

COLUMBIA JOURNAL OF TRANSNATIONAL LAW

Founded by Wolfgang G. Friedmann

Vol. 56

2018

No. 2

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THE MODEL INTERNATIONAL MOBILITY CONVENTION



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This issue should be cited as 56 COLUM. J. TRANSNAT’L L. ____ (2018).

The *Columbia Journal of Transnational Law* (ISSN 0010-1931) is published three times a year by the Columbia Journal of Transnational Law Association, Inc., Columbia University School of Law, New York, New York. The Board of Editors is in no way responsible for the views expressed by contributors.

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COMMENTARIES

The Model International Mobility Convention

MICHAEL W. DOYLE*

People are as mobile as they ever were in our globalized world. Yet the movement of people across borders lacks global regulation, leaving many people unprotected in irregular and dire situations and some States concerned that their borders have become irrelevant. And international mobility—the movement of individuals across borders for any length of time as visitors, students, tourists, labor migrants, entrepreneurs, long-term residents, family members, asylum seekers, or refugees—has no common definition or legal framework.

There does exist a well-established refugee regime based on the 1951 Refugee Convention and its 1967 Additional Protocol,¹ both implemented by the United Nations High Commissioner for Refugees (UNHCR). As the nature of conflict has changed in recent decades, however, this regime has shown strain and weakness. Today there are more than sixty-five million displaced persons in the world,² a level not seen since World War II.³ Mixed flows of labor migrants and refugees fleeing for safety and economic prospects have created a crisis in the asylum-seeking process.⁴ Those forced to

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1. United Nations Convention and Protocol Relating to the Status of Refugees, art. IA(2), July 28, 1951,

U.S.T. 6259, 189 U.N.T.S. 137, <http://www.unhcr.org/en-us/3b66c2aa10> [<https://perma.cc/R36L-MZ2F>].

2. *Figures at a Glance*, UNHCR (2017), <http://www.unhcr.org/en-us/figures-at-a-glance.html> [<https://perma.cc/UMA8-43XU>].

3. *Global Trends: Forced Displacement in 2015*, UNHCR (2016), <http://www.unhcr.org/576408cd7.pdf> [<https://perma.cc/BQ66-FY45>].

4. KATY LONG, MIGRATION POL'Y INST., FROM REFUGEE TO MIGRANT? LABOR MOBILITY'S PROTECTION POTENTIAL; STEFFEN ANGENENDT, DAVID KIPP & AMREI MEIER, GERMAN INST. FOR INT'L AND SECURITY AFF., MIXED MIGRATION – CHALLENGES AND

move as a result of severe economic deprivation, gang violence, natural disasters, or climate change do not meet the “persecution” threshold of refugees and therefore are not guaranteed protection even though the threats to their lives are manifest.

Migration is similarly incoherent. Students, tourists, and short-term workers who do not fit the U.N. definition of a long-term migrant (those outside national or habitual jurisdiction for one year or more) all face distinct and separate national governance regimes. International migration itself has only recently gained a potential lead organization within the U.N. system with the International Organization for Migration (IOM) joining as a related organization in September 2016.⁵ Despite the fact that nearly half the world’s migrants are migrant workers, labor migration remains under a very weak international legal regime that has not been adopted by destination countries.⁶ Critics have charged that “national” standard of treatment simultaneously under-protects and over-privileges migrants, which leads countries of destination to under-provide legal pathways for immigration.⁷ Failing to provide legal pathways for migrants indirectly encourages irregular migration and that in turn makes migrants vulnerable to exploitation and domestic publics concerned about a loss of control over their borders.⁸ The overlaps and gaps of these existing regimes need to be addressed.

A holistic approach to human mobility is needed at the international level to address these gaps in protection, regulation and co-

OPTIONS FOR THE ONGOING PROJECT OF GERMAN AND EUROPEAN ASYLUM AND MIGRATION POLICY (2017).

5. G.A. Res. 71/1 (Oct. 3, 2016).

6. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Dec. 18, 1990, 2220 U.N.T.S. 3. For statistical estimates on the proportion of labor migrant workers, see INT’L LAB. ORG., ILO GLOBAL ESTIMATES ON MIGRANT WORKERS xi (2015).

7. See MARTIN RUHS, *THE PRICE OF RIGHTS* (2013).

8. *The Global Compact for Safe, Orderly and Regular Migration*, Int’l Labour Org., <http://www.ilo.org/global/topics/labour-migration/migration/lang--en/index.htm> [<https://perma.cc/GCS4-TDNW>] (“Evidence suggests that poorly governed labour migration can increase the incidence of irregular migration and raise the risk of exploitation for migrant workers and governance challenges for countries of origin, transit and destination.”). For borders, see Ian Traynor, *Is the Schengen Dream of Europe Without Borders Becoming a Thing of the Past?*, THE GUARDIAN (Jan. 5, 2016) <https://www.theguardian.com/world/2016/jan/05/is-the-schengen-dream-of-europe-without-borders-becoming-a-thing-of-the-past> [<https://perma.cc/9T3N-L7TZ>]; Noah Buyon, *Hungary to Build (Another) Border Fence*, FOREIGN POLICY (Feb. 24, 2017), <http://foreignpolicy.com/2017/02/24/hungary-to-build-another-border-fence/> [<https://perma.cc/BR3P-6VPH>].

operation. We must recognize the huge impact mobility has on economic growth, development and security for all countries. An international mobility regime is needed to establish a system that recognizes the human dignity of all while promoting the interests of countries of origin, transit and destination.

To address this key gap in international law, a Commission sponsored by the Columbia Global Policy Initiative has drafted a Model International Mobility Convention (MIMC).⁹ The International Mobility Commission—composed of academic and policy experts in the fields of migration, human rights, national security, labor economics, and refugee law—debated and developed a model framework on mobility that establishes a framework of minimum rights afforded to all people who cross state borders as visitors and the special rights afforded to tourists, students, labor and economic migrants, family members, forced migrants, refugees, migrants caught in countries in crisis and migrant victims of trafficking as a consequence of their status. It articulates the responsibilities of States to protect the rights of foreigners in their territory and the rights of their citizens in other States. This model convention is designed to be an ideal yet realizable framework for what States someday should adopt when comprehensively regulating international mobility.

The goal of the MIMC is thus both to reaffirm the existing rights afforded to mobile people (and the corresponding rights and responsibilities of States)¹⁰ as well as to expand those basic rights (where warranted) in order to address growing gaps in protection and responsibility that are leaving people vulnerable. It builds on existing international and regional conventions, most notably the Refugee Convention of 1951 (with its 1967 Protocol) and the Migrant Workers Convention of 1990.

The distinguished academics and policy experts comprising the International Mobility Commission were invited to attend workshops and provide feedback on draft chapters in person or through video conferencing. Acting in their personal and independent capacities, they have been asked to sign and endorse (and express reserva-

9. Model International Mobility Convention (MIMC), *International Convention on the Rights and Duties of All Persons Moving from One State to Another and of the States They Leave, Transit or Enter* (2017), http://globalpolicy.columbia.edu/sites/default/files/mimc_document.pdf [<https://perma.cc/F3Q3-6G88>].

10. Including the Charter of the United Nations, the Universal Declaration of Human Rights and other core international human rights treaties and, where applicable, international refugee law and international humanitarian law.

tions, understandings and declarations where desired) the MIMC published in this special issue. (The list of Commission and Selected Public signatories to date can be found at page 342 below; all others are invited to sign at globalpolicy.columbia.edu/mobility-convention.)

In the remainder of this introduction, I comment on some of the distinctive features of the MIMC: its scope, methodology, motivation, compliance, and outcomes.

SCOPE

The single most distinctive feature of the MIMC is its unprecedented scope. It ranges from short-term visitors to tourists, students, labor and investor migrants (both temporary and permanent), residents, those benefiting from family reunification, forced migrants, refugees, those who have been trafficked as well as migrants caught in countries in crisis. It distinguishes in separate chapters of the MIMC the particular rights and responsibilities appropriate to each group when they move across borders, forming a ladder of increasing rights appropriate to each status.

METHODOLOGY

The forty-plus Commission members (the list of Commission signatories follows) were invited to join a single-text process of negotiation. These distinguished experts were consulted by a small Secretariat team at the Columbia Global Policy Initiative (CGPI) who drafted working documents for the chapters.¹¹ Then, over a period of two years, the Commission met in person and by video in various configurations to review, edit and rewrite the chapters of the MIMC, producing by April 2017, the text published here.

Our substantive method was normative. Unlike a restatement of the law—as for the existing restatements for contracts, torts, foreign relations etc., which recapitulate existing case law in a systemat-

11. At various times the Secretariat included Yuichi Kawamoto (now at IOM Legal office in Geneva); Steven Nam at UC Davis Law and Stanford; Kelsey Clark; Hila Wesa; Doron Shiffer-Sebba; Dr. Kiran Banerjee (a postdoc at CGPI who took a special role in drafting the forced migrant and trafficking chapters); Emma Borgnäs (who undertook a similar role with the labor chapter and copyediting the whole), Alicia Evangelides, Maggie Powers and Cory Winter of CGPI who organized all our efforts; and the editorial team at the *Columbia Journal of Transnational Law* who edited and blue-booked this Special Issue.

ic manner—our method was closest to a “Realistic Utopia,” a term coined by John Rawls to refer to a system which requires using what we know about institutions, attitudes, and preferences while joining “reasonableness and justice with conditions enabling citizens to realize their fundamental interests”¹² As did Rawls, it builds on Rousseau’s injunction to legislate for “[m]en as they are, laws as they might be.”¹³ Practically, this means reflecting the world as it is and building a movement toward justice that existing, but better motivated, governments could endorse.

Thus it is no objection to say our articles do not correspond to existing treaty commitments or policy. It is an objection if you feel that governments *should* not be willing to endorse these articles. As one Commission member observed: think of this as a treaty designed for a future world in which Justin Trudeau, the current Canadian premier famous for his welcoming attitude toward refugees and migrants,¹⁴ is the typical head of government.

MOTIVATION

Our aim is to address the unrealized opportunities and the severe challenges in the regimes for migrants and refugees. Today, with 258 million persons,¹⁵ international migrants are the fifth most populous “nation,” just below Indonesia and above Brazil.¹⁶ Although the total number of migrants moving across borders has grown substantially over the past fifteen years, international migrants remain just three percent of the global population.¹⁷ Throughout histo-

12. JOHN RAWLS, *THE LAW OF PEOPLES* 7 (1993) (viewing migration as a common concern for international governance, this approach extends Rawls’ own vision of international relations).

13. JEAN-JACQUES ROUSSEAU, *IN THE SOCIAL CONTRACT; OR, THE PRINCIPLES OF POLITICAL RIGHTS*, Introduction (1893). For Rawls’ invocation of Rousseau, see JOHN RAWLS, *THE LAW OF PEOPLES: WITH, THE IDEA OF PUBLIC REASON REVISITED* 13 (2001).

14. See Trudeau’s tweet retweeted more than 400,000 times: Justice Trudeau (@JustinTrudeau), TWITTER (Jan. 28, 2017, 12:20 PM), <https://twitter.com/justintrudeau/status/825438460265762816?lang=en> [<https://perma.cc/9XQ7-A9VC>].

15. Dep’t of Econ. and Social Aff., *Trends in International Migration: The 2017 Revision*, UNPOP/DB/MIG/Stock/Rev.2017 (2017). The U.N. definition of a migrant measured in this data is someone resident in a country not of his or her birth for more than one year.

16. *Migration in the world*, INT’L ORG. FOR MIGRATION, <http://www.iom.sk/en/about-migration/migration-in-the-world> [<https://perma.cc/43LJ-LD59>].

17. *Id.*

ry, human beings have been defined by their mobility. One hundred and twenty thousand years ago, our human ancestors moved north from southern Africa and then either went west or east; and some thus poured out of Africa to inhabit the globe. At present, more than two thirds of international migrants live in Europe, Asia or North America, in that order. Most migrants come from India, then Mexico, then Russia, China, Bangladesh and others.¹⁸ They make crucial contributions to productivity and innovation around the world.¹⁹

Unfortunately, many migrants are also undocumented and too often exploited by employers as a result. Today, human mobility also includes 22.5 million refugees and almost three million asylum seekers.²⁰ Driven from their homes by civil wars, 2014 saw the largest increase in the numbers of displaced in a single year—nearly double the numbers seen in the previous decade, and a level not seen since World War II.²¹ These numbers continued to climb in 2015, fell back somewhat in 2016 but increased again in 2017.²² Compounding the problem of protracted displacement, the number of refugees returning home is at a thirty-year low.

Over half of all refugees are under the age of eighteen,²³ raising the danger of a lost generation without secondary education or job skills and at serious risk of being exposed to threats of

18. Dep't of Econ. and Soc. Aff., International Migration Report 2015 Highlights, ST/ESA/SER.A/375 at 1 (2016).

19. See, e.g., a report of September 2016 prepared by a panel of social scientists, including economists, sociologists, and demographers. NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, THE ECONOMIC AND FISCAL CONSEQUENCES OF IMMIGRATION 5 (2016), http://d279m997dpfwgl.cloudfront.net/wp/2016/09/0922_immigrant-economics-full-report.pdf [<https://perma.cc/4HK7-YLMP>] (“Importantly, immigration is integral to the nation’s economic growth. Immigration supplies workers who have helped the United States to avoid the problems facing stagnant economies created by unfavorable demographics—in particular, an aging (and, in the case of Japan, a shrinking) workforce. Moreover, the infusion by high-skilled immigration of human capital has boosted the nation’s capacity for innovation, entrepreneurship, and technological change. The literature on immigrants and innovation suggests that immigrants raise patenting per capita, which ultimately contributes to productivity growth.”).

20. UNHCR, GLOBAL TRENDS – FORCED DISPLACEMENT IN 2016 (2017), <http://www.unhcr.org/5943e8a34> [<https://perma.cc/R5Y4-XXUG>].

21. UNHCR, GLOBAL TRENDS – FORCED DISPLACEMENT IN 2015 5 (2016), <http://www.unhcr.org/576408cd7.pdf> [<https://perma.cc/RX27-XAXK>].

22. *United Nations: Refugee Displacement at Seven-decade High*, NEWSLINE (June 19, 2017) <https://newsline.com/united-nations-refugee-displacement-at-seven-decade-high/> [<https://perma.cc/Z8UZ-H3WQ>].

23. *Children*, UNHCR, <http://www.unhcr.org/en-us/children-49c3646c1e8.html>, [<https://perma.cc/B7UB-5MNX>].

trafficking, child labor or child marriage. Add to this that eighty-five percent of the forcibly displaced are being hosted by developing countries that can least afford the cost such as Lebanon, Jordan, Turkey, Pakistan, Iran, Ethiopia and Kenya.²⁴ Without much more substantial global responsibility sharing through adequate funding or resettlement to third countries, this is not sustainable.

On 19 and 20 September 2016, the international community gathered in two summits to address the migration and refugee crises. On the 19th, the U.N. hosted a summit that reaffirmed long standing principles of protection for refugees and the value of “safe, orderly and regular migration”²⁵ and welcomed the IOM into the U.N. system. On the 20th, U.S. President Barack Obama led a Leaders’ Summit on Refugees at which governments pledged more resources and more resettlement opportunities for refugees.²⁶

States postponed most of the hard diplomatic work until 2018, with these discussions promising three specific outcomes in two “compacts”:²⁷

1. To adopt a global compact for safe, orderly and regular migration in 2018, a set of guidelines for shared principles and approaches (Para 63, NYD).²⁸
2. To develop guidelines on the treatment of migrants in vulnerable situations (These guidelines will be particularly important, for example, for the increasing number of unaccompanied children on the move) (Para 52, NYD).²⁹
3. To achieve a more equitable sharing of the burden and responsibility for hosting and supporting the world’s refugees by adopting a global compact on refugees in 2018 (Para 68, NYD).³⁰

These are big promises, and fulfilling them requires much better

24. *Mid-Year Trends 2016*, UNHCR (Feb. 17, 2017), <http://www.unhcr.org/statistics/unhcrstats/58aa8f247/mid-year-trends-june-2016.html>, [<https://perma.cc/NH5R-MXF4>].

25. G.A. Res. 71/1, *supra* note 5, ¶ 4 (Oct. 3, 2016).

26. Office of the Press Secretary, *Fact Sheet on the Leaders’ Summit on Refugees*, WHITE HOUSE (Sept. 20, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/09/20/fact-sheet-leaders-summit-refugees>, [<https://perma.cc/PP3N-8643>]. It remains to be seen whether the promises are kept.

27. G.A. Res. 71/1, *supra* note 5.

28. *Id.* ¶ 63.

29. *Id.* ¶ 52.

30. *Id.* ¶ 68.

leadership and new reform coalitions. But we also need new and sensible standards to shape the movement of people across borders that also address all three of those challenges collectively, not in siloed agreements. The latter is what we have tried to provide in the MIMC.

Our Commission thus decided to address the gaps and flaws in two major treaties: the Refugee Convention of 1951 and its 1967 Protocol and the Migrant Workers Convention of 1990. Some inconsistencies we cannot address. We live in an incoherent world of sovereign States in which everyone has a right to leave any country³¹ but no one has a right to enter any State except his or her country of origin, unless a special treaty regime permits it.³²

Each treaty, however, can be improved. For refugees, the narrow definition of grounds for protection (persecution on the basis of race, religion, nationality, social group or political opinion)³³ needs to be broadened to include flight from life-threatening drought or floods (such as are increasingly caused by climate change)³⁴ or from civil wars and generalized violence.³⁵ Refugees have a right to non-refoulement—not to be expelled—once arrived to the territory of another state, but no right to enter a state and make a claim for international protection.³⁶ Once refugees gain protected status, the Refugee Convention grants rights equivalent to other aliens,³⁷ but this

31. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 13(2) (Dec. 10, 1948), <http://www.un.org/en/universal-declaration-human-rights/> [<https://perma.cc/BPS8-T7ZQ>].

32. Such as the Schengen, passport-free area in Europe, part of the unfettered mobility authorized by The Treaty on the Functioning of the European Union 45. *Schengen Area*, EUR. COMMISSION, MIGRATION AND HOME AFF., http://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen_en [<https://perma.cc/VB4K-ASFX>]; Treaty on the Functioning of the European Union, art. 45, Dec. 13, 2007, C 326/47, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN> [<https://perma.cc/H562-GKYN>].

33. Refugee Convention, *supra* note 1.

34. Somini Sengupta, *Climate Change Is Driving People From Home. So Why Don't They Count as Refugees?*, N.Y. TIMES (Dec. 21, 2017), <https://www.nytimes.com/2017/12/21/climate/climate-refugees.html> [<https://perma.cc/8DMN-NKVM>].

35. Already envisaged in the Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Nov. 22, 1984, and the Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (“OAU Convention”), Sept. 10, 1969, 1001 U.N.T.S. 45.

36. Refugee Convention, *supra* note 1, art. 33.

37. *Id.* arts. 17 and 21.

may not include rights to employment or access to higher education, unless the country of asylum chooses to do so.

Many governments, fortunately, are more protective than the existing treaty obligations require.³⁸ However, they are still susceptible to reactionary backsliding and potential lack of political will to implement their promises. We need to establish a common floor of protections applicable to all persons on the move no matter where they are, not just within a few rights-respecting States. The MIMC addresses all of these issues and more. It expands the grounds for asylum to include “forced migrants” based on a “serious harm” standard that goes beyond state-based persecution. For refugees and forced migrants, the MIMC provides equivalent rights; and it offers rights equivalent to nationals, rather than to aliens, without a waiting period. It specifies that there is a right to enter if fleeing directly from persecution or threat to life of serious harm. The MIMC makes this realizable by establishing genuine shared responsibility among States.³⁹ It curtails arbitrary distribution of duties of asylum based predominantly on proximity, by adding consideration of capacity to provide assistance (borrowing from the EU asylum proposal—taking into account population, GDP, past refugee numbers protected, and rates of domestic unemployment).⁴⁰

With respect to migrant workers, the 1990 Migrant Workers Convention importantly mandated rights to unionization, pay equal to nationals in similar jobs, legal process guarantees and many other rights.⁴¹ For temporary migrants, critics say the 1990 Convention has “too many rights,” when it mandates rights equal to nationals to education access, subsidized housing, higher education, health care,

38. For example, African governments that implement the AU Convention and South American governments that implement the Cartagena Declaration. Moreover, many European countries have a more progressive implementation too, especially those implementing EU Directive 2011/95. We borrow many of these protections and introduce them in the Model International Mobility Convention.

39. It thus responds to the eloquent pleas of the Elders in *THE ELDERS, IN CHALLENGE LIES OPPORTUNITY: HOW THE WORLD MUST RESPOND TO REFUGEES AND MASS MIGRATION* (2016),

http://theelders.org/sites/default/files/the_elders_report_on_refugee_and_mass_migration_-_sept2016_-_final.pdf [<https://perma.cc/6CK9-HN2W>].

40. *Proposal for a COUNCIL DECISION establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary*, EUROPEAN COMM’N (Sept. 9, 2015), http://eur-lex.europa.eu/resource.html?uri=cellar:7a15efe3-053d-11e5-8817-01aa75ed71a1.0001.02/DOC_1&format=PDF [<https://perma.cc/7YRA-SRMX>].

41. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 16 (judicial process), art. 25 (equal pay), art. 26 (participation in unions), Dec. 18, 1990, 30 I.L.M. 1517, 1521.

etc.⁴² Unfortunately, this tends to mean that destination countries with extensive social welfare sectors will not fill positions that, had they been filled, would have benefitted both migrants and the origin countries from which the migrants come. Consequently, the 1990 Convention has very few ratifications by countries of net immigration because it has not been seen as meeting their interests.⁴³ This is a problem because its major purpose is to provide protections for immigrant labor in destination countries.

The MIMC addresses these concerns by creating a special regime for temporary workers.⁴⁴ This regime establishes a number of clearly delineated permissible modifications of the rights or benefits of temporary migrant workers while also granting rights not now widely available to them. This includes facilitating multiple visa entries so that temporary labor can retain close ties to families and communities of their origin countries.⁴⁵ It moreover proposes portable pensions so that temporary laborers can benefit from the retirement funds they earn in countries of destination wherever they retire.⁴⁶ The regime also sets time limits for temporary labor, ensuring that temporary laborers have a path to permanent residency and do not become a permanent class of disadvantaged laborers.

Beyond reforming and improving upon existing legal instruments, the MIMC also adds a number of novel regulations and protections for areas of human mobility that until now have largely lacked coverage by any existing global regime. To do so, the MIMC creates a framework for tourists, international students and migrant residents (those who are not employed, retirees etc.) to provide further protections for the rights of all mobile persons.

The MIMC concludes with an implementation chapter that creates committees to monitor and resolve disputes and proactively facilitate compliance. It adds two important mechanisms: one identifies demand and provides a clearing house market for labor through a Mobility Visa Clearing House⁴⁷ and the other establishes a Respon-

42. See, e.g., MARTIN RUHS, *THE PRICE OF RIGHTS: REGULATING INTERNATIONAL LABOR MIGRATION* (2013).

43. Only Chile and Argentina are countries of net immigration (2007–2015) among the thirty-eight signatories.

44. MIMC, *supra* note 9, arts. 98–110.

45. *Id.* art. 104. Douglas S. Massey, *Theories of International Migration: A Review and Appraisal*, 21 *POPULATION & DEV. REV.* 631 (1995).

46. Special Representative of the Secretary-General for Migration, *Report of the Special Representative of the Secretary-General for Migration*, ¶¶ 64–65, U.N. Doc A/71/728 (2017).

47. MIMC, *supra* note 9, art. 209.

sibility Sharing procedure (modeled after the Paris Climate Agreement) to help countries pledge and implement commitments to extend funding and resettlement opportunities for refugees and forced migrants.⁴⁸ The two mechanisms are connected: forced migrants and refugees are provided resettlement opportunities by gaining priority access to a quota of labor visas under the Visa Clearing House (without losing their protected status).

The overall aim of the MIMC is not to limit the generosity or openness of States, but to establish a floor; a minimum framework on which countries unilaterally, bilaterally and regionally can build.

COMPLIANCE

The MIMC strengthens the human rights claims of all those crossing borders, including undocumented labor migrants, forced migrants, refugees and those trafficked. And the MIMC applies *erga omnes*—every refugee or forced migrant or labor migrant is protected whether her or his home country ratifies or not. Good as that is, there arises a serious problem: how to ensure reasonable compliance given this significant expansion of rights?

The biggest winners are the mobile. Refugees get adequate protection to save their lives, unskilled migrants can multiply their incomes by a factor of ten, and skilled migrants find a ready market for their skills. Compliance by mobile persons is reliable.⁴⁹ Countries of origin lose skilled labor but, through remittances, gain \$432B p.a. (2015),⁵⁰ vastly more than foreign aid flows. According to most studies, migrants are either economically beneficial (or of negligible cost) to destination countries.⁵¹ But they are also in nearly inexhaust-

48. *Id.* art. 211. For an insightful analysis of the importance of labor mobility for refugees, see KATY LONG & SARAH ROSENGERTNER, MIGRATION POL'Y INST., PROTECTION THROUGH MOBILITY: OPENING LABOR AND STUDY MIGRATION CHANNELS TO REFUGEES (2016), <http://www.migrationpolicy.org/research/protection-through-mobility-opening-labor-and-study-migration-channels-refugees> [<https://perma.cc/BP3M-X5UZ>].

49. Those same laborers, of course, and the businesses that exploit their labor are not good candidates for compliance with mobility restrictions.

50. WORLD BANK GROUP, MIGRATION AND DEVELOPMENT: A ROLE FOR THE WORLD BANK GROUP (2016), <http://pubdocs.worldbank.org/en/468881473870347506/Migration-and-Development-Report-Sept2016.pdf> [<https://perma.cc/9VP5-BQV8>].

51. *Is migration good for the economy?*, ORG. FOR ECON. CO-OPERATION AND DEV. (2014), <https://www.oecd.org/migration/OECD%20Migration%20Policy%20Debates%20Numero%20202.pdf> [<https://perma.cc/LP6M-CS6E>]. See also, Jonathan Woetzl et al., *Global migration's impact and opportunity*, MCKINSEY GLOBAL INST. (Nov. 2016),

ible supply. According to a recent Gallup study, up to 700 million want to move.⁵² As Professor Rey Koslowski has argued, these unequal dynamics have meant that destination countries can set unilateral terms.⁵³ Motivating them to comply with a multilateral convention that expands rights is the challenge.

Potential noncompliance with treaty-established regulatory frameworks can be deterred by the threat of retaliation, as it is with the World Trade Organization.⁵⁴ But, clearly, the MIMC cannot rely on this for many of its provisions—States are not likely to be moved by: “if we don’t take their refugees, they won’t take ours.” But there are reciprocal benefits exclusive to joining the club. Signatories extend benefits to other signatories, as they do in the new refugee and forced migrant obligation to allow access (not mere protection against refoulement) which is conditioned on effective support from the Responsibility Sharing scheme (Art. 140, MIMC).⁵⁵ Refugee hosting countries gain a Responsibility Sharing procedure (resettlement visas and funding) and priority access to labor visas for resettlement (Arts. 209-213, MIMC).⁵⁶ Countries of destination such as the United States and those in the EU benefit from universal machine readable and biometric passports to improve security at the border (Art. 10, MIMC).⁵⁷

There are also features of interest-based, “diffused” reciprocity that makes the MIMC an attractive package for States.⁵⁸ Destina-

<https://www.mckinsey.com/global-themes/employment-and-growth/global-migrations-impact-and-opportunity> [<https://perma.cc/QVD2-AS4L>] (“Highly skilled professionals are not the sole source of this productivity effect; low- and medium-skill migrants similarly contribute. Their presence can enable destination countries to achieve growth by expanding their workforces and filling in labor force gaps. A large body of research has shown that immigrants have a negligible impact on the wages and employment of native-born workers and on the fiscal resources of destination countries.”).

52. Dato Tsabutashvili, *Number of Potential Migrants Worldwide Tops 700 Million*, GALLUP NEWS (June 8, 2017), <http://www.gallup.com/poll/211883/number-potential-migrants-worldwide-tops-700-million.esps7version-print> [<https://perma.cc/9CAY-MN7Z>]. Needless to say, not all of these potential migrants succeed in obtaining a visa or choose to migrate.

53. Rey Koslowski, *Conclusions: Prospects for Cooperation, Regime Formation, and Future Research*, in *GLOBAL MOBILITY REGIMES* 260–61 (Koslowski ed., 2011).

54. See, e.g., Andrew Guzman, *A Compliance Based Theory of International Law*, 90 CAL. L. REV. 1826 (2002).

55. MIMC, *supra* note 9, art. 150.

56. *Id.* arts. 209–13.

57. *Id.* art. 10.

58. Robert Keohane, *Reciprocity in International Relations*, 70 INT’L ORG. 1 (1986).

tion countries gain laborers and investors but, more indirectly and collectively, also gain a more regularized and orderly regime for the movement of people. The MIMC, overall, promises a more reliable and thus profitable regime, including facilitation of the travel and tourism industry and of international education. In 2016 alone, international tourism generated four trillion dollars, five percent of global GDP, adding 145 million jobs worldwide;⁵⁹ while foreign students spent thirty-two billion dollars in the U.S. alone in 2015 and generated 400 thousand jobs.⁶⁰

Nonetheless, compliance, as with so many human rights treaties, will also call upon reserves of ethical solidarity “enforced” by common decency and ethical responsibility (plus in the background naming and shaming). No one has expressed this better than did Shakespeare writing in the “Book of Sir Thomas More,” a play by Anthony Munday that Shakespeare as “script doctor” was called in to improve. The background was 1590 anti-immigrant riots that resonated with an earlier set of riots in 1517 confronted by Sir Thomas More, when he was sheriff of London. The Londoners were rioting against refugees who allegedly were taking their jobs. Thomas More, according to Shakespeare, speaking to rioters who scorn the refugees, says:⁶¹

Grant them [refugees] removed, and grant that this your noise
Hath chid down all the majesty of England;
Imagine that you see the wretched strangers,
Their babies at their backs and their poor luggage,

59. This is an estimate based on the data that international tourism generates a little over half of the direct revenue of tourism, international and domestic. “Global Benchmarking Report 2017,” WORLD TRAVEL TOURISM COUNCIL (2017), <https://www.wttc.org/research/economic-research/benchmark-reports/> [https://perma.cc/QFW4-43BT].

60. Consider that foreign students spent thirty-two billion in the U.S. in 2015 and generated 400,000 jobs (Let me as a professor declare an interest!). *New NAFSA Data: International Students Contribute \$32.8 Billion to the U.S. Economy*, ASSOCIATION OF INTERNATIONAL EDUCATORS (NAFSA), (Nov. 14, 2016), [http://www.nafsa.org/About_Us/About_NAFSA/Press/New_NAFSA_Data_International_Students_Contribute_\\$32_8_Billion_to_the_U_S_Economy/](http://www.nafsa.org/About_Us/About_NAFSA/Press/New_NAFSA_Data_International_Students_Contribute_$32_8_Billion_to_the_U_S_Economy/) [https://perma.cc/A8EM-WKCR].

61. Michael Hiltzik, ‘Your Mountainish Inhumanity’: *Shakespeare’s Ringing Defense of Immigrants and Refugees*, L.A. TIMES (Dec. 24, 2016), <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-shakespeare-20161224-story.html> [http://perma.cc/RJD8-5W8G]. Curiously, this short, passage is the only handwritten manuscript of Shakespeare’s to survive. It matches the handwriting of the historical Shakespeare from Stratford.

Plodding to th'ports and coasts for transportation,
False. You'll put down strangers,
Kill them, cut their throats, possess their houses,
. . . Say now the king
. . . Should so much come to short of your great trespass
As but to banish you, whither would you go?
What country, by the nature of your error,
Should give you harbor? Go you to France or Flanders,
To any German province, to Spain or Portugal,
Nay, any where that not adheres to England,
Why, you must needs be strangers. Would you be pleased
To find a nation of such barbarous temper,
That, breaking out in hideous violence,
Would not afford you an abode on earth,
Falsewhat would you think
To be thus used? This is the strangers' case;
And this your mountainish inhumanity.⁶²

ANTICIPATED OUTCOMES

The Commission's long run hope, its moonshot, is that after testing the MIMC with UNHCR, IOM, the Office of the U.N. High Commissioner for Human Rights (OHCHR), the International Committee of the Red Cross (ICRC) and key NGOs associated with refugees and migrants, that well-motivated countries will take up the project and find the MIMC useful in formulating a comprehensive multilateral treaty, as Canada did in taking up a civil society generated initiative that began the successful Mine Ban Treaty process. But, well short of that outcome, we see value in the MIMC. The MIMC identifies a better future regime for migration and mobility. It addresses and fills the sad gaps in existing international law. It displays potential coherence in a comprehensive set of rules, using language that is clear, and action-, rights- and duties-oriented. By demonstrating what a better international mobility regime could look like, we hope to take away undue concerns, assure uneasy publics and inspire action.

62. SIR THOMAS MORE: A PLAY BY ANTHONY MUNDAY AND OTHERS (Gabrieli Melchiori & Giorgio Melchiori eds., 1990).

Following Brexit, the election of Donald Trump, the expulsion of the Rohingya from Myanmar, the bilateral ethnic cleansings of South Sudan, and the continuing hazards of the Mediterranean crossing, these are not auspicious times for creative, multilateral humanitarianism. But it is better to do the analytical work now, when times are inauspicious, so that the hard work of the diplomats will be that much easier when the sun of cooperation shines again and the international community is ready to seize the moment to make a comprehensive multilateral treaty for migrants and refugees.

PLAN OF THE SPECIAL ISSUE

I conclude by thanking the spirit of cooperation and volunteerism that characterized the work of the Commission and the patient and tireless efforts of the Secretariat that shepherded the entire process.

I particularly thank the following Commission members who are contributing commentary in this special issue on various aspects of the MIMC. They include the following comments, starting with general reflections and then ranging across the MIMC from visitors and tourists through labor migrants to forced migrants and refugees:

Ms. Emma Borgnäs, a recent Master of International Affairs graduate of Columbia and the Project Coordinator for International Migration of the Global Policy Initiative, provides an overview that explains how the chapters of the MIMC build on and complement each other. She explains the visualization on page 240 of the rights outlined in the MIMC and shows how the different categories of persons covered by the MIMC are provided varying rights and protections.

Professor Parvati Nair, Founding Director of the United Nations University Institute on Globalization, Culture and Mobility (UNU-GCM) and Professor of Hispanic, Cultural and Migration Studies at Queen Mary University of London, comments on “Beyond Mapped Horizons: Reflections on the Model International Mobility Convention.” Professor Nair puts the MIMC in the context of ongoing international efforts to address global migration. She traces the New York Declaration and the two compacts, for migrants and for refugees, now under negotiation to establish a new regime for persons moving across borders. Professor Nair indicates how the MIMC builds on this momentum and points the way to further progressive reform in international migration governance.

Professor Tendayi Achiume, Assistant Professor of Law at UCLA School of Law, highlights the significance of the Commission's working within the framework of a "realistic utopia," accepting as a given the international order based on sovereign States and seeking to reform it. She eloquently notes how far short of an ideal global order of common humanity existing international law (and the MIMC) is. Professor Achiume emphasizes the challenge posed by the concept of "state sovereignty at the heart of international law" to the establishment of a world of free and fair mobility. She suggests conceptualizing an international law that looks toward subnational actors, such as cities or regional provinces, for creating inclusive governance structures for international migrants.

Professor Rey Koslowski of the University at Albany, State University of New York, comments on the need to "Think Mobility Instead of Migration: Leveraging Visitors, Tourists and Students for More International Cooperation." He highlights the MIMC's focus on the "global mobility" regime, referring to movements of people across international borders for any length of time or purpose. Professor Koslowski notes that by focusing broadly on mobility—and the larger terrain of overlapping state interests, from travel, tourism, to education, and labor, that this entails—the MIMC creates the groundwork for a "richer network of interlocking, interdependent, and mutually beneficial" forms of multilateral coordination and cooperation.

Dr. Diego Acosta, Reader in Migration and European Law at the University of Bristol, U.K., reflects on "Undocumented or Irregular Migrant Workers under the Model International Mobility Convention: Rights and Regularization." He shows how the MIMC advances several important rights granted to migrant workers regardless of their administrative situation. These include access to emergency medical care, equal treatment in respect of remuneration and other conditions of work, and certain provisions applicable to women and children, including access to education in the case of the latter.⁶³ Placing these proposals in the content of regional migration policies, Dr. Acosta argues that the MIMC both builds upon and importantly extends existing State practices.

Ms. Sarah Rosengaertner, a migration and development expert at the Columbia Global Policy Initiative and consultant for various United Nations entities on migration issues, highlights the four key features of Chapter IV of the MIMC in her "Pathways to Protec-

63. MIMC, *supra* note 9, arts. 56–67.

tion and Permanency: Towards Regulated Global Economic Migration and Mobility.” After demonstrating how the MIMC builds on existing international law, she notes how it expands existing protections with particular emphasis on the rights of women migrant workers. She then draws attention to the new and strong language on pathways to permanent status for migrant workers and residents, novel provisions to regulate the visa policies of States; and the clearly delineated limitations on the rights of temporary migrant workers. She concludes by observing how each of these innovations would benefit by further refinement in the policy implementation process.

Professor Randall Hansen, Interim Director of the Munk School of Global Affairs, University of Toronto, explores the MIMC’s approach to economically driven mobility in “Labor Migration and International Mobility: Normative Principles, Political Constraints.” Professor Hansen offers a kind-hearted but tough-minded critique of the MIMC. He finds the MIMC reflects normative commitments associated with human rights and, importantly, does better than existing legal instruments to “respect the political, economic and social constraints involved in translating these commitments into binding law.” But it would, he notes, not win support from the Donald Trump’s or Marine LePen’s of the world. More significantly, he argues, the MIMC would have difficulty winning over the Angela Merkel’s and Justin Trudeau’s. In this last observation, he identifies the difficult advocacy work the supporters of the MIMC have in front of them.

Professor T. Alexander Aleinikoff, Director of the Zolberg Institute on Migration and Mobility and University Professor at The New School and former United Nations Deputy High Commissioner for Refugees, makes an eloquent case for how mobility must play a larger role in the refugee regime. He argues that the international community should move beyond the current situation where forced migrants are subject to displacement followed by constrained movement; instead freely chosen resettlement should be integrated into the refugee regime. The MIMC recognizes “the important link between refugee agency and mobility.” It includes provisions for Responsibility Sharing and the requirement that States Parties allocate at least 10 percent of labor visas to persons who have refugee and forced migrant status.”⁶⁴ But more needs to be done.

Dr. Sarah Deardorff Miller of Columbia’s School of International and Public Affairs focuses her comment on “The Mobility

64. MIMC, *supra* note 9, art. 211.

Treaty's Contribution to Addressing Socioeconomic Issues in Protracted Refugee Situations." Addressing the persistent and long-term realities of contemporary forced displacement, she notes that the average refugee situation lasts for a staggering twenty-six years, with entire generations growing up in exile and without access to some of their most basic human rights. She stresses the importance in the MIMC of naturalization and the right to work, while indicating needed next steps to account for and solve situations of protracted displacement.

Professor Kiran Banerjee of the Department of Political Studies at the University of Saskatchewan, examines the case for reforming the contemporary refugee regime. His comment "Rethinking the Global Governance of International Protection" highlights the MIMC's addition of "forced migrants" to those warranting protection, its expansion of those protections to make them nearly equivalent to rights enjoyed by nationals and the introduction of additional rights to entry (under special circumstances) for those seeking refuge. He emphasizes how these proposals to expand the scope and increase the rights offered to those in need of international protection cannot be separated from the creation of robust and effective responsibility sharing mechanisms.

Professor Yasmine Ergas, the Associate Director of the Institute for the Study of Human Rights at Columbia University, explores in the concluding comment a crucial cross-cutting concern when she discusses "Negotiating for Women's Mobility Rights: Between Definition and Contestation." She argues that the MIMC "marks important steps forward in defining women's rights in the context of mobility, thus shifting the baseline for future negotiations." She also notes that advocates for women's rights will want to press ahead to strengthen protections for domestic workers beyond those embodied in the MIMC. And, equally importantly, the question of what constitutes a family, and hence which women can benefit from the rights related to family reunification "will continue to constitute a site of contestation between and among women's rights advocates as well as States."

Lastly, I recall with gratitude the inspiring 2015 workshop at Columbia's School of International and Public Affairs that first explored with me the purpose and potential content of a model convention on migration and refugees. I thank The Endeavor Foundation, The Lenfest Group, and the Huo Global Policy Initiative Research Fellowship sponsored by the Huo Family Foundation (UK) Limited for their support. I thank the Open Society Foundations' International Migration Initiative, and Maria Teresa Rojas most particularly, for

the loan of the meeting space and gift of hospitality that made the Commission meetings both productive and pleasant. The Sutherland Team, led by Gregory Maniatis, was a constant resource for expert advice. None of this effort would have been possible without the good guidance and managerial talents of Maggie Powers and Cory Winter and the Columbia Global Policy Initiative established by President Lee Bollinger.

An Overview of the Model Convention

EMMA BORGNÄS*

The following overview explains how the chapters of the Model International Mobility Convention (MIMC) build on and complement each other. This overview may be consulted in conjunction with the visualization on pages 240–241 of the rights outlined in the MIMC which offers a breakdown of the different categories of persons covered by the MIMC alongside the rights and protections to which they are entitled.

The MIMC consists of 213 articles divided over eight chapters. These provisions spell out the rights held by a wide array of mobile people, ranging from visitors, students, tourists, migrant workers, investors and residents, forced migrants, refugees, family members, migrant victims of trafficking and migrants caught in countries in crisis. Some of these categories are—to a greater or lesser extent—covered by existing international legal regimes. However, the Model Convention for the first time brings these groups together under a single framework. In developing such a comprehensive legal regime for mobility, the MIMC fills a number of existing gaps in protection and rights, adds clarity around the corresponding responsibilities of States as well as migrants vis-à-vis States, and proposes comprehensive mechanisms for international cooperation and responsibility sharing to strengthen and reinforce the development of a truly global mobility regime.

The Preamble of the MIMC establishes the complementarity of the MIMC with existing international legal instruments. These include the United Nations Charter,¹ the Universal Declaration of Human Rights² as well as other core international human rights treaties, thereby explicitly signaling that the MIMC builds upon the rights and protections embodied in these documents. None of the provisions in the MIMC should be interpreted as undermining such rights, nor should any rights be regarded as negated by the MIMC should they

* Emma Borgnäs is a recent Master of International Affairs graduate of Columbia University and the Project Coordinator for International Migration of the Columbia Global Policy Initiative.

1. U.N. Charter.

2. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

not be explicitly embodied in its articles. The focus of the MIMC is with the rights and protections that are of special relevance to people on account of their moving across national borders. Accordingly, individuals enjoy these rights without prejudice to all other rights they are entitled to as persons, as embodied in the wide range of existing human rights treaties.

