps inadvertently, inculcates.

Conceptions of migrants, as they will be addressed in the following discussion, are perspectives through which migrants are conceived and understood. These conceptions are hybrids, partly rooted in factual observations about migrants and migration, and partly in legal and political convictions. Providing the difficulty of achieving a general and consistent descriptive image of “the migrant,” normative elements acquire particular salience. Adapting a certain conception of migrants involves a consideration of what is it about migration that allows us to group together a specific set of human experiences and apply to them a specific arsenal of regulatory mechanisms and normative justifications. The choice embedded in the conception is twofold: it combines a focus on particular facets of a complex and fragmented reality with a normative prism that ascribes meaning and significance to these observations. These elements, although categorically distinct, are closely interlaced. In emphasizing the normative presuppositions embedded in conceptions of migrants, the present discussion holds that differences in normative choices often correspond to different outlooks on the reality of migration. Keeping in mind the variety of images available to describe migration, an evaluation of the constitutive role of law seeks to open the discussion at a point often overlooked.

453-88 (2000) (exploring various discourses and dimensions of citizenship). Unlike the citizen, the migrant is rarely conceived as a legal or political concept and the availability of different migrant conceptions is largely ignored.

8. Note that, in this respect, the use of conceptions in the literature varies, and often depends on the focus and orientation of study. The conception of nationhood for Brubaker, who looks at “cultural idioms,” supra note 7, at 9-17, is different from the use of conceptions of citizenship for Bosniak, identifying alternative conceptions within political theory, supra note 7, at 449-50, 464. The use of conceptions in the present discussion is more closely related to the normative emphasis of the latter.

9. I therefore speak of conceptions, not concepts of migrants. Cf. JOHN RAWLS, A THEORY OF JUSTICE 5-6 (rev. ed. 1999) (marking the difference between a concept of justice, reflecting common notions about the social function of just institutions, and the various conceptions of justice that interpret and substantiate the concept through different principles determining the allocation of rights and duties or specifying what division of social advantages would be considered just).

10. There is an intricate interplay between the constitutive and the reflective role of law in this respect, as normative presuppositions may both reflect and frame (or constitute) the images of what would be perceived as the “reality” of migration. A more nuanced elaboration of this point merits a separate inquiry that is outside the scope of this discussion. Cf. Guy Mundlak & Hila Shamir, Between Intimacy and Alienage: The Legal Constitution of Domestic & Care Work in the Welfare State, in MIGRATION AND DOMESTIC WORK: A EUROPEAN PERSPECTIVE ON A GLOBAL THEME 161 (Helma Lutz ed., 2008) (demonstrating the dual role of law as both reflective and constitutive in the context of domestic care workers in Israel).

11. In discussing the constitutive approach to the study of law, Garth & Sarat claim that “[p]art of the politics of law . . . involves who controls definitions and categories . . . particular categories and assumptions, generally taken for granted in the law, may limit the possibilities of those whose lives are shaped by the law. Progressive struggle for social change . . . comes in part through resistance and transformation of seemingly taken-for-granted categories and terms.” Bryant G. Garth & Austin
The boundaries of the conventional “space of possibles,” within which migration regulation is perceived, are not fixed. Probing them can potentially assist in redrawing a map that includes alternatives formerly unnoticed. Through a critical reconsideration of the conceptual basis for regulating migration, fleshing out under-discussed normative foundations, a gap in the evaluation and justification of migration regulation can be filled. This view maintains that migration is a legal and political concept, where migrants are conceived through their political and legal status (or lack thereof) and not merely as an extra-political sociological phenomenon. A normative assessment of the legal regulation of migration should not be confined to the strictures of one single conception of migrants.

The remainder of the discussion unfolds in three parts. Part II explores the commonly held status-based conception of migrants. Part III introduces an alternative agency-based conception of migrants. Part IV concludes by discussing the normative ramifications of the proposed distinction between status- and agency-based conceptions, focusing on the challenging attempt to define *migrants* within the law, through the proposed definition included in the draft International Migrants Bill of Rights (IMBR).

II. THE STATUS-BASED CONCEPTION OF MIGRANTS

As the forces behind migration vary, so do the goals of regulating migration and the interests involved. Issues ranging from economic needs to identity politics drive the regulation of migration in different directions. At times, the regulation of migration may even be a side affect of processes that would seem to have little to do with migrants in the first place. Yet while the reasons for addressing migrants within the law are diverse, the conceptions of migrants reflected by the law are not. Migration regulation largely posits a similar conception of migrants, based on migrants’ distinct legal status. The complexity of migration is eventually narrowed down even where the law applies to migrants rather tacitly. When social security or employment laws apply differently to migrants, it is usually their status that makes the difference. In other contexts, reference to status is more clear and explicit, as where laws governing migration and membership are particularly designed to allocate or impose legal status. Overall, migrants earn a distinctive place


12. Objectives ranging from the regulation of domestic secondary labor markets to controlling ethnic conflicts were identified as instigators of migration regulation. See generally Michael Piore, *Birds of Passage: Migrant Labor in Industrial Societies* (1979) (developing the segmented market theory); Adriana Kemp & Rebecca Rajman, *Migrants and Workers: The Political Economy of Labor Migration in Israel* (2008) (demonstrating how introducing migrant workers to the Israeli labor market serves as a mechanism of controlling the Israeli-Palestinian conflict).

13. “Legal status” is used here in the realm of citizenship and migration and is not endemic to this context. Rights instruments, for instance, refer to status in a variety of contexts. When Sir Maine famously wrote, “the movement of the progressive societies has hitherto been a movement from
within the law by holding an impaired legal status.\textsuperscript{14}

A. \textit{The Status-Based Conception from a Rights-Centered Perspective}

A status-based conception of migrants does not necessarily coincide with a positive approach towards the impact of legal status on the condition of migrants and the realities of their lives. On the contrary, its prominence in framing legal approaches towards migrants is repeatedly challenged. Critics express concern over the role of status in entrenching arbitrary or unjust distinctions among persons,\textsuperscript{15} and rights-centered legal instruments expressly reject status-based discrimination.\textsuperscript{16} Qualified legal status is often seen from this perspective as migrants’ main vulnerability. Yet a closer look reveals that the structural logic of status could be reproduced even when status-based distinctions are rejected. Assumptions regarding the hierarchy of status, or the notion that status is a classification imposed or confirmed by higher echelons of power, are not confined to regulation that is explicitly status-based. Foundational elements of legal status can be traced even within approaches that overtly reject status-based distinctions as the key for specifying rights and privileges.