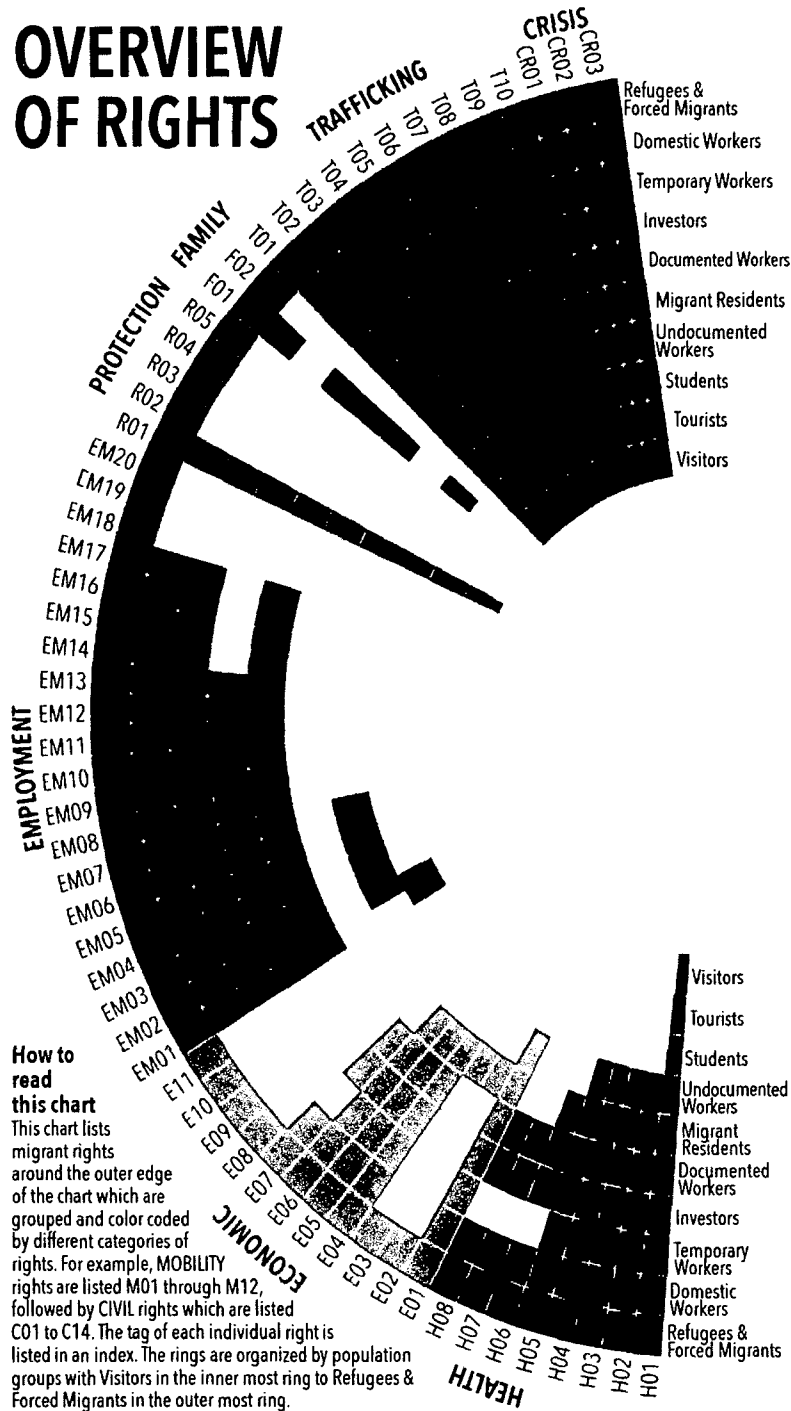
With the aim to help the reader navigate through the MIMC and the rights it contains, a visualization of the rights outlined in the MIMC along with a key can be found on pages 240–243.

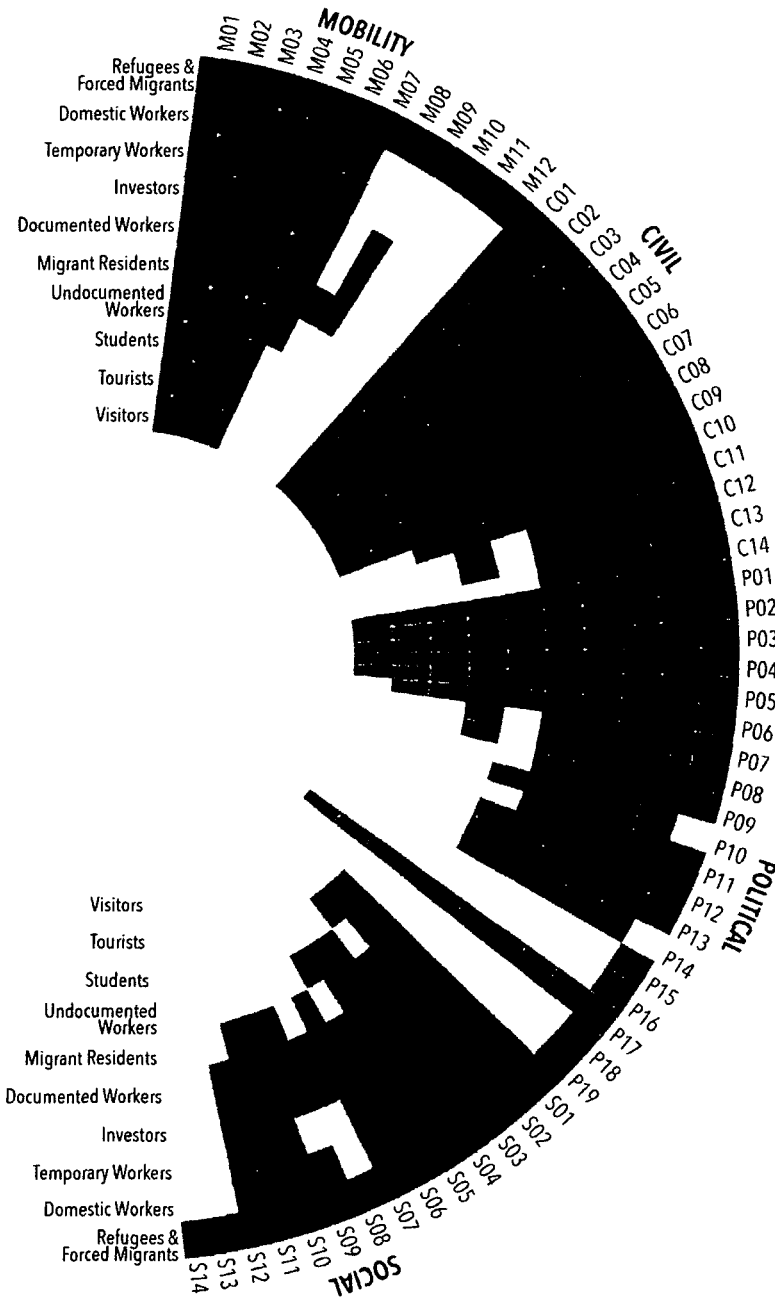
Box 1: Using the visualization to navigate the MIMC

This visualization provides an overview of the rights entitled to different groups of migrants.

- **Mobility categories** are listed on the vertical axis in order of appearance in the MIMC: visitors, tourists, students, migrant workers, residents and investors, temporary and domestic workers, refugees and forced migrants.
- **Rights** are divided by type of right and are listed horizontally in order of introduction in the MIMC; mobility, civil, political, social and cultural, health-related rights, economic, employment, protection and family reunification rights.
- Each **vertical row** represents a rights-category that has been coded at the periphery of the circle (“M01”, “S11”, “E5”). The key can be found on page xx, where the rights and corresponding articles are listed in full.
- A **colored box** along the axis of a particular mobility category (i.e. visitor, domestic worker, refugees and forced migrants) means that the group enjoys the relevant right.
- **Article numbers in the key** indicate where in the MIMC the right can be found; note that a number of rights are given multiple articulations across the MIMC.

OVERVIEW OF RIGHTS





Tag Description (article #)**MOBILITY**

- M01 Access to passports (9)
- M02 Freedom to leave any state (6)
- M03 Right at any time to enter and remain in their State of origin (6)
- M04 Right to apply for lawful entry into any country and to be considered for the award of a visa (8)
- M05 Protection against arbitrary expulsion (12)
- M06 Freedom of movement (18, 80, 100, 158)
- M07 Protection against collective expulsion (70)
- M08 Right to travel with unlimited visas to and from State of origin (72, 104)
- M09 Freedom to choose residence (80)
- M10 Right not to be denied access to air, land, or sea carriers (140)
- M11 Access to documents for international travel (160)
- M12 Right to assistance to facilitate return (177)

CIVIL

- C01 Non-discrimination (5, 55, 98, 133)
- C02 Right to life (14)
- C03 Freedom from slavery and forced labor (15)
- C04 Protection against torture, or cruel, inhuman or degrading treatment or punishment (16)
- C05 Right to privacy (17)
- C06 Protection of property (19)
- C07 Freedom of thought, conscience and religion (20, 141)
- C08 Right to hold opinions (21)
- C09 Right to liberty and security of person (25)
- C10 Right to respectful treatment during arrest, detention and imprisonment (26)
- C11 Freedom of expression (46)
- C12 Right to protection against violence and exploitation in the workplace and in workers' accommodations (63)
- C13 Prohibition against exploitative child labor (64)
- C14 Non-discrimination based on skill (98)

POLITICAL

- P01 Protection of documents (11, 75)
- P02 Right to recognition as a person before the law (24)
- P03 Children have the right to a name, to registration of birth and to a nationality (24)
- P04 Right to equality before the law (27)
- P05 Right not to be imprisoned merely on the ground of failure to fulfill a contractual or visa obligation (28)
- P06 Right to receive objective, honest and timely information (30, 41, 59, 67, 74, 79, 159)
- P07 Equality of treatment with nationals with regards to joining and participating in and seeking assistance of trade unions (61)
- P08 Right to report and seek legal remedy for harassment at work (63)
- P09 Right not to be deprived of authorization of residence or work permit or expelled merely on the ground of pregnancy (76)
- P10 Right to form political associations (81, 99, 145)

- P11 Right to form trade unions (81)
- P12 Right to be considered eligible to apply for regular permanent residence after a specified period of time (83, 155)
- P13 Right to permanent residence after a specified period of employment or residence (83)
- P14 Right to citizenship after a specified period of legal residence in the country not exceeding ten years (84)
- P15 Exemption from exceptional measures (134)
- P16 Exemption from reciprocity (136)
- P17 Children's right not to be detained solely on the basis of the migratory or residence status or of being unaccompanied or separated (137)
- P18 Right to identity papers (150)
- P19 Right to a resident permit valid for at least three years and renewable (157)

SOCIAL

- S01 Full rights of access to educational facilities on par with national students (41)
- S02 Ownership rights over intellectual work (41)
- S03 Right to maintain cultural links with State of Origin (45)
- S04 Right to decent living conditions (62)
- S05 Equality of treatment with nationals with regards to children's right to access primary education (64, 106, 172, 182)
- S06 Equality of treatment with nationals with regards to children's right to access secondary education (64, 106)
- S07 Equality of treatment with nationals with regards to access to and participation in cultural life (85)
- S08 Equality of treatment with nationals with regards to social housing schemes (85)
- S09 Equality of treatment with nationals with regards to access to educational and social services (85)
- S10 Equality of treatment with nationals with regards to protection against rent exploitation (85)
- S11 Right to social inclusion of children into local school systems (87)
- S12 Right to portable pensions (106)
- S13 Right to have rights attaching to marriage or other civil union previously acquired respected by States Parties (142)
- S14 Right to sit for qualifying exams that are relevant to their degree level (163)

HEALTH

- H01 Equality of treatment with nationals with regards to emergency medical care, including reproductive healthcare (22)
- H02 Access to non-emergency health care that supports public health (57)
- H03 Right not to undergo discriminatory medical examinations (57)
- H04 Access to sexual health care services and maternity protection (63)
- H05 Children's right to access necessary medical assistance and health care (64)

- H06 Equality of Treatment with regards to access to health services (85)
 H07 Access to long-term rehabilitation services (86)
 H08 Right to stay in the country in case of incapacity to work (86)

ECONOMIC

- E01 Right to transfer earnings and savings to State of Origin (60)
 E02 Right to rent or purchase property and sell or lease property (72)
 E03 Right to retain bank accounts in country of origin (72)
 E04 Equality of treatment with nationals with regards to access to banks and other financial institutions (85)
 E05 Right to exemption from import and export duties and taxes (88)
 E06 Equality of treatment with nationals with regards to taxes, duties and charges (89, 151)
 E07 Equality of treatment with nationals with regards to social security (90)
 E08 Equality of treatment with nationals with regards to the acquisition of movable and immovable property (143)
 E09 Equality of treatment with nationals with regards to protection of industrial and intellectual property (144)
 E10 Equality of treatment with nationals with regards to rationing and public relief (147, 148)
 E11 Equality of treatment with nationals with regards to transfer of assets (152)

EMPLOYMENT

- EM1 Right to engage in employment activities (41, 105, 174)
 EM2 Equality of treatment with nationals with regards to minimum age of employment (58)
 EM3 Equality of treatment with nationals with regards to remuneration and other conditions of work and safe and secure working environments (58)
 EM4 Right to receive understandable and enforceable employment contracts (59)
 EM5 Equality of treatment with nationals with regards to right to remedies in case of breach of employment contracts (59)
 EM6 Right to have wages paid directly to them on a regular basis and to dispose of their wages as they wish (60)
 EM7 Right to remain in the State of employment to seek a remedy for unpaid wages (60)
 EM8 Right not to be deprived of authorization of residence or work permit or expelled merely on the ground of failure to fulfill an obligation arising out of a work contract (75)
 EM9 Protection against termination of employment merely on the grounds of pregnancy (76)
 EM10 Right to lodge appeal against termination of employment (77, 101)
 EM11 Right to reinstatement or compensation for unjustified termination of employment (77)

- EM12 Right to seek alternative employment (78)
 EM13 Right to temporary absence from State of employment (79)
 EM14 Equality of treatment with nationals with regards to vocational guidance, placement services and training facilities (85, 180)
 EM15 Right not to lose authorization of residence by the mere fact of the termination of their remunerated activity prior to the expiration of work permits or similar authorizations (91)
 EM16 Freedom to choose remunerated activity (94, 100)
 EM17 Equality of treatment with nationals with regards to unemployment benefits, access to public work schemes and alternative employment (95)
 EM18 Equality of treatment with nationals with regards to right to self-employment (161)
 EM19 Same treatment as foreign nationals with regards to practicing of liberal professions (163)
 EM20 Priority access to labor visas (209)

PROTECTION

- R01 Access to consular or diplomatic authorities (23)
 R02 Right to international protection (127)
 R03 Prohibition against expulsion or direct or indirect return to the frontiers of territories where there is a risk of serious harm (138)
 R04 Right to be admitted to the territory of States pending a determination of a request of international protection (140)
 R05 Equality of treatment with nationals with regards to public relief and assistance (155)

FAMILY REUNIFICATION

- F01 Right to nuclear family reunification (Ch. VII)
 F02 Right to extended family reunification (Ch. VII)

TRAFFICKING

- T01 Right to confidential legal proceedings (181)
 T02 Access to measures for physical, psychological and social recovery (181)
 T03 Access to appropriate housing (181)
 T04 Access to counseling and information (181)
 T05 Access to medical, psychological and material assistance (181)
 T06 Access to employment, educational and training opportunities (181)
 T07 Protection against detention (181)
 T08 Access to measures that offer possibility of obtaining compensation for damage suffered (181)
 T09 Right of children migrant victims of trafficking to a legal guardian to represent their interests (182)
 T10 Right to protection from victimization (191)

CRISIS

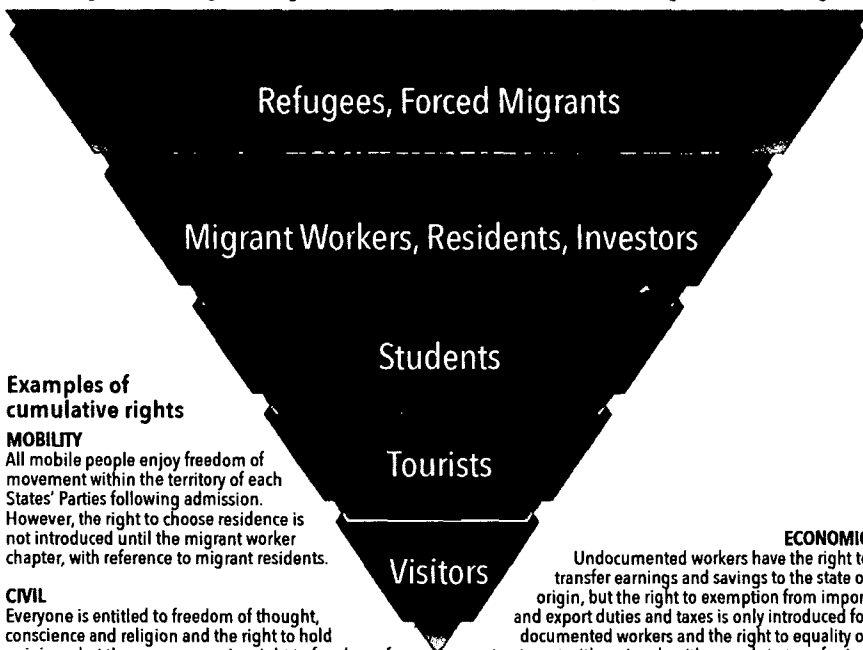
- CR1 Right to internal relocation (187)
 CR2 Access to valid identity and travel documents (188)
 CR3 Access to emergency temporary protection (190)

An essential feature of the MIMC is that it is cumulative. This means that, for the most part, the chapters build on and add to the set of rights afforded to categories of migrants covered by earlier chapters.

CUMULATION OF RIGHTS

How to read this visualization

An essential feature of the Convention is that it is cumulative. Chapters are built upon one another and add to the set of rights afforded to categories of migrants covered by earlier chapters, beginning with visitors and concluding with labor migrants (migrant workers, residents, and investors) and refugees and forced migrants.



Examples of cumulative rights

MOBILITY

All mobile people enjoy freedom of movement within the territory of each States' Parties following admission. However, the right to choose residence is not introduced until the migrant worker chapter, with reference to migrant residents.

CIVIL

Everyone is entitled to freedom of thought, conscience and religion and the right to hold opinions, but the more expansive right to freedom of expression is not introduced until the student chapter.

POLITICAL

Undocumented workers enjoy equality of treatment with regards to joining and participating in and seeking assistance of trade unions. However, only in the sections addressing documented workers is the right to form trade unions or other associations introduced.

SOCIAL

Undocumented workers enjoy the right to decent living conditions and protection from exploitation. However, it is not until the Convention turns to documented migrant workers in chapter IV that the right to equality of treatment with regards to social housing schemes is introduced. Moreover, only forced migrants and refugees enjoy the right to same treatment as foreign nationals with regards to housing.

HEALTH

All mobile people enjoy access to emergency medical healthcare, but access to non-emergency healthcare is introduced in the migrant worker chapter, and only in the section on documented migrant workers the right to equality of treatment with nationals with regards to access to healthcare is introduced.

ECONOMIC

Undocumented workers have the right to transfer earnings and savings to the state of origin, but the right to exemption from import and export duties and taxes is only introduced for documented workers and the right to equality of treatment with nationals with regards to transferring assets only applies to refugees and forced migrants.

EMPLOYMENT

All migrant workers enjoy equality of treatment with regards to remuneration and other conditions of work and safe and secure working environments, but the right to seek alternative employment can only be claimed by documented workers, while equality of treatment with regards to right to self-employment only applies to refugees and forced migrants.

PROTECTION

Everyone has the right to access consular or diplomatic authorities but only forced migrants and refugees have the right to international protection.

FAMILY REUNIFICATION

The right to family reunification of the nuclear family is introduced in the chapter on students (undocumented and temporary migrant workers are exempted) but only forced migrants and refugees enjoy the right to reunification of the extended family.

Although the various sections of the MIMC are designed to be cumulative and interlocking the various chapters, nonetheless, still focus on specific categories of mobile persons.

Following the Preamble, Chapter I on visitors articulates the minimum set of rights afforded to all mobile people, independent of their immigration status and whether they entered a State regularly or not. As chapters and new categories of migrants are subsequently introduced in the MIMC additional rights are added to this minimum base-line of rights. Thus, Chapter II specifies the rights enjoyed by tourists, which are provided in addition to those spelled out in Chapter I. Similarly, Chapter III on students builds on and adds to the rights embodied in the previous two chapters.

Chapter IV covers migrant workers, investors and residents. These provisions address the rights that can be claimed by any migrant working within the territory of any State Party, including undocumented migrants or those in an irregular situation. The chapter also outlines the additional rights that can be claimed by documented migrant workers and investors. Migrant residents have, in addition to a few specific rights related to residency, full access to the non-work related rights enjoyed by undocumented and documented migrant workers alike.

Chapter IV moreover outlines the rights of temporary migrant workers. These provisions introduce some contextual exceptions to the otherwise cumulative nature of the rest of the MIMC: temporary workers may not have access to all the rights afforded to documented migrant workers that have been admitted on a permanent basis. Article 98 lists the permissible modifications that can be placed on the rights of temporary workers. Importantly, however, the MIMC specifies clear time limits for the legitimate modification of these rights.

Chapter V subsequently covers the status of refugees and forced migrants and the specific rights they enjoy and follows the logic of building on the rights set forth in earlier chapters. The chapter presents a unified approach to refugees and forced migrants and strengthens the terms of protection as compared to the existing refugee regime. Refugees and forced migrants enjoy all the rights set forth in Chapters I through III and all the non-work related rights set forth in Chapter IV. To the extent that they engage in employment activities, they enjoy all employment related rights as well. In addition to provisions governing their general treatment by States Parties, they enjoy rights primarily related to protection and access to asylum.

The subsequent two chapters diverge from the earlier chapters of the MIMC by addressing cross-cutting issues and rights entitlements. Chapter VI addresses migrant victims of trafficking and migrants caught in countries experiencing crises. These provisions are

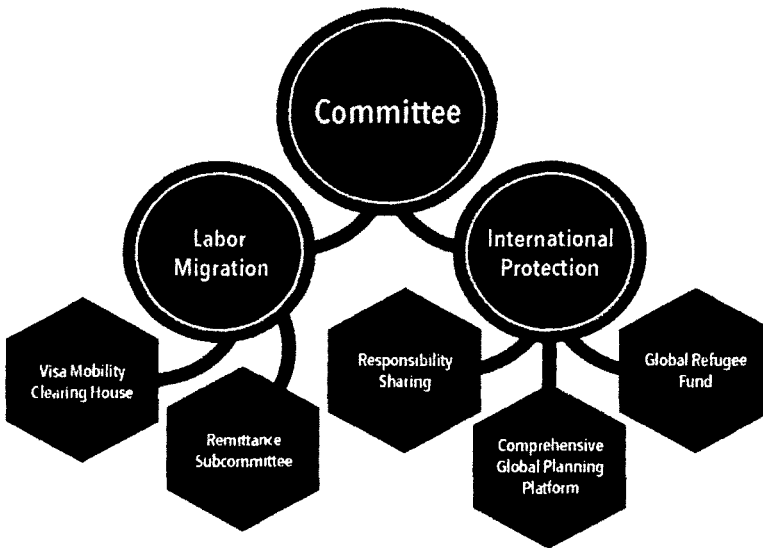
cross-cutting in the sense that the rights embodied therein are applicable to any migrant that should find him or herself in any or both of these two scenarios. Chapter VII is similarly issue-specific and spells out the rights relating to family reunification enjoyed by different mobility categories.

Not all articles in the MIMC are represented in the overview on pages 240–243. This is because the MIMC not only contains provisions that afford rights to migrants, and to a lesser extent States (such as the right to decide who can enter and remain in their territory); it also articulates the responsibilities of migrants vis-à-vis States and the rights and responsibilities of a number of institutions that do not directly respond to a right held by migrants. Examples include the articles in Chapter II on tourists regarding the protection of the environment and those in Chapter III on students on the rights of educational institutions.

Finally, Chapter VIII introduces the Treaty Body and is dedicated to ensuring the effective implementation of the MIMC as well as providing a broader framework for facilitating global cooperation on international mobility. It includes provisions for the establishment of a Committee with the responsibility to review and monitor the application of the MIMC. This role is supported by reporting requirements for States Parties on the legislative, judicial, administrative and other measures they have taken to give effect to the provisions of the MIMC and by identifying the Committee as a source of authoritative guidance on the interpretation of the MIMC. These provisions also create an institutional space for civil society, including migrants and their representative organizations, to participate fully in the independent monitoring process established by each State to promote, protect and monitor the implementation of the MIMC. The chapter moreover includes provisions relating to dispute resolution in cases when States Parties consider that another State Party is not fulfilling its obligations under the MIMC, and outlines the specific procedures and remedies that should be taken under such circumstances.

The Treaty Body chapter also proposes that the Committee establish a number of mechanisms to more comprehensively and equitably address migration flows whichever their causes might be. These mechanisms include a Mobility Visa Clearing House and a Remittance Subcommittee for facilitating international economic migration. The chapter also introduces a number of innovations for supporting and strengthening the provision of international protection, key aspects of which include a Responsibility Sharing framework, a Comprehensive Global Planning Platform and a Global Refugee Fund.

INTERNATIONAL COOPERATION MECHANISMS



Visa Mobility Clearing House

Global platform accessible by States Parties, corporations, nongovernmental organizations and individuals to facilitate the safe, orderly and regular migration of individuals (participating States are asked to allocate at least 10% of all annual labor visas to refugees and forced migrants).

Remittance Subcommittee

Tasked with issuing annual reports surveying the facility and costs of remittances of migrants to designated recipients and making recommendations for reducing costs and ensuring the reliable delivery of funds.

Responsibility Sharing

Tasked with issuing annual reports documenting the number of recognized refugees and forced migrants, their current location of asylum and the cost-per-person of the provision of asylum. During annual meeting involving all States Parties the "responsibility shares" of each State Party will be announced, as based on a responsibility sharing formula. Each State Party will pledge the number of resettlement visas for refugees and forced migrants and the amount of funding that it will provide in the coming year.

Comprehensive Global Planning Platform

Tasked with establishing working groups to propose solutions to protracted refugee situations, with the aim of facilitating return, local integration or resettlement. In order to improve the quality of global deliberation and problem solving for migrants and refugees, the Convention establishes a research function to report and assess the flow of global visitors, refugees and migrants as well as their impacts on countries of origin, transit and destination.

Global Refugee Fund

Supplements the responsibility sharing mechanism by directing funding to support the efforts of States in receiving refugees and displaced persons, resettlement programs and integration efforts, and the provision of emergency measures.

Beyond Mapped Horizons: Reflections on the Model International Mobility Convention

PARVATI NAIR*

To be alive is to move
*Fatema Mernissi*¹

The question of human mobility, intrinsically a motor for all development and a basic, indeed vital, aspect of human existence, has long been relegated to blind spots, most especially where cross-border migration is concerned. Until very recently, it was also largely demarcated to the realms of national and, at best, regional, matters, rather than as an issue of shared international responsibility—an ill-thought but abiding bid perhaps, to contain, constrain, and control a global human phenomenon that might otherwise prove chaotic to the fundamental notions of sovereignty, borders, and citizenship that structure and to a great extent determine, the priorities of international relations.

It is notable that the Model International Mobility Convention (MIMC) comes just a year after the adoption of the New York Declaration for Refugees and Migrants on September 19, 2016.² What has ensued since then is an unparalleled effort within the international community to engage with the question of human mobility. At the United Nations, this work is currently being undertaken down two routes: one towards a global compact on safe, orderly and regular migration³ and another towards a framework of shared responsibility for refugees,⁴ both to be achieved by 2018.⁵ These efforts, triggered

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1. FATIMA MERNISSI, *DREAMS OF TRESPASS: TALES OF A HAREM GIRLHOOD* 209 (Perseus Books, 1995).

2. G.A. Res. 71/1 (Oct. 3, 2016).

3. See G.A. Res. 71/280 (April 17, 2017) (affirming U.N. commitment to launching the process of intergovernmental negotiations and establishing a process designed to lead to the adoption of the global compact for safe, orderly and regular migration).

4. The framework for shared responsibility for refugees, or the Global Compact on

by the largest mass influx of displaced persons in 2014–15 on the shores of Europe since the end of the Second World War,⁶ finally acknowledge the glaring gaps in good governance and international cooperation that have long consigned human mobility to fragmented, uneven, and ill-thought regulatory frameworks. Perhaps the worst aspect of this incoherent political and legal scenario is the fact that it points to a long-standing refusal to acknowledge the vitally important contributions to development and socio-economic progress made possible through human mobility. The cost of this willed blindness is high: countless lives are lost along uncharted and difficult migratory routes,⁷ and millions suffer from deep inequalities, the lack of access to rights and lack of representation. Migration as a choice remains the prerogative of a global elite⁸ while many more, who are either displaced or are seeking better lives, are forced, under existing regulations, to pursue routes that deprive them of dignity and security. A curious paradox emerges: on the one hand, legal and political establishments seek to better the constituencies that they serve in the names of development and progress; and, on the other, they fail to apprehend the mobility inherent to the very ideas of development and progress, which must, if they are to carry any meaning at all, be shaped and implemented by and through the movements of peoples.

GLOBAL MOBILITY

“I have never been outside of India. But with my new smartphone, the whole world can come to me.” (Padma, domestic worker in the

Refugees, is to be developed by the U.N. High Commissioner for Refugees. For details of the proposed contents and timeline, see *Towards a Global Compact on Refugees: a Roadmap*, UNHCR (May 17, 2017), <http://www.unhcr.org/58e625aa7> [<https://perma.cc/C9DP-GYFL>].

5. Details of the U.N. commitments undertaken to shape these global compacts can be found at: *Global Response*, UNITED NATIONS (2017), <http://refugeemigrants.un.org/global-response> [<https://perma.cc/QHH9-QTXM>].

6. *Refugees at Highest Ever Level, Reaching 65m, Says UN*, BBC (June 20, 2016), <http://www.bbc.com/news/world-36573082> [<https://perma.cc/635E-EKVC>].

7. In 2015, an estimated 3,771 lost their lives crossing the Mediterranean, with upwards of 3,740 losing their lives in 2016. See *Mediterranean Death Toll Soars, 2016 is Deadliest Year Left*, UNHCR, (Oct. 25, 2016), <http://www.unhcr.org/en-us/news/latest/2016/10/580f3e684/mediterranean-death-toll-soars-2016-deadliest-year.html> [<https://perma.cc/E6E7-JQ93>].

8. This phenomenon is particularly true in the poorest countries. See STEPHEN CASTLES ET AL., *THE AGE OF MIGRATION: INTERNATIONAL POPULATION MOMENTS IN THE MODERN WORLD* 78 (2013).

informal sector, New Delhi)

In his book, *A Seventh Man*, the writer John Berger says that “the migrant’s intentionality is permeated by historical necessities of which neither he nor anybody he meets is aware. That is why it is as if his life were being dreamt by another.”⁹ In the modern age, and indeed well before it, mobility was a historical necessity, a fundamental aspect of globalization as we know it, the offshoot and the motor of history as we make it. With ever more people on the move, with persistent global inequalities and technological connectivities, with journeys that are complex and contingent upon socio-economic and many other factors, mobility in the twenty-first century is hard to map, and yet everywhere within and around us.¹⁰ To quote Professor Nikos Papastergiadis, “[M]igration, in its endless motion, surrounds and pervades almost all aspects of contemporary society.”¹¹ Such migration takes many forms: that of the forcibly displaced due to conflict or climate change, that of those displaced within themselves because of a collective imaginary that privileges certain parts of the world over others, that of those who seek more freedoms, wealth, power, stability, security, knowledge, resources and/or rights.¹² In this heaving globalscape of humans on the move, it is fair to ask oneself what routes might lead to the good governance of mobility.

THE GLOBAL COMPACTS ON MIGRANTS AND REFUGEES

June 17th 2017. At the Plaça de l’Àngel in Barcelona, we celebrate the Trobada L’Iftar, or breaking of the fast in the month of Ramadan. I meet Ahmed, aged eighteen and two months, through a common acquaintance. He passes me a plate of food and introduces me to some friends.

Later, I ask Ahmed how long he has been here. “I arrived alone,” he

9. JOHN BERGER & JEAN MOHR, *A SEVENTH MAN* 43 (1975).

10. Other factors that trigger migration include the collective imaginary as shaped through colonial histories whereby former seats of empire (Europe and, more generally, the West) may appear to be desirable locations or the influence of mass media, digital technology and other means of communication that reveal global inequalities. etc.

11. NIKOS PASTERGIADIS, *THE TURBULENCE OF MIGRATION* 1 (2000).

12. Perhaps the foremost theorist on this phenomenon of dislocation lived as personal experience by those from the global South is to be found in the seminal work of Frantz Fanon, in FRANTZ FANON, *BLACK SKIN, WHITE MASKS* (Charles Markman & Richard Philcox trans., Grove Press 1967). Another key theorist on the collective imaginary of the global south is Homi Bhabha; see HOMI BHABHA, *LOCATION OF CULTURE* (1994).

says, “when I was eleven years old.”

Ahmed was born in Morocco. He came as a minor and spent his adolescence as a ward of the state. He speaks Spanish, Catalan, Arabic and Amazigh, as well as a smattering of English.

He tells me he would like to qualify as an electrician or a nurse, because he enjoyed studying science at school. But he cannot. Not now anyway, because he has to work as a waiter while his application to remain is being considered.

“If I don’t work, I’ll be on the street. I might even be sent back any day. And then what will I do? Try and come back here without papers?”

I ask him how long it has been since he saw his family.

He hesitates and looks away. “A long time,” he says softly. “Maybe they wouldn’t even recognise me anymore.”

I tell him that the governments of the world are working together to help improve the situation of people like him by bringing in new rules and agreements.

He looks up. “Will that help me?” he asks.

(Ahmed, interviewed by me on June 17th 2017 at Plaça de l’Àngel, Barcelona)¹³

In the context where mobility is one of the most important phenomena of the twenty-first century, the work which commenced in 2017 at the U.N., on shaping the two global compacts on migrants and refugees, must be seen as a historic turn. The 1951 Refugee Convention and its associated Protocol of 1967, which not all Member States are signatories to, are lonely landmarks in global governance on mobility. The U.N. has sought to raise the salience of the issue, with Secretary-General Kofi Annan’s 2002 Report on the Strengthening of the U.N.,¹⁴ the establishment of the Global Migration Group and the Global Forum on Migration and Development,¹⁵

13. I have altered the interviewee’s name to protect his identity. I have his consent to cite from the interview.

14. U.N. Secretary-General, *Strengthening of the United Nations: An Agenda for Further Change* U.N. Doc. A/57/387 (Sept. 9, 2002), <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan005675.pdf> [<https://perma.cc/V9TU-6WNN>].

15. The Global Forum on Migration and Development was established as a result of the first U.N. General Assembly High-Level Dialogue on International Migration and Development. See President of the General Assembly, *Summary of the High-level Dialogue on International Migration and Development*, ¶ 20, U.N. Doc. A/61/515 (Oct. 13, 2006), <http://www.refworld.org/docid/49997afc27.html> [<https://perma.cc/LQ9B-Z95Z>] (noting “widespread support for the proposal of the Secretary-General to create a global forum as a

and Peter Sutherland's mandate as U.N. Special Representative for Migration and Development.¹⁶ But the U.N. has steered clear of policy commitments as human mobility has hitherto largely been treated as a matter for national and regional responsibility. That the U.N. has in an unprecedented fashion set aside 2017 as a year of global consultations in preparation for negotiations on the two Compacts in 2018, provides clear evidence that there is much for Member States to learn about migrants and refugees. The six thematic sessions held in preparation of the Global Compact on migration are, for example, key ways in which Member States practise, exchange and expand their vocabulary on migration.¹⁷ These sessions also help States conceive of the larger global landscape within which international migration takes place, as well as envisage some of the impacts, challenges and benefits that migration brings at the local level. The inclusion of non-governmental actors in the consultation processes, especially civil society, academia and the private sector, marks important milestones in the advancement of efforts towards a more comprehensive approach to the good global governance of migration.

High time, many would say. The absence of legal pathways for many has led to numerous deaths in seas¹⁸ and deserts. It has led to incarcerations, detentions, deportations, and human rights abuses at borders. It has fostered the spread of clandestine and undocumented mobility and, with this, the criminality and irresponsibility to human care that accompanies smuggling and trafficking. It has led to informal economies and labor abuses, as well as to vulnerability and suffering. This lag in attention paid by the international community to all aspects of human mobility does seem somewhat ironic in light of the fact that not only is mobility as old as human history itself, but that the United Nations was formed following the large-scale refugee crisis provoked by World War II. In a sense therefore, the United Nations owes its existence as a grouping of multilateral entities to a historical context characterized by pressing issues of ungoverned

venue for discussing issues related to international migration and development in a systematic and comprehensive way").

16. Press Release, Secretary-General, Secretary-General Appoints Peter Sutherland as Special Representative for Migration, U.N. Press Release SG/A/976 (Jan. 23, 2006), <https://www.un.org/press/en/2006/sga976.doc.htm> [<https://perma.cc/ZA5N-BVFAQ>].

17. These six informal sessions were focused on facilitating safe, orderly and regular migration: the six sessions respectively focused on human rights of migrants, drivers of migration, international cooperation, the contributions of migrants, the smuggling and trafficking of migrants, and labor mobility. See *Refugees and Migrants: Thematic Sessions*, UNHCR (2017), <http://refugeesmigrants.un.org/thematic-sessions> [<https://perma.cc/V2BW-WX34>].

18. See *supra* note 7.

mobility and therefore should long have had as a core concern, the achievement of good governance in this area.

There is little doubt that the Sustainable Development Agenda, with its aim to leave no one behind,¹⁹ forms the frame within which work on the Global Compacts now takes place. The seventeen Sustainable Development Goals that together epitomise this agenda, if all achieved by 2030, would greatly alter the global mobility scenario, rendering migration a choice and a contribution, be this to host, transit or sender countries. While the United Nations High Commission for Refugees (UNHCR) has long played a key global role in the management of refugees and the forcibly displaced, the recent inclusion of the International Organization of Migration (IOM) as a related agency of the U.N., the U.N.'s response confirms the entry of the migrant issue into the global agenda.²⁰ Thus far, the thinking has been that human mobility, when in need of governance, rights and standards, consists of refugees and migrants. This in and of itself is problematic as it constitutes a fundamentally reductive approach to mobility. At the same time, an important conceptual distinction needs to be made when it comes to the question of refugees as opposed to migrants. The idea of refuge enhances that of the nation state as place of shelter. The idea of a migrant, especially a cross-border migrant, can be taken as that of the "other" who crosses over to "our" country. All people everywhere have the right to leave their country, as affirmed in the Universal Declaration of Human Rights.²¹ That, however, raises the question posed by the fact that no one can enter a country without due permission. Refugees, once granted that legal status and offered refuge, are law-abiders. Migrants, particularly those without documentation, may have the right to leave their countries, but remain trespassers once borders have been crossed without documentation. A fundamental disjuncture appears at this point. The United Nations' response, thus far, is to divide and demarcate these inter-related categories.

In considering human mobility in practice, however, there is little doubt that the boundaries between these terms can become blurred, especially from the perspective of the international human rights regime, and with regard to vulnerable persons.²² So too, the

19. G.A. Res. 70/1, Preamble (Sept. 25, 2015).

20. The U.N. and the IOM were officially brought into relationship (in part) in order to "strengthen [the UN and IOM's] efforts in coordinating their respective activities related to migration and human mobility." G.A. Res. 70/296, Annex (Aug. 5, 2016).

21. G.A. Res. 217A (III), Universal Declaration of Human Rights, art. 13, U.N. Doc. A/810 (Dec. 10, 1948).

22. For a discussion of some effects of these "blurred lines" in international law, see

fact that these two terms do little to encompass the vast breadth of types and categories of human mobility in the contemporary age.²³ There are numerous examples in the everyday of blurred categories of people on the move: international migrants in situations as vulnerable as those of refugees; tourists or students who, knowingly or unknowingly, overstay visas; refugees who seek to relocate to countries of their choice for reasons of economic empowerment as much as sanctuary, etc. Yet, the current approach within the U.N. system, as evidenced by the ongoing work on the two Global Compacts, is to uphold the distinction between these two categories on the premise that to not do so would be to seriously undermine the legal protection and rights of refugees.²⁴

In supporting the Rector of the United Nations University, Dr. David M. Malone, in his role as 2017 Chair of the Global Migration Group, I was, last year, a close witness to the consultation processes leading to the Global Compact on safe, orderly, and regular migration. As an academic working for many years on migration, I have been aware that this issue has remained relatively marginal to global processes until now. But the migrant road is long and the very division of mobility governance to the two pathways of migrant and refugee presents concerns. This is so despite the impressively broad span of the elements identified in the New York Declaration as key to the Compacts.²⁵ The demarcations of the “refugee turf” in international relations from the “migrant” one, together with the limitation of mobility to these two categories, remains problematic. In actual fact, mobility has many aspects: students who become migrants, migrants who experience worse vulnerabilities than some refugees, migrants who may also be displaced in one sense or another, and refugees who are also tourists, students and/or visitors and who share the same aspirations as migrants, to mention just a few. The contexts are many and prone to change. In short, the conceptual routes of refugee versus migrant are too narrow, too rigid and too entrenched to encompass the very mobility of categories of mobility.

Parvati Nair, *Refugee or Migrant? Sometimes the Line is Blurred*, THE CONVERSATION (July 25, 2017), <https://theconversation.com/refugee-or-migrant-sometimes-the-line-is-blurred-79700> [<https://perma.cc/U469-WV VX>].

23. For more on categories of people on the move, see ON FOREIGN GROUND: MOVING BETWEEN COUNTRIES AND CATEGORIES (Minaa Ruckenstein and Marie-Louise Kartunnen eds., 2007).

24. As an example of such a position, see Nick Cohen, *To Help Real Refugees, be Firm with Economic Migrants*, THE GUARDIAN (Feb. 6, 2016), <https://www.theguardian.com/commentisfree/2016/feb/06/liberals-harsh-truths-help-refugees-syria> [<https://perma.cc/6NEA-QPJ2>].

25. The list of elements may be found in G.A. Res. 71/1 (Oct. 3, 2016).

In tandem with the above, my engagement with the Commission led by Professor Michael Doyle to shape this Model Convention has provided me with a glimpse into a far more ambitious, nuanced, and far-reaching frame that puts the Global Compact processes in critical perspective. The MIMC projects to a future where mobility is not perceived as a threat. It offers an overarching frame for the protection, regulation and flexible coordination of human mobility, in all its modalities, worldwide. It invites all countries to affirm human rights and to support, value, and protect mobility as a fundamentally enriching and empowering human process. It does so by also highlighting the responsibility of States to open international channels through which such mobility may flourish and flow. Most usefully, the MIMC considers the different sub-sets of mobility as interconnected categories, creating a set of standards that build on one another and offer protection, while also allowing for flexibility.

What lies beyond the Global Compacts? Should the international community address, acknowledge, and support human mobility through the simple, if not at times arbitrary, categorization of refugees and migrants? Or should the international community see the Global Compacts as stepping stones, leading to wider horizons of political and legal imagination, whereby human mobility may be embraced in terms of its multiple, fluid and shifting facets? Regardless of the final form of the Global Compacts, the good governance sought through them must be able to address the living dynamic of human mobility, a core aspect of human existence on the planet.

WHAT DOES THE MODEL INTERNATIONAL MOBILITY CONVENTION ACHIEVE?

"I don't like the word refugee . . . I'm an ordinary girl. I just want to live an ordinary life." (Meera Zaroor, a high school student from Homs, Syria, resident in Barcelona.)²⁶

The MIMC offers a platform from which to think critically about the ongoing processes leading to the two Global Compacts. The U.N. system is playing a key role in shepherding Member States through 2017 and 2018 towards the Global Compacts. The very agencies of the U.N. most involved in the work towards the Compacts are those that could engage best with the MIMC and the blue-

26. *Tot un món: Camins.* (trans. "A whole world: Paths.") (A la carta television broadcast July 17, 2017), <http://www.ccma.cat/tv3/alacarta/tot-un-mon/camins/video/5673602/> [<https://perma.cc/T39B-RAUE>].

sky thinking that it offers. The Compacts are not intended to be an end in and of themselves. They form milestones in what is, in fact, just the start of a long and winding road towards the normalization of human mobility in all its facets. Likewise, the point is not whether, years or decades from now, this Model Convention will cease to be just a model and become formalized. What matters is that the U.N. system and its Member States become familiar with the MIMC even as they shape the Compacts, for it acts as a reminder of what else needs to be done. It forces them to envisage mobility beyond the horizons of governance that they are currently mapping. In this sense, the MIMC urges the international community to be proactive with regard to mobility. In the context of mobility and the risks of poor governance, this proactivity is a matter of life.

The Fatal Flaw in International Law for Migration

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There could hardly be a more challenging moment to try to fix the global governance of international migration, or a time when such reform was more pressing. With good reason, international migration has been at the center of global attention, especially where involuntary or forced migrants are concerned—persons whose movement across borders is coerced by conflict, persecution, climate change-related events, and even extreme socio-economic conditions. In a single year, over a million displaced South Sudanese sought refuge in Uganda.¹ Also in a single year over a million Syrian, Iraqi, Afghan, Somali, Eritrean, Nigerian and others did the same in Europe by sea, as almost four thousand involuntary migrants drowned along the way.² For at least three years a quarter of Lebanon's population has been Syrian refugees.³ The desperation of involuntary migrants in contexts such as these is increasingly matched in intensity by opposition to their admission, especially in countries in the global North experiencing resurgent populist nationalism and more general anti-migrant anxiety.⁴ On the one hand, the intensity, chaos and inhumanity of recent international displacement has precipitated some notable momentum towards reform of the global governance of interna-

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1. Catherine Robinson, *South Sudanese Refugees in Uganda Now Exceed 1 Million*, UNHCR (Aug. 17, 2017), <http://www.unhcr.org/en-us/news/stories/2017/8/59915f604/south-sudanese-refugees-uganda-exceed-1-million.html> [<https://perma.cc/Q542-7Z98>].

2. Jonathan Clayton & Hereward Holland, *Over One Million Sea Arrivals Reach Europe in 2015*, UNHCR (Dec. 30, 2015), <http://www.unhcr.org/en-us/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html> [<https://perma.cc/TM6N-XH5C>].