The endeavor to enhance the legal protection of migrants outside their societies of origin, using the language of rights, usually proceeds within one of two main approaches. One approach invokes an extended conception of citizenship to assert that persons may be afforded certain rights despite the lack of formal status citizenship. A second approach seeks to supplant status with personhood. Both approaches, whether formulating their claims in the language of citizenship or personhood, appear at first sight to go beyond the formal categories of legal status. Only status remains backstage, maintaining

\textsuperscript{14}Some migrants, such as women and children, are often exposed to multiple vulnerabilities and in some respects may share material similarities with non-migrant equivalents. Nevertheless, the particular interplay of other vulnerabilities with migrants’ qualified legal status usually renders them in a materially different reality. See, e.g., Michelle J. Anderson, Note, \textit{A License To Abuse: The Impact of Conditional Status on Female Immigrants}, 102 \textit{YALE L.J.} 1401, 1402-04 (1993) (discussing how conditional status makes many female immigrants in the U.S. vulnerable to physical abuse).

\textsuperscript{15}For a discussion of the inequalities of birth-right citizenship, see Ayelet Shachar & Ran Hirscl, \textit{Citizenship as Inherited Property}, 35 \textit{POL. THEORY} 253 (2007) (comparing the justifications of property and membership regimes); AYELET SHACHAR, THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY (2009) (suggesting a principle of membership acquisition that is based on the genuine connection of persons to states).

\textsuperscript{16}The original draft version of the UNCRC included a provision granting alien children equal rights. Moreover, an attempt by the United States to limit the scope of the convention to children legally within a state’s jurisdiction was rejected outright. The special provision for migrants’ children was dropped in order to prevent limiting the grounds of prohibited discrimination. See \textsc{The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Preparatoires"} 141 (Sharon Detrick ed., 1992).
its decisive function in the construction of migrants’ rights within the law.

The extensive literature on citizenship offers various understandings of what citizenship is and what it should stand for. Whether by an emphasis on the imperatives of social inclusion, the importance of civic engagement and direct participation, or by emphasis on the role of identity, “thick” or “substantial” conceptions of citizenship are contrasted with the “thin” conception of status citizenship.\(^\text{17}\) In fact, migrants can be seen as beneficiaries of the critique of status citizenship that attempts to recast its meaning and expand its reach. Their continual presence in host countries served as an impetus for new formulations of citizenship, both in theory and practice.\(^\text{18}\) Conceiving migrants through the prism of citizenship reinforces a status-based conception of migrants. This is evident when theorists, who regard “thick” conceptions of citizenship as superior to a “thin” status-based conception, still relate to the (thin) status-based conception as the kernel of citizenship.\(^\text{19}\) Even for alternative views that do not regard formal legal status as citizenship’s \textit{sine qua non}, the idea of citizenship for migrants largely encapsulates the foundational elements of a status-based order: (a) it retains the hierarchical (and exclusionary) character of assigned legal status\(^\text{20}\) and (b) it generally presupposes that citizenship extends from within. That is, citizenship is conferred on migrant newcomers by persons who already belong to an established citizenry.\(^\text{21}\)

Replacing the terminology of citizenship with personhood is sometimes read as an effort to transcend the exclusionary nature of the former and avoid statist (or communitarian) concerns that yield status-based inequalities. For migrants, however, the difference between the approaches is not as palpable. Using personhood as the basis for allocating rights usually corresponds to a


\(^{19}\) Bosniak, \textit{supra} note 17, at 143 (“The usual assumption is that the status of citizenship is a necessary precondition for the enjoyment of citizenship in its more substantive and robust versions.”).

\(^{20}\) \textit{See} Linda Bosniak, \textit{The Citizenship of Aliens}, 56 \textit{Social Text} 29, 31-32 (1998) (remarking on the desirability of “giving up on citizenship as an aspirational project altogether” given that it “conveys a deeply exclusionary and parochial message”).

thinner layer of rights. Core instruments of international human rights law, despite their general claim for universal application, are generally careful to provide some significant qualifications in their application to persons lacking formal citizenship status. In curtailing rights as a consequence of broadened personal application, the determinative role of status is implicitly acknowledged and migrants are singled out on account of their legal status. Within the ambit of a dual normative commitment, universalism and personhood may be distanced from bounded concepts of status and citizenship, but remain in their shadow. Concurrently, lack of status remains a cornerstone of the legal characterization of the condition of migrants and is perceived as migrants’ main weakness.

The two distinct approaches to increase the legal protection of migrants are similarly structured. They follow a pattern of enhancing rights, premises on the decisiveness of legal status by drawing circles of inclusion and guaranteed rights that are dependent upon achieving the necessary status. Both envision assimilating the migrant into the citizen as the ultimate remedy for migrants’ vulnerability. Regardless of different, even contrasting conceptions of citizenship, these approaches consider legal status to be the key for defining the acceptable reach of rights and corollary state obligations. Ideally, being a migrant should be a temporary state of transition that ceases upon receiving citizenship, or conversely, upon return to a state of citizenship. Migration under this conception is viewed as an attribute that should be shed on the way to enhancing one’s rights. Formal legal status may be eschewed as a backward measure of distinction among persons, but its basic architecture remains. The distinctiveness of migrants is characterized by and within the law through legal status, which becomes at once a measure of distinction and its own counter-measure. This dialectic role of legal status is illustrated by international instruments aimed at protecting persons that do not enjoy a

22. See e.g. the interpretation of the ICCPR provided in Human Rights Committee, General Comment No. 15: The Position of Aliens Under the Covenant, Reported in 1 Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 189 ¶ 3, U.N. Doc. HRI/GEN/1/Rev.9 (May 27, 2008). In disregarding status completely there is probably more of a wishful universalism than a solid account of obligatory international human rights law. See Ryszard Cholewinski, Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment 40-76 (1997) (discussing the standard interpretation and application of international human rights law instruments on migrants and concluding that “[a]lthough international human rights norms possess an ‘all-embracing’ approach with the objective of protecting all human beings, expectations that they would greatly raise the protection of aliens above that afforded by the vague and rudimentary minimum standard of traditional law have not been fulfilled.” Id. at 76) (emphasis original).