3. *PM Hariri: Lebanon at "Breaking Point" Due to Refugees*, ALJAZEERA.COM (Apr. 1, 2017), <http://www.aljazeera.com/news/2017/04/saad-al-hariri-lebanon-big-refugee-camp-170401045951087.html> [<https://perma.cc/7FCU-NLD8>].

4. See E. Tendayi Achiume, *Governing Xenophobia*, VANDERBILT J. TRANSNAT'L L. (forthcoming 2018) (analyzing recent xenophobic and other backlash against involuntary migrants and arguing that international law exacerbates this backlash).

tional migration.⁵ But on the other, it remains unclear whether any of this momentum will ultimately produce meaningful change.

It is this punishing context that frames the herculean enterprise that is the Model International Mobility Convention (MIMC).⁶ The MIMC aims to reform the global governance of mobility across a range of issue-areas, and the charge its authors level at the existing regime is that it is fragmented and incoherent. For example, the current siloed international protection regime is at odds with the reality of mixed migration flows that along with refugees include labor migrants, who have no claims to protection even when the latter are as politically and economically vulnerable as refugees. Indeed, the majority of international migrants are labor migrants and “[f]ailing to provide legal pathways for migrants indirectly encourages irregular migration and that in turn makes migrants vulnerable to exploitation and domestic publics concerned about a loss of control over their borders.”⁷ According to the authors of the MIMC, what the starkly fragmented universe of global migration governance requires is a new center of gravity—the fact of mobility itself⁸—and coherent treatment of this mobility.

While incoherence and fragmentation is certainly an issue, the extant global governance framework has a more fundamental and much less tractable ticking time bomb. Its cancer—possibly terminal—is the conception of state sovereignty operational within it, and that undergirds our international order as a whole. International law takes as starting point a community of formally sovereign, autonomous nation States, each possessing the largely unfettered right to determine on its own terms which non-nationals it will admit and how. A legal framework premised on such an atomistic conception of nation States and their corresponding entitlements is ill suited to the

5. Examples include the 2016 New York Declaration for Refugees and Migrants and the Global Compacts process it initiated. G.A. Res. 71/1, Annex I at ¶ 19, Annex II at ¶ 9 (Oct. 3, 2016) (initiating processes for the adoption of a Global Compact for Refugees and a Global Compact on Migration).

6. See Model International Mobility Convention, *International Convention on the Rights and Duties of All Persons Moving from One State to Another and of the States They Leave, Transit or Enter* (2017), http://globalpolicy.columbia.edu/sites/default/files/mimc_document.pdf [<https://perma.cc/F3Q3-6G88>].

7. Michael W. Doyle, *The Model International Mobility Convention*, 56 COLUM. J. TRANSNAT'L L. 219, 220 (2017).

8. *Id.* (“A holistic approach to human mobility is needed at the international level to address these gaps in protection, regulation and cooperation.”).

deeply interconnected world in which we presently live.⁹

Decisions and national interests in the global North, for example, deeply impact the global South. They are an important factor in the complex matrix that drives the chaotic and unauthorized cross-border movement the MIMC is intended to address. Consider how the largest international movements of people fleeing conflict in the last decade and at least as far back as World War II have been driven by internationalized conflicts that link multiple powerful sovereign States in webs of coordinated intervention.¹⁰ At the same time, international law places no direct obligation on States causing displacement to admit those consequently displaced.¹¹ Climate-change related displacement is predicted to increase, and the populations that will suffer the most devastation and dislocation (and that already do) are also those least responsible for the human causes of climate change.¹² Again, international law as yet does not require those nations most responsible for environmental degradation to admit those consequently displaced. Even international migration pursued largely in search of better economic outcomes is significantly conditioned by

9. See Chantal Thomas, *What Does the Emerging International Law of Migration Mean for Sovereignty?*, 14 MELB. J. INT'L L. 392, 448 (2013) ("If sovereignty is premised upon an atomistic conception of the state of nature, then surely a more interconnected understanding of nature raises the question whether the basic presumption of autonomy that undergirds sovereignty should shift in favour of a politics of interdependence.").

10. For further discussion, see E. Tendayi Achiume, *The Fact of Xenophobia and the Fiction of State Sovereignty: A Reply to Blocher & Gulati*, COLUM. HUM. RTS. L. REV. ONLINE 13 (2017), <http://hrlr.law.columbia.edu/wp-content/uploads/sites/10/2017/03/Achiume.pdf> [<https://perma.cc/K7P8-69KC>].

11. For a discussion of this and related problems and a proposal for reform see E. Tendayi Achiume, *Syria, Cost-Sharing, and the Responsibility to Protect Refugees*, 100 MINN. L. REV. 687 (2015).

12. Glenn Althor, James E. M. Watson & Richard A. Fuller, *Global Mismatch Between Greenhouse Gas Emissions and the Burden of Climate Change*, 6 SCIENTIFIC REPORTS (Feb. 5, 2016), <https://www.nature.com/articles/srep20281> [<https://perma.cc/UX7V-FAPS>] ("In line with the results of other studies, we find an enormous global inequality where 20 of the 36 highest emitting countries are among the least vulnerable to negative impacts of future climate change. Conversely, 11 of the 17 countries with low or moderate GHG emissions, are acutely vulnerable to negative impacts of climate change. In 2010, only 28 (16%) countries had an equitable balance between emissions and vulnerability. Moreover, future emissions scenarios show that this inequality will significantly worsen by 2030."). Ian Johnson, *Map Shows How Climate Change Will Hit the Economies of the World's Poorest Countries Hardest*, THE INDEPENDENT (Nov. 7, 2016), <http://www.independent.co.uk/environment/climate-change-poor-countries-world-hit-hardest-affected-india-ethiopia-kenya-moodys-a7403076.html> [<https://perma.cc/CFJ8-LJKU>] ("The report's conclusions fit with the general trend that poor countries which have done the least to cause global warming will suffer its effects the most and the nations that built their wealth on fossil fuels will fare better.").

and responsive to global economic interdependence, including historical political projects that brutally brought the world's peoples closer together, as they remain today.¹³

Today's hand-wringing about the challenges posed by international migration, especially when that migration brings Third World peoples to First World nations, ignores the first and incredibly violent chapter of the story still unfolding today. Between the 19th and first half of the 20th century over sixty-two million Europeans migrated from colonial metropolises,¹⁴ to participate in a project of political and economic domination over the very peoples that European and kindred nations today seek so vehemently to exclude. The movement of Europeans into colonial territories was accompanied by movement in the reverse direction of natural and human resources for the overwhelming benefit of Europeans, at overwhelming cost to colonized peoples. European colonialism initiated deep interdependence between colonizing and colonized nations, whereby prosperity in the former relied on exploitation of the latter. International law played an important role in structuring this relationship of subordination.¹⁵ And although colonialism is largely (but not entirely) over as a formal matter,¹⁶ First World exploitation of the Third World persists, again with the help of international law.¹⁷ There is a compelling argument to be made that certain forms of unauthorized economic migration today are the partial product of global structures of subordination originating in the European colonial project.¹⁸ These structures

13. See E. Tendayi Achiume, *Re-Imagining International Law for Global Migration: Migration as Decolonization?*, 111 AMERICAN J. OF INT'L L. UNBOUND (2017) (introducing a proposal for re-conceiving the movement of certain migrants across international borders today as decolonization in order to achieve a new and productive logic and ethics for international law's application to global migration, one that reflects global interconnectedness).

14. J.L. Miège, *Migration and Decolonization*, 1 EUROPEAN REVIEW 81, 85–86 (1993); Chantal Thomas, *Sovereignty and the New International Law of Migration*, 14 MELB. J. INT'L L. 392, 439 (2013) (noting that as a percentage of population, “[m]easured either as a percentage of the total population, or in terms of economic significance, the impact of the earlier wave of [colonial and New World] immigration was much greater than the [contemporary] one.”).

15. See generally, ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2004).

16. See Rahmatullah Khan, *Decolonization*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rudiger Wolfrum, ed., 2015) (“[L]ess than 1% of the world's population now lives under colonial rule.”).

17. See ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 196–234 (2004).

18. See Achiume, *supra* note 13.

remain protected by international law, even while this law imposes no obligations on former colonial powers to recognize and admit former colonial subjects.

Each of the scenarios I have described juxtaposes forms of global interconnection that are implicated in transnational migration with international law's atomistic response, which is to leave it to each individual State to determine its own stance vis-à-vis this migration. The point is that, especially in light of its global causes, the heightened human mobility of the present era is fundamentally at odds with an international system that largely leaves it to each nation State to pick and choose whom it deems worthy of admission and inclusion. Although international law presents our global order as composed of mutually sovereign and formally equal nation States, this fiction obscures the obvious imbalances in power and asymmetries in benefits that different States and their respective populations enjoy as part of the international system. It also obscures the origins of these asymmetries making it all the harder to work towards a more promising legal scenario than the status quo.

By making no radical demands on States to cede sovereignty on this issue of territorial exclusion of non-nationals through international law, the MIMC cannot offer a resolution of the existential ills of global migration governance. Indeed, the authors of the Convention make clear that it is intended as a "Realistic Utopia,"¹⁹ a pragmatic compromise, "designed to be an ideal yet realizable framework for what States someday should adopt when comprehensively regulating international mobility."²⁰ On the one hand, the world would be better off if States were to adopt the MIMC—it is an unquestionable improvement on the status quo. On the other hand, however, it is important not to lose sight of what it would take to achieve systemic resolution, where systemic resolution entails a global framework that is ethical and capable of comprehensively addressing how and why people actually move. Once the fundamental flaw in international law is foregrounded, it is clear that the MIMC can be viewed neither as the sun nor even a lesser star, in that it cannot be a final aspirational destination for global migration governance reform. Instead the

19. Doyle, *supra* note 7, at 223 ("[O]ur method was closest to a 'Realistic Utopia,' a term coined by John Rawls to refer to a system which requires using what we know about institutions, attitudes, and preferences while joining 'reasonableness and justice with conditions enabling citizens to realize their fundamental interests As did Rawls, it builds on Rousseau's injunction to legislate for '[m]en as they are, laws as they might be.' Practically, this means reflecting the world as it is and building a movement toward justice that existing, but better motivated, governments could endorse." (citing JOHN RAWLS, THE LAW OF PEOPLES: WITH, THE IDEA OF PUBLIC REASON REVISITED (2001))).

20. *Id.* at 223.

MIMC should be assessed as contributing something else. It may well be an important stepping stone in a much longer journey. Viewing it this way leaves room for concurrent investment in imagining ideals and utopias that more fully do justice to the world in which we live.

International law is itself a stumbling block to utopianism in global migration governance in another way, namely on account of the singular prominence it accords nation States as makers of this law. Systemic resolution of the problems of the current system would require controversial and presently unrealistic demands on nation States to cede the rights and the power they have over national immigration policies to better reflect the codependent, interconnected world that is our reality. Achieving an ideal form of global migration governance would, in other words, require remedying the fatally flawed conception of state sovereignty at the heart of international law and which nation States are strongly incentivized to protect. For international lawyers, this signals the need for radical changes in method and horizon. It may mean, for example, imagining and conceptualizing an international law that looks to subnational actors such as cities or regional provinces to create global governance structures that are more inclusive of international migrants. More fundamentally it calls for new political and legal theories that begin from a premise of deep global interconnection.²¹ While this may all sound like the beginning of a blueprint for some sort of global migration law Never-never Land, if present-day social, political and technological forces are indeed driving us towards some kind of international migration inflection point, there is a clear need, and may be opportunity, for the previously unthinkable.

21. See Thomas, *supra* note 9; Achiume, *supra* note 13 (as well as accompanying text).

Think Mobility Instead of Migration: Leveraging Visitors, Tourists and Students for More International Cooperation

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The Model International Mobility Convention (MIMC) squarely addresses the reality that there is relatively little international cooperation to regulate the movement of people across international borders. While there is a well-established international refugee regime, there is no comparable international labor migration regime. States have increasingly engaged in discussions of international cooperation on migration at the Global Forum on Migration and Development (GFMD) and other international fora. However, existing international agreements do not involve significant commitments on the part of a majority of the world's States to accept labor migration. They do not add up to a regime facilitating the international movement of labor similar to the international trade regime based on the General Agreement on Tariffs and Trade (GATT).

The world has about 258 million international migrants, defined by the United Nations as those who have lived outside of their country of nationality or birth for more than one year.¹ The number of international migrants has grown significantly but it still accounts for only about three percent of the world's 7.6 billion people. Most people in the world have never left their country of birth and never will.² Some people have travelled internationally once, some occa-

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1. Dep't. of Econ. & Soc. Aff., Trends in International Migration: The 2017 Revision, UNPOP/DB/MIG/Stock/Rev 2017 (Dec. 2017).

2. This is borne out by the fact that relatively few citizens of the three most populous countries in the world have passports: sixty million Indians (4.5 percent); 129 million Chinese (9.2 percent) and 132 million U.S. citizens (41 percent). See MINISTRY OF EXTERNAL AFFAIRS, GOVERNMENT OF INDIA, PUBLIC ADVISORY (2014), http://passportindia.gov.in/AppOnlineProject/pdf/Public_Advisory.pdf [<https://perma.cc/Z2LJ-2MFJ>]; Zhang Yang, *Mainland residents: It is more convenient to*

sionally and a few regularly travel internationally every year.

In contrast to the U.N. definition of migration, “global mobility” refers to movements of people across international borders for any length of time or purpose. In 2016 there were over 1.2 billion international tourist arrivals,³ which includes travel for leisure, business and to visit friends and relatives. If all these tourists returned directly home in the same year that would be another 1.2 billion entries, totaling over 2.4 billion entries. Given that many people enter several countries before returning home or return the following year, it is difficult to say how many entries of returning citizens correspond to international tourist arrivals. Additionally, there are millions of students and temporary contract workers who may be abroad for less than one year as well as large numbers of cross-border commuters who might not be counted in tourist arrival statistics. My best guess is that there are over two billion crossings of international borders worldwide per year.

Thinking in terms of global mobility instead of international migration widens the scope of analysis to include international cooperation on international travel and the activities of the international organizations concerned with it. Expanding the scope of the MIMC beyond migration to include chapters on visitors, tourists and students increases the number of people such a treaty may affect—from 258 million migrants and twenty-two million refugees to all of those people who collectively cross international borders two billion times each year. Adoption of the MIMC, therefore, may also have financial consequences for the transportation businesses that enable those two billion international border crossings and the businesses (and educational institutions) that earn revenues from those abroad for less than a year.

The first three chapters of the MIMC articulate principles, rules and norms of what I have called the “international travel re-

apply for entry and exit documents, PEOPLE'S DAILY OVERSEAS EDITION (Feb. 18, 2017), http://paper.people.com.cn/rmrhwb/html/2017-02/18/content_1751249.htm [<https://perma.cc/79N3-YLLY>]; U.S. DEP'T. OF STATE, PASSPORT STATISTICS: VALID PASSPORTS IN CIRCULATION (1989-2016), <https://travel.state.gov/content/passports/en/passports/statistics.html> [<https://perma.cc/Q84D-2R9R>]. National population figures used in calculations from: U.N. Dep't of Econ. & Soc. Aff. Population Division, World Population Prospects Key Findings & Advance Tables: 2017 Revision, U.N. Doc. ESA/P/WP/248 (2017), https://esa.un.org/unpd/wpp/publications/Files/WPP2017_KeyFindings.pdf [<https://perma.cc/NTG5-WQ4X>].

3. U.N. WORLD TOURISM ORG., 2016 ANNUAL REPORT (2017), <https://www.e-unwto.org/doi/pdf/10.18111/9789284418725> [<https://perma.cc/L5Z5-T4AA>].

gime.”⁴ This regime was established long ago but remains somewhat latent. Cooperation within international organizations to facilitate international travel reaches back to the League of Nations and the 1920 Paris Conference on Passports and Customs Formalities.⁵ The standardization of passports continued after WWII, with the formation of the International Civil Aviation Organization (ICAO) in 1947 that subsequently promoted the standard of machine-readable passports in the 1980s.⁶ Cooperation on international travel may be closely related to cooperation on migration but it is not the same. Often, cooperation on international travel takes place in international organizations such as ICAO, the U.N. World Tourism Organization (UNWTO) and the International Maritime Organization (IMO). None deal with immigration and refugee policies but cooperation within these organizations has enabled increased migration and asylum seeking, along with all other international travel.

For the most part, cooperation on international travel has historically focused on facilitating cross-border movements of ever larger volumes of tourists and business people, however, the hijackings of the early 1970s and the attacks of September 11, 2001 brought security considerations to the forefront of international cooperation in this issue area.⁷ As transnational organized crime and terrorism have raised security concerns, States have increasingly turned to international cooperation to secure international travel while maintaining levels of travel flows.⁸ While travel facilitation enables asylum seeking, increasing international cooperation to improve travel document security, tighten border controls and combat human smuggling reduces opportunities for successful spontaneous arrival asylum seeking by those with a well-founded fear of persecution.⁹ To address

4. Rey Koslowski, *The International Travel Regime*, in *GLOBAL MOBILITY REGIMES* 51, 51 (Rey Koslowski ed., 2011).

5. MARTIN LLOYD, *THE PASSPORT: THE HISTORY OF MAN'S MOST TRAVELLED DOCUMENT* (2003); MARK B. SALTER, *RIGHTS OF PASSAGE: THE PASSPORT IN INTERNATIONAL RELATIONS* (2003).

6. *Machine Readable Travel Documents MRTDs: History, Interoperability and Implementation* (Int'l Civil Aviation Org.: New Tech. Working Group, Working Paper No. 17, 2007) https://www.icao.int/Meetings/TAG-MRTD/Documents/Tag-Mrtd-17/TagMrtd17_WP016.pdf [<https://perma.cc/GNW3-SPV7>].

7. S.C. Res. 1373 (Sept. 28, 2001).

8. Rey Koslowski, *Global Mobility Regimes: A Conceptual Framework*, in *GLOBAL MOBILITY REGIMES* 1, 10–15 (Rey Koslowski ed., 2011).

9. See Koslowski, *supra* note 4, at 69–70. As Alexander Betts notes, “the travel regime exists in parallel to and significantly overlaps with the refugee regime, such that one might refer to a ‘travel-refugee regime complex.’ The principal overlap between the regimes relates to the regulation of spontaneous arrival asylum seekers’ access to territorial asylum.”

this side effect of increasing border security cooperation and maintain international protection, U.N. Member States must increase cooperation to assist countries of first asylum and to resettle refugees,¹⁰ through mechanisms such as those proposed in Articles 211–213 of the MIMC.

Considering the much greater scope of global mobility and the longstanding existence of the international travel regime, I have argued that it is useful to think about international cooperation on migration in terms of a set of three interacting global mobility regimes: the established international refugee regime based on the norm of non-refoulement, an international travel regime based on the norm of secure facilitation of travel, and a non-existent but potential international labor migration regime anchored in the norm of shared prosperity.¹¹ If we think about international migration as a subset of all movements of people across international borders, issue linkages between international travel and labor migration increase the possibilities for cooperation among States.

By placing three chapters of rules regulating the cross-border movement and rights of visitors, tourists and students together with chapters on migrant workers, investors and migrant residents as well as refugees, forced migrants and asylum seekers, the MIMC links cooperation on international travel to cooperation on migration and refugees. The MIMC provides a framework for policymakers to consider the relationship between international cooperation to facilitate the secure travel of inbound international tourists and international cooperation to promote orderly labor migration.

The fundamental obstacle to establishing an international regime governing labor migration is that migration destination States have no reason to join. Foreign labor, especially low-skilled labor, is in abundant supply. If labor shortages develop during periods of economic growth, States can get as much labor from abroad as they like with bilateral agreements or simply by opening labor markets to migrants while at the same time avoiding any international commitments to keep labor markets open during economic downturns. For individual migration destination States, the additional economic gains of joining such an international regime are not very politically salient

Alexander Betts, *The Refugee Regime and Issue-Linkage*, in GLOBAL MOBILITY REGIMES 73, 76 (Rey Koslowski ed., 2011).

10. Rey Koslowski, *Addressing Side-Effects of Increasing Border Security Cooperation: A Global Perspective*, in BEYOND THE MIGRATION AND ASYLUM CRISIS: OPTIONS AND LESSONS FOR EUROPE 108, 108–14 (Ferruccio Pastore ed., 2017).

11. See Koslowski, *supra* note 4 (dealing with issues with which the following five paragraphs also draw).

because such gains are primarily realized by the migrants themselves and the reduced labor costs due to migration are distributed across the economy as a whole. Moreover, the non-economic costs of large-scale immigration to receiving States' society and culture, whether real or just perceived,¹² render a policy of multilateral engagement on migration even more difficult for politicians to sell to skeptical publics than international free trade agreements. International bargaining on labor migration has another problem in that it is not conditioned by reciprocity. In bargaining to reduce tariffs, free trade politicians argue that the gains from opening up foreign markets for exports make up for the profits and jobs lost to cheaper imports.¹³ Workers in developed countries do not benefit much from gaining access to labor markets in migration origin sending States of the developing world. Politicians in developed countries who need the votes of workers threatened by immigration do not have a corresponding constituency akin to "exporters."¹⁴ It should, therefore, not be surprising that there has been little interest among U.N. Member States, especially labor migration destination States, to expand the global legal and normative framework for migration policies.

These and other obstacles to international cooperation on labor migration may not necessarily apply to international cooperation on travel. Although migration destination States have no reason to

12. While immigration may significantly increase the economic growth experienced by migration destination States, immigration may also lead to demographic changes that shift the ethnic and religious composition of their societies and, thereby, precipitate divisive political contestation over issues of national identity that incur non-economic costs, up to and including civil war. See WILLIAM H. MCNEILL, *POLYETHNICITY AND NATIONAL UNITY IN WORLD HISTORY* (1986); Aristide Zolberg, *International Migration in Political Perspective*, in *GLOBAL TRENDS IN MIGRATION: THEORY AND RESEARCH ON INTERNATIONAL POPULATION MOVEMENTS 3* (Mary M. Kritz, Charles B. Keely & Silvano M. Tomasi eds., 1981); MYRON WIENER, *THE GLOBAL MIGRATION CRISIS: CHALLENGE TO STATES AND TO HUMAN RIGHTS* (1995). Politicians may also leverage public perceptions of a state's loss of control over migration for electoral gains that have similar divisive political consequences (and their corresponding non-economic costs), even if the actual immigration flow is not actually changing county's demographic make-up to a significant extent. See *IDENTITY, MIGRATION AND THE NEW SECURITY AGENDA IN EUROPE* (Waever Ole et al. eds., 1993) (looking especially at Martin O. Heisler & Zig Layton-Henry, *Migration and the Links Between Social and Societal Security*, in *IDENTITY, MIGRATION AND THE NEW SECURITY AGENDA IN EUROPE* 148 (Waever Ole et al. eds., 1993)).

13. See Timothy J. Hatton & Jeffrey G. Williamson, *A Dual Policy Paradox: Why have Trade and Immigration Policies Always Differed in Labor Scarce Economies?* (Nat'l Bureau of Econ. Research, Working Paper No. 11866, 2005), <http://www.nber.org/papers/w11866.pdf> [<https://perma.cc/VE45-CYPY>]; Timothy J. Hatton, *Should We Have a WTO for International Migration?*, 22 *ECON. POL'Y* 339, 340–83 (2007).

14. *Id.*

join an international regime to facilitate labor migration, these very same States may be very interested in joining a global regime that facilitates the arrival of foreigners who do not come to work, but rather come to spend money on lodging, meals and entertainment. Worldwide, 1.2 billion international tourists generated over \$1.5 trillion in revenue in 2016.¹⁵ While there may be no inherent reciprocity between or among States that send and receive labor migration, international tourism has a different array of political constituencies producing different political dynamics with respect to international bargaining among States. Six of the top ten migration destination countries (the United States, Russia, Germany, France, the United Kingdom, and Spain) are also top ten international tourist destinations. Major migration destination countries may not need multilateral cooperation to access the abundant supply of migrant workers but the supply of international tourists cannot be similarly taken for granted. International tourist spending can shift away from States that erect barriers to international travel toward those States that do not.

Moreover, the distribution of international tourism's economic benefits differs from that of international labor migration. The economic benefits from international labor migration go to the migrants themselves, the businesses in migration destination States that profit from lower labor costs, and their customers who enjoy lower costs for the goods and services produced. International tourist receipts benefit the lodging, restaurant, and entertainment businesses, and can be directly tied to jobs in these industries. Politicians who advocate for increasing labor migration may be opposed by constituents who face wage competition from migrants. In contrast, calling for more international tourism is a common economic development mantra for many cities and regions in most countries of the world.¹⁶ While it may be difficult for migration destination country politicians to support international agreements that commit their countries to ac-

15. U.N. WORLD TOURISM ORG., *supra* note 3.

16. See, e.g., U.S. TASK FORCE ON TRAVEL AND COMPETITIVENESS, NAT'L TRAVEL AND TOURISM STRATEGY (2012), <http://tinet.ita.doc.gov/pdf/national-travel-and-tourism-strategy.pdf> [<https://perma.cc/EQM8-QQPD>]; EUROPEAN COMMISSION, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS - EUROPE, THE WORLD'S NO 1 TOURIST DESTINATION - A NEW POLITICAL FRAMEWORK FOR TOURISM IN EUROPE (2010), <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52010DC0352&from=EN> [<https://perma.cc/3XX3-Y2PG>]; U.N. WORLD TOURISM ORG., SUSTAINABLE TOURISM FOR DEVELOPMENT GUIDEBOOK, (2013), <http://cf.cdn.unwto.org/sites/all/files/docpdf/devcoengfinal.pdf> [<https://perma.cc/U6XX-3VRF>].

cept certain levels of labor migration regardless of economic conditions, politicians advocating international cooperation to facilitate international tourism can leverage business, union and local government support, especially in periods of economic downturns when international tourist receipts may replace declining domestic spending.

Another reason why politicians may be more inclined to support cooperation on travel than migration is that while the world's 258 million migrants are primarily people from lower socioeconomic classes who went abroad to take difficult, dirty, dangerous and undesirable jobs;¹⁷ international tourists and business travelers are primarily from middle and upper socioeconomic classes.¹⁸ While liberal immigration policies and international cooperation to facilitate labor migration primarily benefits migrant workers themselves¹⁹ (as well

17. The International Labor Organization estimates that there are 150 million migrant workers out of the world's 207 million migrants over the age of fifteen years. See INT'L LAB. ORG., ILO GLOBAL ESTIMATES ON MIGRANT WORKERS, (2015), http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_436343.pdf [<https://perma.cc/6BCX-XDF2>]. As to the kinds of jobs most migrant workers have, see MICHAEL J. PIORE, *BIRDS OF PASSAGE: MIGRANT LABOR AND INDUSTRIAL SOCIETIES* (1979); Manolo I. Abella, *Asian Labour Migration: Past, Present, and Future*, 12 ASEAN ECON. BULL., 125, 125–35 (1995); Amelie F. Constant and Douglas S. Massey, *Labor Market Segmentation and the Earnings of German Guestworkers* (Inst. of Lab. Econ., Working Paper No. 774, 2003), http://www.academia.edu/15230152/Labor_Market_Segmentation_and_the_Earnings_of_German_Guestworkers [<https://perma.cc/A8P8-5X3B>].

18. Over seventy percent of the people in the world have incomes below the middle-income threshold of ten dollars per day (or \$3,650 year). See RAKESH KOCHHAR, *A GLOBAL MIDDLE CLASS IS MORE PROMISE THAN REALITY: FROM 2001 TO 2011, NEARLY 700 MILLION STEP OUT OF POVERTY, BUT MOST ONLY BARELY* (2015). Individuals below this income level would find it difficult to save enough money to pay for the expenses of travelling abroad on visitor visas (which do not allow the traveler to work and earn income in the destination country). A World Bank study found that passport fees of the 127 countries analyzed averaged \$50 but exceeded 10 percent of annual per capita income in one of every ten countries. David J. McKenzie, *Paper Walls Are Easier to Tear Down: Passport Costs and Legal Barriers to Emigration* (World Bank, Working Paper No. 3783, 2005). Comprising roughly half of the world's international tourist arrivals, the top 10 tourist destination countries charge visitor visa fees that vary from \$160 in the US to seventy-one dollars for France, Germany, Italy and Spain to twenty dollars in Turkey and most visitor visa applications to these destinations require the additional cost of traveling to consulates or embassies to submit applications, provide biometrics and/or be interviewed. Finally, in addition to transportation costs, which vary greatly depending on distance and mode of travel, each of the 1.2 billion tourist arrivals on average generated \$990 in receipts from lodging, food, etc. U.N. WORLD TOURISM ORG., *TOURISM HIGHLIGHTS 2017 EDITION* 5–6 (2017).

19. See NAT'L ACAD. OF SCI., ENGINEERING & MEDICINE, ECON. AND FISCAL CONSEQUENCES OF IMMIGRAT.: A REPORT OF THE NAT'L ACADEMIES OF SCIENCE,

as their extended families back home who receive remittances);²⁰ liberalizing visa and border security policies and cooperating to facilitate international travel primarily benefits middle and upper class people who wish to take their holidays abroad as well as attend business meetings and conferences. It is much easier for politicians to advocate for liberal visa and border control policies that reduce the inconveniences of international travel for their own well-to-do constituents (while at the same time making international travel for migrants easier), than it is to promote liberal immigration policies that primarily benefit immigrants and foster economic development of home countries.

Chapter I of the MIMC on visitors lays the groundwork for the rest of the project's approach. The rights of visitors articulated in this chapter set a baseline of rights for anyone and everyone who crosses an international border for any length of time or purpose. Subsequent chapters layer on additional rights for specific categories of visitors—first, tourists and students, then migrants and refugees. Although the MIMC text largely draws on the 1990 Migrant Workers Convention, it also draws on international legal instruments, such as the Chicago Convention on International Civil Aviation, which governs the work of ICAO. In addition to addressing the rights of visitors, Chapter I articulates the rights and duties of States vis-à-vis each other and visitors. Article 6 states that “States Parties have the right to determine who shall be allowed to enter their territories and to decide who shall be allowed to stay,” subject to enumerated constraints, including the obligation of States to allow the entry of their own nationals. Chapter I also includes articles that re-articulate rules guiding States in their use of visas and passports as tools of international cooperation to promote the secure facilitation of travel. Drawing on the New York Declaration, the chapter mandates that States promote international cooperation to manage and control their borders, share best practices in border controls and help build capacities of fellow States.

Chapter II on tourists largely draws on the UNWTO's “Global Code of Ethics for Tourism.” As such, much of Chapter II is the “soft law” of a code of conduct for tourist operators rather than rules governing international cooperation between States. Given that the

ENGINEERING AND MEDICINE 196 (2017).

20. In 2016, migrants sent home \$429 billion in remittances. World Bank, *Migration and Remittances: Recent Developments and Outlook*, Migration and Development Brief 27 (Apr. 2017), <http://pubdocs.worldbank.org/en/992371492706371662/MigrationandDevelopmentBrief27.pdf> [<https://perma.cc/DGZ9-X4NU>].

UNWTO traces its origins to the International Union of Official Tourist Propaganda Organizations of 1934, international cooperation to promote tourism is longstanding.²¹ For example, eighty-seven States agreed at the 1963 UN Conference on International Travel and Tourism that “Governments should extend to the maximum number of countries the practice of abolishing, through bilateral agreements or by unilateral decision, the requirement of entry visas for temporary visitors.”²² The UNWTO’s efforts to persuade governments to eliminate visa requirements and, if visas must remain, to utilize e-visas or allow visitors to get a visa upon arrival have been successful, even in the wake of major global economic downturns that often correspond with tightening immigration policies. At the beginning of 2008, destination countries requested an average of seventy-seven percent of the world’s population to apply for a traditional visa prior to departure; this percentage decreased to sixty-one percent in 2015.²³

Chapter III on students addresses the world’s population of international students, which grew from 2.8 million to 4.6 million between 2005 and 2016,²⁴ but has not been thought of as international migration until relatively recently. European, American, Canadian and Australian policymakers have long viewed international students from less developed countries as future engineers, physicians, teachers who return to help develop their countries of origin.²⁵ Policymakers are increasingly viewing international university students as sources of higher education “export” income and, upon completion of their studies, as human capital to fuel high-tech industries and post-industrial service economies.²⁶ For example, the Australian government required international students to leave Australia after their studies and banned them from immigrating to Australia for three

21. See *History*, U.N. WORLD TOURISM ORG., <http://www2.unwto.org/content/history-0> [<https://perma.cc/W2RE-GE8K>].

22. U.N. Conference on International Travel and Tourism, *Recommendations on International Travel and Tourism*, U.N. Doc. E/Conf. 47/18, Rome (Aug. 21–Sept. 5, 1963).

23. U.N. WORLD TOURISM ORG., VISA OPENNESS REPORT 2015 4 (2016), <https://www.e-unwto.org/doi/pdf/10.18111/9789284417384> [<https://perma.cc/4HCD-HE82>].

24. See *Education: Inbound Internationally Mobile Students by Continent of Origin*, UNESCO DATABASE, <http://data.uis.unesco.org/index.aspx?queryid=169> [<https://perma.cc/62G6-RRS5>].

25. See, e.g., WALTER JOHNSON & FRANCIS J. COLLIGAN, *THE FULBRIGHT PROGRAM: A HISTORY* (1965); Margaret L. Cormack, *International Development Through Educational Exchange*, 38 REV. OF EDUC. RES. 293, 293–302 (1968).

26. See Rey Koslowski, *Shifts in Selective Migration Policy Models: a Comparison of Australia, Canada, and the United States*, in HIGH-SKILLED MIGRATION: DRIVERS, DYNAMICS AND POLICIES (Mathias Czaika, ed., forthcoming Feb. 2018).

years.²⁷ In 1999, the government lifted the three-year ban and added five bonus points in the skilled migration program for earning a degree at an Australian university.²⁸ Three years later, international students comprised half of Australia's permanent skilled immigrant stream.²⁹ In 2007, Canada followed the Australian example in revising its points system for permanent immigration to give priority to applications from foreign students who had completed their degrees in Canada.³⁰ In 2011 the Canadian government began offering permanent residency to foreign students who earned their PhDs in Canada³¹ through a "PhD graduate stream" of permanent immigration that is now administered through provincial programs, such as that of Ontario³² and British Columbia.³³ Although tourists vastly outnumber international students, the annual per capita economic impact of international students is much greater. Consider that, for example, during the 2015–2016 academic year, the 1,043,839 international students studying at U.S. colleges and universities contributed \$32.8 billion to the U.S. economy and supported more than 400,000 jobs.³⁴

As noted above, an important innovation of the MIMC lies in its explicitly broader focus on all cross-border movements as a domain of international cooperation. By taking up mobility—and with that the wider field of State interests this covers, from travel, tourism, to education, and labor—this approach lays the groundwork for a potentially richer network of interlocking, interdependent, and mutually beneficial forms of multilateral State cooperation than what a more

27. Lesleyanne Hawthorne, *Picking Winners: The Recent Transformation of Australia's Skilled Migration Policy*, 39 INT'L MIGRATION REV. 663, 663–96 (2005).

28. *Id.*

29. *Id.*

30. See *Canadian Experience Class*, GOV'T OF CANADA, <http://www.cic.gc.ca/english/resources/tools/perm/econ/cec/> [https://perma.cc/KTA8-4ZBK].

31. See *International PhD students or graduates: Want to stay in Canada permanently?*, CITIZENSHIP & IMMIGR. CANADA, <http://www.cic.gc.ca/english/pdf/pub/PhD-factsheet.pdf> [https://perma.cc/PB4R-A46D].

32. See *International Students – PhD Graduate Stream*, GOV'T OF ONTARIO, http://www.ontarioimmigration.ca/en/pnp/OI_PNPSTUDENTS_PHD.html [https://perma.cc/74X6-XDYA].

33. See *Express Entry BC (EEBC) – International Post-Graduate category of the BC Provincial Nominee Program*, GOV'T OF BRITISH COLUMBIA, <https://www.welcomebc.ca/Immigrate-to-B-C/BC-PNP-Express-Entry-B-C/EEBC-International-Post-Graduate> [https://perma.cc/5W6F-F985].

34. *International Student Economic Value Tool*, NAFSA: ASS'N. OF INT'L EDUCATORS, http://www.nafsa.org/Policy_and_Advocacy/Policy_Resources/Policy_Trends_and_Data/NAFSA_International_Student_Economic_Value_Tool/ [https://perma.cc/U6A4-Z7TH].

narrow focus on migration alone might allow. Diplomats seeking to leverage the economic benefits of international tourism and international education in negotiations toward a global compact for safe, orderly, and regular migration can use the approach of the MIMC as a framework to link international cooperation on travel to cooperation on migration.

Undocumented or Irregular Migrant Workers under the Model International Mobility Convention: Rights and Regularization

DIEGO ACOSTA*

This paper argues in favor of a rethinking of how the status of migrants in an irregular situation is tackled. The New York Declaration for Refugees and Migrants mentions numerous times the need to facilitate and ensure safe, orderly and regular migration.¹ It is laws, however, which create irregularity. In particular, when such laws are applied at the border, migration often becomes unsafe and disorderly as proven by the hundreds of individuals dying when trying to cross borders each year.

Undocumented migration is indeed one of the most politicized and debated aspects of mobility on a global scale. Despite the fact that, in places like Europe, most unauthorized migrants at some point possessed regular status and only lose such status through visa-overstay, non-renewal or unauthorized work,² discussions regarding undocumented migration are usually interrelated with issues of border control. Clarifications in legal instruments as to who is in an irregular situation are often far from conclusive, because these instruments tend to simply define “irregular migrants” in the negative: as individuals who are not legally residing in the country. However, as Hiroshi Motomura has highlighted, “immigration status is hard to ascertain or is changeable. And even when a violation is clear, its consequences are not.”³ This tendency can also be found in existing international legal instruments. For instance, Article 5 of the

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1. G.A. Res. 71/1, ¶¶ 4, 40, 41, 57 (Sept. 19, 2016).

2. INTERNATIONAL CENTRE FOR MIGRATION POLICY DEVELOPMENT, REGULARISATIONS IN EUROPE: STUDY ON PRACTICES IN THE AREA OF REGULARISATION OF ILLEGALLY STAYING THIRD-COUNTRY NATIONALS IN THE MEMBER STATES OF THE EU (2009), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/legal-migration/pdf/general/regine_appendix_b_january_2009_en.pdf [<https://perma.cc/M88S-SH23>].

3. HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 21 (2014).

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) defines non-documented persons as those who do not comply with the conditions “to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party.”⁴ This level of generality demands domestic analysis on a case-by-case basis.

The Model International Mobility Convention (MIMC) takes a similar approach to that of the ICMW in Article 2 but limits undocumented status to those who are not authorized to enter or stay for a period of time in the host State. In principle, this means that under the MIMC, working without permission under a residence permit should not lead to losing residency status and falling into irregularity. Additionally, Chapter IV, Part II of the MIMC also contains provisions for several important rights granted to migrant workers, irrespective of whether they have residence permits. These include access to emergency medical care (Art. 57), equal treatment in respect of remuneration and other conditions of work (Arts. 58–61), and certain provisions applicable to women and children, including access to education for children (Arts. 63–64).⁵

Equally crucial are the provisions of the MIMC which create protections against expulsions and provide for possible regularization. Regularization, or the process by which an irregular migrant may obtain a resident permit, in particular is undoubtedly a current pressing global challenge. Many countries, ranging from Morocco to Brazil, USA to Russia, or Japan to numerous Member States in the European Union, have opted for regularization mechanisms, either permanent or extraordinary, based on a variety of reasons including length of residence, family links, employment, ethnic ties or humanitarian motivations.⁶ Numerous international organizations, ranging

4. G.A. Res. 45/158. (Dec. 18, 1990).

5. The full list of rights can be found Model International Mobility Convention, *International Convention on the Rights and Duties of All Persons Moving from One State to Another and of the States They Leave, Transit or Enter*, arts. 56–67 (2017), http://globalpolicy.columbia.edu/sites/default/files/mimc_document.pdf [<https://perma.cc/F3Q3-6G88>].

6. See, e.g., on Brazil: D. Acosta & L. F. Freier, *Turning the immigration policy paradox up-side down?*, 49 INT’L MIGRANT REV. 659, 696 (2015); on Japan see: Atsushi Kondo, *Migration and Law in Japan, Asia & the Pacific*, 2 ASIA & THE PACIFIC POL’Y STUD. 155, 168 (2015); on Russia see: Caress Schenk, *Open Borders, Closed Minds: Russia’s Changing Migration Policies: Liberalization or Xenophobia?*, 18 DEMOKRATIZATSIYA 101, 121 (2010); on Morocco see: Kirsten Schuettler, *A second regularization campaign for irregular immigrants in Morocco: When emigration countries become immigration countries*, THE WORLD BANK (Jan. 13, 2017), <http://blogs.worldbank.org/peoplemove/second-regularization-campaign-irregular->

from the Inter-American Commission on Human Rights,⁷ to the Parliamentary Assembly of the Council of Europe,⁸ to the U.N. Special Rapporteur on the Human Rights of Migrants,⁹ have considered regularization as a vital policy tool to deal with migration regulation.

The MIMC provides important protection for migrants in an irregular situation when it comes to expulsion and regularization. To appreciate this innovation of the Model Convention, Articles 69(2) and 70(4) must be read together. Under Article 70(4), States have to take into account family ties, humanitarian considerations, and the length of residence before taking any expulsion decision.¹⁰ In other words, the Convention opts in favor of a personalized proportionality assessment of the individual circumstances of the person concerned in order to see if expulsion constitutes an excessive measure in the particular case. In turn, Article 69(2) encourages States Parties to consider regularization in cases of family connections, compassionate, humanitarian or other reasons when a migrant is undocumented.¹¹ This approach deserves several comments.

To begin with, Article 69(2), while not imposing an obligation on States Parties to regularize an individual under certain given circumstances, provides a non-exhaustive enumeration of possible grounds to consider offering an undocumented migrant authorization

immigrants-morocco-when-emigration-countries-become [<https://perma.cc/2T4L-2R75>]; on the European Union, see ICMPD, *supra* note 2; on the United States, see Motomura, *supra* note 3.

7. Press Release, Inter-American Commission on Human Rights (IACHR), IACHR Welcomes Measures to Provide Protection to Venezuelan Migrants in Peru and Calls on States in the Region to Implement Measures for their Protection (Apr. 4, 2017), http://www.oas.org/en/iachr/media_center/preleases/2017/043.asp [<https://perma.cc/T2PR-JA54>].

8. Eur. Consult. Ass., *Regularisation Programmes for Irregular Migrants*, Doc. No. 11350 (2007) <http://www.unhcr.org/4b9fac519.pdf> [<https://perma.cc/N9GM-UNC3>].

9. François Crépeau (Special Rapporteur on the Human Rights of Migrants), *Report of the Special Rapporteur on the human rights of migrants: Labour exploitation of migrants*, U.N. Doc. A/HRC/26/35 (Apr. 3, 2014), <http://www.ohchr.org/Documents/Issues/SRMigrants/A.HRC.26.35.pdf> [<https://perma.cc/Y4AG-8TPK>].

10. "In considering whether to expel a migrant worker or a member of his or her family, account should be taken of family ties, humanitarian considerations and of the length of time that the person concerned has already resided in the State of employment." MIMC, *supra* note 5, art. 70(4).

11. "States Parties should consider, as they deem appropriate, granting an autonomous residence permit or other authorization offering a right to stay for family connections, compassionate, humanitarian or other reasons to a non-national staying irregularly on their territory." *Id.*, art. 69(2).

to remain. In other words, States Parties can come up with their own list of criteria or requirements to regularize individuals falling into particular categories or fulfilling certain conditions.

Second, when it comes to family connections or family life, the best interests of the child are prioritized. This emphasis tracks important legal innovations that have taken shape in existing regional frameworks. For example, the Inter-American Court on Human Rights has already clearly established that:

the rupture of the family unit by the expulsion of one or both parents due to a breach of immigration laws related to entry or permanence is disproportionate in these situations, because the sacrifice inherent in the restriction of the right to family life, which may have repercussions on the life and development of the child, appears unreasonable or excessive in relation to the advantages obtained by forcing the parent to leave the territory because of an administrative offence.¹²

According to this interpretation, in countries falling under the jurisdiction of the Inter-American Court, an individual right to regularization exists for the family member concerned when children have the nationality of the host State or when they have permanent residence.¹³ Expulsion is illegal since it would breach the best interests of the child. Indeed, several countries in the Americas provide for this individual right in their legislations when family life and the best interest of the child are at stake.¹⁴ In the European case, the European Court of Human Rights has also interpreted family life in certain circumstances as impeding the expulsion of undocumented migrants.¹⁵ For example, children who are EU nationals have a right as EU citizens to not have their parents deported, but only when deportation would entail the need to leave the entire territory of the EU and

12. Rights and guarantees of children in the context of migration and/or in need of international protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21. ¶ 280 (Aug. 19, 2014).

13. *Id.*, ¶ 277.

14. See Law No. 25871, 2004, E.D.L.A. 616, arts. 22, 61 (Arg.); Law No. 370, May 8, 2013, art. 380 (Bol.); Decreto No. 13.445, de 25 de maio de 2017, DIÁRIO OFICIAL DA UNIÃO [D.O.U.], art. 55 (Braz.); Law No. 978/96, 2010, art. 35 (Para.); Law No. 18.250, 2008, art. 48 (Uru.). In Peru, this has been framed as a temporarily limited right to regularize during a certain period in 2017. Supreme Decree, No. 001-2017-IN, Jan. 2, 2017 (Peru).

15. Rodrigues de Silva and Hoogkamer v. The Netherlands, App. No. 50435/99, Eur. Ct. H. R. (Jan. 31, 2006), <http://www.refworld.org/cases,ECHR,464dcaca2.html> [perma.cc/ZC9F-NCTD].

provided that the children are dependent on their parents.¹⁶ When family life is not considered as a sufficiently strong link to obtain residence, this can lead to dramatic consequences. In the United States for example, around half a million parents of U.S. nationals were deported between 2009 and 2013.¹⁷

Finally, and in line with the U.N. Convention against Torture, the MIMC affirms the requirement that no State Party shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that the individual would be in danger of being subjected to torture, inhuman or degrading treatment.¹⁸ These constraints on expulsion are further supplemented by the MIMC’s broader framing of the grounds for a claim to international protection. Not only does this approach offer a more capacious standard for accessing refuge under a formal status, but the MIMC also explicitly includes the requirement that States provide recognition for protection needs that may arise *sur place*.¹⁹ In doing so, the MIMC opens additional space for States to provide avenues to regularize the status of certain groups of undocumented persons.

These three elements combined offer States Parties the possibility to opt for a less restrictive legal choice when dealing with undocumented migration. This is paramount in the case of the so-called un-removable migrants, meaning those migrants who cannot be expelled for a variety of reasons including the lack of cooperation of the countries of origin, the lack of a functioning government in the nationality State with the capacity to issue an identity document, or simply the non-recognition of an individual as a national by that second State. At times States may tolerate a segment of the population as being undocumented with potential risks of increasing labor exploitation and vulnerability.²⁰ Indeed, the puzzle of un-removable

16. This would be the case when both parents are to be deported but not necessarily when it is only one who is expelled. See Cases C-34/09, Gerardo Ruiz Zambrano v. Office National de l’emploi (ONEm), 2011 E.C.R. I-01177, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62009CJ0034&from=EN> [<https://perma.cc/5M5A-RUVL>]; C-256/11, Murat Dereci et al. v. Bundesministerium für Inneres, 2011 E.C.R. 734, ¶ 68, http://eur-lex.europa.eu/resource.html?uri=cellar:f0ce2b9b-9d5e-4c91-8455-eb248eb288b2.0002.05/DOC_1&format=PDF [<https://perma.cc/MAD4-JDWV>].

17. R. CAPPS ET AL, MIGRANT POL’Y INST. & URBAN INST., IMPLICATIONS OF IMMIGRATION ENFORCEMENT ACTIVITIES FOR THE WELL-BEING OF CHILDREN IN IMMIGRANT FAMILIES: A REVIEW OF THE LITERATURE (2015).

18. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51, art. 3 (1984).

19. See MIMC, *supra* note 5, arts. 125(d), 128.

20. Motomoro, *supra* note 3, at 22. For examples of unreturnable migrants, see

migrants is particularly important regarding vulnerable categories of individuals such as pregnant women, unaccompanied minors or those who have been the victims of trafficking.²¹ The Model International Mobility Convention provides States with a legislative choice more in line with respect for human rights and human dignity, the rule of law, justice, equality and non-discrimination.²² If the intention is to have safe and orderly migration, we need to re-assess how we legally tackle the distinction between irregular and regular migration and the legal transitions between both concepts. By encouraging States to strengthen regularization mechanisms, providing transparent, non-discretionary criteria to access regular status, and by prioritizing residence status as the first option for undocumented migrants under certain conditions, the MIMC is a step in the right direction.

VANDERBRUGGEN ET AL, POINT OF NO RETURN: THE FUTILE DETENTION OF UNRETURNABLE MIGRANTS (2014), http://pointofnoreturn.eu/wp-content/uploads/2014/01/PONR_report.pdf [<https://perma.cc/RQ4H-Z2GL>].

21. See MIMC, *supra* note 5, art. 76 on protection during pregnancy providing safeguards against loss of status on such grounds; Chapter VI, Part II requiring that States provide assistance to victims of trafficking in persons without regard to the immigration status of such victims (art. 181) as well as special protections for children (art. 182, Child Victims of Trafficking in Persons); and art. 184 providing that in cases of victims of trafficking in persons States shall consider adopting legislative or other appropriate measures that them to remain in its territory, temporarily or permanently, giving appropriate consideration to humanitarian and compassionate factors.

22. See *Id.*, Preamble.

Pathways to Protection and Permanency: Towards Regulated Global Economic Migration and Mobility

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If we believe global statistics, economically motivated migrants make up the majority of migrants in the world.¹ Yet, international legal instruments to govern economic migration remain underdeveloped and undersubscribed. Against this backdrop, Chapter IV of the Model International Mobility Convention (MIMC)² formulates a set of rights specifically applicable to economic migrants, encompassing different categories of visa holders, such as migrant workers, residents, and investors, and a number of sub-categories, including temporary and domestic workers. The chapter draws heavily on the 1990 Migrant Workers Convention, the ILO's Multilateral Framework on Labour Migration, as well as a number of other international and regional legal instruments and political commitments.³

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1. The ILO estimates that roughly two-thirds of all international migrants, or 150 million people, are migrant workers, about four percent of all workers globally. This includes "all international migrants who are currently employed or are unemployed and seeking employment in their present country of residence." See INT'L LABOUR ORG., ILO GLOBAL ESTIMATES OF MIGRANT WORKERS AND MIGRANT DOMESTIC WORKERS: RESULTS AND METHODOLOGY (2015), http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_436343.pdf [<https://perma.cc/HS2R-AL3D>].

2. Model International Mobility Convention (MIMC), *International Convention on the Rights and Duties of All Persons Moving from One State to Another and of the States They Leave, Transit or Enter*, at 32 (2017), http://globalpolicy.columbia.edu/sites/default/files/mimc_document.pdf [<https://perma.cc/F3Q3-6G88>].

3. These include, but are not limited to: the Domestic Workers Convention, the Convention on the Rights of the Child, the ILO Minimum Age Convention, the Worst Forms of Child Labour Convention, the Private Employment Agencies Convention; the EU Directive on temporary agency work, the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers; the Sustainable Development Goals, and the

As with the MIMC overall, Chapter IV largely follows a cumulative logic with rights progressively accumulating across the chapters. The exception to this logic is the section on temporary migrant workers, as described in Part IV of the chapter. Here, the MIMC allows the possibility to limit certain rights, otherwise applicable to migrant workers, for specific periods of time. This is perhaps one of the most innovative, and likely also the most controversial, parts of the chapter, which will be discussed in greater detail later on in this paper. The chapter also proposes a set of rules for inter-governmental conduct, designed to further facilitate economic migration. These are complemented by the Convention's Treaty Body provisions (Chapter VIII). The paper ends with some concluding observations.

ECONOMIC MIGRATION: CURRENT DYNAMICS

Current political and market dynamics surrounding economic migration are characterized by global power imbalances. Countries of destination largely get to determine who they admit and under which conditions, while countries of origin tend to have little interest or leverage to control the exit of migrant workers and other economically motivated migrants.⁴ Policies in destination countries have become increasingly selective over the past decade, giving employment and residence rights more easily to high-skilled and/or wealthy migrants, while excluding less-skilled migrants.⁵ At the same time, more governments in countries of origin have adopted proactive policies for encouraging and managing low-skilled labor migration, often with a view to relieving domestic labor market pressures and generating foreign currency earnings through remittance receipts.⁶

Addis Ababa Action Agenda. The Chapter also leans on academic sources where it seeks to establish new norms.

4. JOSE ANTONIO ALONSO, UNITED NATIONS COMMITTEE FOR DEVELOPMENT POLICY, *MANAGING LABOUR MOBILITY: A MISSING PILLAR OF GLOBAL GOVERNANCE* (2015), http://www.un.org/en/development/desa/policy/cdp/cdp_background_papers/bp2015_26.pdf [<https://perma.cc/9LTQ-4Y73>]; REY KOSLOWSKI, THE CTR. FOR MIGRATION STUD., *GLOBAL MOBILITY AND THE QUEST FOR AN INTERNATIONAL MIGRATION REGIME* 103 (2008), <http://onlinelibrary.wiley.com/doi/10.1111/j.2050-411X.2008.tb00395.x/abstract> [<https://perma.cc/BL3K-K7EB>].

5. Matthias Czaika & Hein de Haas, *The Globalization of Migration: Has the World Become More Migratory?*, 48 INT'L MIGRATION REV. 283 (2014), <http://onlinelibrary.wiley.com/doi/10.1111/imre.12095/full> [<https://perma.cc/965U-V539>].

6. This is particularly true of countries of origin in Asia that send large numbers of migrant workers abroad, with the Philippines having the most evolved and often cited

As a result, two almost separate global labor markets have emerged. In the market for investors and highly skilled labor, rich and emerging economies compete with one another to attract wealth and talent to their shores. This is reflected, for example, in the adoption of investor visas, job search visas, and more generous provisions for allowing students to work (except in the English-speaking countries that already lead the market).⁷ Developing countries stand to lose out in this competition.

The dynamics are inversed on the global market for low-skilled labor, where the supply of workers outstrips demand and countries of origin are in competition to place their workers abroad. A number of countries of origin have sought to protect their migrant workers abroad by adopting measures such as Memoranda of Understanding and bilateral agreements with destination countries;⁸ adopting standard contracts and recruitment regulations to keep fees in check;⁹ investing in pre-departure training and professional skills development for migrant workers;¹⁰ establishing Migrant Welfare Funds or Banks to provide a measure of social protection;¹¹ and

overseas employment policy. See, e.g., MARUJA M.B. ASIS, MIGRATION POL'Y INSTITUTE, THE PHILIPPINES' CULTURE OF MIGRATION (2006), <https://www.migrationpolicy.org/article/philippines-culture-migration> [<https://perma.cc/DY7Q-DK9F>]; Maruja M.B. Asis, MIGRATION POL'Y INST., *The Philippines: Beyond Labor Migration, Toward Development and (Possibly) Return* (2017), <https://www.migrationpolicy.org/article/philippines-beyond-labor-migration-toward-development-and-possibly-return> [<https://perma.cc/EU39-LYT9>]. For an overview of foreign worker policies in Bangladesh, India, Nepal, Pakistan and Sri Lanka, see *Situation Report: International Migration in South and South-West Asia*, UNESCAP, <http://sitreport.unescap.org/labour-migration/governance-labour-migration> [<https://perma.cc/5ECR-HXVE>].

7. OECD, INTERNATIONAL MIGRATION OUTLOOK 2011 (2011), <http://www.oecd.org/migration/internationalmigrationoutlook2011.htm> [<https://perma.cc/78DE-48BK>].

8. See, e.g., PIYASIRI WICKRAMASEKARA, INT'L LAB. ORG., BILATERAL AGREEMENTS AND MEMORANDA OF UNDERSTANDING ON MIGRATION OF LOW SKILLED WORKERS: A REVIEW (2015), http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_413810.pdf [<https://perma.cc/JG4Z-K96K>].

9. KATHARINE JONES, INT'L ORG. FOR MIGRATION, RECRUITMENT MONITORING AND MIGRANT WELFARE ASSISTANCE: WHAT WORKS? (2015), https://www.iom.int/sites/default/files/migrated_files/What-We-Do/docs/Recruitment-Monitoring-Book.pdf, [<https://perma.cc/YX5W-KWKJ>].

10. For a global overview, see EUR. TRAINING FOUNDATION, GLOBAL INVENTORY WITH A FOCUS ON COUNTRIES OF ORIGIN (2015), http://cadmus.eui.eu/bitstream/handle/1814/36840/MISMES_Global_Inventory.pdf?sequence=1&isAllowed=y [<https://perma.cc/KB7L-TNMD>].

11. See, e.g., MARIUS OLIVIER, INT'L ORG. FOR MIGRATION, SOCIAL PROTECTION FOR

strengthening the reach and breadth of their consular protections and services.¹² Yet, these measures only go so far, as long as large wage differentials between countries of origin and destination create a strong incentive for migrants to collude with recruiters or smugglers in circumventing regulations. What is more, destination countries can always turn to countries that supply cheaper labor with less regulations attached, a reality that further limits the scope of countries of origin to shape existing labor migration dynamics.

Those dynamics leave low-skilled workers in a weak bargaining position. To secure a job abroad, many incur debt paying high upfront-fees to recruiters, who may mislead them about the nature and conditions of employment abroad. Formal opportunities for low-skilled workers are generally confined to temporary and seasonal worker programs, which have proliferated in recent years. Such programs often come with restrictive conditions: not permitting workers to bring families, to gain secure residence status, or to accrue and export social security benefits. Moreover, migrant workers are often tied to their employer, making them vulnerable to abuses such as withholding of wages, poor living and working conditions, seizure of passports or identity documents, and physical or sexual violence. This risk is aggravated in sectors that are inadequately covered by labor laws or where enforcement is poor. For female migrant workers, these are often domestic work or the sex industry; for male migrants it may be working on fishing boats or in the agriculture sector. With trade union rights restricted or nonexistent in some countries, migrants in low-wage sectors are often not organized, further contributing to the imbalance in power between employers and migrant workers.

THE EXISTING LEGAL REGIME

For the time being, economic migration remains largely governed through a complex and fragmented tapestry of bilateral and re-

MIGRANT WORKERS ABROAD: ADDRESSING THE DEFICIT VIA COUNTRY-OF-ORIGIN UNILATERAL MEASURES? (2017), https://publications.iom.int/system/files/pdf/social_protection.pdf?language=en [<https://perma.cc/P52J-42Q3>].

12. For example, on the provision of consular services, see C. R. Abrar et al., *Institutional Strengthening of the Office of Labour Attaché: Research Findings from Bangladesh, India and Sri Lanka* (Research Programme Consortium, Working Paper 23, 2014), <http://migratingoutofpoverty.dfid.gov.uk/files/file.php?name=wp23-abrar-et-al-2014-institutional-strengthening-of-the-office-of-labour-attaches-final.pdf&site=354> [<https://perma.cc/TX4P-VCB9>].

gional agreements and understandings that can take various forms and contain different objectives, provisions and protections for migrant workers.¹³ The current context lacks coherence but also effective coverage; the ILO notes that many bilateral labor agreements remain mute on provisions for the protection and equal treatment of migrant workers, gender concerns, and social dialogue.¹⁴ Major international migration corridors fall in between existing regional agreements and are only subject to informal dialogue processes rather than more formalized governance arrangements.

There is no general framework that would spell out the rules of engagement among States in this area—that is, a “General Agreement on Labor Migration” similar to the General Agreement on Trade in Services (GATS) of the World Trade Organization (WTO). The closest States have come to any global commitment on rules governing admissions of migrant workers are those on the international movement of service providers established under the auspices of the GATS (Mode 4). Yet, under those rules, market access remains largely restricted to movements of intra-corporate transferees and other highly skilled persons for limited periods of time.

States have not only been reluctant to cede control as regards the quantity of migration, but also when it comes to rules regarding the “quality” of movements. A number of instruments spell out the rights of migrant workers and how they should be treated, chiefly the 1990 United Nations Convention on the Rights of Migrant Workers and Members of their Families and the ILO Migration for Employment Convention (No. 97) of 1949 and Migrant Workers Convention (No. 143) of 1975. The problem is that ratification rates of these legal instruments are low, especially among the main receiving countries, not least due to reluctance on the part of governments to recognize and uphold the rights of migrants in an irregular situation.

THE MIMC’S OBJECTIVES AND APPROACH TO ECONOMIC MIGRATION

The MIMC pursues two overarching strategies related to economic migration. First, in its perhaps most direct challenge to the implicit power granted to receiving States, Chapter IV introduces some “ground rules” for the governance of what is currently an under-regulated area. This is most evidently the case where its provisions directly affect States’ policies as regards visas, admissions, res-

13. Wickramasekara, *supra* note 8. See SÁEZ, SEBASTIÁN, LET WORKERS MOVE: USING BILATERAL LABOR AGREEMENTS TO INCREASE TRADE IN SERVICES (2013).

14. Wickramasekara, *supra* note 8.

idence and citizenship—areas of policy that are traditionally considered sovereign domain.

Second, in a challenge to the existing international legal regime protecting migrant workers, the MIMC introduces a hierarchy or graduation of rights. This strategy grows out of a longstanding academic and policy debate about the existence of a trade-off between the number of migrants a State will admit, and the level of rights it will afford them.¹⁵ If States have discretion over who they admit, and if maintaining openness to low-skill immigration is desirable from the perspective of the migrants and the countries of origin, then—the argument goes—certain rights limitations may be the price to pay for States' willingness to accept large numbers of low-skilled workers.

Opponents fear that backsliding on migrant workers' rights, especially for the less educated and skilled, will exacerbate inequality and risks reducing migrants to a permanent underclass.¹⁶ It may also undermine labor standards for all workers in a particular sector or labor market. Those who argue for specific rights restrictions point to the ineffectiveness of existing legal frameworks, which often enough leave low-skilled workers essentially in a protection vacuum, and stress the agency and consent of migrant workers, who clearly benefit from greater income opportunities abroad (and who may not enjoy full labor rights protections in their country of origin, either).

While Chapter IV sides with the latter position in this debate, it clearly recognizes and seeks to address existing protection gaps for migrant workers. Thus, it expands, on the one hand, rights protections for migrant workers over and above what current legal instruments prescribe, but accepts, on the other, limitations on some rights for certain categories of migrant workers, namely temporary workers. The implicit "gamble" is that States will be more willing to accept and actually apply a more limited set of rights thus leading to a net improvement over the current widespread non-application of migrant workers' rights.

15. See, e.g., Martin Ruhs, *The Rights of Migrant Workers: Economics, Politics and Ethics*, 155 INT'L LAB. REV., 281 (2016); Michelle Leighton, *The Price of Rights: Regulating International Labor Migration*, 154 INT'L LAB. REV. 277 (2015).

16. Leighton argues that adherence to international labor standards is not only legally and morally the right thing to do, but that the perception of fairness for workers, including higher wages, also increases productivity and leads to better economic outcomes. She further questions whether restricting migrant workers' rights would lead to greater acceptance of immigration given the often rather loose connection between public opinion on migration and the actual number and conditions of those admitted. Leighton, *supra* note 15.

CHAPTER IV: KEY PROVISIONS AND INNOVATIONS

At the outset, Chapter IV reaffirms the basic rights of all economic migrants, regardless of category, including civil and political rights, such as the right to life, freedom from slavery and forced labor, right to privacy, freedom of conscience and religion, and the right to recognition as a person before the law. Further, all categories of migrant workers are entitled to fundamental labor rights, such as equality of treatment with nationals as regards remuneration and other conditions of work, and the right to receive understandable and enforceable employment contracts. Beyond Chapter IV, all economic migrants enjoy the protections laid out in Chapter VI, on “Assistance and Protection of Migrant Victims of Trafficking and Migrants Caught in Countries in Crisis.” These include, for example, the right to confidential legal proceedings for victims of trafficking, and to internal relocation and access to valid identity and travel documents in times of crisis.

Beyond reaffirming these fundamental rights, Chapter IV breaks new ground in important respects:

1. It expands existing protections with particular emphasis on the rights of women migrant workers.

Recognizing practices and situations that render women migrant workers particularly vulnerable, the MIMC obliges States Parties to, among other measures, protect women migrant workers from violence, exploitation and abuse (Art. 63(1)(a)) to provide them with access to sexual and reproductive health services and maternity protection (Art. 63(2)); and to ensure equal remuneration and working conditions for women and men (Art. 63(b)(3)). It also spells out specific protections that apply during pregnancy (Art. 76), banning employers from terminating the employment of a woman merely on the grounds of pregnancy (with some safeguards for the health of the mother or the child, as well as the safety of those relying on her), and declares that pregnancy is not a permissible ground for revoking the authorization of a residence or a work permit of a migrant worker or expelling her and members of her family.

2. The MIMC includes new and strong language on pathways to permanent status—through residence and citizenship—for migrant workers and residents.

Article 108 on the “Renewal of Status” for temporary workers

holds that foreign workers who are employed or have offers of employment are allowed to re-apply for a new work authorization.¹⁷ Furthermore, the MIMC obliges States to allow temporary migrant workers to apply for regular permanent residence after no more than five years, and states that “[n]o temporary migrant worker shall be renewed in temporary status longer than seven years.”¹⁸ On access to citizenship, the MIMC, in expanding on European law,¹⁹ establishes ten years of legal residence in a country as the maximum threshold after which migrant workers and migrant residents shall be offered citizenship, “subject to the rules and requirements relating to naturalization applied in that State.” It also calls on States to “consider granting migrant workers and residents the possibility to possess multiple nationality”—an important condition for facilitating integration.

3. *The chapter ventures quite far into regulating the visa policies of States.*

It obliges States to issue multiple-entry visas to temporary migrant workers, holding that States limit the number of exits and re-entries available on visas to no less than three per year. It further establishes clear parameters for governing the re-entry of temporary migrant workers. For those workers “in full compliance with the laws of the State of employment” the time period they must spend outside of the country before being allowed to re-enter “should in no cases extend beyond one year.” The chapter also includes detailed prescriptions for the admission of migrant entrepreneurs and investors [Art. 97], putting forward a set of “non-exclusive principles” that States Parties are encouraged to incorporate into their systems for evaluating candidates for initial and renewed visas. States Parties are obliged to regularly produce, and make publicly available, “reports on their implementation and regulation of the entrepreneurship visas.” According to the MIMC, such reports should include, “at a minimum,” information regarding the criteria used to award entrepreneurship visas; on those awarded and denied entrepreneurship visas by industry; on the rights and privileges attached with each category of entrepreneurship visa; and on investment thresholds. In some instances, the provisions of Chapter IV can seem difficult to opera-

17. MIMC, *supra* note 2, art. 108.

18. *Id.* art. 109, ¶ 3.

19. European Convention on Nationality (1997) (ETS No. 166), <http://www.refworld.org/pdfid/3ae6b36618.pdf>, [<https://perma.cc/ZC8X-MHYZ>].

tionalize.²⁰ In sum, its provisions and innovations promise to add up to a stronger rights protection framework for migrant workers, including particularly vulnerable groups, such as women and temporary migrant workers.

CONCLUDING OBSERVATIONS

The MIMC is a daring undertaking, both in terms of its scope—it brings together disparate bodies of law, policy and constituencies—and in terms of content, with its willingness to push the boundaries of what is currently acceptable to States. Yet, while it is difficult to see States sign on to an instrument like this any time soon, the MIMC, and its chapter on economic migration, come at an opportune time. States are considering future governance and cooperation arrangements on migration and refugees, to be enshrined in two Global Compacts that are being developed and will be adopted by the end of 2018. If some of the provisions in Chapter IV—on women migrant workers' rights, pathways to secure legal status, and rules around visa policies and temporary labor migration—will find consideration and resonance in those discussions and the resultant agreements, the door to future progress on a global labor mobility regime remains ajar.

20. For example, Article 107, paragraph 3, states that “States of employment may restrict access to social rights for temporary migrant workers if there is demonstrable evidence that granting the rights creates a net fiscal loss for that State.” MIMC, *supra* note 2, art. 107, ¶ 3. Given the scarcity of available data on States' migration-related spending, governments may find it rather easy to duck such an obligation by presenting evidence in a manner that corresponds to their political objectives.

Labor Migration and International Mobility: Normative Principles, Political Constraints

RANDALL HANSEN*

The Model International Mobility Convention (MIMC) is the product of an ambitious, two year-long project that consulted an extensive array of stakeholders. Its aim, eloquently articulated by Michael Doyle in his introduction, is implied by John Rawls' idea of a realistic utopia: a document that reflects some of our deepest normative commitments on human rights and the dignity of the individual while still remaining a Convention that serving politicians are willing to sign. In the former, Rawls' realistic utopianism refers to the task of extending "what are ordinarily thought of as the limits of practical political possibility" by using "what we know about institutions, attitudes, and preferences while joining 'reasonableness and justice with conditions enabling citizens to realize their fundamental interests'¹ Practically, this means reflecting the world as it is and building a movement toward justice that existing, but better motivated, governments could endorse."²

There are thus three standards for judging the MIMC: first, does it reflect our deepest normative commitments? Second, does the Convention respect the political, economic, and social constraints involved in translating these commitments into binding law? And, third, are serving politicians likely to sign this document? In the last, no one expects a Donald Trump, Nigel Farage, or Marine Le Pen to affix their name to the MIMC. Rather, the aim is to envision centrist politicians with an open attitude to immigration and a cosmopolitan bent supporting this Convention. Could Canada's Justin Trudeau, Germany's Angela Merkel (who, much more than Trudeau, walked the walk during the 2015–2016 European refugee crisis), or France's Emmanuel Macron sign this document?

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1. Michael Doyle, *Model International Mobility Convention*, 56 COLUM. J. TRANS'L L. 219, 223 (2017).

2. The text in double quotation marks is from Doyle, *supra* note 1; that in single quotation marks is from JOHN RAWLS, *THE LAW OF PEOPLES* 6–7 (2001).

The first question is the easiest to answer and is an unqualified yes. The Convention brought together scholars and practitioners who, to be sure, had differences of opinion but who all agree on several fundamental normative principles. Each was and is committed to basic human rights, human dignity, and a duty to protect refugees. It is also fair to say that most, if not all, shared two further beliefs: (a) that borders, and the wealth and privilege they protect and bestow, have an arbitrary quality to them (one is as likely to be born in Zanzibar as in Switzerland) and (b) that accidents of geography determine the countries that are buffeted by refugee crises (Jordan, Syria, Uganda, Greece, or Italy) and those that are spared them (Canada). Against this backdrop, it is perhaps unremarkable that the MIMC adopts a rights-based approach that seeks to extend to economic migrants, forced migrants, family migrants, students, tourists, and all other migrants the widest array of entitlements consistent with their status.

The last word in the last sentence is an important one. The MIMC correctly recognizes that the claims that one can make as a migrant are a function of the type of migrant one is: refugees have the most robust set of rights, followed by other forced migrants, permanent economic migrants, family members, temporary economic migrants, students, and tourists. Unless one is an open borders advocate (a perfectly respectable intellectual if politically naïve position, though not one that was in any case reflected in the discussions informing this Convention), then rights legitimately claimed by and properly extended to migrants depend on the reasons for migration.³

The second question—does the MIMC respect constraints faced by signing States—can also be answered, at least in some cases, in the affirmative. I approach it through a discussion of Chapter IV on Migrant Workers, Investors, and Migrants Residents. It makes sense to do so insofar as economic migrants—both permanent high-skilled and temporary low-skilled—are the migrants that States have an interest in welcoming. If States are likely to sign any Convention, it is one governing wanted migration (employable economic migrants) rather than unwanted migrants (forced migrants and, in most cases, family migrants).⁴ The logical corollary of this point is that, if States are unlikely to sign Chapter IV, they are even less likely to

3. JOSEPH CARENS, *THE ETHICS OF IMMIGRATION* 225–254 (2013); Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 *REV. OF POL.* 251 (1987); Chandran Kukathas, *Are Refugees Special*, in *MIGRATION IN POLITICAL THEORY: THE ETHICS OF MOVEMENT AND MEMBERSHIP* (Sarah Fine & Lea Ypi, eds., 2016).

4. On ‘wanted’ vs ‘unwanted’ migration, see CHRISTIAN JOPPKE, *IMMIGRATION AND THE NATION-STATE: THE UNITED STATES, GERMANY AND GREAT BRITAIN* 19–21 (1999).

sign any other subsequent chapters.

From a methodological point of view, Chapter IV builds on the core provisions of the 1990 International Convention on the Rights of all Migrant Workers and Members of their Families and attempts to fill gaps in that treaty whilst recognizing, as Michael Doyle notes in the Introduction, some of the difficulties that prevented any receiving State from signing the Convention.⁵ The chapter primarily addresses both permanent, or at least long-term, economic migrants and temporary migrants.

In the case of permanent/long-term migrants, the rights delineated can be divided into three broad categories:

- Liberal Rights: to movement (Art. 80) and association (Art. 81), subject to the usual public order/security qualifications;
- Social Rights (Arts. 57, 62, 86, 87, 90, 106); and
- Economic Rights (Arts. 58–60, 63, 77–78, 90)

Liberal rights include rights that liberals—who support the maximum freedom of the individual, subject to the Millian harm principle, against State coercion—view as universal rights; specifically, the right to freedom of expression and association.⁶ The social and economic rights are based, in the main, on an equal treatment principle: economic migrants should enjoy the same access to health care, social security, education, the labor market, job protection, as well as the right to lease, purchase and sell property, as nationals. They should also be taxed at the same level as nationals.

The chapter also mandates that States implement legislation and policies guaranteeing a series of rights that are also the rights of citizens, but which pertain much more to situations uniquely faced by economic migrants: protection against forced labor, trafficking, retention of passports, and debt bondage (Art. 65). Finally, the chapter endorses the principle of time-based entitlements: after five years, migrants should enjoy full equality with nationals in access to training schemes, housing, educational institutions, and banks (Art. 85). Throughout the chapter, the accent is on expanding rights and transforming the temporary into the permanent (more on this below).

In the case of temporary migrant workers, the chapter takes,

5. Doyle, *supra* note 1, at 227–28.

6. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, preamble (Dec. 10, 1948) (“Whereas...the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people”); *Id.*, art. 20(1) (“Everyone has the right to freedom of peaceful assembly and association.”).

in the first few articles, an expansive view on the rights of temporary workers, placing them in the case of many social and economic rights on par with permanent economic migrants. In Articles 100 and 105, however, a series of provisions allows States to modify the rights of temporary workers. Article 100 allows States to: (a) limit the right to work to one employer for a maximum of six months (Art. 100(2)); (b) restrict migrants' choice of remunerated activities for a maximum of two years (Art. 100(1)); and (c) limit temporary workers to a specific region under specific enumerated circumstances (Art. 100(4)). Additionally, Article 105 of the chapter allows much more scope for national preference in the job market (with no similar provision in education policy). Finally, Articles 111–116 of the chapter contain rights for specific categories of migrants: domestic workers, frontier workers, seasonal workers, project-tied workers, and so forth. Importantly for this discussion, Articles 85 and 98 of the chapter also require an easing of all distinctions between temporary workers and nationals within five years.

One of the strengths of the Model Convention is that it includes provisions that expand rights, are economically optimal, *and* serve State interests. For example, portable pensions (Art. 106(7)) increase labor market flexibility and make it more likely that temporary migrants will resist pressures to return. Similarly, multiple visa entries (Art. 104) and easy rotation (Art. 110) increase the likelihood—as North European countries learned the hard way when they imposed migration stops in the early 1970s—that people will go home, safe in the knowledge they can come back.

In short, the MIMC respects, more so than does the 1990 Migrant Workers' Convention, the interests and constraints faced by potential signing States, particularly in the global north.

This leaves the third question: will liberal States actually sign this document? Here I am cautiously skeptical. Throughout the debates and conversations leading up to the MIMC, there has been a tension between the utopian and realist aims Michael Doyle outlined, and between idealists and realists among the contributors. Although I share the project's normative commitments and therefore signed the Convention that emerged from the discussions, it is fair to say that I find myself firmly among the Mobility Convention's realists. The issue for me throughout has been simple: if we create a document that no major receiving State will sign, then we run the risk of being engaged in a purely normative exercise that will fall short of offering a reasonable basis for future policy. This in itself is fine, but our aspirations would remain limited to those of "ideal theory." They would not provide a path towards concrete reform.

One way to reflect on this possibility is to ask why the 1990

International Convention on the Protection of the Rights of all Migrant Workers and members of their families failed (beyond negotiating in bad faith, which some States might well have done).⁷ Different countries had different objections (the French government, for instance, rejected article 31 on grounds of cultural identity),⁸ but the main concern is that the formalizing of such rights for migrants poses a threat to sovereignty. Article 68 of the proposed Mobility Convention—which states that nothing in the MIMC implies regularization—may allay this concern, but two others remain. The chapter contains provisions that encourage the temporary track to be seen, in principle, as a pathway to a permanent one: a right to reapply for work authorization (Art. 108(2)) and a duty on employers to keep employees informed of vacancies for permanent jobs (Art. 105(1)). These proposals have some parallels in the past immigration experiences of important destination States that might provoke more than mild resistance on their part. In the Federal Republic of Germany, the constitutional court ruled in the late 1970s that repeated work permit renewals created a “reliance interest” on the part of the applicant, meaning he or she could remain permanently.⁹ This decision wrecked any chance that German guest workers would return home, resulting in a sharp increase in immigration via family reunification and formation during a time of rising unemployment in Germany. It is inconceivable that Germany, now generally open to immigration, would agree to this provision.

In this respect, the five-year limitation on differential rights between migrant workers and citizens (Arts. 83, 85, 98, 103, 106), though normatively justifiable, raises as many problems as it solves. Receiving States in the global north will either refuse to sign on to the Convention or ensure that *no* temporary migrant worker is allowed to remain beyond five years. Article 109(2) would make the latter difficult, so the likely result may be non-signature. Similarly, Article 109(4), *requiring* States to offer permanent residence to temporary workers after seven years, would likely result in non-signature or would ensure that no temporary worker secures a contract for more than six years.

The expansive view of entitlements adopted by the Conven-

7. I owe consideration of this point to Michael Doyle.

8. Paul de Guchteneire & Antoine Pécarrd, *Obstacles to ratification of the United Nations Convention on the Protection of the Rights of Migrant Workers*, 75 DROIT ET SOCIÉTÉ 2, 431–51 (2010).

9. Entscheidungen Des Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 26, 1978, 1 BvR 525/77, 1978 (Ger.).

tion raises a broader issue: the rights-numbers trade-off.¹⁰ Simply put, since rights impose costs on States and often involve granting access to finite goods (school places, hospitals, housing, and so forth) the more rights that States offer migrants, the fewer migrants that State can welcome. When I raised this point in our discussions, I was assured that the rights-numbers trade-off has been overcome. It has not; such would be a world of free lunches. And what this means is that, were the Convention signed, States would adopt measures designed to limit migrants' access to the entitlements it outlines and, indeed, to the signatory country itself.

But it is equally likely that they will not sign. The limited scope for distinguishing between citizens and economic migrants in the provision of social and economic benefits will turn States, particularly in this age of populist, anti-immigrant sentiment, off. UK universities, for which foreign students are a cash cow, currently charge even UK citizens who have not lived in the country for three years higher foreign fees;¹¹ the British government would not accept Article 85(d) on equal access to educational institutions for all documented foreigners residents after five years. The Government of Canada recently denied an application for permanent residency to a university professor on the grounds that his child had Down Syndrome and, under Section 38.1(c) of Canada's Immigration and Refugee Protection Act, "might reasonably be expected to cause excessive demand on health or social services."¹² Following a public outcry, the Minister of Immigration, Refugees and Citizenship relented,¹³ but the affair was an indicator of the degree to which the Government of Canada insists on drawing distinctions between citizens and non-citizens.¹⁴

10. Phil Martin & Martin Ruhs, "Numbers vs. Rights: Trade-Offs and Guest Worker Programs," 42 INT. MIGRATION REV. 249, 249–265 (2008).

11. The Education (Fees and Awards) (England) Regulations 2007, SI 2007/779, ¶ 4(1) ("it shall be lawful for the institutions mentioned in paragraph (3) to charge higher fees in the case of a person who does not fall within Schedule 1 than in the case of a person who does fall within Schedule 1").

12. *York University Prof Denied Permanent Residency over Son's Down Syndrome*, CBC NEWS (Mar. 14, 2016), <http://www.cbc.ca/news/canada/toronto/programs/metromorning/costa-rica-down-syndrome-1.3489120> [<https://perma.cc/8RMJ-4E72>].

13. *York University Prof Denied Residency over Son with Down Syndrome Returning to Canada*, CBC NEWS (Aug. 10, 2016), <http://www.cbc.ca/news/canada/toronto/professor-granted-permanent-residency-1.3715416> [<https://perma.cc/GSY2-HFV3>].

14. Michelle McQuigge, *University prof denied residency over son with Down syndrome returning to Canada*, TORONTO STAR (Aug. 10, 2016), <https://www.thestar.com/news/gta/2016/08/10/university-prof-denied-residency-over-son-with-down-syndrome-returning-to-canada.html> [<https://perma.cc/F5ED-MJVG>].

In this regard, the Government of Canada would object to Article 57's limitations on HIV testing given the costs that HIV treatment would impose on the national health system.

Canada would also likely have other objections to the Convention. In the past, its Government has refused to sign up to any agreement or to participate in any forum that implies a limitation on the country's ability to impose, limit, or revoke visas. The provisions on multiple visas might be viewed as exactly this sort of limitation (Art. 104).

The French government, for its part, would—subject to EU law—act as it always does as an uncompromising guardian of its sovereignty. France would also have—as it did in 1990—objections to Article 87(2) preventing efforts to discourage the teaching of migrant children's languages in school.

When such objections were raised during discussions, the lawyers' reply was that States could attach a derogation to any article. This is no doubt legally true, but if the matter were so simple why did receiving States not apply derogations to the 1990 Migration Workers' Convention and sign the document? They clearly felt that, with or without derogations, the 1990 Convention constitutes too great a limitation on State sovereignty. For all its normative merits, I worry that the same would be true of this Convention.

This cautious and pessimistic conclusion requires two qualifications. First, labor migration remains only one (though a crucial) component of the larger framework advanced by the project. It may well be that the broader package will provide States with sufficient benefits to transcend the concerns outlined above. Second, and more importantly, the MIMC remains an aspirational project: the proposals it advances are not envisioned to be taken up and supported by States, let alone globally implemented, overnight. The project of modeling the global governance of mobility is rather meant to offer more of an ideal for further thought and work, suggesting how the pieces of an otherwise fragmented approach to migration might, one day, take coherent and more enlightened form. Perhaps above all in the current populist environment, there is an argument for a comprehensive document outlining what all migrant rights and States obligations would be in an ideal world. The MIMC, with its unprecedented breadth and detail, is just that.

Taking Mobility Seriously in the Model International *Mobility* Convention

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The Model International Mobility Convention (MIMC)¹ develops a comprehensive and rights-based framework for individuals on the move, whether as tourists, workers, students, or simply as visitors to other States. As such, the concept of *mobility* is implicit throughout the Convention and core to many of its principles and provisions. For refugees and other forced migrants, however, the MIMC's proposals for promoting and regulating voluntary movement may be viewed as orthogonal to their predicament in two respects. First, most forced migrants would prefer a world in which they could stay home; safety at home, not movement, may be their primary goal. Second, contemporary approaches toward forced migrants focus on securing protection and providing assistance, not on facilitating movement. What I want to suggest in this brief comment is that mobility can and should play a larger role in the international refugee regime than is usually recognized. That is, the MIMC's normative commitment to mobility can be made central in the context of forced migration as well as in the context of voluntary migration.

The experience of most forced migrants today can broadly be described as coerced displacement followed by constrained movement. The initial movement of refugees is forced, not voluntary; and once they have achieved safety in (usually) a country bordering their home State they become largely immobile.² If the hosting State has a

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1. Model International Mobility Convention, *International Convention on the Rights and Duties of All Persons Moving from One State to Another and of the States They Leave, Transit or Enter* 32 (2017), http://globalpolicy.columbia.edu/sites/default/files/mimc_document.pdf [<https://perma.cc/F3Q3-6G88>].

2. Viewed from this perspective, one could characterize the three durable solutions—voluntary repatriation, local integration and resettlement—as prioritizing the interests of States in creating immobility rather more directly promoting the individual agency of refugees.

policy of encampment—as does Kenya—then refugees may be denied the right of freedom of movement within the asylum State, a violation of the rights guaranteed by the Refugee Convention.³ And opportunities for moving beyond the country of first asylum are generally quite limited: only a small number of refugees each year are granted resettlement in third countries; a few are able to take advantage of other routes of lawful migration (for work, education or to join family).⁴ So most onward movement from countries of first asylum is deemed by destination States as illegal.

In the earliest days of the refugee regime, movement was understood as crucial to the project of helping refugees rebuild their lives. A central innovation of the post-WWI efforts to extend protection to refugees was the “Nansen Passport,” a document issued in the name of the first High Commissioner for Refugees Fridtjof Nansen.⁵ For many refugees who had no documentation from either their home State or hosting State, the Nansen Passport served as an identity card. The Nansen Passport did not guarantee entry to another State; admission would depend on the domestic laws and policies of that State pertaining to non-citizens. But it facilitated travel outside the borders of the State of asylum: receiving States would accept the document as adequate for purposes of identification, and asylum States would recognize the Nansen Passport as sufficient to permit re-entry of a refugee who had ventured abroad.⁶ The movement of refugees was generally understood as important to attaining self-reliance—refugees would travel to other States in search of gainful employment.⁷

This sensible idea of providing opportunities for refugees to move no longer figures in the refugee regime. Refugees are, in effect, given one shot at safety and security. Consider how this played out during the movement of hundreds of thousands of Syrian refugees from Turkey to Europe in 2015-16.⁸ Those who were accepted

3. United Nations Convention Related to the Status of Refugees, art. 26, July 28, 1951, 189 U.N.T.S. 150.

4. For example, 189,300 persons were resettled in 2016, a number that amounts to a small fraction of the 22.5 million refugees across the world. UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2016 (2017).

5. Katy Long, *When Refugees Stopped Being Migrants: Movement, Labour, and Humanitarian Protection*, 1 MIGRATION STUD. 4 (2013).

6. Principles of re-admission were explicitly adopted in the 1933 Refugee Convention. See Convention Relating to the International Status of Refugees, Oct. 28, 1933, 159 L.N.T.S. 199.

7. See Long, *supra* note 5.

8. *Migrant Crisis: One Million Enter Europe in 2015*, BBC NEWS (Dec. 22, 2015),

into European States were placed into the asylum process, where they will be subject to individualized determinations as to their status as refugees. Others met with border police, fences and other barriers and were denied entry; for those States, the refugees were simply illegal migrants who had no right to enter either based on their refugee status or in order to file a claim for asylum. A decision by the governing body of the EU to distribute Syrian asylum-seekers among EU members according to a formula was rejected by several Member States and never put into effect. Eventually, an agreement was negotiated between the EU and Turkey, which permitted the return of Syrian asylum-seekers to Turkey (in exchange for a promise of 6 billion euros, progress toward visa-free travel for Turks in the EU, and a restart of the process that could eventuate in Turkey's admission to the EU).⁹ Thus while EU politicians, journalists, NGOs, and other humanitarian actors have no difficulty in traveling to Turkey to negotiate about, report on, and work with more than 2.5 million refugees being housed by Turkey, the refugees themselves now face formidable legal and practical barriers in moving beyond the country of first asylum. Freedom of movement, it seems, is a privilege of the most fortunate, not the most in need.

Scholars and policy experts have over the past several years made a number of proposals for reforming the international refugee regime. Unfortunately, enhancing refugee mobility does not figure prominently in their thinking. It is possible to identify what I would label a New Liberal Consensus on reform. While there is no formal New Liberal Consensus "manifesto," we can see a set of ideas and policy recommendations that are generally adhered to and advocated for by a wide range of progressive, reform-minded government officials, experts, and institutions. These include: (1) the refugee definition should not be "opened up," but persons fleeing conflict and violence are and should be generally assisted as refugees;¹⁰ (2) refugees

<http://www.bbc.com/news/world-europe-35158769> [https://perma.cc/X5FK-KE54] (estimating that over 800,000 refugees traveled from Turkey to Greece, half of which were migrants from Syria).

9. Agreement between the European Union and the Republic of Turkey on the Readmission of Persons Residing without Authorization, E.U.-Turk., May 7, 2014, L 134/3, [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0507\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A0507(01)&from=EN) [https://perma.cc/X5Y4-4KLT]. For a critical analysis of the mechanics of the EU-Turkey Deal and the logistical implications for host countries, see Elizabeth Collett, *The Paradox of the EU-Turkey Deal*, MIGRATION POL'Y INST. (Mar. 2016), <https://www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal> [https://perma.cc/A6QB-G6GU].