24. Full fledged cosmopolitanism that disregards national borders in one way or another, may escape this problem, but runs into others. Realization of this utopia would arguably require a new concept of migration, as basic ideas about migration as we know them, may well become obsolete. Exposition of such ideas is however well outside the scope of the present paper.
protective citizenship status. Both the Refugee Convention\textsuperscript{25} and the Convention on the Reduction of Statelessness\textsuperscript{26} clearly imply that in the current state of affairs, only states can assure the full range of human rights to their formal citizens.\textsuperscript{27}

The implicit endorsement of a status-based conception by rights-centered approaches coincides with state-centered approaches to migration regulation, which are otherwise clearly distinguished. Domestic courts repeatedly confirm the sovereignty of states through their rulings in matters of migration, sustaining states’ authority to determine and confer legal status.\textsuperscript{28} States’ struggle against irregular migration provides another substantiation of the statist preoccupation with status and legality of migrants.\textsuperscript{29} This concurrence, often reported in the general context of migration policy and regulation,\textsuperscript{30} is not entirely unexpected. The shared conception is, however, more than a mere coalition of interests. It represents a coalescence of normative presuppositions that embeds status in the common understanding of how migrants can be addressed by and within the law.

B. \textit{Normative Underpinnings of the Status-based Conception}

The status-based conception is the conventional wisdom about what is significant in the relationship of migrants with the law. This process, by which a status-based conception becomes commonplace and considered the standard perception of migrants, is reinforced by considerations that highlight its normative advantages. First, there is a sovereignty consideration: a status-based conception is conveniently reconcilable with a view that accepts the sovereign prerogative in regulating migration. Second, there is a categori-
zation consideration: a status-based conception offers a workable device for classification that allows the law to administer and justify the extension of rights to migrants. These considerations differ in their explicit reasoning, particularly with regards to the value attached to preserving statist control over migration. At the same time, the considerations are interconnected and mutually reinforce one another, coming far closer together than what would initially appear.

In matters of migration, the sovereignty consideration is overt and normally presented directly. Proponents of stronger versions seek to preserve independent state control over migration policy and regulation. In its radical account, the very use of universal human rights in the domestic arena of migration policy is questioned. Weaker versions of this argument are captured by the idea of a dual normative commitment, balancing migrants’ rights against the obligation to uphold state sovereignty. Thus fashioned, this tension is difficult to reconcile. A formula that would be acceptable to receiving states seems to require concessions that undermine the concomitant purpose of enhancing migrants’ legal protection.  

Some commentators even question the very possibility of achieving any coherent equilibrium in this context. Available examples appear to restate this quandary, as illustrated by the experience of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW). In practice, coming to terms with the tension between State sovereignty and migrant rights within one comprehensive framework involves subtle work to consider respective and contrasting claims. An emphasis on migrants’ status can serve to strike a balance between the conflicting normative commitments by reaffirming the primacy of sovereign interests, while maintaining that migrants’ rights considerations extend within limits prescribed by status. International human rights instruments largely follow this rational, but without openly admitting that status-based distinctions are benign or that the universality of rights is ancillary to sovereignty. After all, rights-centered legal mechanisms are heavily dependent upon and vitalized by state imple-

Against the political backdrop in which migration is situated, identifying and distinguishing migrants through their legal and political status seems inevitable. Yet the political moment at which status is made central to the architecture of migration regulation is obscured, overlooking the function of migrants (and migration generally) in constructing state sovereignty.\footnote{Categorizing migrants in terms of their status solidifies states’ sovereign authority to classify and regulate (or irregulate) migration. Exclusion and inclusion are often performed emblematically, as definitive acts of sovereignty. See Rogers Brubaker, Citizenship and Nationhood in France and Germany 1–17 (1992). When even critical liberal thinkers concede that migration remains a stronghold of sovereignty, they flesh out the constitutive role of migration for sovereignty itself. See Chaim Gans, The Limits of Nationalism 130–47 (2003).} The status-based conception of migrants masks the role of law and legal status in distinguishing migrants from citizens and in creating distinct subgroups of migrants. Leaving these constitutive political decisions underexplored, the status-based conception narrows down the image of migrants to their capacity to bear and acquire legal status.

Moving to a comparatively instrumental view of sovereignty leads us to a second set of considerations, concerned with a general tendency for categorization. In a recent attempt to put together an International Migrants Bill of Rights (IMBR),\footnote{IMBR Network, International Migrants Bill of Rights: Draft in Progress, 24 Geo. Immigr. L.J. 399 (2010).} drafters and commentators struggled with questions similar to those reflected by the nuanced definition clause included in the ICRMW. An intricate web of international mechanisms and domestic laws already provides an important set of legal protections for migrants, including some acknowledged classifications that provide some migrants relatively strong legal protections. This is not a unique trait of migration law; the fragmentary and piecemeal manner that frequently characterizes legal development often explains why different categories emerge, evolve and overlap. Legal devices are not easily abandoned, and in reality, even qualified legal status may be significantly instrumental for migrants. The daily practice of immigration law in many jurisdictions provides numerous examples of migrants seeking to qualify for recognized legal classifications in attempts to acquire some measure of legal protection. Simply adhering to a longstanding practice does not in and of itself provide a sufficient justification for holding categorical distinctions among migrants. Yet even within a rights-centered perspective that is overtly suspicious of status-based distinctions, there remains a number of compelling arguments in favor of sustaining the legal categorization of migrants.
First, within a system structured through legal status, carving out status-based categories to protect migrants is a practical necessity. An incremental approach values recognized categories of protection, however partial and fragmented. It maintains that progressing through acknowledged categories would enjoy the best prospect of adoption and compliance by states, or, to put it less crudely, enhance the possibility of reaching a better and wider consensus. Advocacy campaigns that appeal to courts, state politics, or both, are expected to apply accepted terminology and utilize existing categories together with a shared status-based conception of migrants.\(^\text{37}\) This is a cautious approach, sensitive to the political economy of determining boundaries of status. In practicing restraint, it is careful of becoming counterproductive or creating a backlash. Such concerns are not ungrounded, as stretching the boundaries of recognized status occasionally increases state suspicion over the eligibility of claims for status.\(^\text{38}\) Facing state resistance, a sensible strategy for migrants’ advocates appears to be to work within existing categories, without upsetting them. The widening interpretation of the definition of “refugee” illustrates some benefits of an incremental approach.\(^\text{39}\) Furthermore, even when states are mobilized to grant status to (some) migrants or reform their immigration laws, the basic scheme of status remains intact. This is a positive spillover of citizenship status. Securing migrants with a status akin to citizenship is said to provide legal protection that is perhaps shy of full citizenship, but shares some of its core basic rights vis-à-vis the State.