10. UNHCR, GUIDELINES ON INTERNATIONAL PROTECTION NO. 12 (2016), http://www.rulac.org/assets/downloads/UNHCR_Guidance_Armed_Conflict_2016.pdf

are best assisted in States close to home (it is cheaper and makes return easier);¹¹ (3) self-reliance should replace “care and maintenance” as the primary focus of international programming (with the assistance of development actors and the private sector);¹² (4) refugees can be a benefit to hosting States;¹³ (5) resettlement programs should be expanded and additional legal pathways created to help share the burden imposed on countries of first asylum;¹⁴ and (6) non-entrée policies should be criticized¹⁵ and xenophobia condemned.¹⁶

Were the world to adopt policies along the lines of the New Liberal Consensus, the lives of millions of refugees would be improved. And yet it is important to see that the Consensus is actually quite at home with the premises of the approach that has produced the present dismal state of affairs. We can see this by noticing what is missing. While the Consensus gestures at increased responsibility sharing (through “new pathways” to third countries), no serious effort is made to construct a global framework for addressing protracted situations. States are not being asked to commit themselves to a sys-

[<https://perma.cc/RCV7-TLYD>].

11. ALEXANDER BETTS & PAUL COLLIER, *REFUGEE: TRANSFORMING A BROKEN REFUGEE SYSTEM* 132–135 (2017).

12. U.N. Secretary-General, *In Safety and Dignity: Addressing Large Movements of Refugees and Migrants*, paras. 80–82, U.N. Doc. A/70/59 (Apr. 21, 2016), <https://reliefweb.int/sites/reliefweb.int/files/resources/N1611262.pdf>

[<https://perma.cc/M8XA-FX4X>]. ALEXANDER BETTS ET AL., *REFUGEE ECONOMIES: RETHINKING POPULAR ASSUMPTIONS* 36 (2014), <https://www.rsc.ox.ac.uk/files/files-1/refugee-economies-2014.pdf> [<https://perma.cc/KE9W-F6V2>]. WORLD BANK GROUP, *FORCIBLY DISPLACED: TOWARD A DEVELOPMENT APPROACH SUPPORTING REFUGEES, THE INTERNALLY DISPLACED, AND THEIR HOSTS* 90, <https://openknowledge.worldbank.org/bitstream/handle/10986/25016/9781464809385.pdf?sequence=11&isAllowed=y>. T [<https://perma.cc/BK88-3K9L>].

13. *REFUGEE ECONOMIES*, *supra* note 12, at 16–19 (citing empirical evidence that refugees buy products and services in host economies, create employment, and contribute human capital as a source of labor); ALEXANDER ALEINIKOFF, *MIGRATION POL’Y INST., FROM DEPENDENCE TO SELF-RELIANCE: CHANGING THE PARADIGM IN PROTRACTED REFUGEE SITUATIONS* (2015) (suggesting that humanitarian actors should focus on shifting the paradigmatic view of refugees from one of “burden” to “benefit”).

14. G.A. Res. 71/1, ¶¶ 77, 78 (Oct. 3, 2016).

15. “Non-entrée” refers to the commitment of ensuring that refugees should not be allowed to arrive. James Hathaway, *The Emerging Politics of Non-Entrée*, 91 *REFUGEES* 40, 40–41 (1992). For criticisms of non-entrée policies, see e.g., James Hathaway and Thomas Gammeltoft-Hansen, *Non-Refoulement in a World of Cooperative Deterrence* (Working Paper No. 106, 2014), https://repository.law.umich.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1216&context=law_econ_current [<https://perma.cc/5RH3-2SL9>].

16. G.A. Res. 71/1, *supra* note 14, ¶¶ 14, 39.

tem of distributing burdens, nor is any international structure or platform suggesting allocating “shares.”

Furthermore, the New Liberal Consensus says very little about enforcement of the rights of refugees. And while xenophobia and non-entrée policies are criticized, they are not really confronted; indeed, they become a basis for supporting policies that offer developed States protection from spontaneously arriving asylum-seekers. Most troubling is that Consensus continues to relegate refugees to the countries in which they were first provided protection; movement beyond is seen not as a part of a system of protection but rather as *migration*—and therefore subject to normal rules States put in place for regulating the entry and stay of migrants.

At the end of the day, the New Liberal Consensus is surprisingly close to the current North-South bargain: the global North adopts policies to incentivize the global South to keep refugees from moving onward. The new incentive on the table today is increased development funding to supplement (inadequate) humanitarian resources. The potential benefits to hosting States are two-fold: increased overall levels of funding, and participation of refugees in local economies. Nothing more is demanded of the global North. Indeed, once refugees have re-attained productive lives, their justification for moving North can be asserted to be far weaker. A goal of self-reliance, it turns out, is simply the old humanitarianism tune with new development words—a way for the global North to believe it is doing something to relieve human misery while keeping refugees in States to which they first fled.

In accepting a State-based refugee regime, the New Liberal Consensus approaches the international refugee regime not as a system but as a series of bilateral and multilateral bargains. This is a mistaken view. The States that have signed up to this project—by ratifying the Refugee Convention, serving as members of UNHCR’s Executive Committee, approving the annual UN General Assembly resolution on refugee protection—have obligations toward displaced persons and other State members to support the system and promote its goals.

Crucial to the success of the international refugee regime is a far more robust commitment to global responsibility sharing than currently exists. And it is here that the concept of mobility can play an important role. The idea would be that refugees should be recognized as having the right of free movement between and among the members of the regime. In essence, this is a suggestion for the revival of the Nansen Passport, and endowing it with the additional element of presumptively authorizing entry of recognized refugees to other State members of the international system of refugee protec-

tion. Persons arriving from a country of first asylum would not be subject to lengthy asylum determinations that take years and impose substantial costs on receiving States; prior adjudication of refugee status, perhaps certified by UNHCR or another international body, would suffice for all members of the regime. To be acceptable to member States—and to be consistent with fair distribution of responsibilities—they could limit admissions to a certain annual amount or could condition admission upon demonstration that the refugee has a means of supporting him or herself and their families (and other conditions relating to security and the like). But the central principle would be one of supporting refugee agency as they attempt to rebuild their lives.

Free movement among members of a political body is hardly a new idea. From the creation of the United States, to the EU and ECOWAS¹⁷ (and perhaps soon MERCOSUR), the right to move is protected by law.¹⁸ To be sure, a new Nansen Passport would extend that privilege to non-citizens of the political entities that constitute the whole, but they will have achieved a certain degree of membership by meeting standards that warrant the exercise of international protection—which all members of the regime are committed to guaranteeing. Refugees could choose their State of residence as States accept their responsibilities as regime members. This is similar to current refugee resettlement programs, but puts the right of initiative in the refugees' hands: rather than States selecting refugees, refugees select States.

It should be apparent that this kind of mobility within the system benefits all parties. Refugees are able to regain agency and advance the goal of self-reliance; hosting States are benefitted if refugees who are unable to find work there can find it in another State; and States of destination gain from having refugees link to employers who seek their labor. And this kind of mobility would undercut smuggling and trafficking activities, which would surely decrease exploitation and abuse of refugees and prevent deaths at sea. Indeed, under such an approach, mobility can itself be a “solution” to the refugee situation—one that does not demand of States that they extend

17. *ECOWAS – Free Movements of Persons*, UNITED NATIONS ECONOMIC COMMISSION FOR AFRICA, <https://www.uneca.org/pages/ecowas-free-movement-persons> [<https://perma.cc/576G-UDUM>].

18. For a summary of legal frameworks protecting the right to move freely, see INT'L ORG. FOR MIGRATION, FREE MOVEMENT OF PERSONS IN REGIONAL INTEGRATION PROCESSES: SUPPLEMENTAL MATERIALS (2007), https://view.officeapps.live.com/op/view.aspx?src=http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/microsites/IDM/workshops/free_movement_of_persons_18190607/idm2007_handouts.doc [<https://perma.cc/XJJ7-UESV>].

membership.

We should not be so naïve as to think that systemic mobility can be adopted immediately. There would be strong opposition from third countries that would (correctly) believe that they would receive large numbers of refugees. This would not constitute fair burden-sharing any more than the current situation of “responsibility by proximity.”¹⁹ So States may want to ease into mobility, perhaps establishing annual quotas, or requiring refugees to establish that there is an employer who has offered them a job. Or mobility could be established at a regional or sub-regional level—as in the EU and among ECOWAS States.

The MIMC advances a number of proposals that address and also help lay the groundwork for incorporating mobility as a potential solution to forced migration. Most importantly, the MIMC makes realizing collective and fair responsibility sharing a core element of international protection. It does so by proposing a framework for allocating shares among States Parties to provide adequate funding and resettlement as well as establishing a mechanism to ensure accountability.²⁰ The MIMC also advocates the implementation of a broadly comprehensive system that would foreclose the need for subsequent status determinations: the establishment of a single harmonized asylum procedure would allow international protection status to “travel” and thus function globally.²¹ Finally, recognizing the important link between refugee agency and mobility, it also includes provisions requiring States Parties to allocate at least ten percent of labor visas to persons who have refugee and forced migrant status.²²

The move away from refugee camps in most parts of the world—and UNHCR’s policy on alternatives to camps—has supported refugee mobility within States of first asylum.²³ It is now time to adopt similar practices allowing movement between and among all States that are part of the international refugee regime. The MIMC suggests important first steps in the right direction.

19. This phrase is adopted from Peter Sutherland, former U.N. Special Representative of the Secretary-General for International Migration, Interview by U.N. News Service with Peter Sutherland, U.N. Special Representative of the Secretary-General for International Migration (Oct. 2, 2015), <https://reliefweb.int/report/world/interview-refugees-are-responsibility-world-proximity-doesn-t-define-responsibility> [<https://perma.cc/NU59-J8JT>].

20. MIMC, *supra* note 1, art. 209.

21. *Id.* art. 129.

22. *Id.* art. 211.

23. UNHCR, POLICY ON ALTERNATIVES TO CAMPS (2014), <http://www.unhcr.org/5422b8f09.pdf> [<https://perma.cc/5RL9-23CH>].

The Mobility Convention's Contribution to Addressing Socioeconomic Issues in Protracted Refugee Situations

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The Model International Mobility Convention (MIMC) is a unique and aspirational document that has the capacity to address a number of challenges related to forced migration. It is not a panacea for all migration-related concerns, and States will surely take issue with some parts of it. That said, its timing is critical: it comes at a moment when the world is increasingly focused on migration as a political, security and economic issue. Migration, and forced migration in particular, is no longer a side issue that is left to human rights activists and humanitarians; it is at the center of a range of negotiations that are now viewed as crucial to peace and stability. This commentary focuses on how the MIMC engages with socioeconomic issues in protracted refugee situations (PRS).¹ It considers the main concerns that are raised by protracted situations, and then outlines how the Convention approaches them. It concludes by offering a discussion of places for improvement, as well as current challenges to preventing situations from becoming protracted, and ending those that are ongoing.

PROTRACTED REFUGEE SITUATIONS

Today more than sixty-five million people have been uprooted from their homes.² While ongoing crises, such as the conflicts in Syria, Yemen, the Democratic Republic of the Congo, and the Central African Republic continue, the majority of displacement situations in the world—particularly refugee situations—are now pro-

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1. *Protracted Refugee Situations*, U.S. DEP'T OF STATE, <https://www.state.gov/j/prm/policyissues/issues/protracted/> [<https://perma.cc/KQJ3-UA8C>].

2. *Figures at a Glance*, UNHCR, <http://www.unhcr.org/en-us/figures-at-a-glance.html> [<https://perma.cc/TG6S-ELKB>].

tracted. Indeed, the average refugee situation lasts for a staggering twenty-six years, with entire generations growing up in exile and without access to some of their most basic human rights.³ In these situations, which have become an increasingly widespread and enduring feature of contemporary displacement:

[R]efugees find themselves in a long-lasting and intractable state of limbo. Their lives may not be at risk, but their basic rights and essential economic, social and psychological needs remain unfulfilled after years in exile. A refugee in this situation is often unable to break free from enforced reliance on external assistance.⁴

According to the UNHCR's definition, nearly two-thirds of the world's refugees in 2015—some twelve million—are considered to be in a protracted situation.⁵ This is a staggering figure and one that is only expected to grow given the underlying root causes of forced displacement that will likely remain unresolved in the near future.

Moreover, the States hosting the largest populations of refugees tend to be the least capable, and also experience high levels of poverty and insecurity.⁶ Refugees and other forced migrants in these contexts often face significant rights denials, including difficulty accessing the right to work and limitations on their freedom of movement. Indeed, refugees and other forced migrants are often unable to obtain required work permits or the necessary permissions to leave a camp or settlement to work and support themselves, despite the codification of such rights in international refugee law. Many refugees in PRS are thus forced to rely on aid, and as the years go on, may remain in poverty. This results in unrealized potential, frustration and uncertainty—all the while host States miss the opportunity to benefit from the skills of refugees. It can also drive some refugees to seek other more vulnerable and marginalized avenues of earning income in dangerous or unregulated sectors of the informal economy. This can leave such populations exposed to trafficking, child labor and the risks characteristic of other precarious or exploitative situations.

3. UNHCR, PROTRACTED REFUGEE SITUATIONS: HIGH COMMISSIONER'S INITIATIVE 5 (2008), <http://www.unhcr.org/4937de6f2.pdf> [<https://perma.cc/PSH8-K67E>].

4. UNHCR defines such situations as those in which displacement has occurred for five years or longer for a population of 25,000 or more. *Id.* However, this definition does not include Palestinian refugees, internally displaced people, or urban self-settled refugees.

5. *Global Protracted Refugee Situations*, U.S. DEP'T OF STATE, <https://www.state.gov/documents/organization/266018.pdf> [<https://perma.cc/TCF3-8TKZ>].

6. *Protracted Refugee Situations*, *supra* note 1.

Likewise, children and youth in PRS often lack access to education for years on end. Refugees may struggle to access courts, health services, and may not be able to own land or property. The presence of refugees and other displaced populations for long periods of time can also exacerbate tensions within host communities, as locals feel that they must compete for health and education services that might be more readily available to refugees from international aid groups.

Increased attention on protracted displacement has renewed a call for thinking creatively about how to solve these seemingly endless situations. For example, Gil Loescher and James Milner focus on responsibility sharing among host States—which tend to be poorer and less able to cope—and wealthier, Northern States like the United States and European countries—which tend to absorb only a small number of refugees (less than one percent) through resettlement programs.⁷ They argue that States in the global South are inclined to feel that Northern States are trying to contain refugees to the South, while Northern States are inclined to view Southern States as impeding solutions for refugees, especially as they often ignore or flat out refuse support for any form of local integration.⁸ Thus, finding more balanced approaches to responsibility sharing is, broadly speaking, at the heart of solving protracted displacement.

Other perspectives include finding ways to make hosting refugees seem less unfavorable to the countries of first asylum. This includes urging further development investment in the area, as well as finding ways for refugees to work and apply their skills to grow the local economy. In this vein, refugees are framed not as a drain or burden over the long haul, but as having economic potential as entrepreneurs, consumers, taxpayers, and innovators. Their presence—often through local integration—may bring about more investment in infrastructure by the international community seeking to serve them, for example. Or they may boost other labor activities, as potentially seen in “special economic zones” taking place in Jordan.⁹ These local integration-based solutions may be “win-win” in helping to support the development of host communities, as well as addressing the denial of some socioeconomic rights, such as education, housing, health care, and livelihood opportunities.¹⁰

7. GIL LOESCHER & JAMES MILNER, PROTRACTED REFUGEE SITUATIONS: DOMESTIC AND INTERNATIONAL SECURITY IMPLICATIONS 375 (2005). JAMES MILNER, REFUGEES, THE STATE AND THE POLITICS OF ASYLUM IN AFRICA (2009).

8. *Id.*

9. *Id.*

10. ALEXANDER BETTS, FORCED MIGRATION AND GLOBAL POLITICS (2009).

Likewise, finding ways to shift from “care and maintenance” models (where international organizations simply maintain refugees in camps, rather than working to find solutions) to self-reliance (where refugees support themselves) can help to ameliorate and eventually end PRS.¹¹ This might include vocational skills training for refugees, political negotiations to open up business opportunities and markets, or finding other modes of cooperation between host communities, refugees, and international organizations working in the area.¹² Resettlement can also be beneficial in overcoming “care and maintenance” PRS stalemates. Indeed, when other countries offer to take a portion of a refugee population, this can unlock new political avenues for finding additional durable solutions, rather than leaving people in limbo for years on end. After all, host countries that bear the largest numbers of arrivals ought not be expected to solve the situation on their own. Finally, recognizing that refugee populations are diverse and that there is no one-size-fits-all approach is an important step to overcoming PRS. Indeed, many host countries are set on one solution—usually repatriation—and thus hold out for years as conflicts continue and conditions remain unsafe for return, rather than thinking creatively to help end displacement for some of the refugees they are hosting.

WHAT THE CONVENTION DOES

The MIMC does a number of things that help to address PRS, and it builds on existing relevant international law and norms, particularly those enshrined in the 1951 Refugee Convention¹³ and the EU Qualification Directive.¹⁴ First off, it explicitly mentions PRS in Ar-

11. For further discussion, see T. ALEXANDER ALEINIKOFF, *MIGRATION POL’Y INST., FROM DEPENDENCE TO SELF-RELIANCE: CHANGING THE PARADIGM IN PROTRACTED REFUGEE SITUATIONS* (2015).

12. See, for example, recent efforts to create “special economic zones” in Jordan, or local integration opportunities among refugees in Uganda. For more on local integration, see Karen Jacobsen, *Local Integration: The Forgotten Solution*, *MIGRATION POL’Y INST.*, (Oct. 1, 2003), <https://www.migrationpolicy.org/article/local-integration-forgotten-solution> [<https://perma.cc/4YUJ-P2BM>].

13. Convention Relating to the Status of Refugees, July 28, 1951, 198 U.N.T.S. 137.

14. Directive 2011/95/EU of the European Parliament and of the Council of 13 Dec 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast), 2011 O.J. (L 337) 9, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0095&from=EN> [<https://perma.cc/D6L4->

ticle 163, noting that return is not necessarily the only solution in such contexts and that States should facilitate integration and naturalization of those under international protection.¹⁵ This is important: the explicit mention of integration is a step forward in and of itself, as indicated by recent research on ways to find solutions to PRS. Moving beyond the rhetoric of return as the best and sole option is the first step in unlocking many PRS.

Second, the MIMC emphasizes expediting naturalization, essentially limiting how long displacement lasts before individuals are provided with pathways to integration and secure status. This is an obvious and significant step to avoiding protracted displacement. To this end, it proposes that some legal status (permanent residence or an equivalent legal status) should be obtained in under six years, and that time under international protection should count towards fulfilling naturalization or permanent residency requirements.

The MIMC also encourages a shift away from care and maintenance to self-reliance—another important move toward overcoming PRS and accessing socioeconomic rights. For example, these provisions cap the length of time that access to work can be denied and require that no restrictive measures should be imposed on those with international protection (even as there may be restrictions for other foreign nationals) when it comes to accessing the national labor market.¹⁶ And following the lead of the EU Qualification Directive which seeks to harmonize the criteria used by EU States to define who is a refugee,¹⁷ this approach emphasizes access to employment-related education and vocational training opportunities for adults, including training courses for upgrading skills, practical workplace experience and counseling services afforded by employment offices.¹⁸ All of these are key to helping find solutions to protracted situations and securing better access to socioeconomic rights.

The MIMC also emphasizes freedom of movement within the host territory, the issuance of travel documents, and the right to

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15. See Model International Mobility Convention, *International Convention on the Rights and Duties of All Persons Moving from One State to Another and of the States They Leave, Transit or Enter*, art. 163, ¶ 1 (2017), http://globalpolicy.columbia.edu/sites/default/files/mimc_document.pdf [<https://perma.cc/F3Q3-6G88>].

16. *Id.*, art. 169, ¶ 12. The Convention delimits such measures to no more than six months after the application has been filed, and indicates that refugees should have the same treatment as nationals once they have recognized protection status.

17. Directive, *supra* note 14.

18. MIMC, *supra* note 15, art. 169, ¶ 3.

choose one's place of residence. It places constraints on how long temporary protection should last and when it should translate to a more permanent and robust form of protection status. It also limits how long host countries can abstain from providing access to permanent status or naturalization. This is a key element to avoiding protracted situations, emphasizing that the labels and restrictions that come with displacement have an end point; as time passes, people should have more access to rights, ultimately working toward a solution that enables them to live in dignity and self-reliance. Put simply, it establishes the rights that affirm that no one should be a refugee forever. This broader point—that no one should be kept in limbo or remain a migrant indefinitely—is an important theme throughout the MIMC.

Moreover, the MIMC engages with and advances the principles of responsibility sharing, a concept commonly discussed in conversations about protracted displacement and that is key to overcoming such situations.¹⁹ For example, in Chapter VIII—which is devoted to conceptualizing a Treaty Body to monitor and implement the Convention—there is the proposal that other States should help when another State cannot effectively offer protection, particularly in contexts of mass influx.²⁰ These provisions also provide a clear framework for committing States to facilitate additional resettlement—a crucial way that wealthier countries can support struggling host States—and includes a formal mechanism for responsibility sharing by creating legal pathways for labor mobility as an additional solution to displacement. It also pushes for increased cooperation between States to work toward solutions to protracted situations. Indeed, many protracted situations have gone on for so long because the lack of cooperation to find solutions has continued. The MIMC thus emphasizes and opens space for creative thinking about how refugees and other displaced persons can begin to benefit local economies and host areas.

Likewise, the focus on work or livelihoods, freedom of movement and access to other rights relating to health and education (including higher education as a pathway for asylum) throughout the MIMC speak directly to protracted situations. In doing so, the Convention also highlights the complexity of why people move—yes,

19. For more, see, e.g., Martin Gottwald, *Burden Sharing and Refugee Protection*, in OXFORD HANDBOOK OF REFUGEE AND FORCED MIGRATION STUDIES 525 (Elena Fiddian-Qasmieh et al. eds., 2014); Alexander Betts, *The Refugee Regime Complex*, 29 REFUGEE SURVEY QUARTERLY 12 (2010); Eiko R. Thielemann, *Between Interests and Norms: Explaining Burden-Sharing in the European Union*, 16 J. OF REFUGEE STUD. 253 (2003).

20. MIMC, *supra* note 15, art. 174, ¶ 3.

they may flee persecution, but education, work and other factors are also relevant, particularly as years go by. For example, a family that originally fled persecution a decade ago would want to know if they could support themselves upon return. Has someone taken over their land and home? Are conditions such that they can find work? Or they may not want to return because schools and clinics may be difficult to access in their former home, or children and youth may be more familiar with the language and culture of their host country than the country their family fled years ago. They may want a student to finish their studies in the host country, rather than try to transfer back to a different system in the country of origin. Indeed, as with any family or individual considering a move, reasons can evolve over time—families change, babies are born, marriages happen, relatives pass away, and any number of life occurrences can alter calculations of movement—something that the MIMC as a whole helps to account for.

PLACES FOR IMPROVEMENT

Despite putting forward many important advancements, there remains some additional work that could be done to strengthen the MIMC's response to socioeconomic rights in the protracted context. There could be further attention on how States can avoid long-term encampment situations in particular, and how to respond differently to urban versus camp settings. There also continues to be a need for additional work on refugee agency: how can more choice and self-determination be realized for displaced persons? Much of the MIMC is geared toward the actions of States, by way of providing legal and policy guidance. Exploring ways for refugees to determine their path during displacement—including incorporating refugee ideas on how best to improve access to rights, or considering how refugees might have greater choice in the durable solutions relevant to them—might further address this concern. For example, incorporating refugee leadership in policy formation relating to health, education, livelihoods and freedom of movement would add a missing piece to how many States respond to refugees. Likewise the MIMC could more robustly incorporate refugee choice in the resettlement quotas that States will offer in the Responsibility Sharing scheme.²¹ The MIMC

21. The Convention does give some attention to this by way of providing an avenue to labor mobility for forced migrants, while also requiring that “consideration be given to the resettlement and mobility interests of refugees.” See MIMC, *supra* note 15, art. 210, ¶ 7. However, Alex Aleinikoff's discussion of Nansen passports and freedom of movement offers some additional ideas for improving refugees' choices during displacement. See T.

could also do more to account for shifting roles over the duration of displacement, including how different aid actors alter their assistance with the passing of time and how this may potentially transform and complicate the relationship of refugee committees to their host States.²² It could also be more explicit in understanding how forced migrants' needs change and are dynamic.

The MIMC also struggles to differentiate some context-specific issue areas within protracted situations, including cyclical migration or situations that are both emergency and protracted, such as Syria. Indeed, situations where refugees flee and then return (perhaps during a pause in the fighting, or a specific season where it might be safe enough to go and check on property or family that may have stayed behind), or where multiple waves of displacement cause refugees to flee, return, and then flee again are not uncommon. It is challenging to consider how to address this, but might be worth doing so in future conversations. Likewise, situations that are both emergency and protracted represent specific challenges, as humanitarian relief actors (who are acting in the immediate crisis phase) and development actors (who would tend to be more useful in protracted cases where immediate needs are addressed, but longer term development goals must be addressed) are notorious for not working well together. It is not clear whether the MIMC could do more to take this into account given its focus on creating a multilateral framework for addressing mobility more broadly. However, there might be opportunities to support further ways to alleviate the tensions with host communities that can emerge as refugees stay for long periods of time. Moreover, while reinforcing some of the resources available to humanitarian actors, the MIMC does not give many new tools to UNHCR or others to push harder on the right to work, freedom of movement, and other important rights relevant to refugee and other migrants' socioeconomic status. Finally, while the MIMC cannot delve into the political impasses and ongoing conflicts that cause displacement situations to become protracted, it could incorporate some sense of migration as a political variable in and of itself (rather than a mere symptom or byproduct of politics) in prolonging or ending conflict.²³ There might be opportunities for this as it complements other

Alexander Aleinikoff, *Taking Mobility Seriously in the Model International Mobility Convention*, 56 COLUM. J. OF TRANS. L. 296, 300 (2017). See also Alexander Betts, *Let Refugees Fly to Europe*, N.Y. TIMES (Sept. 24, 2015), <https://www.nytimes.com/2015/09/25/opinion/let-refugees-fly-to-europe.html> [<https://perma.cc/7CKV-QNL2>].

22. See, e.g., SARAH DEARDORFF MILLER, UNHCR AS A SURROGATE STATE: PROTRACTED REFUGEE SITUATIONS (forthcoming 2018).

23. For a broader discussion of some of these issues, see SARAH DEARDORFF MILLER,

important moments in addressing PRS, including building upon the New York Declaration; a renewed focus on mass migration; the UNHCR Executive Committee Conclusion on PRS from 2009; Convention Plus; Development Assistance to Refugees; Development through Local Integration; and the self-reliance strategy, as seen in Uganda and elsewhere.²⁴

CONCLUSION

In closing, the MIMC marks an important step in driving forward ongoing conversations about improved responses to migration, and forced migration in particular. It provides many concrete recommendations, serving as a guide for how to progress in ways that are better for receiving States, and, most of all, to the displaced themselves. This commentary has highlighted some of the key concerns raised by protracted displacement and potential ways of overcoming these challenges. It has focused on various socioeconomic aspects of protracted displacement, including the right to work, and outlined how the MIMC offers improvements to the current common responses. Some include time limits on how long a person can be denied a status and access to important rights, in part by articulating clear guidelines on when work permits and other opportunities should become available to refugees and other forced migrants. This commentary has also pointed out ways in which the MIMC could be even stronger, or highlighted gaps where it would be helpful to offer more guidance. Above all, the MIMC serves as a useful tool for continuing the conversation on what the international response to mobility

POLITICAL AND HUMANITARIAN RESPONSES TO SYRIAN DISPLACEMENT (2016).

24. UNHCR, CONCLUSION OF PROTRACTED REFUGEE SITUATIONS, <http://www.unhcr.org/en-us/excom/exconc/4b332bca9/conclusion-protracted-refugee-situations.html> [https://perma.cc/7J2L-FSXV];

Convention Plus at a Glance, UNHCR, <http://www.unhcr.org/403b30684.pdf> [https://perma.cc/YV6V-SCVV];

UNHCR, DEVELOPMENT ASSISTANCE FOR REFUGEES (DAR) FOR UGANDA SELF RELIANCE STRATEGY: WAY FORWARD (2003), <http://www.unhcr.org/en-us/protection/operations/41c6a19b4/development-assistance-refugees-dar-uganda-self-reliance-strategy-report.html> [https://perma.cc/8NE7-VEW9]; UNHCR, ZAMBIA INITIATIVE: DEVELOPMENT THROUGH LOCAL INTEGRATION (2002), <http://www.unhcr.org/en-us/partners/partners/3dd4fb264/zambia-initiative-development-local-integration-programme-formulation-mission.html> [https://perma.cc/B6EC-Y5S4]; UNHCR EXCOM, LOCAL INTEGRATION AND SELF-RELIANCE (2005), <http://www.unhcr.org/en-us/excom/standcom/42a0054f2/local-integration-self-reliance.html> [https://perma.cc/55U4-99L2].

should be. Now, more than ever, is the time to have this discussion, and the MIMC—whether adopted or simply drawn upon to advance this conversation—is an important step forward in ending protracted displacement.

Rethinking the Global Governance of International Protection

KIRAN BANERJEE*

As readers of the Model International Mobility Convention (MIMC) will note, the first four chapters of the project center primarily on the more-or-less voluntary migration of persons. In contrast, Chapter V is devoted to the situation of individuals who are forced to cross international borders in search of safety and refuge. Whether caused by persecution, generalized violence, or forms of state breakdown and insecurity that expose individuals to serious harm, the MIMC's turn to forced migration signals a shift in attention to persons in need of international protection and the humanitarian considerations these circumstances raise.

In this comment, I will largely focus on providing an analysis and overview of Chapter V and the responsibility sharing provisions of Chapter VIII. I begin by sketching the larger context of contemporary forced migration that informs the approach of the MIMC. From here I discuss how the MIMC addresses the relationship between migration and vulnerability to develop responses to many of the gaps that currently exist in international protection. This will highlight how these provisions aim to both deepen rights protections, by refining the existing framework of the refugee regime, while also expanding the scope of coverage, by accounting for persons with strong claims to protection who fall outside the formal refugee definition articulated in the 1951 Refugee Convention. By way of conclusion I briefly consider some of the enduring difficulties that have beset efforts to develop a more effective, equitable, and truly global approach to international protection and the proposals the MIMC advances for meeting these challenges.

Of all the fields of global migration governance, forced migration is perhaps the most developed in terms of norms and institutions. The emergence of international cooperation in this domain extends back almost a century to the inter-war era in Europe and

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culminated with the post-Second World War emergence of our contemporary refugee regime.¹ The cornerstone of this framework is the 1951 Refugee Convention—with its ground norm of non-refoulement—a legal regime supported by the mandate and competency of the Office of the United Nations High Commissioner for Refugees (UNHCR).² In the context of the Cold War, the 1967 Protocol formally globalized the regime, with this expansion taking place alongside the post-war growth and institutionalization of the UNHCR as a major actor in global governance.³ Despite relatively humble beginnings, the Refugee Convention now includes 145 States Parties, while the UNHCR has become a (if not the)⁴ leading organization in the international humanitarian community.

Although the refugee system represents one of the most institutionalized areas of migration governance, there is also increasingly widespread consensus today that the regime is far from perfect on both a normative and practical level. Most glaringly, the current realities of forced displacement exceed the 1951 Refugee Convention's narrow construction of the grounds for claiming refugee status. Ex-

1. For a comprehensive study of the important but frequently forgotten 'pre-history' of international protection, see CLAUDENA SKRAN, *REFUGEES IN INTER-WAR EUROPE: THE EMERGENCE OF A REGIME* (1995).

2. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; G.A. Res. 428 (V), Statute of the Office of the U.N. High Comm'r for Refugees (Dec. 14, 1950). UNHCR has emphasized the enduring and fundamental significance of the principle of non-refoulement as defined in Article 33(1), which states that "No Contracting State shall expel or return ("refouler") a refugee 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." See U.N. High Comm'r for Refugees, Note on Non-Refoulement (Submitted by the High Commissioner), U.N. Doc. EC/SCP/2 (Aug. 23, 1977).

3. U.N. General Assembly, Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267. For a definitive account of the institutional development of the refugee regime see GIL LOESCHER ET AL., *THE UNHCR: THE POLITICS AND PRACTICE OF REFUGEE PROTECTION INTO THE TWENTY-FIRST CENTURY* (2008); for an account within a broader view on the evolution of international organizations see MICHAEL BARNETT & MARTHA FINNEMORE, *RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS* (2004).

4. Beyond its subsequent transformations in temporal and geographic scope, culminating in the 1967 Protocol, the 1951 Convention's non-refoulement norm (Article 33) is now largely recognized as part of customary international law, binding all States regardless of their accession. Given the considerable development in normative authority and organizational capacity that the UNHCR has undergone by way of becoming the "world's most important humanitarian organization" it is easy to forget that, at its foundation, the organization was allocated a miniscule budget and tightly constrained to "very specific functions within narrow parameters and with almost no institutional or material autonomy." LOESCHER ET AL., *supra* note 3, at 29, 14.

amples of such drivers of displacement that fall outside the explicit Convention grounds include generalized violence and State failure, as well as famine, environmental disaster, and climate-change induced displacement.⁵ The preservation of an individualistic and formally narrow definition—one rooted in and deeply shaped by the historical context of its formation—remains a pressing issue for the refugee regime.⁶ Indeed, at present vast numbers of persons who are assisted by the UNHCR may not, from a legal standpoint, qualify as refugees under the current definition.⁷ While the institutional evolution of the regime was capable of expanding its temporal and geographic boundaries, attempts to further revise this dimension of the scope of international protection have been far less global in reach. Such developments have largely played out in the form of regional instruments, such as the Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention) and Cartagena Declaration, or in the more or less ad-hoc creation of various forms of complementary and temporary protection status by particular States.⁸ The latter trend in turn has produced both inconsistencies in access to protection and arbitrary variations in treatment.⁹

Compounding this issue of coverage, other institutional features of the regime have led to great disparities in how the responsibility to provide international protection is distributed globally. The population of “Persons of Concern” to the UNHCR is currently at a historically unprecedented level: the organization puts the number of

5. The evident absence of coverage under international law for persons displaced by the latter causes can be seen in the UNHCR Handbook, which notes that the 1951 Convention “rules out such persons as victims of famine or natural disaster.” UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, ¶ 39, U.N. Doc. HCR/1P/4/ENGG/Rev. 3 (Dec. 2011).

6. James Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT’L. L. J. 162–63 (1990).

7. This reality has lead Arboleda to suggest that the “general definitions of refugee status contained in the Statute of the UNHCR and the 1951 Convention have been rendered obsolete by evolving realities in the third world.” Eduardo Arboleda, *Refugee Definition in Africa and Latin America: The Lessons of Pragmatism*, 3 INT’L J. REFUGEE L. 185, 188 (1991).

8. Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S 45; Cartagena Declaration on Refugees, Nov. 22, 1984. For an overview of the state of complementary protection, see JANE MCADAM, *COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW* (2007).

9. More worrisomely, the larger global context of international protection reveals a broader dynamic of vastly uneven treatment and protections gaps, with asylum and expansive rights for recognized refugees in the global north and policies of basic humanitarian relief (and often encampment) for refugees in the global South.

refugees globally at 22.5 million, with a total of 65.6 million persons forcibly displaced worldwide as a result of persecution, conflict, violence, or human rights violations.¹⁰ This expansion in the need for international protection has coincided with inadequate amounts of support for the humanitarian operations of the UNHCR as a result of systematic funding shortfalls.¹¹ These developments have led to rising gaps in protection that affect vast numbers of people. Moreover, responsibility for hosting refugees disproportionately falls on developing States in a context in which support for third-country resettlement remains woefully inadequate, accounting for less than one percent of those in need of refuge.¹² The effects of these trends, alongside broader shifts in the nature of displacement, means that roughly two-thirds of refugees are in what UNHCR calls ‘protracted situations’ in which the average time spent in a refugee camp is measured in decades.¹³

It is against this background of growing gaps in protection and insufficient international cooperation that one should view the 2016 U.N. Summit for Refugees and Migrants.¹⁴ Despite this urgency, States have not yet agreed to a collective solution and it may very well be quite some time until any concrete outcomes emerge at the international level, whether from the proposed Global Compact for Refugees or related initiatives.¹⁵ However, the convening of the Summit itself—amid other efforts to rethink the world’s approach to forced migration—was a clear sign of the widespread recognition of

10. UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2016 2 (2017). To put this figure in perspective, if the total population of people in need of international protection were a nation they would form the 21st largest country in the world.

11. For a historical overview of such developments, see GIL LOESCHER, *THE UNHCR AND WORLD POLITICS: A PERILOUS PATH* (2001). To take a recent example, UNHCR reported considerable funding shortfalls for its Syrian refugee assistance efforts for 2015, which remained 38% below the requests made in its humanitarian appeals to donor states. UNHCR, REGIONAL REFUGEE AND RESILIENCE PLAN, 2015–16: 2015 ANNUAL REPORT 8 (2015).

12. UNHCR reports that 189,300 refugees were resettled in 2016, a number that accounts for a small fraction of the total global population of refugees, while simultaneously representing the highest resettlement figures in nearly two decades. In contrast, 84% of the forcibly displaced are hosted by states in developing regions. UNHCR, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2016 (2017).

13. See Sarah Deardorff Miller, *The Mobility Convention’s Contribution to Addressing Socioeconomic Issues in Protracted Refugee Situations*, 56 COLUM. J. TRANSNAT’L L. 303, 303–08 (2017) for further discussion and assessment of the MIMC’s ability to address protracted refugee situations.

14. G.A. Res. 71/1 (Oct. 3, 2016).

15. UNHCR, TOWARDS A GLOBAL COMPACT ON REFUGEES: A ROADMAP (2017).

this pressing global challenge.

The MIMC takes three broad strategies to address the present realities of forced migration and improve international protection. First, it seeks to broadly relocate global responses to displacement within a larger comprehensive and holistic framework for mobility. Second, Chapter V—which is devoted to forced migration—expands the scope of protection to account for the many people not covered by the traditional refugee definition. Third, this chapter proposes strengthening the rights provided under international protection, both revising the schedule articulated in the 1951 Convention in light of contemporary human rights standards, and tying this to provisions supporting greater global cooperation. Finally, the MIMC complements these core strategies by explicitly addressing the inter-state dimension of international protection by way of developing a modest institutional framework for facilitating and implementing global responsibility sharing among States.

The central innovation of the MIMC lies in embedding international protection within a larger mobility framework. This is no trivial improvement on the current state of affairs. As recent work at the intersection of international relations and migration studies has revealed, the refugee regime has become part of a “regime complex:” rather than representing a distinct and independent domain of State coordination and cooperation, the institutional space of the global refugee system is now enmeshed with other mobility regimes in an arbitrary and non-systematic manner.¹⁶ For instance, State cooperation to improve border enforcement under the emerging travel regime may conflict or compromise the refugee regime’s goal of providing effective international protection.¹⁷ Institutional proliferation at the global level has also produced situations of overlapping authority and competition between multilateral organizations that has often proved to be counter-productive. Exacerbating this, the State-centric inflection of refugee law¹⁸ as well as the relatively weak mechanisms for

16. GLOBAL MOBILITY REGIMES (Rey Kowalski ed., 2011); Alexander Betts, *Institutional Proliferation and the Global Refugee Regime*, 7 PERSPECTIVES ON POL. 53 (2009); Alexander Betts, *The Refugee Regime Complex*, 29 REFUGEE SURV. QUARTERLY 12 (2010); Alexander Betts, *Regime Complexity and International Organizations: UNHCR as a Challenged Institution*, 19 GLOBAL GOVERNANCE 69 (2013).

17. Betts, *The Refugee Regime Complex*, *supra* note 16, at 15–16; Betts, *Regime Complexity and International Organizations*, *supra* note 16, at 74–75.

18. T. Alexander Aleinikoff, *State-centered Refugee Law: From Resettlement to Containment*, 14 MICH. J. INT’L L. 120 (1992). An important component of this of course is the territorialized nature of asylum. See RANDALL HANSEN, *MIGRATION POL’Y INST., CONSTRAINED BY ITS ROOTS: HOW THE ORIGINS OF THE GLOBAL ASYLUM SYSTEM LIMIT CONTEMPORARY PROTECTION* (2017), <https://www.migrationpolicy.org/research/constrained->

fairly sharing responsibility in a spirit of international solidarity¹⁹—whether through resettlement or funding contributions—provide opportunities and incentives for States to shirk their moral obligations to assist the forcibly displaced. Under current circumstances this has led to deeply problematic outcomes and an important goal of the MIMC is to address these pathologies of protection by embedding responses to forced migration within a broader mobility framework.

Approaching forced migration holistically, as a key part of the global governance of mobility, provides a way to support cooperation through issue-linkage and shared incentives.²⁰ Governments interested in securing the many advantages of a more comprehensive and effective global migration regime are expected to accept these benefits alongside a commitment to support international protection. Moreover, by creating the conditions for coordinated collective State action, the MIMC provides a framework for international protection that more equitably distributes global responsibility while effectively responding to the needs of forced migrants. In doing so, this approach addresses a core challenge: motivating collective action in a world of divergent State interests. Arguably, it is this difficulty that has most stymied efforts to reform the refugee regime and so I return to this issue in my conclusion.

Another major proposal concerns the narrowness of the traditional refugee definition and the necessity to more explicitly account for the diverse grounds that should justify a claim to international protection. Here the MIMC builds on the work of scholars who have questioned the normative inconsistencies of the 1951 Convention's definition and called for a rethinking of who should have access to refuge.²¹ But this re-thinking and expanding of the scope of protec-

its-roots-how-origins-global-asylum-system-limit-contemporary-protection
[<https://perma.cc/6KQC-N2SN>].

19. For a brief overview of the origins and evolution of responsibility sharing (more often called “burden sharing”), see CHRISTINA BOSWELL, *MIGRATION POL’Y INST., BURDEN-SHARING IN THE NEW AGE OF IMMIGRATION* (2003), <https://www.migrationpolicy.org/article/burden-sharing-new-age-immigration> [<https://perma.cc/8W5F-DKH>].

20. For further discussion of the potential advantages that may lie in leveraging such connections between mobility and migration see Rey Koslowski, *Think Mobility Instead of Migration: Leveraging Visitors, Tourists and Students for More International Cooperation*, 56 COLUM. J. OF TRANS. L.: 263 (2017).

21. The literature addressing this matter is legion. For some important interventions consider Andrew Shacknove, *Who is a Refugee?*, 95 ETHICS 274 (1985); ARISTIDE ZOLBERG ET AL., *ESCAPE FROM VIOLENCE: CONFLICT AND THE REFUGEE CRISIS IN THE DEVELOPING WORLD* (1989); Aleinikoff, *supra* note 18; ALEXANDER BETTS, *SURVIVAL MIGRATION: FAILED GOVERNANCE AND THE CRISIS OF DISPLACEMENT* (2013); JOSEPH H. CARENS, *ETHICS*

tion also takes inspiration from regional instruments, like the 1969 OAU Convention and the Cartagena Declaration, as well as the ongoing practices of the UNHCR, all of which provide acknowledgment of the need for a more inclusive coverage.²²

To this end Chapter V introduces a new category of protection for “forced migrants”—a group that includes any individual who, owing to the risk of serious harm, is compelled to leave or unable to return to her or his country of origin.²³ In creating this category the MIMC frames “harm” to include generalized armed conflict and mass violations of human rights, but also threats resulting from environmental disasters, enduring food insecurity, acute climate change, or other events seriously disturbing public order.²⁴ This group thus represents a broader class of which refugees are a subset.

In articulating this status, Chapter V draws on the 2011 EU subsidiary protection framework, while also incorporating elements from a number of alternative sources to significantly modify that approach.²⁵ As framed, all forced migrants are uniformly entitled to international protection in order to avoid creating unjustified hierarchies in protection status.²⁶ In doing so, the MIMC departs from many existing forms of subsidiary or complementary protection, insisting that a normatively coherent and rights-based approach to the

OF IMMIGRATION (2013).

22. Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45; Organization of American States, Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Nov. 22 1984; UNHCR, UNHCR RESETTLEMENT HANDBOOK 2011 (2011).

23. See Model International Mobility Convention, *International Convention on the Rights and Duties of All Persons Moving from One State to Another and of the States They Leave, Transit or Enter*, art. 125 (2017), http://globalpolicy.columbia.edu/sites/default/files/mimc_document.pdf, [<https://perma.cc/F3Q3-6G88>]. Additionally, while affirming and preserving the historical achievement of the 1951 Convention in securing shared recognition for a universal status for refugees, the MIMC also acknowledges the need to introduce a new common protection category to reflect the broader complex of causes that produce displacement. *Id.* Preamble.

24. *Id.* art. 125.

25. See Council & Parliament Directive 2011/95/EU, 2011 O.J. (L 337).

26. Although the Convention adopts some elements from the EU’s approach to subsidiary protection, it also incorporates insights from the critical literature on complementary protection. See Jane McAdam, *The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime*, 17 INT’L J. REFUGEE L. 461 (2005); McADAM, *supra* note 8. For consideration of a European example that avoids these problematic divergences by providing for a uniform status, see Immigration Act, § 28 (May 15, 2008) (Nor.).

provision of international protection must begin by addressing vulnerability. This is because the protection needs of a person fleeing civil war or mass human rights violations can be equally urgent to those escaping persecution and thus demands an equivalently robust response.

This expansion of access to international protection represents one of the most ambitious proposals of Chapter V. Yet at the same time, the MIMC also recognizes the need to provide a more provisional form of protection status. This is intended to secure effective refuge in cases where individual status determinations may not be possible and where the need for protection is manifestly justified, but also likely to be temporary in duration. An important reason for this proposal is to provide a formalized and uniform protection status to apply in cases of short-term displacement. This aims to address situations in which individuals should be able to return to their country of origin in the near future and in which it would make both normative and practical sense for them to remain in a State of first asylum in the region.

To develop this form of interim protection the MIMC draws from pre-existing frameworks such as “Temporary Protection Status” in the United States and the 2001 EU Directive on Temporary Protection.²⁷ Like these prior approaches, interim protection status provides a uniform baseline for accessing important rights, such as secure residency, work authorization, and other entitlements. However, the Convention also anticipates concerns with creating a form of “protection status lite” and the possibility that this could be used to erode access to more robust forms of protection. This has been done to account for important criticisms that have been raised against existing approaches to temporary protection.²⁸

The MIMC thus carefully circumscribes interim protection and provides incentives for appropriate implementation. Crucially, the application of interim protection does not preclude an individual’s right to a status determination offering recognition as a forced migrant entitled to international refuge. Moreover, Chapter V draws on the recommendations of the European Council on Refugees and Exiles (ECRE) to insert cessation provisions to ensure that interim protection is indeed only temporary.²⁹ Accordingly, interim protection should normally last for one year and can only be extended by

27. Council Directive 2001/55/EC, 2001 O.J. (L 212); INA § 244, 8 U.S.C. § 1254a.

28. GUY GOODWIN-GILL, *THE CHALLENGES TO INTERNATIONAL REFUGEE LAW IN THE CURRENT CRISIS* (2016).

29. EUROPEAN COUNCIL ON REFUGEES AND EXILES, *POSITION OF THE EUROPEAN COUNCIL ON REFUGEES AND EXILES ON TEMPORARY PROTECTION* (1997).

another year before automatically transitioning to a more stable status.³⁰ After this two-year limit, States should assume that the need for protection still remains, meaning that local settlement and integration should be more fully promoted.³¹ Moreover, these provisions require that time spent under interim protection count toward regularizing status overall. This is important because Chapter V provides for the regularization of status of forced migrants—including a right to access permanent residency status after six years.³² Finally, the MIMC discourages States from applying interim protection in an arbitrary manner by bracketing it off from the resettlement dimension of responsibility sharing arrangements.

The last major proposal of Chapter V is to deepen and strengthen the basic framework of rights afforded to forced migrants. These provisions revisit the protections granted to refugees in the 1951 Convention and raise the bar on those rights. As part of this, the MIMC reworks the non-discrimination provisions of the 1951 Convention, updating these to reflect and cohere with contemporary international standards.³³ These proposals also provide forced migrants with rights equivalent to nationals (rather than just non-nationals) in terms of employment and access to primary and secondary education, as well as freedom of association and access to courts.³⁴ The underlying imperative of these provisions is to upgrade these rights and lay the basis for more effective inclusion. This goal is informed by the emerging body of research that has shown the importance of supporting refugee resilience through enabling and sustaining the livelihoods of displaced persons. Rather than consigning individuals to confinement in refugee camps, such research highlights how supporting the agency and unlocking the economic potential of refugees can benefit both local communities and refugees themselves.³⁵ Tying international protection directly to development

30. MIMC, *supra* note 23.

31. *Id.* art. 155.

32. *Id.*

33. *Id.* art. 133.

34. *Id.* arts. 161–163, 165, 145, 146.

35. ALEXANDER BETTS, ET AL., *REFUGEE ECONOMIES: FORCED DISPLACEMENT AND DEVELOPMENT* (2017); ALEXANDER BETTS & PAUL COLLIER, *REFUGEE ECONOMIES: TRANSFORMING A BROKEN REFUGEE SYSTEM* (2017); RANDALL HANSEN, *CONSTRAINED BY ITS ROOTS: HOW THE ORIGINS OF THE GLOBAL ASYLUM SYSTEM LIMIT CONTEMPORARY PROTECTION* (2017). This emphasis on resilience has some precedence in earlier era of refugee protection, one where refugee assistance placed a specific emphasis on livelihoods. See, Evan Elise Easton-Calabria, *From Bottom-up to Top-down: The “Pre-history” of Refugee Livelihoods Assistance from 1919 to 1979*, 28 J. OF REFUGEE STUD. 412 (2015).

assistance—as some scholars have suggested—remains a matter of policy that is likely beyond the scope of a multilateral treaty.³⁶ However, the MIMC recognizes that the goal of effectively establishing such an issue linkage across these areas itself relies upon formally securing robust rights protections for forced migrants—an especially relevant concern given the heightened vulnerability of the displaced and dispossessed to exploitation.³⁷

Most crucially, the MIMC addresses the existing refugee regime's problematic lack of a "right of asylum" in three ways. First, it reworks and strengthens the foundational non-refoulement norm. The key innovations it proposes are to expand protection from refoulement to cover rejection at the frontier, interception and indirect refoulement.³⁸ Second, the MIMC incorporates provisions from the 1974 Draft Convention on Territorial Asylum to formalize a right to be admitted and remain in the territory of a State of first-arrival pending a final status determination.³⁹ Finally, this approach strengthens the protections for forced migrants "unlawfully in the Country of Refuge"—that is, persons in need of refuge who enter a State without authorization. To do so, Chapter V introduces proportionality rules on the use of administrative detention, restricting it to an option of last resort.⁴⁰ These protections are complemented by further limits on the detention of minors and the requirement that States apply all measures in a manner consistent with the best interests of the child.⁴¹

I end by turning to the Convention's Treaty Body provisions for addressing the issue of global responsibility sharing. As noted earlier, a major challenge that confronts our current refugee regime lies in the starkly uneven distribution of responsibility for providing asylum to forced migrants, who are overwhelmingly hosted by developing nations—a problem that is only exacerbated by funding shortfalls in the UNHCR's budget.⁴² These difficulties are the direct result of two flaws in the current refugee regime: its territorialized

36. See, e.g., WORLD BANK, FORCIBLY DISPLACED: TOWARD A DEVELOPMENT APPROACH SUPPORTING REFUGEES, THE INTERNALLY DISPLACED, AND THEIR HOSTS (2017).

37. This is all the more crucial because this dimension is often not sufficiently emphasized in much of the literature on refugee resilience. Arguably, entrenching robust rights protections into the international refugee regime therefore represents a crucial background condition for such initiatives for a variety of reasons.

38. MIMC, *supra* note 23, art. 138(3).

39. *Id.* art. 138; Executive Committee on the High Commissioner's Programme, Draft Convention on Territorial Asylum, U.N. Doc. A/AC.96/508 (1974).

40. MIMC, *supra* note 23, art. 137.

41. *Id.* art. 137(3).

42. See *supra* note 4.

approach toward asylum and the weak to non-existent requirements on States to contribute to international protection, whether through resettlement or funding humanitarian assistance.

Chapter V is largely devoted to articulating, and indeed strengthening, the obligations of States toward forced migrants. However, these proposals are essentially unworkable without a profound modification in the inter-state dimension of international protection, one in which the responsibility to protect takes on a truly collective and solidaristic institutional structure. As various moments in the history of the refugee regime have shown, at an elemental level, responsibility sharing remains acutely connected with the securing of the fundamental right of forced migrants to refuge.⁴³ Yet at the same time, this fact highlights the reality that international protection does not only involve the claims of individuals to assistance from a particular State. Rather, it entails a demand on the State-system as a whole, and with that, to the equitable participation of all States in the provision of safety and the securing of human rights.⁴⁴ The MIMC thus recognizes the necessity of creating fairer and more effective forms of global support and coordination to respond to the situation of forced migrants. This is done by advancing a number of formal mechanisms by which States Parties collectively commit to supporting international protection, both through funding and resettlement.⁴⁵

As elsewhere, these proposals are partially drawn from existing State practice. In looking at how to restructure responsibility sharing, the MIMC adopts aspects of the EU “distribution key”—a framework envisioned to manage the cross-European relocation and intra-EU resettlement of asylum seekers.⁴⁶ Yet the MIMC departs

43. This connection was made most apparent in the outcomes of the 1979 International Conference on Indochinese Refugees, which was held following the declaration of regional states that they had “reached the limit of their endurance” and “would not accept any new arrivals.” The resulting agreement greatly expanded global resettlement quotas in return for the continued commitment of regional states to provide refuge as countries of first asylum. UNHCR, *THE STATE OF THE WORLD'S REFUGEES* 82–86 (2000), <http://www.unhcr.org/3ebf9bad0.html> [<https://perma.cc/FRG2-KSBA>].

44. In a sense, international protection raises questions of justice not only between individuals and states qua actors in the state-system, but also between states as well. For valuable conceptual discussion of these two—ultimately interrelated—dimensions of responsibility, see Matthew J. Gibney, *Refugees and justice between states*, 14 *EUR. J. OF POL. THEORY* 448 (2015) and David Owen, *In Loco Civitatis: On the Normative Basis of the Institution of Refugeehood and Responsibilities for Refugees*, in *MIGRATION IN POLITICAL THEORY: THE ETHICS OF MOVEMENT AND MEMBERSHIP* 269 (Sarah Fine & Lea Ypi eds., 2016).

45. MIMC, *supra* note 23, Chapter VIII, Part III.

46. *Proposal for a Regulation of the European Parliament and of the Council*

from this example both with an eye to the ambitious goal of developing a globally viable solution, which requires a different model for sharing responsibility, while also accounting for the manifest difficulties that the EU approach has confronted in practice. It does so by introducing the concept of “responsibility shares” in order to manage and fairly realize the collective obligation of all States to support international protection.⁴⁷ These shares are assigned annually on the basis of State capacity—by taking into consideration a variety of factors—with the aim of providing a metric to hold States Parties publicly to account.⁴⁸ Recognizing further potential divergences between countries, allowances are made for support to be provided through pledging resettlement visas and by contributing humanitarian funding. Nonetheless, it is required that all States that are parties to the Convention offer some degree of support through *both* resettlement and funding, in a spirit of international solidarity.

In addition, this approach attempts to anticipate and forestall the difficulties of the EU model by focusing on proactive solutions to global displacement. Rather than serving primarily as a remedial (and reactive) response to situations of large-scale influx or subsequent secondary movements, the MIMC proposes an ongoing international framework for equitably and collectively responding to forced migration. This is further complemented by a “Global Planning Platform” created to develop lasting and fair solutions to protracted refugee situations, alongside a “Global Refugee Fund” designed to supplement the responsibility sharing framework.⁴⁹ The latter does so by assisting (primarily developing) States in their resettlement and integration efforts, as well as establishing a pool of resources to fund emergency measures in situations of mass arrivals.⁵⁰

The interlocking and holistic features of the MIMC in themselves should provide a powerful incentive for many States to support such reforms. But by also assuring governments that truly international support will be both immediate and secure, all States should

Concerning Establishing a Crisis Relocation Mechanism and Amending Regulation, COM (2015) 450 final (Sept. 9, 2015). Although never fully tested in either circumstance, the EU distribution key was envisioned for both “emergency” situations as well as a permanent complement to the Dublin Regulation.

47. MIMC, *supra* note 23, art. 211.

48. If the MIMC’s distribution formula were applied, as an illustrative example, to the case of the 120,000 asylum seekers that arrived in Europe in the fall of 2015, this would entail the U.S. accepting a share of 8,726 individuals, while China would have a quota of 8,035 and Japan a quota of 4,616.

49. MIMC, *supra* note 23, arts. 212, 213.

50. *Id.* art. 213.

feel more confident in honoring their moral and legal obligations to extend refuge, while remaining assured that they will never have to do so alone. Indeed, to further maintain global responsibility sharing as a collective obligation of the State system, the MIMC also incorporates recognition of the resettlement needs of forced migrants into the “Visa Mobility Clearing House” put forward in the Treaty Body chapter.⁵¹ Together, the above mechanisms are intended to address some of the larger systemic challenges facing the refugee regime today while also accounting for the formidable collective action problems posed to the much needed reform and transformation of international protection in a world of divergent State interests.

As a product of (albeit, largely scholarly) debate and negotiated consensus, the MIMC’s framework for reforming international protection may strike some readers as boldly radical and unrealistic, while perhaps seeming far too consistent with the status quo and conservative to others. To skeptics, I readily admit that these proposals aim toward long-term reforms that would require a substantial degree of international solidarity and cooperation among States, while conceding that our current moment may not provide a sufficient basis for the energetic and creative multilateralism that would be required to effectively improve the provision of international protection. Yet such elements of common commitment and trust, fortified with institutional incentives that satisfy or align otherwise divergent interests, remain basic to any form of global governance and thus central to this project as a whole.⁵² To those who worry that these reforms may not go far enough in more fully transforming international responses to forced migration, although sympathetic to such concerns, I must insist on emphasizing that these provisions of the MIMC seek to provide an institutional starting point for addressing the tragic realities of our present. In doing so, its approach to international protection takes as given the unresolved tensions of the contemporary State system, not denying that in a fully just world—in which the human

51. In particular, the MIMC obliges States Parties to allocate 10% of annual labor migration visas toward beneficiaries of international refuge. This proposal and the incorporation of labor mobility into refugee policy harkens back to earlier approaches to forced displacement taken during the inter-war era; on this point, see Katy Long, *When Refugees Stopped being Migrants*, 1 *MIGRATION STUD.* 4 (2013). For more on the relevance of a connection between mobility and refugee agency in the past and for our present, see T. Alex Aleinikoff, *Taking Mobility Seriously in the Model International Mobility Convention*, 56 *COLUM. J. TRANSNAT’L L.* 300 (2017).

52. Indeed, it is worth stressing the degree to which even the post-war creation of the refugee regime itself represented a considerable achievement of international cooperation, one accomplished during a moment in which multilateralism and human rights were far from fully ascendant in the global importance they hold today.

rights of all persons were fully respected and globally realized—there would be no need for a refugee regime at all.

Negotiating for Women's Mobility Rights: Between Definition and Contestation

YASMINE ERGAS*

Invoking surging migration, national-populist movements and their allied governments all over the world have legitimated xenophobic policies and given rise to neo-sovereigntist confrontations that undermine international cooperation. It is impossible to overstate the harshness with which those seeking entry into at best indifferent, at worst overtly hostile, States have been treated. But the unending stream of discouraging accounts is punctuated by reports by NGOs, individual volunteers, and public authorities seeking to succor migrants in distress. Conflicting trends are evidently at work. While some States threaten, and, at times, implement, individual solutions, appeals for coordinated approaches amongst States that supplement or even supplant the existing, inadequate migratory regime gain traction.¹ At the same time, stakeholders mobilize to press for solutions

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1. See, e.g., Declan Walsh and Jason Horowitz, *Italy, Going It Alone, Stalls the Flow of Migrants. But at what cost?*, N.Y. TIMES (Sept. 17, 2017), https://www.nytimes.com/2017/09/17/world/europe/italy-libya-migrant-crisis.html?_r=0 [<https://perma.cc/B3GU-G3V4>]. On interstate cooperation, see *Migrant Crisis: Italy Approves Libya Naval Mission*, BBC NEWS (Aug. 2, 2017), <http://www.bbc.com/news/world-europe-40802179> [<https://perma.cc/GXA2-ETL7>]. See also, *Italy's Code of Conduct for NGOs Involved in Migrant Rescues*, EURONEWS (Aug. 3, 2017), <http://www.euronews.com/2017/08/03/text-of-italys-code-of-conduct-for-ngos-involved-in-migrant-rescue> [<https://perma.cc/GXA2-ETL7>]. But on the difficulties entailed in these approaches, see *Aid groups snub Italian code of conduct on Mediterranean rescues*, THE GUARDIAN (July 31, 2017), <https://www.theguardian.com/world/2017/jul/31/aid-groups-snub-italian-code-conduct-mediterranean-rescues> [<https://perma.cc/429K-9FUV>]. A key instance of attempted interstate cooperation is provided by the European Council Decision 2015/1601 of September 2015 establishing provisions to assist Italy and Greece in coping with migrant inflows. Council Decision 2015/1601, L 248/80. Despite apparent progress these measures have yielded meager results. European Commission Press Release IP-17-2014, Migration: Record Month for Relocations from Italy and Greece (July 26, 2017), http://europa.eu/rapid/press-release_IP-17-2104_en.htm [<https://perma.cc/96NH-PRES>] (Ken Roth noting that only 9,078 migrants have been relocated from Italy, “fewer than the average number of new arrivals there in a single month.”). For instances of stakeholder participation, see *Refugees and Migrants: Summary of Hearings*, UNITED NATIONS (July 22,

that take into account the human rights of migrants and refugees.² In this context, as Michael Doyle recalls in his introduction to this issue, initiatives have taken shape that may presage a fairer and more open regulatory framework, although they may also carry the risk of retrogression.³ *Inter alia*, the United Nations New York Declaration on Refugees and Migrants⁴ has given rise to processes intended to lead to two new Global Compacts, one for refugees and the other for safe, orderly and regular migration, as well as to the development of guidelines for the treatment of migrants in vulnerable situations, all to be agreed on in 2018.

The Model International Mobility Convention (MIMC)⁵ on which this symposium issue centers is not formally part of these processes, but it should be read in the context of the current international negotiations. As Doyle points out in his introduction, the MIMC can constitute an important resource for those engaged in such negotiations: it offers a holistic framework in which to situate migratory movements while also proposing a broad array of solutions, including to issues that the Compacts and the guidelines will need to address. This comment briefly discusses the MIMC's potential significance as a platform for future negotiations regarding women's rights.⁶ It ar-

2016), <https://www.un.org/pga/71development/wp-content/uploads/sites/40/2015/08/Refugees-and-Migrants-Summary-of-hearings-22-July-2016.pdf> [https://perma.cc/P8SH-L52F] (including a critique of the of the concept of burden-sharing with its attendant implication that migrants constitute a net cost to a host society) [hereinafter *Stakeholders Hearings*].

2. Stakeholders hearings, *supra* note 1. For a recent example, see Kenneth Roth, *How the EU can Manage the Migrant Flow*, HUMAN RIGHTS WATCH (Nov. 8, 2017), <https://www.hrw.org/news/2017/11/08/how-eu-can-manage-migrant-flow> [https://perma.cc/9WYD-F7HR].

3. For an expression of the risks and opportunities embedded in the negotiations intended to lead up to a Global Compact on refugees and a Global Compact on [Migration], see *What Is the Global Compact on Migration?*, GLOBAL COALITION ON MIGRATION, <http://gcmigration.org/2017/04/what-is-the-global-compact-on-migration/> [https://perma.cc/CRA8-SNW5]. See Michael Doyle, JTL Introduction, 56 COLUM. J. TRANS'L L. 219 (2018).

4. G.A. Res. 71/1 (Oct. 3, 2016).

5. Model International Mobility Convention (MIMC), *International Convention on the Rights and Duties of All Persons Moving from One State to Another and of the States They Leave, Transit or Enter* (2017), http://globalpolicy.columbia.edu/sites/default/files/mimc_document.pdf [https://perma.cc/F3Q3-6G88].

6. The following remarks focus on women's rights, while understanding that issues relating to oppression on the basis of sexual orientation, gender identity and sexual characteristics as well as to gender more generally would require a far more extensive analysis.

gues that the MIMC marks important steps forward in defining women's rights in the context of mobility, thus shifting the baseline for future negotiations. For it is the way in which, framing and reframing key issues, the MIMC establishes sites of contestation that will affect its long-term impacts.

Such sites of contestation include but are not limited to those that might be identified by a reading of the New York Declaration. Unlike the Declaration, the MIMC addresses "mobility" as an all-encompassing category that includes, along with refugees and migrants, several types of border-crossers—such as tourists and students⁷—whose *prima facie* objectives do not entail a relocation of the primary sites of their lives (as with migration) and whose motivations cannot be ascribed to persecution and other causes of displacement that do, or should, elicit international protection (as with refugees).⁸ Casting migrants and refugees as variants of a more generally mobile population reduces the visibility that xenophobic movements continuously seek to highlight; it contributes to their normalization by suggesting that they are part of the more general movement of people across borders associated with globalization. Because that movement also involves individuals crossing borders to realize the "normal" events of their everyday lives—to study, for example, or form families—the MIMC opens to international negotiations aspects of social organization strongly characterized by gender relations over which States have conventionally asserted exclusive domestic jurisdiction. The MIMC also draws to the negotiating table protagonists who might not have been involved in discussions strictly concerned with refugees or traditionally defined migrants, such as tourism lobbies or student associations, whose positions on women's rights will, whether implicitly or explicitly, also come into play.

Again, unlike the Compacts and Guidelines adumbrated by the New York Declaration, the MIMC is presented as the blueprint for a *convention*. Reclassifying and formalizing the treatment of border-crossers from a concession States make to an obligation they must respect may enhance the MIMC's appeal to advocates eager to ensure that States legally commit to specific responsibilities. Alternatively, it may dissuade States from signing on to the MIMC in its entirety (although they may nonetheless incorporate particular provisions in their negotiations of other documents). Whether State repre-

7. MIMC, *supra* note 5, arts. 30–52.

8. The MIMC proposes a broad understanding of forced migration that includes but is not limited to refugees fleeing persecution as defined by current international human rights law. See Doyle, *supra* note 3; Kiran Banerjee, *Rethinking the Global Governance of International Protection*, 56 COLUM. J. TRANS'L L. 313 (2018).

sentatives will draw on the MIMC as they develop the Compacts and guidelines referenced above, use it to inform a separate—possibly binding—treaty, or allow it to fall into desuetude, remains to be seen.⁹ At least in part, the MIMC’s capacity to help promote an agreement among States will depend on the extent to which it incentivizes their “buy-in,” including by reducing the costs associated with participation.¹⁰ Like the New York Declaration, the MIMC provides assurances of State sovereignty with respect to border controls.¹¹ Such assurances are accompanied by a commitment to inter-state cooperation in combating “irregular” migration, including through deportations.¹² These commitments are somewhat tempered by reiterations of the principle of *non-refoulement*, references to human rights (such as conditioning measures regarding migrants return to the best interests of the child), and commitments to the humane treatment of those subject to deportation, potentially limiting the MIMC’s attractiveness for some States but perhaps also appealing to others.¹³ Moreover, the MIMC proposes several institutional mechanisms through which inter-state cooperation can be affected. It is this combination of assurances of sovereignty, protection of individual rights and institutional design that may encourage States to adopt aspects of the MIMC as a platform for negotiation. But it is the way in which the MIMC casts rights that will either lead advocates to draw on its provisions, or dissuade them from doing so, as they mobilize to influence States and the international community.

From the perspective of gender rights advocates, the stakes

9. In some cases, processes established parallel to on-going negotiations fostered by the United Nations have sometimes issued agreements where the initial, formal processes proved unable to do so. Thus, if the ultimate negotiations for the two Global Compacts adumbrated by the New York Declaration were to encounter significant blockages, it might be possible for NGOs, working in concert with State allies, to promote a treaty (or other agreement) based on the MIMC. Successful examples of such parallel processes are represented by the landmines and the cluster munitions treaties. United Nations Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211; United Nations Convention on Cluster Munitions, May 30, 2008, 2668 U.N.T.S. 39.

10. For more than a decade, a wide-ranging debate among political scientists and lawyers has focused on the conditions that affect States’ likelihood of signing, ratifying and implementing human rights treaties. See, e.g., JACK L. SNYDER, L. VINJAMURI & S. HOPGOOD, HUMAN RIGHTS FUTURES (2017).

11. MIMC, *supra* note 5, at 5; G.A. Res. 71/1, *supra* note 4, at 9 (“We recall at the same time that each State has a sovereign right to determine whom to admit to its territory, subject to that State’s international obligation”).

12. MIMC, *supra* note 5, art. 119.

13. *Id.*

involved in the reform of the mobility regime are high. Gender relations permeate the entire migratory cycle—from the moment people prepare to depart their countries of origin, to their passage through (often multiple) States in transit, arrival in their countries of destination, and, at times, return to their point of departure. The gendered nature of these experiences is reflected in, and shaped by, the policies that regulate migration.¹⁴ Unsurprisingly, participants in the 2016 discussions among stakeholders that preceded the New York Declaration advocated for a paradigm shift towards a rights-based and gender-sensitive approach. Moreover, albeit with limitations and inconsistencies, the Declaration recognizes the importance of gender; the MIMC does so even more fully.¹⁵ However, in the reform of mobility or that of any other international sector, today, attempts to foster gender equality—or, at least, fairer gender relations—operate against a background characterized by widespread backlash.¹⁶

States and advocates have acknowledged the perils inherent in the current context. In 2015, for example, States fearful of the poten-

14. For a general discussion of gender and migration, from a gender perspective, see Comm. on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 26 on Women Migrant Workers, CEDAW/C/2009/WP.1/R (2008). See Sara van Waslum, *The Rise and Fall of the Breadwinner Citizen, As Reflected in Dutch and EU Migration Law*, 3 AMSTERDAM L. F. 62 (2006); Kitty Calavita, *Gender, Migration and Law: Crossing Border and Bridging Disciplines*, 40 Int'l Migration Rev. 104 (2006); WOMEN AND IMMIGRATION LAW: NEW VARIATIONS ON CLASSICAL FEMINIST THEMES (Sarah van Walsum & Thomas Spijkerboer eds., 2007); GENDER, MIGRATION AND THE WORK OF CARE: A MULTI-SCALAR APPROACH TO THE PACIFIC RIM (Sonya Michel & Ito Peng eds., 2017).

15. *Stakeholders Hearings*, *supra* note 1, at 7. G.A. Res. 71/1, *supra* note 4, ¶¶ 23, 31. It should be noted, however, that the general anti-discrimination clause of the Declaration includes sex but not gender among the prohibited bases of discrimination. *Id.* ¶ 13. For an authoritative interpretation of human rights law that specifically extends the prohibition against discrimination to gender, see High Commissioner for Human Rights, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, U.N. Doc. A/HRC/19/41 (Nov. 17, 2011), http://www.ohchr.org/Documents/Issues/Discrimination/A.HRC.19.41_English.pdf [<https://perma.cc/FRD2-HM9R>].

16. “Gender equality” is an inherently contested term; each part of the binomial has given rise to intense debate. It is beyond the scope of this comment to explore the complex meanings of either “gender” or “equality” or their conjunction. In reference to advocacy and policy in this comment, I use “gender equality” to indicate a two-fold general goal: 1) Obviating the negative effects of heterosexual male dominance, with particular reference here to the effects of that domination on women and the manifold ways in which they experience such domination in the context of the other intersectional factors that shape their life-chances, and 2) recognizing women as active subjects rather than passive objects of oppression. In this comment, I am concerned with all women, whether or not they are gender-conforming.

tial regression of women's rights that might have resulted from a fifth U.N. conference on women, advocated against convening such a conference to mark the twentieth anniversary of the landmark Fourth World Conference on Women and the approval of the Beijing Platform for Action.¹⁷ Confronted with the failures of the migration regime, the MIMC takes a different stance, seeking to delineate, in Doyle's words, a "realistic utopia," one that takes as its point of departure "the world as it is" to promote a "movement toward justice that better motivated States could endorse."¹⁸ The realization of this objective would require a radical revision of the discriminatory views of gender relations embedded in the current regime.¹⁹ Indeed, the MIMC includes gender, sex, sexual orientation and marital status in its general non-discrimination clause,²⁰ provides specific protections for the rights of women,²¹ and makes significant progress in key areas. For example, in addressing the rights of individuals for whom international protection should be granted, the MIMC allows for explicit consideration of risks of physical harm as a basis for forced migrant status and of gender-based persecution for refugee status.²² It provides for assistance to victims of trafficking.²³ It affords migrant workers (and their family members) the ability to be temporarily absent without jeopardizing their right to stay or to work, which may be especially significant for women (and men) with children and

17. U.N. Fourth World Conference on Women, Beijing Declaration and Platform for Action (1995), http://beijing20.unwomen.org/~media/headquarters/attachments/sections/csw/pfa_e_final_web.pdf [<https://perma.cc/RZ6A-DX56>]. The Beijing Platform for Action has served as a guiding document for international women's equality policies for the past two decades.

18. Doyle, *supra* note 3.

19. It has been pointed out, however, that gender stereotyping can sometimes work in favor of women migrants. For a discussion in relation to refugee status, see THOMAS SPIJKERBOER, GENDER AND REFUGEE STATUS (2000); Calavita, *supra* note 14, at 111–117.

20. MIMC, *supra* note 5, art. 5. Although this article addresses "visitors," the protections of "visitors" apply to all other categories covered by the MIMC art. 1(2). *Id.* art. 1(2).

21. *Id.* arts. 5, 63. While the MIMC incorporates important safeguards against discrimination—including a specific prohibition against deprivations of residence or work authorizations on the basis of pregnancy (art. 76), it does not, however, explicitly commit States to conducting a gender analysis of their mobility policies. Such an analysis would limit States' ability to implement indirect forms of discrimination, as is entailed in visa policies that privilege job categories and other qualifications (for example, as implicated in investor visas) in which men predominate. See, CEDAW, *supra* note 14, ¶ 26(a), http://www2.ohchr.org/english/bodies/cedaw/docs/GR_26_on_women_migrant_workers_en.pdf, [<https://perma.cc/6BPT-7RQA>].

22. MIMC, *supra* note 5, art. 125(a), (b).

23. *Id.* art. 181.

other family members in their States of origin.²⁴ It ensures, among the specific protections of migrant women, protection against violence and harassment²⁵ and access to emergency health care, including sexual and reproductive health services and maternity protection.²⁶ Additionally, it prohibits employers from firing women, and States from expelling either migrant workers or members of their families (or generally depriving them of their residency authorization or work permits), because of pregnancy.²⁷

At the same time, the MIMC still allows for discriminatory stances. For example, despite affording domestic workers assurances that echo those of the Domestic Workers Convention, the MIMC explicitly exempts States from providing domestic workers with the same access to social housing that it extends to other migrant workers.²⁸ The MIMC also implicitly discriminates when it specifies that States *shall* “take all adequate and effective measures to eliminate employment in their territory of migrant workers in an irregular situation, including, whenever appropriate, sanctions on employers of such workers,” because female migrants are so often employed in the informal sector, and the gendered consequences of this stipulation are not addressed.²⁹ Additionally, the provision that the MIMC offers in mitigation of this measure adopts a hortatory rather than mandatory stance: in article 119, the MIMC simply provides that “States Parties *should* adopt measures to transform informal economy activities into formal activities and to ensure . . . [the rights of] migrant workers, residents and investors in these activities.”³⁰ Similarly, the MIMC does not explicitly address the risk that discrimination may shape the institutional organs it establishes to oversee its implementation. For example, the Rome Statute of the International Criminal Court re-

24. See, e.g., Helma Lutz, Euro-orphan and the Stigmatization of Migrant Motherhood, in *Reassembling Motherhood: Procreation and Care in a Globalized World* 247–268 (Yasmine Ergas et al., eds., 2017); Gioconda Herrera, Stratified Workers/Stratified Mothers: Migration Policies and Citizenship Among Ecuadorian Immigrant Women, in *The Globalization of Motherhood: Deconstructions and Reconstructions of Biology and Care* 55–76 (Wendy Chavkin and Jane Maree Maher eds., 2010).

25. MIMC, *supra* note 5, art. 63.1(a).

26. *Id.* art. 63.2.

27. MIMC, *supra* note 5, art. 76.

28. Int'l Lab. Org. Convention Concerning Decent Work for Domestic Workers, June 16, 2011; MIMC, *supra* note 5, art. 111(1) (stating that migrant domestic workers should be entitled to rights provided by in Part IV, except for the provisions of Art. 85(1)(c) regarding social housing schemes).

29. MIMC, *supra* note 5, art. 119.

30. *Id.*

quires that the selection of judges be effected taking into account the need, within the membership of the Court, to ensure “a fair representation of female and male judges,” and that it include expertise on violence against women and children.³¹ By contrast, the MIMC’s committee is not subject to gender balance, nor required to ensure that it has gender-relevant expertise. Additionally, the MIMC does not require States or its own institutions to conduct gender analyses or to mainstream gender into their mobility policies, as has been international policy for many years.³²

But the MIMC cannot be read as a final answer to the regulation of mobility. Rather, it constitutes a platform for discussion, and as such can lead to both immediate and long-term effects. In the immediate, the MIMC enables a dialogue among those who either seek to translate it directly into an agreement or draw on its provisions to inform other efforts, such as the Global Compacts to which the New York Declaration is intended to give rise. In the longer term, the MIMC provides a potential reference point for policy-makers and judicial authorities involved in the implementation of those elements that are adopted in a binding treaty or otherwise incorporated into international and national law. The MIMC, in other words, structures sites of contestation, some of which will be of particular interest for women’s rights advocates. It does so by providing a general non-discrimination clause that renders each key concept it presents as essentially contestable: women’s rights advocates can utilize that clause to contest the provisions detailed above, among others.³³ But the meanings of “non-discrimination” are not necessarily evident however. Rather, the MIMC at its best must be taken as a living text, which will give rise to conflicting interpretations that will shape and reshape women’s rights.

By way of example, consider family reunification. Family reunification has long provided an important pathway for women’s legal migration.³⁴ In itself, the importance of family reunification to

31. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, July 17, 1998, 37 I.L.M. 999 (1998), art. 36(8)(a), (b), https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf, [<https://perma.cc/3SKE-8EV3>].

32. See e.g., *Gender Mainstreaming*, U.N. WOMEN, <http://www.unwomen.org/en/how-we-work/un-system-coordination/gender-mainstreaming> [<https://perma.cc/FLD2-NAYN>].

33. MIMC, *supra* note 5, art. 5 (read with art. 1(2)).

34. *Id.* at Chapter VII. See, JONATHAN CHALOFF, ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD), GLOBAL TRENDS IN FAMILY MIGRATION 11–12 (2013), <http://www.oecd.org/els/mig/Chaloff.pdf> [<https://perma.cc/3VUH-4DYZ>] (describing family reunification as “the flip side to a predominantly male humanitarian and labour flow” and showing that, in 2011, on average women represent approximately two-thirds of family migration).

women's mobility is revelatory of the gendered nature of migration. On a sociological level, the choice to migrate has sometimes been understood as easier to make for men,³⁵ although in recent decades migration has appeared increasingly feminized and, especially, to include a larger proportion of women moving on their own, migrating first rather than to join family members.³⁶ On an institutional level, while the migratory policies of some States have been predicated on a male primary mover with a family that could eventually accompany him, other States have promoted migratory outflows including of women workers.³⁷

The MIMC mutes the familistic rhetoric embedded in the foundational texts of international human rights law. While such texts posit "the family" as *the* natural and fundamental group unit of society," the MIMC describes the family as *a* natural and fundamental group unit.³⁸ Proponents of "traditional values" may well bridle at this change (although they will agree that the family is a "natural" entity); advocates of women's rights may instead bridle at the notion that the family constitutes a "natural" entity. Even though it maintains the reference to the family as a "natural" entity, the MIMC actually treats it as a historical and national variable. In fact, the MIMC implicitly acknowledges that the term "the family" designates a site of contestation, and provides guidance for the resolution of disputes.

Thus, while expanding the conventional understanding of the nuclear family to cover "the sponsor's [i.e. primary migrant's] unmarried partner," the MIMC assigns the establishment of the status of that "unmarried partner" to the migrant's home State.³⁹ This attribu-

35. Indeed, in some contexts, the migration of women independently from their husbands has been subjected to significant restrictions. See, NANA OISHI, *WOMEN IN MOTION: GLOBALIZATION, STATE POLICIES AND LABOR MIGRATION* (2005).

36. See, IRENA OMELANIUK, *WORLD BANK, GENDER, POVERTY REDUCTION AND MIGRATION*, <http://siteresources.worldbank.org/EXTABOUTUS/Resources/Gender.pdf>, [<https://perma.cc/5XSE-4SW4>].

37. See, e.g., Sara van Walsum, *The Rise and Fall of the Breadwinner Citizen, As Reflected in Dutch and EU Migration Law*, 3 *AMSTERDAM L. F.* 62 (2011), <http://amsterdamlawforum.org/article/view/206>, [<https://perma.cc/FLR3-TDDU>] (describing the male breadwinner model and its crisis). See, generally, OISHI, *supra* note 35, at 95–96 (2005) (discussing Bangladesh's ban on women emigrating to work as domestic workers).

38. G.A. Res. 217 (III) A, *Universal Declaration of Human Rights*, art. 16(3) (Dec. 10, 1948); MIMC, *supra* note 5, art. 193.

39. MIMC, *supra* note 5, art. 193(1)(b) ("For purposes of the present Convention, family shall include ... the sponsor's unmarried partner, with whom the sponsor is in a duly attested stable long-term relationship, in accordance with the national law of the State of origin."). Note that the MIMC also provides that the personal status of individuals entitled

tion contradicts the general practice of reserving the right to define family membership to States of immigration.⁴⁰ Moreover, specifying that, “in cases of conflicts of interpretation arising from different nationalities, States Parties shall adopt an interpretation most in line with the right to family life,” the MIMC potentially favors the laws and practices of States of emigration where the family life was established.⁴¹

Shifting the power of definition from States of immigration to States of emigration is likely to prompt intense debates both among and between women’s rights advocates and States. For some women’s rights advocates, allowing home States’ legal definitions to prevail will comport with the MIMC’s general non-discriminatory stance. This is because the MIMC assigns entry rights to women to whom such rights would otherwise be denied: wives in polygamous marriages, for example, or child-brides, or wives married through processes that did not provide for their consent, or, again, wives within close degrees of consanguinity to their spouses.⁴² It may also allow women in same-sex marriages that are legal in their States of origin to gain entry into States where such marriages are not allowed. But for other advocates, allowing States to recognize—and hence legitimate—polygamous or early childhood or non-consent-based marriages stands in stark opposition to their views regarding gender-based discrimination and to perspectives long incorporated in international human rights law.⁴³

to international protection is to be governed by the law of their State of domicile (or, residence) rather than of the stay in which protection is being granted. *See*, MIMC, *supra* note 5, art. 142.

40. *See, e.g.*, Council Directive 2003/86, Preamble, ¶ 10, O.J. (L 251) 12. (“It is for the Member States to decide whether they wish to authorise family reunification for ... unmarried or registered partners.”). *See also, id.* art. 4(3).

41. MIMC, *supra* note 5, art. 193(1)(g).

42. An argument might be made that the MIMC provision applies to “unmarried” partners, and hence does not apply to wives in multiple marriages. But such an interpretation would contradict the obligation to adopt the interpretation most in line with family life, as required by MIMC, *supra* note 5, art. 193 (1)(g).

43. U.N. Comm. on the Elimination of Discrimination Against Women, CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations on the Elimination of Discrimination Against Women, ¶ 14, U.N. Doc A/49/38 (1994) (stating “[p]olygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5 (a) of the Convention.”). *See* U.N. Comm. on the Elimination of Discrimination Against Women & U.N. Comm. on the Rts of the

At the same time, this assignment of the right to define any aspect of family status to a State of origin will likely provoke discussions among States. No State bound by the European Council Directive on Family Reunification can currently grant a migrant living in a host country with one wife a right to family reunification for another wife, even if her spousal status is sanctioned by the migrant's State of origin.⁴⁴ It is predictable that, were the MIMC ever to inform a binding agreement, many States would reserve against this provision; and, if it were subject to judicial interpretation of the provision, such States would likely invoke a public policy exception with respect to the recognition of family relations. But States (and other political actors) that have long championed "traditional values" could find their hands strengthened, and argue for a strict interpretation. Allowing States of origin to define matrimonial relations freights the understanding of marriage towards States of emigration, privileging their values over those that States of immigration may espouse.

In sum, under the MIMC, what constitutes a family, and hence which women can benefit from the rights related to family reunification will continue to constitute a site of contestation between and among women's rights advocates as well as States. The outcomes of this contestation will likely shape the mobility rights of women for years to come.

Child, Joint General Recommendation No. 31 of the Comm. on the Elimination of Discrimination against Women/General Comment No. 18 of the Comm. on the Rts of the Child on Harmful Practices, ¶ 7, CEDAW/C/GC/31-CRC/C/GC/18 (2014).

44. Council Directive, *supra* note 40, art. 4(4). An argument might be made that the MIMC provision applies to "unmarried" partners, and hence does not apply to wives in multiple marriages. But such an interpretation would contradict the obligation to adopt the interpretation most in line with family life, as required by art. 193 (1) (g).

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Model International Mobility Convention

International Convention on the Rights and Duties of All Persons Moving from One State to Another and of the States they Leave, Transit or Enter

BY THE MODEL INTERNATIONAL MOBILITY COMMISSION*

The Model International Mobility Convention provides a holistic and rights-based approach to international mobility that integrates the various regimes that seek to govern people on the move. In addition, it fills key gaps in international law that leave many people unprotected by establishing the minimum rights afforded to all people who cross state borders — whether as visitors, tourists, students, workers, residents, entrepreneurs, forced migrants, refugees, victims of trafficking, people caught in countries in crisis and family members — and defines their relationships to their communities of destination, origin, and transit.

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*After nearly two years of study and debate convened by the Columbia Global Policy Initiative's International Migration Project, the Model International Mobility Convention represents a consensus among over 40 academics and policymakers in the fields of migration, human rights, national security, labor economics, and refugee law.

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PREAMBLE

The States Parties to the present Convention,¹

Reaffirming the purposes and principles of the Charter of the United Nations and of the Universal Declaration of Human Rights and recalling the core international human rights treaties;²

Protecting the human rights of all refugees and migrants, regardless of status and demonstrating full respect for international law and international human rights law and, where applicable, international refugee law and international humanitarian law;³

Reasserting the existing rights afforded to mobile people and corresponding rights and responsibilities of States established by international and regional conventions and initiatives, including the Refugee Convention of 1951 and its 1967 Protocol and, for its States Parties, the Migrant Workers Convention;

Expanding those basic rights of mobile people where warranted in order to address the growing gaps in protection and responsibility that are leaving people vulnerable;

Recognizing that the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone, including persons moving across national borders, may enjoy economic, social, cultural, civil, and political rights in the appropriate locale;⁴

1. This model treaty borrows the conceptual framework suggested by Rey Koslowski for a "General Agreement on Migration, Mobility and Security" from his edited volume *Global Mobility Regimes* (Palgrave Macmillan, 2011) and draws on Joel Trachtman's "Illustrative Draft General Agreement on Labor Migration," pp. 347-361 in his *The International Law of Economic Migration: Toward the Fourth Freedom* (Kalamazoo, MI: W.E. Upjohn Institute for Employment Research, 2009). The full list of Commission members and other selected public signatories who have signed onto the Convention can be found at: www.globalpolicy.columbia.edu/mobility-convention.

2. U.N. Charter; G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

3. G.A. Res. 71/1, ¶ 5 (Sept. 19, 2016) (modified by author) (citations in this Article using the phrase "modified by author" reflect the fact that the author has modified or has rewritten the language of pre-existing provisions) [hereinafter *New York Declaration for Refugees and Migrants*]; see International Migrants Bill of Rights, 28 GEO. IMMIGR. L. J. 395, Preamble (2010) (modified by author) [hereinafter *International Migrants Bill of Rights*].

4. G.A. Res. 71/1, *supra* note 3, ¶ 5 (modified by author); *International Migrants Bill of Rights*, *supra* note 3, Preamble.

Recognizing that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory response to the protection needs of forced migrants and refugees is international in scope and nature cannot therefore be achieved without international cooperation;⁵

Expressing the wish that all States, recognizing the social and humanitarian nature of international protection, continue to receive persons in need of protection in their territories and that they act in concert in a true spirit of international cooperation in order that forced migrants and refugees may find asylum and the possibility of resettlement;⁶

Envisaging, as do the Sustainable Development Goals (2030 Agenda), a world of universal respect for human rights and human dignity, the rule of law, justice, equality and non-discrimination;⁷

Recognizing, as also do the Sustainable Development Goals,⁸ the positive contribution of migrants for inclusive growth and sustainable development; including that international migration is a multidimensional reality of major relevance for the development of countries of origin, transit and destination, which requires coherent and comprehensive responses, cooperating internationally to facilitate safe, orderly, regular and responsible migration;⁹

Committing to strengthen the resilience of communities hosting refugees, particularly in developing countries;¹⁰

Underlining the right of migrants to return to their State of citizenship; and recalling that States must ensure that their returning nationals are duly received;¹¹

Realizing the importance and extent of the mobility of persons phe-

5. United Nations Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Refugee Convention], preamble (modified by author).