Second, it appears that clear and narrow legal categories would prevent diluting the protection afforded to eligible migrants. Echoing the “rights vs. numbers” problem fashioned in the migration literature, there appears an inevitable trade-off between the numbers of migrants a state can absorb and the scope of rights (and corollary obligations) it can be expected to grant.\(^\text{40}\) The practice of balancing rights against numbers is not always made explicit, but is often difficult to ignore.\(^\text{41}\) Instead of reaching a one-size-fit-all compromise between rights and numbers, narrower categories allow states to


\(^{38}\) See, e.g., Matthew J. Gibney & Randall Hansen, Immigration and Asylum: From 1900 to the Present 223 (2005) (mentioning the example of concern about bogus family unification claims). Obviously, similar examples abound.


\(^{40}\) Martin Ruhs & Philip Martin, Number vs. Rights: Trade-Offs and Guest Worker Programs, 42 INT’L IMMIGRATION REV. 249 (2008).

\(^{41}\) In recent years, discussion regarding the naturalization of children of migrant workers has been high on the Israeli political agenda, with numerous, explicit references to such considerations across the media and within parliamentary debates. See Adriana Kemp, Managing Migration, Reprioritizing National Citizenship: Undocumented Migrant Workers’ Children and Policy Reforms in Israel, 8 THEORETICAL INQ. L. 663, 680-83 (2007) (accounting for the “politics of numbers” that were considered crucial in debates over naturalization).
specify a different set of rights to discrete classes of migrants according to their relative needs. Drafters of the IMBR were concerned that a catchall definition of migrants may be considered over-demanding and ultimately weaken the bill, either ending with a diminished scope of its provisions or limiting its appeal to states. The drafters suspected that adopting a broad category of migrants would blur acknowledged classifications and eliminate relevant status-based distinctions. Is it justified to collapse the distinction between regular and irregular migrants? Ought the established difference between migrants and refugees (or other categories of forced migrants) be tagged as irrelevant and disregarded? As these questions surface, the practice of upholding status-based categories reveals its compound character through a tacit reiteration of the status-based conception. These questions share an understanding that it is justified to distinguish categories of migrants who are more deserving or have particularly dire needs and to develop correspondingly different standards of protection. Erasing such distinctions, already recognized by an elaborated system of classification and allocation of legal status, is arguably no less arbitrary than maintaining them. Rather, it is status that offers a middle ground where conflicting perspectives can both compete and meet.

Describing the propensity to think of migrants within the law through categories of legal status does not undermine its practical relevance. Presently, when status citizenship serves as a legitimate basis for distinction and lack of status often has concrete detrimental consequences, status remains an important factor and a practical goal for migrants. For many migrants, a secured legal status is valuable in preventing harm or exploitation. The positive effects of status can nevertheless become blind spots if we fail to see their inherent limitations and consider alternatives.

C. The Status-Based Conception Reevaluated

While a status-based conception provides a point of convergence for the competing views on migration policy issues entrenched in common legal practice, it is also necessary to consider some important objections to adopting the status-based conception as the standard perspective for addressing migrants within the law.

First, a reevaluation should begin by recognizing the political and norma-
tive decisions embedded in established categories of legal status. The function of status in making the political decision commonplace, already discussed above, has several representations in practice. The definition of refugees—with its exclusion of internally displaced persons, or forced migrants who are not persecuted, and the mechanisms for sharing responsibility among states—are instructive in this respect. Conditioning working permits in employment by specific employers, and designating migrants as irregular for leaving their employers, provide further examples. Narrow definitions, in this context, shape the scope of protected vulnerabilities. There is often little to justify intrinsically the existing criteria to distinguishing between an undocumented migrant from a recognized refugee, or an irregular migrant from a visa worker. Genuine concerns regarding particular needs and vulnerabilities may be at play, but they are obfuscated by a wide assortment of realpolitik policy preferences. Legally and politically constructed categories of migrants, produced by a differential legal status regime, cannot stand in for any form of organic community.

Second, standard normative justifications supporting a status-based classification system are weakened by practices that undermine their reasoning. Constructing an agreed taxonomy of status-based distinctions does not foretell state practice within these boundaries. States may acknowledge privileged categories of migrants, such as refugees or children, while simultaneously raising procedural or substantial barriers, and ultimately dismissing claims for legal protection on contingent, individual grounds. Similarly, doubting the eligibility of particular claimants can disguise principled doubts in the legitimacy of migrants’ claims. The legitimizing effect of recognized legal status may prove only marginally beneficial for migrants,

44. See Andrew E. Shacknove, Who Is a Refugee?, 95 ETHICS 274 (1985) (critically discussing the moral relevance of politically based distinctions ingrained in the Refugee Convention).
45. Such a practice was partly ruled out by the Israeli Supreme Court in HCJ 4542/02 Kav LaOved Worker’s Hotline v. Gov’t of Israel [2006] (1) IsrLR (1) 260.
46. Drawing again from the Israeli experience, after a special commission for evaluating visa requests on humanitarian grounds was established, it was severely criticized for operating without any guidelines and rejecting nearly all the requests it received. See, e.g., the decision of the Tel Aviv District Court, sitting as an administrative court, in AA 1952/07 Carati v. State of Israel (Unreported) (2009) (Isr.). The practice of the governmental asylum commission in Israel provided similar results, rejecting the decisive majority of claims it reviewed. In its review of the domestic asylum process, the Israel Comptroller found that between the years 2000–2007, only 1.3% of the asylum claimants received official recognition as refugees. See Comptroller Report 58B for the Year 2007 and the Fiscal Year 2006, Vol. 1 105 (2008) (Hebrew), available at: http://www.mivaker.gov.il/servlet/contentTree.asp?bookid=514&id=190&contentid=&parentcid=undefined&sw=1024&hw=698. Completing the picture, the numbers of those who received temporary protection without a formal status was greater manifold. See Tally Kritzman-Amir, "Otherness" as the Underlying Principle in Israel’s Asylum Regime, 42 ISR. L. REV. 603, 617-20 (2010) (describing the Israeli practice of extending temporary group protection to asylum seekers).
47. See, e.g., Avinoam Cohen, Lone Children in the Shadow of Immigration Law: Considering Domestic Law in Light of International Human Rights Law, in CHILDREN RIGHTS AND ISRAELI LAW 347, 372-82 (Tamar Morag ed., 2010) (Hebrew) (discussing such a phenomenon in the context of claims for protection made by unaccompanied migrant children, where the age of claimants is often disputed).
while the state-centered structure of the status-based order is reaffirmed. As long as states and sovereignty are only instrumentally valued, such an outcome is disconcerting.

Third, and most significant, is the inadequate account of migration that the status-based conception can offer. Indeed, it should be admitted outright that opportunities and constraints generated by the law are part of a complex web of “push and pull factors” that shape realities and trends of transnational migration. The limits of legal concepts and conceptions in providing accurate representations of the experience of migrants should not, however, discourage the attempt to improve their fit. Only here, the appropriateness of applying a status-based categorization should be questioned. The unidimensional imagery of migrants posited by the status-based conception neglects some characteristics of migrants that could possibly make a difference in migration regulation.

The normative considerations evaluated so far explain both why the categorization of migrants is practically necessary and why utilizing status-based categories is reasonable, but these considerations come short of explaining why categories of migrants must be conceived in terms of legal status. Missing from this exposition is the possibility of non-status-based categories.

III. AN AGENCY-BASED CONCEPTION OF MIGRANTS

The ICRMW begins a movement away from status-based conceptions. In line with the conventions concerning stateless migrants and refugees, it acknowledges the significance of legal status and even strives to reduce irregularity as one of its proclaimed goals. Still, within this recognized framework and despite an emphasis on the universality of its provisions, it eventually submits that distinctions among migrants in regular and irregular

48. Institutional approaches explaining migration tend to put law at the center stage, yet this is only one of many sociological explanations for the phenomenon of migration. Compare, e.g., Kitty Calavita, Immigration, Law, and Marginalization in a Global Economy: Notes from Spain, 32 L. & SOC. REV. 529 (1998) and Kemp & Rainman, supra note 12, at 40, with Massey et al., supra note 1 (in which legal factors make little appearance). It should, however, be noted that sociological theories of migration, such as the segmented labor market theory proposed by Piore, supra note 12, presuppose an infrastructure of states and differential legal status. Truth in this respect is considerably dependent upon the eyes (and discipline) of the beholder.

49. Cf. Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35 COLUM. L. REV. 809, 826 (1935) (sarcastically criticizing the theoretical use of concepts and conceptions that is decoupled from their practical consequences). Without blunting the edge of his critique, for the present discussion it should be noted that Cohen uses concepts and conceptions rather indistinguishably.

conditions are relevant and consequential. However, there is another voice present. The ICRMW accentuates various difficulties encountered by migrants; it stipulates that migrants’ vulnerabilities are not merely derivatives of legal status or lack thereof.51

What can be read in the ICRMW is a wider concern with the human experience of migrants. Although it fails to realize the full breadth of this idea and ultimately aligns with the rules governing status, it supplies the seeds for a conceptual shift. Against the rigid understanding of migrants that is focused on one specific aspect of their condition, it offers a thicker account of migrants’ vulnerability. True, this is a relatively minor divergence from the conventional image of migrants’ vulnerability, but it at least hints at an underexplored path.

Unlike the migrant, its counterpart citizen was far more successful in attracting scholarly imagination. Citizenship maintained the prospect of being construed positively through more inclusive conceptualizations. It is therefore commended even by observers who remain sensitive to the innate exclusionary consequences of defining those who belong.52 As the concept of citizenship was rehabilitated and its conceptions thickened, citizenship as status served increasingly as a mere point of departure.53 For such evolving conceptions, citizenship stands for more than its formal legal attributes. What would be a similarly thick conception of migrants that addresses migration more richly and positively?

Answering this question should probably begin with Rawls’ claim that, in a well-ordered world, there would be no migration.54 This claim succinctly expresses the core problem. In a state-ordered world, migration has strong negative connotations. Highlighting migrants’ vulnerability, marginality and political incapacity coincides with this idea and explains why migration is regarded as a transnational phenomenon and personal attribute to be overcome. Yet the assumption that societies are better off without migration and people are better off not migrating, ascribes to an unnecessarily narrow conception of migrants. A different and insightful coalescence of underlying presuppositions about migrants yields a radically different imagery. Between the emerging model of migration and development, and a state-centered perspective that is more reluctant about migration, there appears another

51. The ICRMW mentions, inter alia, vulnerabilities owed generally to migrant workers’ “absence from their State of origin,” ICRMW Preamble, ¶ 9, or other outcomes of migration such as the “scattering of the family,” ICRMW Preamble, ¶ 11.

52. See LINDA BOSNIK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 11-16 (2006) (maintaining that citizenship may still have a redemptive value succinctly captured by the proposed construct of alien citizenship); see also Gordon, supra note 21.