6. *Id.*

7. G.A. Res. 70/1, ¶ 8 (Sept. 25, 2015).

8. *Id.* ¶ 29.

9. François Crépeau, *A new agenda for facilitating human mobility after the UN summits on refugees and migrants*, OPENDEMOCRACY (Mar. 24, 2017), <https://www.opendemocracy.net/beyondslavery/safepassages/fran-ois-cr-peau/new-agenda-for-facilitating-human-mobility-after-un-summits-on-refugee>, [<https://perma.cc/M6TF-9WUS>].

10. G.A. Res. 70/1, *supra* note 7, ¶ 29.

11. G.A. Res. 68/4, ¶ 24 (Oct. 3, 2013); *see* G.A. Res. 70/1, *supra* note 7, ¶ 29.

nomenon, which involves millions of individuals and affects all States in the international community;¹²

Recognizing the legitimate interest of States in controlling their borders and that the exercise of sovereignty entails responsibility, including in the adoption of appropriate and comprehensive policies governing the movement of persons;¹³

Recognizing that persons outside their state jurisdiction have special needs that may require special accommodation in certain regards;¹⁴

Convinced, therefore, of the need to bring about the international protection of the rights of all persons moving across borders and members of their families, reaffirming and establishing basic norms in a comprehensive convention which could be applied universally;¹⁵

Mindful that the legitimate claims persons moving across borders can make, and the responsibilities they should bear, should reflect the particular circumstances and reasons for their movement and aware that States have consequent rights and duties both toward those mobile persons and other States;

And, highlighting the particular circumstances and cumulative sets of rights of visitors, tourists, students, migrant workers, investors and residents, family reunification, migrant victims of human trafficking, forced migrants and refugees;

Have agreed as follows:

12. G.A. Res. 45/158, preamble (Dec. 18, 1990); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families preamble, Dec. 18, 1990, 2220 U.N.T.S. 3 (modified by author) [hereinafter MW].

13. *International Migrants Bill of Rights*, *supra* note 3, preamble.

14. *Id.*

15. G.A. Res. 45/158, *supra* note 12, preamble. MW, *supra* note 12, preamble (modified by author).

CHAPTER I VISITORS¹⁶

Part I: Scope and Definitions

Article 1

For the purposes of the present Convention:

1. The term “visitor” refers to a person who is outside his or her State of origin, temporarily residing or in transit in a State of which he or she is not a national and does not qualify under one of the chapters that follow for another status.
2. The rights of the visitor enumerated herein shall apply to all those persons who qualify for additional protections as a tourist, student, migrant worker, investor or resident, reunifying family member, migrant victim of human trafficking, migrant caught in a crisis, forced migrant or refugee.
3. The present Convention shall apply during the entire migration process, which comprises preparation for migration, departure, transit and the entire period of stay and/or remunerated activity in the State of destination or employment as well as return to the State of origin.
4. The “member of family” includes spouses, dependent children and any dependent adults,¹⁷ and any other members of the family as defined in Chapter VII of the present Convention.
5. For the purposes of the protections provided in this Convention, “child”, “children” or “minor” shall mean any person below the age of eighteen years, unless under the law applicable by States Parties to the child majority is attained earlier.¹⁸

16. The first three chapters of the model treaty draw on the excellent research assistance of Doron Shiffer Sebba, Yuichi Kawamoto and Steven Nam and reflect many of the suggestions made by Rey Koslowski, Randall Hansen, T. Alexander Aleinikoff, Joel Trachtman, Sarah Rosengaertner, Justin MacDermott, Alicia Evangelides and Maggie Powers.

17. G.A. Res. 45/158, *supra* note 12, art. 4; MW, *supra* note 12, art. 4 (modified by author).

18. Convention on the Rights of the Child, art. 1, Nov. 20, 1989, 1577 U.N.T.S. 3 (modified by author).

Article 2¹⁹

For the purposes of the present Convention, visitors and members of their families:

1. Are considered as documented or in a regular situation if they are authorized to enter and to stay for a period of time in the host State pursuant to the law of that State and to international agreements to which that State is a party.
2. Are considered as non-documented or in an irregular situation if they do not meet with the conditions provided for in paragraph 1 of the present article.

Article 3²⁰

For the purposes of the present Convention:

1. The term "State of origin" means the State of which the person concerned is a national or habitual resident.
2. The term "host State" means a State where the visitor is visiting or plans to visit.
3. The term "State of transit," means any State through which the person concerned passes on any journey from the State of origin or the State of habitual residence to the host State or from the host State to the State of origin or habitual residence.

Article 4**Rights Granted Apart from this Convention**

1. This Convention shall be without prejudice to the rights granted to migrants and refugees under existing human rights instruments of international law. Nothing in this Convention shall be deemed to impair any rights and benefits granted by States Parties in bilateral, regional or global multilateral treaties to migrants and refugees apart from this Convention.
2. Nothing in the present Convention should be construed to limit States Parties from granting additional rights and privileges to migrants and refugees who seek entry, transit or are resident in their jurisdictions.

19. G.A. Res. 45/158, *supra* note 12, art. 5; MW, *supra* note 12, art. 5 (modified by author).

20. G.A. Res. 45/158, *supra* note 12, art. 6; MW, *supra* note 12, art. 6 (modified by author).

Article 5²¹**Non-Discrimination**

States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all visitors 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, gender, race, color, language, religion or conviction, sexual orientation, disability, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status (including documented or undocumented, unless otherwise prescribed in the present Convention).

Part II: Mobility Rights**Article 6²²****Freedom to Leave and Enter States**

1. All persons shall be free to leave any State, including their State of origin. This right shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order, public health or the rights and freedoms of others and are consistent with the other rights recognized in this Convention.

2. Persons shall have the right at any time to enter and remain in their State of origin.

Article 7**Right of States to Determine Who Can Enter and Stay**

States Parties have the right to determine who shall be allowed to enter their territories and to decide who shall be allowed to stay, subject to the constraints outlined in article 6 above, other provisions of this Convention and in particular the non-refoulement provisions of Chapter V below and any other treaties—bilateral, regional and multilateral—the States may have entered into.

21. G.A. Res. 45/158, *supra* note 12, art. 7; MW, *supra* note 12, art. 7 (modified by author).

22. G.A. Res. 45/158, *supra* note 12, art. 8; MW, *supra* note 12, art. 8 (modified by author).

Article 8

Visas

1. Consular officers of States Parties may issue visas that authorize nationals of other States to travel and present themselves for inspection by state officials at designated border crossing points and ports of entry. States Parties may also permit nationals of other States to present themselves for inspection without having applied for and received a visa. The granting of visa-free travel is a prerogative of all States Parties and States Parties have full discretion regarding which States' nationals need visas and which do not.

2. Nationals of States Parties from whom visas are required for entry have the right to apply for lawful entry to any country and to be considered for the award of a visa in accordance with article 5 of the present Convention.²³

3. Distinctions in the regulation of admission and exclusion are permissible only where the distinction is made pursuant to a legitimate aim, the distinction has an objective justification, and reasonable proportionality exists between the means employed and the aims sought to be realized.²⁴

Article 9

General Provisions

1. Visitors will abide by the laws of the host State, carry a passport for identification and remain as visitors no longer than their visa or other permission to enter allows, unless they qualify for special exemption based on a valid claim under Chapter V below.²⁵

2. States of origin will take no measures that restrict the return of nationals and take measures to facilitate the return of their nationals.

Article 10

Documentation and Border Control

1. States Parties will issue passports to their nationals at their request, once they provide the appropriate documentation and at a reasonable cost. Any costs greater than production costs shall reflect public purposes and shall be nondiscriminatory among similarly circumstanced

23. G.A. Res. 71/1, *supra* note 3, ¶ 33.

24. *International Migrants Bill of Rights*, *supra* note 3, art. 2(2).

25. Italian Ministry of Tourism, Charter of Rights for Tourists 11, Law No. 135, art. 4 (2001), http://www.formez.it/sites/default/files/Carta_diritti_turista_en_def.pdf, [<https://perma.cc/2425-FLCP>].

applicants.²⁶

2. States Parties, having rights and responsibilities to manage and control their borders, will promote international cooperation on border control and management as an important element of security for States, including battling transnational organized crime, terrorism and illicit trade. This also includes: ensuring that public officials and law enforcement officers who work in border areas are trained to uphold the human rights of all persons crossing, or seeking to cross, international borders; strengthening international border management cooperation, including in relation to training and the exchange of best practices; and intensifying support to help to build capacity as appropriate.²⁷

3. States Parties shall endeavor to provide machine readable, biometric passports to facilitate identification of their nationals.²⁸ States requiring such passports for entrance shall assist other States in making the technology affordable.

Article 11²⁹

Protection of Documents

It shall be unlawful for anyone, other than a public official duly authorized by law, to confiscate, destroy or attempt to destroy identity documents, documents authorizing entry to, or documents authorizing stay, residence or establishment in the national territory. No authorized confiscation of such documents shall take place without delivery of a detailed receipt. In no case shall it be permitted to destroy the passport or equivalent document of a visitor.

26. Convention on International Civil Aviation, Dec. 7, 1944, 15 U.N.T.S. 295; Int'l Civil Aviation Org. [ICAO], *Annex 9: Facilitation*, at 3–2 (12th ed. 2005), <http://www.ifrc.org/docs/IDRL/Chicago%20Convention%20Annex%20209.pdf>, [<https://perma.cc/GZ5F-B4YL>].

27. G.A. Res. 71/1, *supra* note 3, ¶ 24 (modified by author).

28. ICAO, *Machine Readable Travel Documents Part 4: Specifications for Machine Readable Passports (MRPs) and other TD3 Size MRTDs*, ICAO Doc. 9303 (7th ed. 2015), https://www.icao.int/publications/Documents/9303_p1_cons_en.pdf, [<https://perma.cc/9JYS-8F6X>]. ICAO, *supra* note 26, at 3-1.

29. G.A. Res. 45/158, *supra* note 12, art. 21; MW, *supra* note 12, art. 21 (modified by author).

Article 12³⁰**Denial of Entry**

1. Nothing in this Convention shall restrict a State Party's right to decide the number of visas it issues at its discretion.
2. States Parties can deny entry to any particular prospective visitor when acting in accordance with article 7 above. In this connection, host and transit state officials at ports of entry and authorized border crossing points have discretion to deny entry to a prospective visitor regardless of whether that individual holds a valid entry or transit visa.

Article 13**Protection against Arbitrary Expulsion**

1. Visitors may be expelled from the territory of a State Party only in pursuance of a decision taken by the competent authority in accordance with law and provided they do not qualify for international protection under Chapter V below.
2. The decision shall be communicated to them in a language they understand. Upon their request where not otherwise mandatory, the decision shall be communicated to them in writing and, save in exceptional circumstances on account of national security, the reasons for the decision likewise stated. The persons concerned shall be informed of these rights before or at the latest at the time the decision is rendered.
3. Except where a final decision is pronounced by a judicial authority, the person concerned shall have the right to submit the reason he or she should not be expelled and to have his or her case reviewed by the competent authority, unless compelling reasons of national security require otherwise. Pending such review, the person concerned shall have the right to seek a stay of the decision of expulsion.
4. If a decision of expulsion that has already been executed is subsequently annulled, the person concerned shall have the right to seek compensation according to law and the earlier decision shall not be used to prevent him or her from re-entering the State concerned.
5. In case of proposed expulsion, the person concerned shall have a reasonable opportunity before or after departure to settle any claims and other entitlements due to him or her and any pending liabilities.

30. G.A. Res. 45/158, *supra* note 12, art. 22; MW, *supra* note 12, art. 22 (modified by author).

6. In case of expulsion of a visitor the costs of expulsion shall not be borne by him or her. The person concerned may be required to pay his or her own international travel costs.

Part III: Rights of All Visitors

Article 14

Right to Life

Every visitor has an inherent right to life that shall be protected by law. No visitor may be arbitrarily deprived of life.³¹

Article 15³²

Freedom from Slavery and Forced Labor

1. No visitor shall be held in slavery or servitude.
2. No visitor shall be required to perform forced or compulsory labor.
3. Paragraph 2 of the present article shall not be held to preclude, in States where imprisonment with hard labor may be imposed as a punishment for a crime, the performance of hard labor in pursuance of a sentence to such punishment by a competent court.
4. For the purpose of the present article the term “forced or compulsory labor” shall not include:
 - (a) Any work or service not referred to in paragraph 3 of the present article normally required of a person who is under detention in consequence of a lawful order of a court or of a person during conditional release from such detention;
 - (b) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community.

Article 16³³

Protection against Torture or Cruel, Inhuman or Degrading Treatment or Punishment

No visitor shall be subjected to torture or to cruel, inhuman or de-

31. G.A. Res. 45/158, *supra* note 12, art. 9; MW, *supra* note 12, art. 9 (modified by author).

32. G.A. Res. 45/158, *supra* note 12, art. 11; MW, *supra* note 12, art. 11 (modified by author).

33. G.A. Res. 45/158, *supra* note 12, art. 10; MW, *supra* note 12, art. 10 (modified by author).

grading treatment or punishment.

Article 17³⁴

Right to Privacy

No visitor shall be subjected to arbitrary or unlawful interference with his or her privacy, family, correspondence or other communications, or to unlawful attacks on his or her reputation. Each visitor shall have the right to the equal protection of the law against such interference or attacks.

Article 18³⁵

Freedom of Movement

Visitors with permission to enter a country are free to travel in that country on the same basis as nationals of that country without restrictions other than those required by national security, public health or the rights and freedoms of others.

Article 19³⁶

Protection of Property

No visitor shall be arbitrarily deprived of property, whether owned individually or in association with others. Where, under the legislation in force in the host State, the assets of a visitor are expropriated in whole or in part, the person concerned shall have the right to fair and adequate compensation.

Article 20³⁷

Freedom of Thought, Conscience and Religion

1. Visitors shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of their choice and freedom either individually or in community with others and in public or private to manifest their religion or belief in worship, observance, practice and teaching.

34. G.A. Res. 45/158, *supra* note 12, art. 14; MW, *supra* note 12, art. 14 (modified by author).

35. Youth on the Move: An Initiative to Unleash the Potential of Young People to Achieve Smart, Sustainable and Inclusive Growth in the European Union, at 10, COM (2010) 477 final (Sept. 15, 2010).

36. G.A. Res. 45/158, *supra* note 12, art.15; MW, *supra* note 12, art. 15 (modified by author).

37. G.A. Res. 45/158, *supra* note 12, art.12; MW, *supra* note 12, art. 12 (modified by author).

2. Visitors shall not be subject to coercion that would impair their freedom to have or to adopt a religion or belief of their choice.

3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public order, health or the fundamental rights and freedoms of others.

4. States Parties to the present Convention undertake to have respect for the liberty of parents, and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions, within the confines of the law of the hosting State.

Article 21³⁸

Right to Hold Opinions

Visitors shall have the right to hold opinions without interference.

Article 22³⁹

Medical Care

Visitors shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care, including reproductive healthcare, shall not be refused to them but payment for such care may be limited to terms that are reciprocal with the State of origin of the visitor or as otherwise arranged through special medical insurance by the visitor.

Article 23⁴⁰

Access to Consular or Diplomatic Authorities

Visitors and members of their families shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin or of a State representing the interests of that State whenever the rights recognized in the present Convention are impaired. In particular, in case of proposed expulsion, the person concerned shall be informed of this right without delay and

38. G.A. Res. 45/158, *supra* note 12, art.13; MW, *supra* note 12, art. 13 (modified by author).

39. G.A. Res. 45/158, *supra* note 12, art. 28; MW, *supra* note 12, art. 28 (modified by author).

40. G.A. Res. 45/158, *supra* note 12, art. 23; MW, *supra* note 12, art. 23 (modified by author).

the authorities of the expelling State shall facilitate the exercise of such right.

Article 24⁴¹

Right to Recognition as a Person Before the Law

1. Every visitor shall have the right to recognition everywhere as a person before the law.
2. Each child of a visitor, including those born in transit or host States,⁴² shall have the right to a name, to registration of birth and to a nationality.⁴³
3. Each State Party shall provide in its national law for its nationality to be acquired by children born on its territory who do not have or are not able to exercise a right to acquire at birth another nationality.⁴⁴

Part IV: Criminal Proceedings

Article 25⁴⁵

Right to Liberty and Security of Person

1. Visitors shall have the right to liberty and security of person.
2. Visitors shall be entitled to effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions.
3. Any verification by law enforcement officials of the identity of visitors shall be carried out in accordance with procedure established by law.

41. G.A. Res. 45/158, *supra* note 12, art. 24; MW, *supra* note 12, art. 24 (modified by author).

42. Int'l Labour Org. [ILO], ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration, at 26 (2006), https://www.unicef.org/socialpolicy/files/The_ILO_multilateral_framework_on_labour_migration.pdf, [<https://perma.cc/Y2QF-6SXG>].

43. G.A. Res. 45/158, *supra* note 12, art. 29; MW, *supra* note 12, art. 29 (modified by author); G.A. Res. 70/1, Sustainable Development Goals, at Goal 16.9 (Sept. 25, 2015).

44. European Convention on Nationality, art. 6.2, Nov. 6, 1997, E.T.S. No. 166 (modified by author).

45. G.A. Res. 45/158, *supra* note 12, art.16; MW, *supra* note 12, art. 16 (modified by author).

4. Visitors shall not be subjected individually or collectively to arbitrary arrest or detention; they shall not be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law.

5. Visitors who are arrested shall be informed at the time of arrest as far as possible in a language they understand of the reasons for their arrest and they shall be promptly informed in a language they understand of any charges against them.

6. Visitors who are arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that while awaiting trial they shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings and, should the occasion arise, for the execution of the judgment.

7. When a visitor is arrested or committed to prison or custody pending trial or is detained in any other manner:

(a) The consular or diplomatic authorities of his or her State of origin or of a State representing the interests of that State shall, if he or she so requests, be informed without delay of his or her arrest or detention and of the reasons therefor;

(b) The person concerned shall have the right to communicate with the said authorities. Any communication by the person concerned to the said authorities shall be forwarded without delay, and he or she shall also have the right to receive communications sent by the said authorities without delay;

(c) The person concerned shall be informed without delay of this right and of rights deriving from relevant treaties, if any, applicable between the States concerned, to correspond and to meet with representatives of the said authorities and to make arrangements with them for his or her legal representation.

8. Visitors who are deprived of their liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful. When they attend such proceedings, they shall have the assistance, if necessary without cost to them, of an interpreter, if they cannot understand or speak the language used.

9. Visitors who have been victims of unlawful arrest or detention shall have an enforceable right to compensation.

Article 26⁴⁶**Treatment During Arrest, Detention and Imprisonment**

1. Visitors who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity.
2. Detained visitors shall, save in exceptional circumstances, be separated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.
3. Children who are detained shall be separated from adults (other than their parents) and be accorded treatment appropriate to their age and legal status.
4. Visitors who are subjected to any form of detention or imprisonment in accordance with the law in force in the host State or in the State of transit shall enjoy the same rights as nationals of those States who are in the same situation.
5. If a visitor is detained for the purpose of verifying any infraction of provisions related to migration, he or she shall not bear any costs arising therefrom.

Article 27⁴⁷**Right to Equality Before the Law**

1. Visitors shall have the right to equality with nationals of the State concerned before the courts and tribunals. In the determination of any criminal charge against them or of their rights and obligations in a suit of law, they shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.
2. Visitors who are charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.
3. In the determination of any criminal charge against them, visitors and members of their families shall be entitled to the following minimum guarantees:
 - (a) To be informed promptly and in detail in a language they under-

46. G.A. Res. 45/158, *supra* note 12, art. 17; MW, *supra* note 12, art. 17 (modified by author).

47. G.A. Res. 45/158, *supra* note 12, art. 18; MW, *supra* note 12, art. 18 (modified by author); HHCH Proposal by the Government of Brazil on a Draft Convention on cooperation and access to justice for international tourists, January 2015. <https://assets.hcch.net/docs/74b12153-45a4-45fa-a86e-814fa5bf9d2a.pdf>, [<https://perma.cc/8QBA-X54B>].

stand of the nature and cause of the charge against them;

(b) To have adequate time and facilities for the preparation of their defense and to communicate with counsel of their own choosing;

(c) To be tried without undue delay;

(d) To be tried in their presence and to defend themselves in person or through legal assistance of their own choosing; to be informed, if they do not have legal assistance, of this right; and to have legal assistance assigned to them, in any case where the interests of justice so require and without payment by them in any such case if they do not have sufficient means to pay;

(e) To examine or have examined the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them;

(f) To have the free assistance of an interpreter if they cannot understand or speak the language used in court;

(g) Not to be compelled to testify against themselves or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Visitors convicted of a crime shall have the right to their conviction and sentence being reviewed by a higher tribunal according to law.

6. When a visitor has, by a final decision, been convicted of a criminal offence and when subsequently his or her conviction has been reversed or he or she has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to that person.

7. No visitor shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure of the State concerned.

Article 28⁴⁸**Principle of Legality**

1. No visitor shall be held guilty of any criminal offence on account of any act or omission that did not constitute a criminal offence under national or international law at the time when the criminal offence was committed, nor shall a heavier penalty be imposed than the one that was applicable at the time when it was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, he or she shall benefit thereby.
2. Humanitarian considerations related to the status of a visitor, in particular with respect to his or her temporary status, should be taken into account in imposing a sentence for a criminal offence committed by a visitor.
3. No visitor shall be imprisoned merely on the ground of failure to fulfill a contractual or visa obligation.⁴⁹

48. G.A. Res. 45/158, *supra* note 12, art. 19; MW, *supra* note 12, art. 19 (modified by author).

49. G.A. Res. 45/158, *supra* note 12, art. 20; MW, *supra* note 12, art. 20 (modified by author).

CHAPTER II TOURISTS

Part I: Scope and Definitions

Article 29

For the purposes of the present Convention:

1. The term “tourists” refers to persons who visit a country for the purposes of entertainment, relaxation and cultural appreciation and in order to explore the cultural and or natural resources of the host State.
2. In addition to the rights and duties listed below in Chapter II, tourists and members of their families have all the rights and duties of visitors as prescribed in Chapter I.
3. Tourists must secure visas for travel when required to do so, and respect the terms and conditions of those visas, including leaving the host country before those visas expire.⁵⁰
4. The term “tourism professionals” refers to persons, natural or judicial, who sell, provide, furnish, contract for, arrange, or advertise that they can or may arrange, or have arranged, wholesale or retail, travel services catered to tourists.⁵¹
5. Host States shall take all appropriate legislative and administrative measures to ensure that state agents, tourists and tourism professionals comply with the principles and responsibilities set forth in the present Chapter through appropriate legislative, administrative, social and educational measures, except as otherwise required hereafter.

Part II: Rights of Tourists

Article 30

General Provisions

1. Tourists have a right to receive and States Parties have a duty to ensure that tourism professionals provide tourists with objective and honest information on their places of destination and on the condi-

50. Italian Ministry of Tourism, *supra* note 25, at 11 (modified by author).

51. CAL. BUS. & PROF. CODE §17550.1 (West 2007) (modified by author).

tions of travel, hospitality and stays.⁵²

2. Tourists have a right to receive and tourism professionals should ensure that the contractual clauses proposed to their customers are readily understandable as to the nature, price and quality of the services they commit themselves to providing and the financial compensation payable by them in the event of a unilateral breach of contract on their part.⁵³

3. Tourism professionals, insofar as it depends on them, should show concern, in cooperation with the public authorities, for the security and safety, accident prevention, health protection and food safety of those who seek to visit for the purposes of tourism.⁵⁴

Article 31⁵⁵

Prohibition against Sex Tourism

1. The exploitation of human beings in any form, particularly sexual, especially of children, conflicts with fundamental human rights and the aims of legitimate tourism; as such, in accordance with international law, tourists should neither engage in nor encourage such activity. States, both hosts and origins of tourists, should energetically combat and penalize it.

2. Each State Party shall ensure that all acts of prostitution of children are offences under its criminal law.

Article 32

Responsibilities of Sea Borne Facilities

For the purposes of the rights and responsibilities of tourists, cruise ships and other sea borne facilities are subject to all the commitments undertaken by their State of registration and/or ownership, including all the relevant provisions in the present Convention, in particular:

1. Before embarkation and during the voyage, tourists have a right to timely information on the status of the ship and its itinerary and to disembark a docked ship, if essential provisions such as food, water, restroom facilities and access to medical care cannot adequately be provided onboard, subject only to the Master of the ship's concern for passenger safety and security and customs and immigration re-

52. U.N. World Tourism Org. Res. 406 (XIII), art. 6(1) (Oct. 1, 1999) [hereinafter CGET] (modified by author).

53. *Id.* art. 6(1) (modified by author).

54. *Id.* art. 6(2) (modified by author).

55. *Id.* art. 2(3) (modified by author).

quirements of the port.⁵⁶

2. Tourists have a right to transportation to the ship's scheduled port of disembarkation or the passenger's home city and a full refund for a trip that is canceled due to mechanical failures, or a partial refund for voyages that are terminated early due to those failures.⁵⁷

3. Tourists have a right to have available on board ships operating beyond rivers or coastal waters full-time, professional emergency medical attention, as needed until shore side medical care becomes available.⁵⁸

Part III: Protecting the Environment

Article 33⁵⁹

Sustainable Environment

All stakeholders in tourism development—tourists, tourism professionals and host States in particular—should safeguard the natural environment with a view to achieving sound, continuous and sustainable economic growth, satisfying equitably the needs and aspirations of present and future generations.

Article 34⁶⁰

Preservation of Natural Resources

All forms of tourism development that are conducive to saving rare and precious resources, in particular water and energy, as well as avoiding waste production so far as possible, should be given priority and encouraged by national, regional and local public authorities.

Article 35⁶¹

Ecosystems and Biodiversity

Tourism infrastructure should be designed and tourism activities programmed in such a way as to protect the natural heritage composed

56. Cruise Line Int'l Ass'n, *Cruise Industry Passenger Bill of Rights*, art. 1 (modified by author) (May 22, 2013).

57. *Id.* art. 7 (modified by author).

58. *Id.* art. 3 (modified by author).

59. CGET, *supra* note 52, art. 3(1) (modified by author).

60. *Id.* art. 3(2) (modified by author).

61. *Id.* art. 3(4) (modified by author).

of ecosystems and biodiversity and to preserve endangered species of wildlife; the stakeholders in tourism development, and especially professionals, should agree to the imposition of limitations or constraints on their activities when these are exercised in particularly sensitive areas: desert, polar or high mountain regions, coastal areas, tropical forests or wetlands, propitious to the creation of nature reserves or protected areas.

Article 36⁶²

Vulnerable Areas

Special attention should be paid to the specific problems of coastal areas and island territories and to vulnerable rural or mountain regions, for which tourism often represents a rare opportunity for development in the face of the decline of traditional economic activities.

Article 37⁶³

Impact Evaluation

Tourism professionals, particularly investors, governed by the regulations laid down by the public authorities, should carry out studies of the impact of their development projects on the environment and natural surroundings; they should also deliver, with the greatest transparency and objectivity, information on their future programs and their foreseeable repercussions and foster dialogue on their contents with the populations concerned.

Part IV: Respecting Local Cultural Traditions

Article 38⁶⁴

Natural and Cultural Resources

While natural resources belong to the common heritage of mankind, the communities in whose territories they are situated have particular rights and obligations to them. States should require that tourists respect those particular rights and do nothing to prevent the realization of the obligations host communities have toward protecting those natural and cultural resources, in particular:

62. *Id.* art. 5(3) (modified by author).

63. *Id.* art. 5(4) (modified by author).

64. *Id.* art. 4 (modified by author).

1. Tourism policies and activities should be conducted with respect for artistic, archaeological and cultural heritage, which they should protect and pass on to future generations; particular care should be devoted to preserving and upgrading monuments, shrines and museums as well as archaeological and historic sites, which should, as far as safety and preservation permits, be widely open to tourist visits;
2. Encouragement should be given to public access to privately-owned cultural property and monuments, with respect for the rights of their owners, as well as to religious buildings, without prejudice to normal needs of worship;
3. Financial resources derived from visits to cultural sites and monuments should, at least in part, be used for the upkeep, safeguard, development and embellishment of this heritage.

Article 39⁶⁵**Local Culture and Economy**

Tourism activity should be planned in such a way as to allow traditional cultural products, crafts and folklore to survive and flourish, rather than causing them to degenerate and become standardized. Local populations should be given the opportunity to become associated with tourism activities and share equitably in the economic, social and cultural benefits they generate, and particularly in the enjoyment of direct and indirect jobs resulting from them. Tourism policies should be applied in such a way as to help to raise the standard of living of the populations of the regions visited and meet their needs. And the planning and architectural approach to and operation of tourism resorts and accommodation should aim to integrate them, to the extent possible, in the local economic and social fabric; where skills are equal, priority should be given to local manpower.

65. *Id.* arts. 4.4, 5.1, 5.2 (modified by author).

CHAPTER III STUDENTS

Part I: Scope and Definitions

Article 40

For the purposes of the present Convention:

1. The term "international student" refers to any person engaging in learning at an educational institution outside of his or her State of citizenship.⁶⁶
2. The term "educational institution" refers to any institution or entity certifying, facilitating the enrollment of and providing learning opportunities to international students or scholars.⁶⁷ A "host institution" is an educational institution within the host State at which an international student engages in learning.
3. The term "home institution" refers to an educational institution in the State of origin with which an international student remains registered before, during or after the period in which he or she engages in learning at the host institution.
4. International students have all the rights and responsibilities of visitors as specified under Chapter I (and of tourists, as under Chapter II, if they engage in tourism). They may have rights in addition to the ones described below as a function of membership in a regional association or in accord with bilateral treaties.
5. Host States and States of origin shall take all appropriate legislative and administrative measures to ensure the rights set forth in the present Chapter and to encourage, and oblige where appropriate, all educational institutions to respect and comply with the responsibilities set forth in the present Chapter, keeping in mind the obligations set forth in Article 5.

66. Am. Ass'n of Collegiate Registrars & Admissions Officers, Bill of Rights and Responsibilities for International Students and Institutions, definitions (1996) [hereinafter AACRAO] (modified by author).

67. *Id.*

Part II: Rights of International Students and Responsibilities of Educational Institutions

Article 41

Rights of International Students

Host States should ensure that educational institutions respect the rights of international students herein, in particular:

1. To know who the provider of educational services is and of the provider's major affiliations; to a clear explanation from the institution to which they are applying of the admissions process and documentation necessary to complete their admissions dossiers, of the academic course offerings and the approximate time normally required to complete an intended program from the institution to which they are applying, of a clear and accurate account of all costs for the academic year or a reasonable estimation of the full cost of their educational program, including a clear and detailed explanation of the costs associated with the services of placement agencies or other third parties in the admissions process that are readily distinguishable from the standard costs associated with a course of study at the intended institution;⁶⁸
2. To have full rights of access to the educational facilities of the host institution on par with national students enrolled in similar degree programs at a similar stage of preparation.⁶⁹ This includes rights to temporary employment if such employment is a required part of the degree, such as research assistants or assistant teaching;
3. To have ownership rights over their intellectual works unless the works are subject to specific published institutional policies to the contrary or ownership rights are relinquished by the students;⁷⁰
4. To know what personal information is collected about them by an educational institution, why it is being collected and how they may review their files and correct any errors, to have assurance that personal information about them may be used only by those persons with a legitimate right to know, and to have assurance that the education institution has developed, instituted and maintained security procedures to insure the integrity of their files.⁷¹

68. *Id.* art. I. §§1–4, IV (modified by author).

69. Erasmus+, *Erasmus Student Charter*, art. II (modified by author)(2014).

70. AACRAO, *supra* note 66, art. I §11 (modified by author).

71. *Id.* arts. I. §5, IV. §5 (modified by author).

Article 42

Services and Information

International students have the right to services and information that support their unique needs as international students and educational institutions have a responsibility to provide such services, in particular:

1. To receive counseling on immigration regulations, cultural adjustment, orientation to the host institution, and information on insurance and taxes;⁷²
2. To have their language abilities assessed to determine if their skills are sufficient to enable them to benefit from the host institution's academic course offerings;⁷³
3. To receive a clear and complete explanation of all legal requirements governing their enrollment, including how to maintain their student status;⁷⁴
4. To have their application for admission and their prior learning experiences evaluated by admissions officers and/or credential evaluators trained to evaluate international applications and learning.⁷⁵

Article 43

Transparency

International students have the right to a clear explanation from their home institution of whether, or the extent to which, course work at their host institution may be transferable to their program of study at their home institution.⁷⁶

Article 44

Degrees and Credentials

1. Educational institutions will award relevant degrees and credentials on the basis of academic performance as promised to the international student on enrollment.
2. Educational institutions will return the tuition payment, in whole or in part, if they fail to provide the educational services promised at

72. *Id.* arts. I, §8, IV, §8 (modified by author).

73. *Id.* arts. I, §9, IV, §9 (modified by author).

74. *Id.* arts. I, §10, IV, §10 (modified by author).

75. *Id.* art. IV, §6 (modified by author).

76. *Id.* arts. I, §, IV, §7 (modified by author).

the time of enrollment.

Article 45

Cultural Identity

1. States Parties shall ensure the respect of the cultural identity of students and shall not prevent them from maintaining their cultural links with their State of origin.
2. States Parties may take appropriate measures to assist and encourage efforts in this respect.

Article 46⁷⁷

Freedom of Expression

1. International students and accompanying members of their families shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of their choice.
2. The only allowable restrictions to this right are those which are equally applicable to nationals, are provided by law and are necessary.

Part III: Responsibilities of International Students

Article 47

Information

International students shall provide accurate information in their representations to educational institutions, government entities and others in the international education community. International students shall abide by the host institutions' honor systems. Fraud or misrepresentation of achievements are valid reason for expulsion from the institution.⁷⁸

Article 48

Intellectual Property

International students shall recognize, honor and properly attribute

77. G.A. Res. 45/158, *supra* note 12, art. 13 (modified by author).

78. AACRAO, *supra* note 66, art. II(1) (modified by author) (1996).

the intellectual property of others.⁷⁹

Article 49

Rules and Regulations

International students shall in addition to adhering to the laws of the host State abide by the rules and regulations of the host institution.⁸⁰

Part IV: Rights of Educational Institutions

Article 50

Criteria and Deadlines

1. Educational institutions have the right to establish appropriate admissions criteria and deadlines consistent with their educational programs,⁸¹ as well as appropriate and realistic deadlines for completion of the international student's program.⁸²

2. States parties, acting in accordance with national laws, shall encourage the relevant public authorities to permit universities and other institutions of higher learning to consider the protection of refugees and forced migrants from persecution as a criterion for admission and financial assistance for international students.

Article 51

Fraud or Lack of Achievement

Educational institutions have the right to deny admission or continuing enrollment if evidence proves fraud or lack of achievement by any student, including international students.⁸³

Article 52

Placement Agencies

Educational institutions have the right to be informed if an international student is being assisted in admission by a placement agency or other third party.⁸⁴

79. *Id.* art. II, §2 (modified by author).

80. *Id.* art. II, §3 (modified by author).

81. *Id.* art. III, §1 (modified by author).

82. *Id.* art. III, §2 (modified by author).

83. *Id.* art. III, §3 (modified by author).

84. *Id.* art. III, §4 (modified by author).

CHAPTER IV MIGRANT WORKERS, INVESTORS AND RESIDENTS⁸⁵

Part I: Scope and Definitions

Article 53⁸⁶

For the purposes of the present Convention:

1. 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.
2. The term “migrant resident” refers to a person who maintains a residence for at least a year, relies upon an independent source of income and is not employed.⁸⁷
3. The term “migrant entrepreneur” or “migrant investor” refers to an individual who creates or provides a substantial (and specified in national law) investment in a business or related corporate entity.
4. The term “temporary migrant worker” refers to a migrant worker whose permission to work and reside in a State of employment is limited in time and who does not fall under any of the other definitions under the present article.
5. Other migrant workers include:
 - (a) The term “migrant domestic worker” refers to a migrant worker who in the State of employment is engaged in work performed in or for a household or households within an employment relationship;⁸⁸
 - (b) The term “frontier migrant worker” refers to a migrant worker who retains his or her habitual residence in a neighboring State to

85. This chapter has benefited from the research and drafting of Emma Borgnäs and Kelsey Clark, from Daniel Naujok’s and Diego Acosta’s comments, from the advice of Austin Fragomen on investor migration, and from Donald Kerwin, Randall Hansen, and Joel Trachtman’s “Illustrative Draft General Agreement on Labor Migration”—while continuing to draw most of its provisions from International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (MW, *supra* note 12).

86. G.A. Res. 45/158, *supra* note 12, art. 2 (modified by author).

87. Directive 2003/109, of the European Council of 25 November 2003 Concerning the Status of Third-country Nationals who are Long-term Residents, 2003 O.J. (L 16) (modified by author).

88. Int’l Labour Org. [ILO], Convention (No. 189) Concerning Decent Work for Domestic Workers, art. 1(a), Jun. 16, 2011, Registration No. 51379 [hereinafter Domestic Workers Convention] (modified by author).

which he or she normally returns every day or at least once a week;

(c) The term “seasonal migrant worker” refers to a migrant worker whose work by its character is dependent on seasonal conditions and is performed only during part of the year;

(d) The term “migrant seafarer”, which includes a fisherman, refers to a migrant worker employed on board a vessel registered in a State of which he or she is not a national or on a vessel owned and operated by nationals of another State;

(e) The term “migrant worker on an offshore installation” refers to a migrant worker employed on an offshore installation that is under the jurisdiction of a State of which he or she is not a national;

(f) The term “itinerant migrant worker” refers to a migrant worker who, having his or her habitual residence in one State, has to travel to another State or States for short periods, owing to the nature of his or her occupation;

(g) The term “project-tied migrant worker” refers to a migrant worker admitted to a State of employment for a defined period to work solely on a specific project being carried out in that State by his or her employer;

(h) The term “specified-employment migrant worker” refers to a migrant worker:

i. Who has been sent by his or her employer for a restricted and defined period of time to a State of employment to undertake a specific assignment or duty; or

ii. Who engages for a restricted and defined period of time in work that requires professional, commercial, technical or other highly specialized skill; or

iii. Who, upon the request of his or her employer in the State of employment, engages for a restricted and defined period of time in work whose nature is transitory or brief; and who is required to depart from the State of employment either at the expiration of his or her authorized period of stay, or earlier if he or she no longer undertakes that specific assignment or duty or engages in that work.

6. Migrant workers, investors and residents have all the rights and responsibilities of visitors as specified under Chapter I and of tourists, as under Chapter II, if they engage in tourism and of students, as under Chapter III, if they engage in learning at an educational institution in the host State. They may have rights in addition to the ones described below in accord with bilateral treaties.

Article 54⁸⁹

The present Chapter shall not apply to:

1. Persons sent or employed by international organizations and agencies or persons sent or employed by a State outside its territory to perform official functions, and whose admission and status are regulated by general international law or by specific international agreements or conventions;
2. Persons sent or employed by a State or on its behalf outside its territory who participate in development programs and other co-operation programs, 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;
3. Seafarers and workers on an offshore installation who have not been admitted to take up residence and engage in a remunerated activity in the State of employment.

Article 55⁹⁰

For the purposes of the present Convention, the term “State of employment” means a State where the migrant worker is to be engaged, is engaged or has been engaged in a remunerated activity, as the case may be. The term “State of long term residence” means a State where the migrant resident has established a permanent abode.

Part II: Rights of All Migrant Workers, including Undocumented or Irregular Workers, and Members of their Families**Article 56**⁹¹**Non-Discrimination**

All migrant workers without prejudice to skill level shall enjoy the rights articulated in this Part II of the present Convention, keeping in mind the obligations set forth in article 5 of this Convention.

89. G.A. Res. 45/158, *supra* note 12, art. 3; MW, *supra* note 12, art. 3 (modified by author).

90. G.A. Res. 45/158, *supra* note 12, art. 6; MW, *supra* note 12, art. 6 (modified by author).

91. G.A. Res. 45/158, *supra* note 12, art. 7; MW, *supra* note 12, art. 7 (modified by author).

Article 57⁹²**Access to Health Care**

1. Migrant workers and members of their families shall not be refused emergency medical care, including reproductive health care.⁹³
2. States Parties shall adopt measures to ensure that migrant workers and members of their families are provided with access to non-emergency health care that supports public health, such as immunization programs and treatment of communicable diseases.⁹⁴
3. Migrant workers and members of their families shall not be required to undergo discriminatory medical examinations,⁹⁵ including HIV or pregnancy testing.⁹⁶

Article 58⁹⁷**Equality of Treatment**

1. States of employment shall ensure that migrant workers shall enjoy treatment not less favorable than that which applies to nationals of the State of employment in respect of remuneration and:
 - (a) Other conditions of work and safe and secure working environments,⁹⁸ including, overtime, hours of work, weekly rest, holidays with pay, safety, health, employer-provided healthcare, termination of the employment relationship, protection against dismissal and any other conditions of work, which, according to national law and practice, are covered by these terms;
 - (b) Other terms of employment, that is to say, minimum age of em-

92. G.A. Res. 45/158, *supra* note 12, art. 28; MW, *supra* note 12, art. 28 (modified by author).

93. ILO R202, *Social Protection Floors Recommendation*, art. 5(a) (modified by author) (June 19, 2012).

94. See generally Matthew Lister, *Justice and Temporary Labor Migration*, 29 GEO. IMMIGR. L.J. 95, 114 (2014).

95. ILO, *The Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration* 24 (Int'l Labour Office ed., 2006) [hereinafter ILO Multilateral Framework] (modified by author).

96. ILO R201, *Domestic Workers Convention*, *supra* note 88; ILO, *Domestic Workers Recommendation* art. 3(c) (June 16, 2011).

97. G.A. Res. 45/158, *supra* note 12, art. 25; MW, 1990, art. 25 (modified by author).

98. Rep. of the Open Working Group of the Gen. Assembly on Sustainable Development Goals on the Work of Its Sixty-Eighth Session, at 16, U.N. Doc. A/68/970 (2014) [hereinafter U.N. Doc. A/68/970].

ployment, restriction on work and any other matters which, according to national law and practice, are considered a term of employment.

2. It shall not be lawful to derogate in private contracts of employment from the principle of equality of treatment referred to in paragraph 1 of the present article.

Article 59

Employment Contracts and Conditions of Employment

1. States of employment shall ensure that migrant workers shall have the right to receive understandable and enforceable employment contracts.⁹⁹

2. Migrant workers shall be informed in a language they understand of the nature of the position they have been offered, their actual working and living conditions and the terms and conditions of employment.¹⁰⁰

3. States Parties shall promote the establishment of written employment contracts that accurately reflect their working conditions and remuneration in order to serve as the basis for determining obligations and responsibilities of employers and a mechanism for the registration of such contracts where this is necessary for the protection of migrant workers.¹⁰¹

4. States of employment shall provide for effective remedies to all migrant workers for any breach of employment contracts on the same basis as available to national workers.¹⁰²

Article 60

Remuneration

1. States Parties shall implement measures such that migrant workers shall have the right to have their wages paid directly to them on a regular basis, to dispose of their wages as they wish, and that all their wages are paid upon the termination of employment, in accordance

99. ILO Multilateral Framework, *supra* note 95, at 25, guideline 13.3 (modified by author).

100. *Id.* at 25, guideline 13.4 (modified by author); Domestic Workers Convention, *supra* note 88, art. 7 (modified by author).

101. ILO Multilateral Framework, *supra* note 95, at 19, guideline 10.3 (modified by author).

102. *Id.* at 20, guideline 10.5 (modified by author).

with national law and practice.¹⁰³

2. Migrant workers shall have the right during and upon the termination of their stay in the State of employment to transfer their earnings and savings, in particular those funds necessary for the support of their families, and their personal effects and belongings to their State of origin or any other State. Such transfers shall be made in conformity with procedures established by applicable legislation of the State concerned and in conformity with applicable international agreements.¹⁰⁴ States Parties shall take appropriate measures to facilitate such transfers.¹⁰⁵

3. Migrant workers who leave the State of employment are entitled to any outstanding remuneration and benefits which may be due in respect of employment and as applicable are given a reasonable period of time to remain in the State of employment to seek a remedy for unpaid wages.¹⁰⁶

Article 61¹⁰⁷

Participation in Trade Unions

1. States Parties recognize the right of migrant workers and members of their families under the same conditions as national workers:

(a) To take part in meetings and activities of trade unions and of any other associations established in accordance with law, with a view to protecting their economic, social, cultural and other interests, subject only to the rules of the organization concerned;

103. *Id.* at 18, guideline 9.11 (modified by author).