53. While citizenship discourses are mainly found in political and social theory, they are increasingly found in claims made within the legal sphere. See, Guy Mundlak, Litigating Citizenship Beyond the Law of Return, in TRANSNATIONAL MIGRATION TO ISRAEL IN GLOBAL COMPARATIVE CONTEXT 51, 54-61 (Sarah S. Willen ed., 2007); Bosniak, supra note 52, at 77-101.

figure of the migrant. Proponents of migration and development emphasize migrants’ positive economic contribution. Apparently in contrast, states seeking to justify restrictive measures imposed on migrants address migration as threatening fundamental communal interests such as state sovereignty, national identity, or physical and economic security of a state’s polity. Hence, migrants may be represented as cunning, resourceful, threatening or otherwise capable of destabilizing state rule. Although the underlying motivations for these representations may be diametrically opposed, they both construct an image of migrants that is dramatically different from what the status-based conception has offered. By emphasizing other attributes of migrants, we receive a far more powerful image. From this vantage point, migrants are certainly not fatally incapable of exercising meaningful agency. Moreover, as some justifications for restrictive immigration practices suggest, these attributes are neither irrelevant for nor unnoticed by legal mechanisms for migration regulation.

This insight underscores the function of a thin, status-based conception of migrants in suppressing migrant agency. Sovereign states can create status-based categories to classify, individuate, and check the transgressing capacity of migrants. As we have seen, this conception and its disempowering effects becomes the prism through which migrants are also conceived from a rights-centered perspective. However, it also lays out the foundations for an alternative conception of migrants that, unlike the ICRMW, is not restricted to expressing migrants’ vulnerabilities.

Analogous to thick conceptions of citizenship, a thicker conception of migrants identifies basic common characteristics of migrants and migration without reducing them to the simple image generated and represented by formal legal status. Such a conception is founded on agency rather than status, linking attributes found along three main dimensions of migrants’ agency: vulnerability/resourcefulness; temporality/permanence of stay; and political (in)capacity. These dimensions represent an understanding of migration as a dynamic process that involves crossing of legal and societal boundaries and bears effect on the rights and political standing of migrants.

---


56. See Carola Suarez-Orozco & Marcelo M. Suarez-Orozco, Children of Immigration 36-65 (2002) (describing the variety of migrant experiences in light of stereotypical images of migrants). For legal representations, see, for example, Cohen, supra note 47, at 372-82.


Vulnerability/resourcefulness—The process of migration exposes migrants to vulnerability, whereby they leave their societies of origin to enter a country in which they enjoy a limited degree of social support, social benefits, and legal protection. Vulnerability may originate already in the society of origin, and is sometimes the driving force behind migration. It can further be exacerbated by the process of migration itself, as in cases of trafficked persons or, in a different manner, of migrants smuggling across borders. Where criminal activity develops around the crossing of closed borders, migrants’ dependency in their exploiters is bound to increase.

But are all migrants innately vulnerable? Even if we disregard migrants who are relatively well off, such as transnational corporate personnel, professional experts and overseas graduate students, migration itself is often indicative of the resourcefulness and adaptability of migrants. Compared with similarly-situated compatriots, left behind under the same economic or political conditions, those who made the journey may actually fair better. Flourishing undocumented communities in many target countries, sprawling transnational networks and involvement in the informal economy all destabilize a simple image of migrant vulnerability. After a closer look, one should come to wonder what substantial boundaries can be drawn, for example, between a longtime student who does not plan to return to her country of origin, personnel of international organizations or transnational corporations that have settled outside their country of origin, and a relocated high-tech engineer.

Temporality/permanence of stay—A fundamental aspect of migration that status regularly veils is its inherent transitional nature. Legal status endeavors to determine a particular temporality of stay for migrants and specify a corresponding set of rights. It thus fails to account for the way that migrants—particularly migrants in irregular status—effectively resist attempts to frame their presence. Even an inclusive approach to citizenship that would grant migrants a permanent status does not necessarily capture the

59. The ICRMW art. 3 also disregards such migrants.
60. Migrant networks attract increasing ethnographic literature, which is illuminating in this context, particularly with respect to its prospect of political mobilization. For recent illustrative examples, see Philip E. Kelly, Transnationalism and Political Participation among Filipinos in Canada, in Organizing the Transnational: Labour, Politics, and Social Change 215 (Lain Goldring & Sailaja Krishnamurti eds., 2007); Patricia Landolt, The Transnational Geographies of Immigrant Politics: Insights from a Comparative Study of Migrant Grassroots Organizing, 49 Soc. Q 53 (2008).
62. Note further how the ICRMW effectively includes contingent legal and political considerations in its non applicability clause: “The present Convention shall not apply to: (a) Persons sent or employed by international organizations and agencies . . . whose admission and status are regulated by general international law or by specific international agreements or conventions; (b) Persons sent or employed by a State or on its behalf outside its territory who participate in development programmes and other co-operation programmes, whose admission and status are regulated by agreement with the State of employment and who, in accordance with that agreement, are not considered migrant workers.” ICRMW, art. 3 (emphasis added).
essence of migration or the wishes of migrants themselves. As studies of transnational political participation show, migrants may be deeply interested in maintaining ties with their home societies and are increasingly capable of doing so.  

Shifting away from a statist perspective of legal status, notions of temporality and permanence are challenged. Migration can be understood both as a movement towards incorporation in an established polity, or as a steady flow of people, capital, culture and knowledge that interconnects polities and economies. Through both theoretical and concrete policy measures, migrants' transient nature can therefore be either suppressed or valued.

**Political (in)capacity**—For many, migrant political participation presents a contradiction in terms. This is manifest in the wide agreement both in contemporary political theory and popular politics concerning the illegibility of non-citizen migrant voting. However, examining this consensual position in view of the status-based conception of migrants sheds a different light on this truism. In deriving political participation from formal membership, a status-based duality between the migrant and the citizen is maintained. In this respect, identifying the chronic democratic deficit of migrants who are excluded from participating in making rules that govern their lives structurally situates non-citizen migrants outside the space of political belonging and engagement. Consequently, attempts to include migrants by extending or redefining the boundaries of citizenship have unintended consequences. The focus on inclusion reaffirms the political incapacity of the non-citizen migrant that remains in the realm of imposed status and in this respect constitutes their political marginality.

Making sense of political agency outside the commanding frameworks of membership is difficult, at least as long as migrants are framed by the status that identifies them. Yet, as historical precedents and ample examples in local

---


64. Alexander distinguishes between assimilationist and pluralist attitudes and policies towards migrants, and considers the distinctive approach to the transient nature of migrants as central to his typology of local migration policies. See Michael Alexander, *Cities and Labour Migration: Comparing Policy Responses in Amsterdam, Paris, Rome and Tel Aviv* 33-34, 41 (2007).

65. Even Walzer concedes this point. His claim that migrants “must be set on the road to citizenship” goes part of the way, while confirming the difference vis-a-vis citizens in matters of political participation. Michael Walzer, *Spheres of Justice: A Defense of Plurality and Equality* 60 (1983). The convergence of otherwise contrasting “status-based and presence-based conceptions of immigrant inclusion” at this point is an important basis for Bosniak’s critique of Walzer’s “ethical territorialism.” Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 THEORETICAL INQ. L. 389, 391-94 (2007). To clarify, in the terms of the present discussion, even what Bosniak considers “presence-based conceptions” of migrant inclusion can espouse status-based conceptions of migrants.

settings show, migrant participation is not at all untenable. Other venues of political participation exist besides formal representative politics. From civil society activity to unionizing, participation can take different forms. As we have increasingly seen in recent years, it can even take the form of mass protests that achieve public visibility. Emergent forms of migrant political activity show how, in reality, migrants are not innately incapable of political expression and participation.

These three dimensions draw the contours of a broad spectrum of migrant agency. Under this conceptualization, performing migrant agency may often be practically impossible, but it would remain theoretically available. An agency-based conception shifts the focus from situating migrants within predetermined spheres of status, which migrants enter and exit with no ability to alter, to identifying meaningful expressions of migrant subjectivity. This would require an elaborated effort to give concrete meaning to the political concept of migrant subjectivity. When considering migrants as agents, it is insufficient to address the migrant as “someone who is the passive recipient of specific rights and who enjoys protection of the law.”

Eventually, an agency-based conception of migrants cannot disregard status, because status-based restrictions can successfully trump migrant agency. Nevertheless, juxtaposing agency and status would still yield a thicker conception of migrants. Categorization of migrants in view of an agency-based conception would (a) be more cautious about decisions made for migrants, providing that migrants can often express their preferences.

---


69. This can be achieved, for instance, by exploring the virtues of migrants’ subjectivity. Compare this idea with the extensive exploration of citizens’ virtues in William Galston, Liberal Purposes: Goods, Virtues, and Duties in the Liberal State 221-24 (1991).

70. Chantal Mouffe, The Return of the Political 69 (1993). This excerpt is from Mouffe’s critical discussion of liberal citizenship (represented by Rawls) and civic republic citizenship, both ultimately rejected in the process of introducing radical democratic citizenship. Mouffe’s own idea links the definition of a citizen to the state (respublica) and is therefore not readily analogous to migrant agency, yet her view of the content of the political concept remains relevant.

71. Examining possibilities of how to substantially involve migrants in ordering their preferences requires a separate investigation. In the context of the present discussion, the particular legal form of the IMBR is in this respect an unfortunate divergence from the ideal envisioned in T. Alexander Aleinikoff, International Legal Norms of Migration: Substance without Architecture, in International Migration Law: Developing Paradigms and Key Challenges 467 (Ryszard Cholewinski, Richard Perruchoud & Euan MacDonald eds., 2007). It is difficult to imagine that laymen could easily discuss and debate the principled choices made by the drafters of the IMBR.
(b) allow more flexible and overlapping categorizations; and (c) ultimately, potentially change the ordering of rights afforded to migrants within immigration regimes.

IV. MIGRANTS CONCEPTIONS AND THE DEFINITION OF MIGRANTS

Translating the proposed distinction between status- and agency-based conceptions of migrants into concrete normative guidelines is difficult. One cannot simply introduce a new conception and reorient an established set of norms, conceived under a different conception. This distinction is therefore primarily a critical and heuristic device for unsettling unchallenged conventions. Hence, for example, thinking of migration as an enduring movement across borders should lead us to question the basic premise identifying migrants as persons who are outside their country of origin. Should people preparing to leave, who have already made substantial familial or financial commitments, be excluded from our understanding of migrants?72 On the other end of the migration continuum, how should returning migrants be regarded, and does it matter whether their return is seasonal or permanent? Overall, looking at migrants’ agency may help to suspend the regular mode of discussing migrants within the law to some extent. One may wish to avoid methodological nationalism by accentuating the lifecycle of transnational migration, but transnationalism alone does not render states and status obsolete.73

The chief contribution of an agency-based conception of migrants to legal instruments seeking to recapitulate migrants’ rights is to be found in its endeavor to replace legally- and politically-based categories with a more grounded and holistic view of migration than the one we encounter in practice. Contrary to available international instruments that largely disre-

72. For example, the worldwide practice of paying onerous recruitment fees, often exposing migrants to exploitative relationships, usually takes place before departure and therefore falls out of the purview of instruments focusing on the condition of migrants after the crossing of borders. Although this practice was identified as an issue of concern by drafters of the IMBR, it was ultimately not addressed. For the contribution of such practices to creating and reinforcing migrant workers’ vulnerability, see HCJ 4542/02 Kav LaOved, supra note 45.

73. See Andreas Wimmer & Nina Glick Schiller, Methodological Nationalism and Beyond: Nation-State Building, Migration and the Social Sciences, 2 GLOBAL NETWORKS 301 (2002) (contesting the assumption that the nation state society is the natural social and political form of the modern world, and addressing the conceptual limitations it places on research and thought in fields such as migration). This critique, which has led to developing an idea of transnational migration, does not ignore the material difference that crossing national borders makes in contemporary realities. Despite many similarities, there remains both a conceptual and practical disparity between transnational and intrastate migrants. See also IMBR Network, International Migrants Bill of Rights: Addendum, 24 Geo. IMMIGR. L.J. 493 (2010). Indeed, as Frederick Schauer put it in his discussion of the generalizing character of rules “[g]eneralizations are thus selective, but as selective inclusions generalizations are also selective exclusions. In focusing on a limited number of properties, a generalization simultaneously suppresses others, including those marking real differences among the particulars treated as similar by the selected properties.” See Frederick Schauer, A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 21-22 (1993) (emphasis original).
gard personal motives and particularities, an agency-based perspective suggests that specific legal formulations should be more attenuated to a diversity of personal experiences. This would require, at the outset, an adaptive classification of migrants that does not succumb to preordained status-based distinctions. Here I find the draft International Migrants Bill of Rights (IMBR) provocative and insightful in proposing to define a *migrant* as “a person who has left a State of which he or she is a citizen, national, or habitual resident.”

The wording allows for a thicker understanding of the condition of migrants, which inescapably aims at a broader personal application than other international instruments, most notably the ICRMW. This is also the underlying premise of Article 1 to the IMBR, as made clear in its commentary (para. 17), that “migrants are entitled to human rights protections, regardless of nationality, the cause of their migration and whether their presence is lawful or irregular, temporary or longstanding.” In view of the agency-based conception of migrants, such a choice enjoys a number of advantages.

First, under conditions where status plays an influential and constitutive role in setting the background circumstances for migrants, the definition of migrants is better distanced from definitions that already embed a given balance and certain criteria for protection. Most significantly, formal status-based distinctions between migrants should not be considered as the standard baseline for rights allocation. This may also assist in reducing the volumes of falsified claims aimed at attaining status-based protections. Second, the broad definition abstains from reinforcing the image of the vulnerable

---

74. IMBR, art. 1. See also the wording of ¶ 9 to the IMBR’s preamble.
75. In temporal scope, the ICRMW extends more widely than the IMBR, by also applying to migrants before departure. ICRMW art. 1(2), 2(1), provide, respectively, that (a) the convention applies “during the entire migration process” spanning from preparation, through departure and transit to return (art. 1(2)); and that (b) the definition of migrant worker includes persons prepared to be engaged or have been engaged in remunerative activity outside their state of origin or habitual residence (art. 2(1)). Conversely, the convention focuses on migrant workers (“engaged in a remunerated activity”), relating differently to undocumented workers, and in general does not challenge the conventional balancing of universal rights vs. state sovereignty. See Linda Bosniak, *Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention*, 30 INT’L MIGRATION REV. 737, 742, 758 (1991).
76. Cf. IMBR art. 3 (non refoulement), 5 (removal) and 7 (asylum seekers), that all include different protections against removal, that are intentionally broad and provide an opportunity to recognize various vulnerabilities as a basis for granting relief from removal. Particularly, compare art. 5.6 with art. 7.2.
77. Hence, linking specific benefits to age was criticized for instigating false claims for protection that overburden specialized systems of protection and even for having dire unintended consequences, such as encouraging family separation when unaccompanied children are entitled for special protection. See, e.g., UNICEF, *REFERENCE GUIDE ON PROTECTING THE RIGHTS OF CHILD VICTIMS OF TRAFFICKING IN EUROPE* 20 (2006), available at http://www.unicef.org/ceecis/UNICEF_Child_Trafficking_low.pdf; UNHCR, *GUIDELINES ON POLICIES AND PROCEDURES IN DEALING WITH UNACCOMPANIED CHILDREN SEEKING ASYLUM* (February 1997) s. 5.11), available at http://www.unhcr.org/3d4f91cf4.html. (underlining that immaturity, rather than formal criteria of age, is the reason for providing sensitive treatment). Note that this reasoning may support a recognition of particular vulnerabilities (e.g. children, victims of trafficking), but would remain careful of creating classes on entitlements based on these characteristics.
migrant, shaping migration regulation and migrants’ rights in particular in a manner that does not undercut migrant agency predeterminately. The definition, which is the most explicit legal vehicle for constructing and transmitting particular conceptions of migrants, has therefore also a positive role in offering an opportunity to reorient discussions on the justification of migrants’ classification. Third, it would allow for diverse experiences as well as competing understandings of the migration experience to take part in shaping the substance of migrant subjectivity and the scope of migrants’ rights. Fourth, the catch-all definition affords considerable space for balancing a wide application of the IMBR’s provisions and state discretion. This may offer states an opportunity to reexamine their migration regimes in consideration of the actual modes of migration they encounter. It may also facilitate local deliberation and adaptation without the recurrent need to fit into a readymade procrustean bed. In the face of an extremely versatile set of human experiences and capabilities, a wide category may actually prove to be more modest than any attempt to capture normatively relevant distinctions between migrants within preconceived categories. This relatively open texture may open spaces for creating \textit{sui generis} provisions that are adaptable for specific needs of migrants in particular conditions.\footnote{Cf. IMBR art. 8.} Finally, there is a subtle yet important idea that can be read into the active definition of the migrants as “a person who has left.”\footnote{Previous versions of the IMBR read: “a person \textit{outside} of a State . . . .” (emphasis added).} By migrating, a person may be exposed to vulnerabilities, but she may also be performing her personal capacities. Legal instruments may therefore be utilized not only to remedy migrants’ vulnerabilities, but also to enhance (or facilitate the enhancing of) migrants’ capabilities.

Migration regimes, in local, national, regional and global spheres, are under constant reconfiguration. As the pendulum of legal reforms moves on, it is important to recognize the conceptual frameworks that structure the commitment to migrant protection. For this purpose, a wide and flexible definition of migrants that can accommodate an agency-based conception of migrants suits better the complexity and diversity of migration. The IMBR presents an opportunity to break away from previous attempts to square the circle and open these multifaceted debates.

\footnotetext[78]{Cf. IMBR art. 8.} \footnotetext[79]{Previous versions of the IMBR read: “a person \textit{outside} of a State . . . .” (emphasis added).}