104. G.A. Res. 45/158, *supra* note 12, arts. 32, 47.1. MW, *supra* note 12, arts. 47.1, 32 (modified by author); G.A. Res. 68/4, Declaration of the High-level Dialogue on International Migration and Development (Oct. 3, 2013), <http://undocs.org/A/RES/68/4>, [<https://perma.cc/JN2G-YYAJ>]; U.N. Dept. of Econ. and Soc. Affairs, Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Aug. 10, 2015), http://www.un.org/esa/ffd/wp-content/uploads/2015/08/AAAA_Outcome.pdf, [<https://perma.cc/J8C5-637D>] (modified by author).

105. G.A. Res. 45/158, *supra* note 12, art. 47(2); MW, *supra* note 12, art. 47(2) (modified by author).

106. ILO Multilateral Framework, *supra* note 95, at 18, guideline 9(5) (modified by author).

107. G.A. Res. 45/158, *supra* note 12, art. 26; MW, *supra* note 12, art. 26 (modified by author).

(b) To join freely any trade union and any such association as aforesaid, subject only to the rules of the organization concerned;

(c) To seek the aid and assistance of any trade union and of any such association as aforesaid.

2. No restrictions may be placed on the exercise of these rights other than those that are in place for nationals and that are prescribed by law and which are necessary in the interests of national security, public order (*ordre public*) or the protection of the rights and freedoms of others.

Article 62

Decent Living Conditions

States Parties shall take adequate measures to ensure access to decent living conditions for all migrant workers and members of their families.¹⁰⁸

Article 63

Protection and Rights of Women

1. States Parties recognize the specific vulnerabilities of women migrant workers and shall take appropriate measures to:

(a) Protect women against violence and exploitation, and address the particular problems and abuses women face in the migration process, in the workplace and in workers' accommodations. Such abuses include, but are not limited to, rape, sexual exploitation and harassment, trafficking, and other forms of gender-based violence and discrimination.¹⁰⁹

(b) Allow migrant workers to report harassment and discrimination at work, including seeking a legal remedy and assist women to seek redress.¹¹⁰

2. All women migrant workers shall receive appropriate emergency healthcare, including access to sexual and reproductive health ser-

108. Ass'n of S. Asian Nations [ASEAN], *Declaration on the Protection and Promotion of the Rights of Migrant Workers*, art. 8 (Jan. 13, 2007), <http://www.asean.org/wp-content/uploads/images/archive/23062.pdf>, [<https://perma.cc/5EKG-3GQT>]; see also G.A. Res. 2200A (XXI), International Convention on Economic, Social and Cultural Rights, arts. 7(a)(ii), 11 (Dec. 16, 1966) [hereinafter ICESCR] (modified by author).

109. ILO, *Gender Sensitivity in Labour Migration-Related Agreements and MOUs* (Apr. 7, 2016).

110. *Id.* at 6.

vices¹¹¹ and maternity protection.¹¹²

3. States Parties undertake to strive to provide equality of wages and work conditions for men and women.¹¹³

Article 64

Protection and Rights of Children

1. Each child of a migrant worker, including those born in the State of Employment countries,¹¹⁴ shall have the basic right of access to necessary medical assistance and health care with an emphasis on primary health care. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.¹¹⁵

2. Each child of a migrant worker, including those born in the State of Employment countries,¹¹⁶ shall have the basic right of access to primary and secondary education on the basis of equality of treatment with nationals of the State concerned.¹¹⁷

3. States Parties shall ensure the respect of the minimum age for admission to employment,¹¹⁸ and shall take immediate and effective measures¹¹⁹ to prohibit and eliminate exploitative child labor, includ-

111. *Id.*

112. ILO, *Working Conditions Laws Report 2012* (Feb. 6, 2014), http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_235155.pdf, [<https://perma.cc/P5XU-KW2U>].

113. *Gender Sensitivity in Labour Migration-Related Agreements and MOUs*, *supra* note 109 (modified by author); *see also* ICESCR, *supra* note 108, art. 7(a) (modified by author).

114. ILO Multilateral Framework, *supra* note 95, at 28, guideline 14.11 (modified by author).

115. Convention on the Rights of the Child, art. 24, Nov. 20, 1989, 1577 U.N.T.S. 3 (modified by author).

116. ILO Multilateral Framework, *supra* note 95, at 28, guideline 14.11 (modified by author).

117. G.A. Res. 45/158, *supra* note 12, art. 30 (modified by author).

118. ILO, *Minimum Age Convention* (Jun. 26, 1973), http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C138, [<https://perma.cc/C4X4-696E>]; G.A. Res. 45/158, *supra* note 12, art. 25(1)(b) (modified by author). MW, *supra* note 12, art 25.1(b) (modified by author).

119. ILO, Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Jun. 17, 1999) [hereinafter Worst Forms of Child Labour Convention], http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_COD

ing trafficking and forced labor of migrant children and children of migrant workers¹²⁰ as a matter of urgency.¹²¹

Article 65

Protection Against Abuse

1. States Parties shall adopt, implement and enforce legislation and policies to assist and protect migrant workers from abusive practices, including physical or sexual harassment or violence, restriction of movement outside the law, debt bondage, forced labor, trafficking, withholding, underpayment or delayed payment of wages and benefits, retention of passports or identity or travel documents and threat of denunciation to authorities, particularly migrant workers in an irregular situation or other groups of migrant workers, including women, children and domestic workers who are particularly vulnerable to such abuses.¹²²

2. States Parties shall adopt measures to encourage migrant workers and trafficking victims to denounce abuse, exploitation and violation of their rights, taking account of the special circumstances of women and children,¹²³ including by establishing mechanisms for migrant workers to lodge complaints and seek remedy without discrimination, intimidation or retaliation.¹²⁴

3. States Parties should adopt measures to provide temporary or permanent protection to victims of trafficking or other serious forms of exploitation, on terms provided for in Chapter VII of the present Convention. Such protection should not be conditional on the victim's agreement to cooperate with law enforcement agencies.¹²⁵

E:C182, [<https://perma.cc/XWR3-29X5>].

120. ILO Multilateral Framework, *supra* note 95, at 15, guideline 8.4 (modified by author).

121. Worst Forms of Child Labour Convention, *supra* note 119, art. 1.

122. ILO Multilateral Framework, *supra* note 95, at 22, guideline 11.2 (modified by author).

123. *Id.* at 22, guideline 11.5 (modified by author).

124. *Id.* at 20, guideline 10.5 (modified by author).

125. U.N. Secretary-General, In Safety and Dignity: Addressing Large Movements of Refugees and Migrants, ¶ 94, U.N. Doc. A/70/59 (Apr. 21, 2016).

Article 66¹²⁶**Political Rights in State of Origin**

1. Migrant workers and members of their families shall have the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State, in accordance with its legislation.

2. The States Parties shall, as appropriate and in accordance with their legislation, take measures to facilitate the exercise of these rights by documented migrant workers.

Article 67¹²⁷**Information**

1. Migrant workers and members of their families shall have the right to be informed by the State of origin, the State of employment or the State of transit as the case may be concerning:

(a) Their rights arising out of the present Convention;

(b) The conditions of their admission, their rights and obligations under the law and practice of the State concerned and such other matters as will enable them to comply with administrative or other formalities in that State.

2. States Parties shall take all measures they deem appropriate to disseminate the said information or to ensure that it is provided by employers, trade unions or other appropriate bodies or institutions. As appropriate, they shall cooperate with other States concerned.

3. The above information shall be provided upon request to migrant workers and members of their families, free of charge, and, as far as possible, in a language they are able to understand.

Article 68¹²⁸**Obligations**

Nothing in the present part of the Convention shall have the effect of relieving migrant workers and the members of their families from either the obligation to comply with the laws and regulations of any State of transit and the State of employment or the obligation to respect the cultural identity of the inhabitants of such States.

126. G.A. Res. 45/158, *supra* note 12, art. 41 (modified by author).

127. *Id.* art. 33 (modified by author).

128. *Id.* art. 34 (modified by author).

Article 69¹²⁹**Regularization**

1. Nothing in the present part of the Convention shall be interpreted as implying the regularization of the situation of migrant workers or members of their families who are undocumented or in an irregular situation or any right to such regularization of their situation, nor shall it prejudice the measures intended to ensure sound and equitable conditions for international migration as provided in Part V below of this Chapter in the present Convention.

2. States Parties should consider, as they deem appropriate, granting an autonomous residence permit or other authorization offering a right to stay for family connections, compassionate, humanitarian or other reasons to a non-national staying irregularly on their territory.¹³⁰

Article 70¹³¹**Protection Against Expulsion**

1. Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually.

2. Without prejudice to the execution of a decision of expulsion, a migrant worker or a member of his or her family who is subject to such a decision may seek entry into a State other than his or her State of origin.

3. Expulsion from the State of residence or employment shall not in itself prejudice any rights of a migrant worker or a member of his or her family acquired in accordance with the law of that State, including the right to receive wages (for migrant workers) and other entitlements due to him or her.

4. In considering whether to expel a migrant worker or a member of his or her family, account should be taken of family ties, humanitarian considerations and of the length of time that the person concerned has already resided in the State of employment.¹³²

129. *Id.* art. 35 (modified by author).

130. Council Directive 2008/115, 2008 O.J. (L 348) 102 (EU).

131. G.A. Res. 45/158, *supra* note 12, art. 22; MW, *supra* note 12, art. 22 (modified by author).

132. G.A. Res. 45/158, *supra* note 12, art. 56; MW, *supra* note 12, art. 56 (modified by author). See also JOEL P. TRACHTMAN, THE INTERNATIONAL LAW OF ECONOMIC MIGRATION:

Part III: Rights of Migrant Residents and Members of their Families

Article 71¹³³

Scope

1. Migrant residents and members of their families in an undocumented or irregular migrant resident condition in the State of residence shall enjoy the relevant rights set forth in Part II of the present Convention.
2. Migrant residents and members of their families in a documented or regular migrant resident condition in the State of residence shall in addition to the relevant non-work related rights set forth in Part II also enjoy the rights set forth here in Part III. They also enjoy those additional rights specified for migrant residents in Part IV below.

Article 72

Provisions Applicable Only to Migrant Residents

1. Migrant residents have the right to rent or purchase property and sell or lease their property provided they maintain a status of residence for at least half of every year they claim residence.
2. Migrant residents may retain bank accounts in their State of origin and travel with unlimited visas to and from their State of origin.

Part IV: Additional Rights of Migrant Workers and Members of their Families who are Documented or in a Regular Situation

Article 73¹³⁴

Scope

Migrant workers and members of their families who are documented or in a regular situation in the State of employment shall enjoy the rights set forth in the present part of the Convention in addition to those set forth in Part II. And those who are admitted on a permanent basis obtain additional rights as specified below.

TOWARD THE FOURTH FREEDOM 347 (2009); Council Directive 2008/115, *supra* note 130, art. 5. See TRACHTMAN, *op. cit.*, art. 15.

133. G.A. Res. 45/158, *supra* note 96, art. 36; MW, *supra* note 12, art. 36.

134. G.A. Res. 45/158, *supra* note 96, art. 36; MW, *supra* note 12, art. 36.

Article 74¹³⁵**Information**

Before their departure, or at the latest at the time of their admission to the State of residence or employment, migrant residents, migrant workers and members of their families shall have the right to be fully informed by the State of origin or the State of employment, as appropriate, of all conditions applicable to their admission and particularly those concerning their stay and the remunerated activities in which they may engage as well as of the requirements they must satisfy in the State of employment and the authority to which they must address themselves for any modification of those conditions.

Article 75¹³⁶**Protection of Status**

1. No migrant worker or member of his or her family shall be deprived of his or her authorization of residence or work permit or expelled merely on the ground of failure to fulfill an obligation arising out of a work contract unless fulfillment of that obligation constitutes a condition for such authorization or permit.

2. In addition to the protections afforded in article 11 in the present Convention, it shall be unlawful for anyone, other than a public official duly authorized by law, to confiscate, destroy or attempt to destroy work permits.¹³⁷

Article 76**Protection during Pregnancy**

1. Employers shall not be allowed to terminate the employment of a woman merely on the grounds of pregnancy, unless it is determined that her work is prejudicial to the health of the mother or the child, or being pregnant while engaged in the employment risks the safety of those relying on her.

2. Subject to article 77 of the present Convention, no migrant worker or member of his or her family shall be deprived of his or her authorization of residence or work permit or expelled merely on the ground of pregnancy.

135. G.A. Res. 45/158, *supra* note 96, art. 37; MW, *supra* note 12, art. 37.

136. G.A. Res. 45/158, *supra* note 96, art. 20; MW, *supra* note 12, art. 20 (modified by author).

137. G.A. Res. 45/158, *supra* note 96, art. 21; MW, *supra* note 12, art. 21 (modified by author).

Article 77¹³⁸**Protection Against Termination of Employment**

1. Migrant workers shall be allowed to lodge an appeal against the termination of his or her employment, under such procedures as may be available, and should be allowed sufficient time as determined by national authorities in light of the type of employment to obtain a final decision thereon.

2. If it is established that the termination of employment was not justified, the migrant worker should be entitled, on the same terms as national workers, to reinstatement, to compensation for loss of wages or of other payment which results from unjustified termination, or to access to a new job with a right to indemnification. If he or she is not reinstated, migrant workers shall be allowed sufficient time to find alternative employment.

Article 78**Right to Seek Alternative Employment**

1. Migrant workers who, through no fault of their own, have lost their employment shall be allowed sufficient time (at least three months) to find alternative employment.¹³⁹

2. Migrant workers shall be allowed sufficient time to find alternative employment if he or she files a valid complaint against an employer,¹⁴⁰ in particular when such complaints pertain to cases of abuse, including those specified in article 63 through 65 of the present Convention.

Article 79¹⁴¹**Right to Temporary Absence**

1. States of employment shall make every effort to authorize migrant workers and members of their families to be temporarily absent without effect upon their authorization to stay or to work, as the case may be. In doing so, States of employment shall take into account the special needs and obligations of migrant workers and members of their families, in particular in their States of origin, and their interests in

138. ILO, Recommendation concerning Migrant Workers (R151), art. 32(2) (1975).

139. ILO Multilateral Framework, *supra* note 95, guideline 9.4 (modified by author).

140. Philip Martin, Towards Effective Temporary Worker Programs: Issues and Challenges in Industrial Countries, 89 INT'L MIGRATION PAPERS 35, 36 (2007).

141. G.A. Res. 45/158, *supra* note 12, art. 38; MW, *supra* note 12, art. 38.

maintaining social and cultural ties.¹⁴²

2. Migrant workers and members of their families shall have the right to be fully informed of the terms on which such temporary absences are authorized.

Article 80¹⁴³

Freedom of Movement

1. Migrant workers, migrant residents and members of their families shall have the right to liberty of movement in the territory of the State of residence or employment and freedom to choose their residence there.

2. The rights mentioned in paragraph 1 of the present article shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order, public health or morals, or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Article 81¹⁴⁴

Right to Form Associations

1. Migrant workers, migrant residents and members of their families shall have the right to form associations and (for workers) trade unions in the State of residence or employment for the promotion and protection of their economic, social, cultural and other interests.

2. No restrictions may be placed on the exercise of this right other than those that are prescribed by law and are necessary in a democratic society in the interests of national security, public order (*ordre public*) or the protection of the rights and freedoms of others.

Article 82¹⁴⁵

Coordination, Participation and Representation

1. States Parties in both States of origin and States of employment should consider establishing participatory inter-agency mechanisms that allow for the consideration of migration in a variety of policy sectors and that promote institutional and policy coherence for migra-

142. ILO Multilateral Framework, *supra* note 95, guideline 12.9 (modified by author).

143. G.A. Res. 45/158, *supra* note 12, art. 39; MW, *supra* note 12, art. 39.

144. G.A. Res. 45/158, *supra* note 12, art. 40; MW, *supra* note 12, art. 40.

145. G.A. Res. 45/158, *supra* note 12, art. 42; MW, *supra* note 12, art. 42.

tion.¹⁴⁶

2. States of employment should facilitate, in accordance with their national legislation, the consultation or participation of migrant workers, migrant residents and members of their families in decisions concerning the life and administration of the local communities in which they reside.

3. States Parties should promote the integration of the specific concerns of men and women migrant workers in collective bargaining processes and social dialogue as performed by employers and workers' organizations.¹⁴⁷

4. States Parties should work with the social partners and migrant worker associations to ensure, including through the appointment of ombudspersons, better representation and participation of migrant workers, migrant residents and members of their families in economic, social and political life.¹⁴⁸

Article 83

Permanent Residence Status

1. Migrant workers, investors and residents shall be eligible to apply for regular permanent residence after a specified period of time not exceeding five years.¹⁴⁹

2. After seven years States of employment or residence must offer permanent residence to migrant workers, investors and residents who have met all the conditions of their residency and/or employment together with all applicable laws of the State of employment or residence.

146. Global Knowledge Partnership on Migration and Development, Operationalizing a Dashboard of Indicators for Measuring Policy and Institutional Coherence for Migration and Development, OECD Development Ctr., Indicators 1.18, 1.19 (June 2015), <https://www.oecd.org/dev/migration-development/Agenda%20-%20Expert%20meeting%20on%20dashboard%20of%20PICMD%20indicators.pdf>, [https://perma.cc/4PCF-S9KM] (modified by author).

147. ILO Multilateral Framework, *supra* note 95, at 19, guideline 9.14 (modified by author).

148. *Id.* at 28, guideline 14.6 (modified by author).

149. Matthew Lister, *Justice and Temporary Labor Migration*, 29 GEO. IMMIGR. L. REV. 95, 122 (2014).

Article 84

Path to Citizenship

1. The State of residence or employment shall, in the exercise of its sovereignty, grant migrant workers, migrant residents, and members of their families a path to citizenship after a specified period of legal residence in the country,¹⁵⁰ in accordance with national laws.¹⁵¹

2. States shall offer citizenship to migrant workers, migrant residents and members of their families subject to the rules and requirements relating to naturalization applied in that State, after a specified period of legal residence in the country not exceeding ten years.¹⁵²

3. States should consider granting migrant workers, migrant residents and members of their families the possibility to possess multiple nationalities.¹⁵³

4. Neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse.¹⁵⁴

Article 85¹⁵⁵

Equality of Treatment

1. Migrant workers, migrant residents and members of their families shall enjoy equality of treatment with nationals of the State of residence or employment in accordance with national laws and no later than five years after admission.¹⁵⁶ For migrant workers, this applies in relation to:

- (a) Access to vocational guidance and placement services;
- (b) Access to vocational training and retraining facilities and institu-

150. G.A. Res. 45/158, *supra* note 12, art. 42(3); MW, *supra* note 12, art. 42(3).

151. ILO Multilateral Framework, *supra* note 95, at 28, guideline 14.13 (modified by author).

152. European Convention on Nationality, Council of Europe, art. 6(3), Nov. 6, 1997, 166 E.T.S. 4 (modified by author).

153. *Id.* at preamble (modified by author).

154. *Id.* art. 4(d) (modified by author).

155. G.A. Res. 45/158, *supra* note 12, art. 43; MW, *supra* note 12, art. 43 (modified by author).

156. Council Directive 2003/109, *supra* note 87, art. 11 (concerning the status of third-country national who are long-term residents).

tions;

(c) Access to housing, including social housing schemes, and protection against exploitation in respect of rents.

For migrant residents and migrant workers, this applies in relation to:

(d) Access to educational institutions and services subject to admission requirements and other regulations of the institutions and services concerned;

(e) Access to social and health services, provided that the requirements for participation in the respective schemes are met;

(f) Access to banks and other financial institutions,¹⁵⁷ subject to the rules and regulations of the institutions and services concerned;

(g) Access to co-operatives and self-managed enterprises, which shall not imply a change of their migration status and shall be subject to the rules and regulations of the bodies concerned;

(h) Access to and participation in cultural life.

2. States Parties shall promote conditions to ensure effective equality of treatment to enable migrant residents and migrant workers to enjoy the rights mentioned in paragraph 1 of the present article whenever the terms of their stay, as authorized by the State of residence or employment, meet the appropriate requirements.

3. States of employment shall not prevent an employer of migrant workers from establishing housing or social or cultural facilities for them. A State of employment may make the establishment of such facilities subject to the requirements generally applied in that State concerning their installation.

Article 86

Access to Health Care

1. States Parties shall adopt measures to ensure that migrant workers, migrant residents and members of their families receive, following a set period if there is one, the same treatment as nationals with regard to the provision of medical care.¹⁵⁸

2. States Parties in which insurance is tied to employment shall require employers to provide migrant workers access to that coverage

157. Martin, *supra* note 140, at 58.

158. ILO Multilateral Framework, *supra* note 95, at 18, guideline 9.10 (modified by author).

on the same basis as nationals.¹⁵⁹

3. States Parties should ensure that migrant workers who are injured on the job are provided with long-term rehabilitation services, if needed.¹⁶⁰

4. States Parties undertake to adopt measures to ensure that migrant workers admitted on a permanent basis are allowed to stay in the country in case of incapacity to work.¹⁶¹

Article 87

Children's Right to Education

1. States of employment or residence shall pursue a policy, where appropriate in collaboration with the States of origin, aimed at facilitating the social inclusion of children of migrant workers and residents in the local school system, particularly in respect of teaching them the local language.

2. States of employment or residence shall take no measures to discourage for the children of migrants the teaching of their mother tongue and culture.

3. States of employment or residence may provide special schemes of education in the mother tongue of children of migrant workers, if necessary in collaboration with the States of origin.

Article 88¹⁶²

Exemptions on Import and Export Duties and Taxes

Migrant workers, migrant residents and members of their families shall, subject to the applicable legislation of the States concerned, as well as relevant international agreements and the obligations of the States concerned arising out of their participation in customs unions, enjoy exemption from import and export duties and taxes in respect of their personal and household effects as well as the equipment necessary to engage in the remunerated activity for which they were admitted to the State of employment:

(a) Upon departure from the State of origin or State of habitual residence;

159. Lister, *supra* note 94, at 114 n. 65.

160. *Id.*

161. ILO Multilateral Framework, *supra* note 95, at 18, guideline 9.6 (modified by author).

162. G.A. Res. 45/158, *supra* note 12, art 46; MW, *supra* note 12, art. 46.

- (b) Upon initial admission to the State of employment or residence;
- (c) Upon final departure from the State of employment or residence;
- (d) Upon final return to the State of origin or other State of habitual residence.

Article 89¹⁶³

Taxes, Duties and Charges

1. Without prejudice to applicable double taxation agreements, migrant workers, migrant residents and members of their families shall, in the matter of earnings in the State of employment or residence:

- (a) Not be liable to taxes, duties or charges of any description higher or more onerous than those imposed on nationals in similar circumstances;
- (b) Be entitled to deductions or exemptions from taxes of any description and to any tax allowances applicable to nationals in similar circumstances, including tax allowances for dependent members of their families.

2. States Parties shall endeavor to adopt appropriate measures to avoid double taxation of the earnings and savings of migrant workers and members of their families.

Article 90¹⁶⁴

Social Security

1. With respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfill the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. The competent authorities of the State of origin and the State of employment can at any time establish the necessary arrangements to determine the modalities of application of this norm.

2. Where the applicable legislation does not allow regular migrant workers and members of their families a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar cir-

163. G.A. Res. 45/158, *supra* note 12, art 48; MW, *supra* note 12, art. 48.

164. G.A. Res. 45/158, *supra* note 12, art. 27; MW, *supra* note 12, art. 27 (modified by author).

cumstances.

3. States Parties should seek to enter into bilateral, regional or multi-lateral agreements to provide social security coverage and benefits, as well as portability of social security entitlements, to regular migrant workers and, as appropriate, to migrant workers in an irregular situation.¹⁶⁵

Article 91¹⁶⁶

Residence and Work Authorizations

1. Where separate authorizations to reside and to engage in employment are required by national legislation, the States of employment shall issue to migrant workers authorization of residence for at least the same period of time as their authorization to engage in remunerated activity.

2. Migrant workers who in the State of employment are allowed freely to choose their remunerated activity shall neither be regarded as in an irregular situation nor shall they lose their authorization of residence by the mere fact of the termination of their remunerated activity prior to the expiration of their work permits or similar authorizations.

3. In order to allow migrant workers referred to in paragraph 2 of the present article sufficient time to find alternative employment, the authorization of residence shall not be withdrawn at least for a period corresponding to that during which they may be entitled to unemployment benefits.

4. Migrant workers who in the State of employment are not permitted freely to choose their remunerated activity shall neither be regarded as in an irregular situation nor shall they lose their authorization of residence by the mere fact of the termination of their remunerated activity prior to the expiration of their work permit, except where the authorization of residence is expressly dependent upon the specific remunerated activity for which they were admitted. Such migrant workers shall have the right to seek alternative employment, participation in public work schemes and retraining during the remaining period of their authorization to work, subject to such conditions and limitations as are specified in the authorization to work.¹⁶⁷

Article 92

165. ILO Multilateral Framework, *supra* note 95, at 18, guideline 9.9.

166. G.A. Res. 45/158, *supra* note 12, art. 49; MW, *supra* note 12, art. 49.

167. G.A. Res. 45/158, *supra* note 12, art. 51; MW, *supra* note 12, art. 51.

Authorization of Residence for Family Members

1. Members of a migrant worker's family who have themselves an authorization of residence or admission that is without limit of time or is automatically renewable shall be permitted freely to choose their remunerated activity under the same conditions as are applicable to the said migrant worker.
2. With respect to members of a migrant worker's family who are not permitted freely to choose their remunerated activity, States of employment shall consider favorably granting them priority in obtaining permission to engage in a remunerated activity over other workers who seek admission to that State, subject to applicable bilateral and multilateral agreements.

Article 93¹⁶⁸

Death or Dissolution of Marriage

1. In the case of death of a migrant worker or dissolution of marriage, the State of employment shall favorably consider granting family members of that migrant worker residing in that State on the basis of family reunification an authorization to stay and work if they have resided in the State of employment for four years and in no case less than equal in length of time to the time they have already resided in that State.
2. In the case of death of a migrant resident or dissolution of marriage, the State of residence shall grant family members of the residents(s) residing in that State on the basis of family reunification an authorization to adopt the same rights of the original residents provided they can meet the same qualifications of independent income sufficient to meet their obligations in the State of residence.
3. Members of the family in all cases shall be allowed before departure a reasonable period of time in order to enable them to settle their affairs in the State of employment or residence.
4. The provisions of paragraphs 1 and 2 of the present article may not be interpreted as adversely affecting any right to stay and work otherwise granted to such family members by the legislation of the State of employment or residence or by bilateral and multilateral treaties applicable to that State.

168. G.A. Res. 45/158, *supra* note 12, art. 50; MW, *supra* note 12, art. 50.

Article 94¹⁶⁹**Freedom to Choose Remunerated Activity**

1. Migrant workers in the State of employment shall have the right freely to choose their remunerated activity, subject to the following restrictions or conditions.

2. For any migrant worker a State of employment may:

(a) Restrict access to limited categories of employment, functions, services or activities where this is necessary in the interests of this State and provided for by national legislation;

(b) Restrict free choice of remunerated activity in accordance with its legislation concerning recognition of occupational qualifications acquired outside its territory. However, States Parties concerned shall endeavor to provide for recognition of such qualifications when they are impartially found to be functionally equivalent.

3. States of employment shall prescribe the conditions under which a migrant worker who has been admitted to take up employment may be authorized to engage in work on his or her own account. Account shall be taken of the period during which the worker has already been lawfully in the State of employment.

Article 95¹⁷⁰**Unemployment**

1. Without prejudice to the terms of their authorization of residence or their permission to work and the rights provided for in articles 58 and 90 of the present Convention, migrant workers shall enjoy equality of treatment with nationals of the State of employment in respect of:

(a) Unemployment benefits;

(b) Access to public work schemes intended to combat unemployment;

(c) Access to alternative employment in the event of loss of work or termination of other remunerated activity, subject to article 94 of the present Convention.

2. If a migrant worker claims that the terms of his or her work con-

169. G.A. Res. 45/158, *supra* note 12, art. 52; MW, *supra* note 12, art. 52 (modified by author).

170. G.A. Res. 45/158, *supra* note 12, art. 54; MW, *supra* note 12, art. 54 (modified by author).

tract have been violated by his or her employer, he or she shall have the right to address his or her case to the competent authorities of the State of employment, on terms provided for in article 27 of the present Convention.

Part V: Provisions Applicable to Particular Categories of Migrant Workers and Members of their Families

Article 96¹⁷¹

Scope

The particular categories of migrant workers and members of their families specified in the present part of the Convention who are documented or in a regular situation shall enjoy the rights set forth in Part II and, except as modified below, the rights set forth in Part III.

Migrant entrepreneurs and migrant investors

Article 97

1. In order to facilitate international investment on terms that contribute to the development of States Parties and to protect the rights of investors and entrepreneurs to clear and transparent rules of investment, States Parties undertake to make available certain visas for migrant entrepreneurs, as defined in article 53, paragraph 3 of the present Convention, and similar business individuals and investors (together, "entrepreneurship visa"), in coordination with their respective domestic legal frameworks.

2. While such a framework will depend on each domestic system and its immigration policies and is ultimately a matter of state discretion, States Parties are encouraged to incorporate the following non-exclusive principles into their systems of evaluating candidates for initial and renewed visas:

- (a) The business plan of the applicant and the applicant's educational and professional background, as appropriate for the specific industry;
- (b) Third-party endorsement by individuals or organizations with specialized knowledge of the relevant industry;
- (c) A de-emphasis on, or alternatives to, investment thresholds, as appropriate for the specific industry;

171. G.A. Res. 45/158, *supra* note 12, art. 57; MW, *supra* note 12, art. 57.

(d) Sufficient time for businesses to generate profits, balancing the purpose of the visa with the recognition that many ultimately successful businesses may not be immediately profitable;

(e) Clear and transparent extension and settlement criteria;

(f) Interim monitoring mechanisms.

3. States Parties undertake to make publicly available regular reports on their implementation and regulation of the entrepreneurship visas.

(a) Reports should include, at a minimum:

i. The criteria used to award entrepreneurship visas;

ii. Detailed information on those awarded and denied entrepreneurship visas by industry;

iii. Detailed information regarding the rights and privileges attached with each category of entrepreneurship visa, including but not limited to the duration of visa; processes, if any, to full citizenship; any intermediate review process throughout the duration of the visa and rights during that process (such as the right to appeal and the right to due process);

iv. Detailed information on investment thresholds and any monetary contributions given to the State Party in connection with or with the expectation of securing an entrepreneurship visa.

(b) States Parties undertake to release such report within one year of entry into force of the present Convention for the States Parties concerned.

(c) Thereafter, States Parties undertake to report every four years.

(d) In the interest of maximum transparency, States Parties are strongly encouraged to release such reports online.

4. To further entrepreneurial opportunities internationally, States Parties are encouraged to take steps, individually and through international assistance and co-operation, especially economic, technical, and educational, to the maximum of their available resources, with a view to achieving progressively the full realization of the rights recognized in the present Chapter by all appropriate means. States Parties are encouraged to partner with the private sector as appropriate to effectuate this Chapter.

5. States Parties may, at their discretion, impose duties on applicants for entrepreneurship visas in connection with this article. Duties may include the applicant's obligation to provide truthful and candid disclosures throughout the application process.

*Temporary migrant workers***Article 98****Modification of Rights**

1. Temporary migrant workers, as defined in article 53, paragraph 4 of the present Convention, shall be entitled to the rights provided for in this Convention, with the exception of the rights established in the following provisions:

(a) Liberty of movement and freedom to choose residence as specified in the provisions of article 80.

(b) Access to educational institutions or vocational guidance and training as specified in the provisions of article 85, paragraph 1 (a), (b) and (d).

(c) Access to social housing schemes as specified in the provisions of article 85, paragraph 1 (c).

(d) Access to social and health services as specified in the provisions of article 85, paragraph 1 (e).

(e) Access to social security systems as specified in the provisions of article 90.

(f) Protections in the case of termination of employment as specified in the provisions of article 91, paragraphs 2 and 3.

(g) Right to seek alternative employment and right to participate in public work schemes and retraining programs as specified in the provisions of article 95.

(h) Right to freely choose remunerated activity as specified in the provisions of article 94.

(i) Access to unemployment benefits as specified in the provisions of article 95, paragraph 1.

2. All temporary migrant workers, without prejudice to skill level, shall enjoy the rights articulated in this part of the present Convention.

3. States Parties shall ensure that any policy relating to work responds to established labor market needs, and that these policies respect the principle of equality of treatment between migrant and national workers as it pertains to the rights set out in article 58 of the present Convention.¹⁷²

172. ILO Multilateral Framework, *supra* note 95, at 13, guideline 5.5 (modified by author).

4. States Parties may conclude, after consulting social partners, collective agreements, which, while respecting the overall protection of temporary workers, may establish arrangements concerning the working and employment conditions of temporary workers which may differ from those referred to in article 85 paragraphs I (a)-(b), paragraph I (c), as it pertains to social housing schemes and paragraph I (e), of the present Convention.¹⁷³ Such agreements shall include a qualifying period for equality of treatment, which may not exceed five years.¹⁷⁴

Article 99

Civil and Political Rights

States Parties must respect and protect the civil and political rights of temporary migrant workers.¹⁷⁵

Article 100

Work Authorization

States Parties may issue work authorizations for temporary migrant workers, that:

1. Make the right freely to choose their remunerated activities subject to the condition that the migrant worker has resided lawfully within its territory for the purpose of remunerated activity for a period of time prescribed in its national legislation that may not exceed two years.¹⁷⁶
2. Within a period of time not exceeding six months limit the authorization to work to one employer, subject to the provisions of article 78, paragraph 2 of the present Convention.
3. Subject to paragraph 1 of the present article, limit the authorization to work to the sector within which a work visa has been issued.¹⁷⁷
4. Subject to paragraph 1 of the present article, limit the authorization to work to a specific region. Such restrictions shall be justified only

173. Council Directive 2008/104, of the European Council and of the Council of 19 November 2008 on Temporary Agency Work, art. 5(3), 2008 O.J. (L 327) 9, 12 (modified by author).

174. *Id.* art. 5(4) (modified by author).

175. See Martin Ruhs, *The Price of Rights: Regulating International Labor Migration* 193 (Princeton University Press, 2013).

176. G.A. Res. 45/158, *supra* note 12, art. 52; MW, *supra* note 12, art. 52 (modified by author).

177. Ruhs, *supra* note 175, at 182.

on grounds specified in article 80, paragraph 2 of the present Convention or on the basis of general interest relating to the protection of temporary workers, the requirements of health and safety at work or the need to ensure that the labor market functions properly and abuses are prevented.¹⁷⁸

5. The restrictions in paragraphs 1 through 4 of the present article will not apply if the temporary worker has been made subject to abusive working conditions or the employer has failed to abide by the terms of the employment contract.

Article 101

Termination of Employment

1. Temporary migrant workers shall, upon loss of their employment through no fault of their own, be allowed to find alternative employment during a period of no less than one month.

2. States of employment may, subject to paragraph 1 of the present article, require temporary migrant workers who can no longer work because of injury or illness to return to their State of origin once they are able to do so.¹⁷⁹

Article 102

Violation of Employment Contracts

1. If a temporary migrant worker claims that the terms of his or her work contract have been violated by his or her employer, he or she shall have the right to address his or her case to the competent authorities of the State which has jurisdiction over that employer, on terms provided for in article 27 paragraph 1, of the present Convention.¹⁸⁰

2. States Parties shall ensure the effective protection for migrants to exit any temporary work program whenever they wish to do so.¹⁸¹

Article 103

Equality of Treatment

States of employment shall adopt measures to ensure that temporary migrant workers lawfully within its territory enjoy equal treatment with nationals regarding employment and training opportunities after

178. Council Directive 2008/104, *supra* note 173, art. 4(1) (modified by author).

179. Lister, *supra* note 94, at 114, n. 65.

180. G.A. Res. 45/158, *supra* note 12, art. 54; MW, 1990, art. 54 (modified by author).

181. *See also* Ruhs, *supra* note 176.

a reasonable period of employment that may not exceed five years.¹⁸²

Article 104

Multiple Entry Visa

States of employment may limit the number of exits and re-entries available on visas issued to temporary migrant workers to no fewer than three per year.¹⁸³

Article 105

Access to Employment

1. Employers should keep temporary migrant workers informed of permanent vacancies and give them the same opportunity as other workers to find permanent employment.¹⁸⁴

2. States of employment may limit access by a temporary migrant worker to remunerated activities in pursuance of a policy of granting priority to its nationals or others by virtue of legislation or bilateral or multilateral agreements. Any such limitation shall cease to apply to a migrant worker who has resided lawfully in its territory for the purpose of remunerated activity for a period of time prescribed in its national legislation that should not exceed five years.¹⁸⁵

Article 106

Social Rights including Portable Pensions

1. States of employment may not limit equal access to primary or secondary education to children of temporary migrant workers who have been authorized to bring their families with them.¹⁸⁶

2. States of origin may not limit access to social rights for temporary migrant workers upon return.

3. States of employment may restrict access to social rights for temporary migrant workers if there is demonstrable evidence that granting the rights creates a net fiscal loss for that State.¹⁸⁷

182. ILO Multilateral Framework, *supra* note 95, at 17, guideline 9.4 (modified by author).

183. Lister, *supra* note 94, at 114.

184. Council Directive 2008/104, *supra* note 173, art. 6(1) (modified by author).

185. G.A. Res. 45/158, *supra* note 12, at 17–18; MW, *supra* note 12, art. 52(3) (modified by author).

186. See also G.A. Res. 70/1, *supra* note 7, Sustainable Development Goal 4.

187. Ruhs, *supra* note 175.

4. Restrictions of social rights shall be limited to means-tested benefits and may be applied only for a specified period of time that may not exceed five years.

5. States Parties should consider establishing a welfare fund to assist migrant workers and their families in cases of illness, injury, repatriation, abuse or death.¹⁸⁸

6. States of employment shall make appropriate arrangements to ensure the maintenance of acquired rights and rights in course of acquisition of temporary migrant workers, including ensure the transfer to temporary workers of any contributory benefits upon their return to their State of origin.¹⁸⁹

7. Arrangements for portability of benefits should cover, at a minimum, any pension benefits acquired or in course of acquisition in the State of employment.¹⁹⁰

8. States Parties should endeavor to conclude bilateral or multilateral agreements to facilitate the transfer of contributory social and health benefits earned by temporary migrant workers upon return to their State of origin.

9. States Parties shall take appropriate measures with the aim of ensuring that the transfer of acquired rights are not subject to double taxation.

Article 107

Temporary Residence Status

It is at the discretion of the State of employment to decide the duration of the period for which a temporary work authorization is issued. This period should be set so as to ensure that temporary migrant workers can generate the net financial gains necessary to make migration financially worthwhile.¹⁹¹

188. ILO Multilateral Framework, *supra* note 95, at 24, guideline 12.10 (modified by author).

189. ILO, Migration for Employment Recommendation (Revised), R086, art. 21(3) (1949), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312424, [<https://perma.cc/A99F-CWYR>].

190. Philip Martin, Immigration Policy and Agriculture: Possible Directions for the Future, 5 J. ON MIGRATION AND HUM. SECURITY 252 (2017).

191. Ruhs, *supra* note 176, at 184.

Article 108

Renewal of Status

1. States of employment shall ensure that foreign workers who are employed or have offers of employment at the end of the period for which they have a work authorization are allowed to re-apply for a new work authorization.¹⁹²
2. States of employment may make eligibility for renewal of status conditioned upon:
 - (a) Good behavior, such as no felony convictions, compliance with conditions attached to any previous work or residence permit, including overstay;¹⁹³
 - (b) Regular periods of employment and the payment of taxes,¹⁹⁴ without prejudice to articles 77 and 78 of the present Convention.
3. States of employment should ensure that eligibility for renewal of status allows periods spent away from that State.¹⁹⁵

Article 109

Permanent Residence Status

1. States of employment shall implement transparent criteria for regulating the transfer of migrant workers from temporary residence status to permanent residence status.¹⁹⁶
2. Temporary migrant workers shall be eligible to apply for regular permanent residence after a specified period of time not exceeding five years.¹⁹⁷
3. No temporary migrant worker shall be renewed in temporary status longer than seven years.

192. Lister, *supra* note 94, at 122.

193. Organisation for Economic Co-Operation and Development [OECD], *International Migration Outlook*, SOPEMI, 2008, at 187.

194. Lister, *supra* note 94, at 122.

195. This draws on the analysis in European Migration Network, Temporary and Circular Migration: empirical evidence, current policy practice and future options in EU Member States (2011), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/circular-migration/0a_emn_synthesis_report_temporary__circular_migration_final_sept_2011_en.pdf, [<https://perma.cc/UY5W-ZY26>].

196. See also Ruhs, *supra* note 175, at 177.

197. Lister, *supra* note 94, at 122.

4. After seven years States of employment must offer permanent residence to temporary migrant workers who have met all the conditions of their employment together with all applicable laws of the State of employment.

Article 110

Circular and Return Migration

1. States Parties undertake to adopt policies with the aim to encourage circular and return migration and reintegration into the State of origin, including by promoting schemes and circulation-friendly visa policies.¹⁹⁸

2. States Parties undertake to adopt measures to facilitate the return of migrants whose temporary work permits have expired. Such measures may include:

(a) Recognition and accreditation of qualifications and experience acquired abroad in the State of origin;¹⁹⁹

(b) Assistance through welfare funds established under article 106, paragraph 5;²⁰⁰

(c) Opening of special savings accounts offering migrant workers the opportunity to save part of their wages at market rates, with the possible condition that the savings be released to migrant workers on their return to their home country;

(d) Allowing migrant workers to open up foreign currency accounts.

3. It is up to the State of employment to establish the time period and conditions during which a temporary migrant may be prohibited from re-entering its territory. But for temporary migrant workers in full compliance with the laws of the State of employment, this time period should in no cases extend beyond one year.

Migrant domestic workers

Article 111

1. Migrant domestic workers, as defined in article 53, paragraph 5 (a), of the present Convention, shall be entitled to the rights provided

198. ILO Multilateral Framework, *supra* note 95, at 30, guideline 15.8 (modified by author).

199. *Id.* at 24, guideline 12.6 (modified by author).

200. *Id.* at 24, guideline 12.10 (modified by author).

for in Part IV, in accordance with national laws and regulations,²⁰¹ except the provisions of article 85, paragraph 1 (c), as it pertains to social housing schemes.

2. Temporary migrant domestic workers shall enjoy the same rights and may be subject to the same restrictions as set forth in articles 98-110 of the present Convention.

3. States Parties undertake to extend the same minimum protections that apply to workers generally to domestic workers, in particular in the areas of employment, maternity protection, wages, occupational safety and health and other conditions of work.²⁰²

4. States Parties shall take measures to ensure migrant domestic workers residing in the household decent living conditions that respect their privacy.²⁰³

5. States Parties may, by measure of national laws, regulations, collective agreements or arbitration awards, provide for the payment of a limited proportion of the remuneration of migrant domestic workers in the form of payments in kind that are not less favorable than those generally applicable to other categories of workers, provided that measures are taken to ensure that such payments in kind are agreed to by the worker, are for the personal use and benefit of the worker, and that the monetary value attributed to them is fair and reasonable.²⁰⁴

6. States Parties, recognizing the specific vulnerability of migrant domestic workers, should consider establishing mechanisms to protect them from abuse, harassment and violence, such as programs for the relocation from the household and rehabilitation of migrant domestic workers subjected to such conditions, including the provision of temporary accommodation and health care.²⁰⁵

201. Domestic Workers Convention, *supra* note 88, art. 14 (modified by author).

202. ILO Multilateral Framework, *supra* note 95, at 18, guideline 9.8 (modified by author).

203. Domestic Workers Convention, *supra* note 88, art. 6 (modified by author).

204. *Id.* art. 12(2) (modified by author).

205. *Id.* art. 5 (modified by author).

*Other migrant workers***Article 112**²⁰⁶**Frontier Migrant Workers**

1. Frontier migrant workers, as defined in article 53, paragraph 5 (b), of the present Convention, shall be entitled to the rights provided for in Part IV that can be applied to them by reason of their presence and work in the territory of the State of employment, taking into account that they do not have their habitual residence in that State.
2. States of employment shall consider favorably granting frontier workers the right freely to choose their remunerated activity after a specified period of time. The granting of that right shall not affect their status as frontier migrant workers.
3. Frontier migrant workers should not be charged above-market rates by States Parties, employers or their agents for transportation to and from their work sites, or for food or water at their work sites or while in transit. They should also be permitted to bring their own food and drinks to work. Transportation and food and water costs should not be automatically deducted from the pay of frontier migrant workers.

Article 113²⁰⁷**Seasonal Migrant Workers**

1. Seasonal migrant workers, as defined in article 53, paragraph 5 (c), of the present Convention, shall be entitled to the rights provided for in Part IV that can be applied to them by reason of their presence and work in the territory of the State of employment and that are compatible with their status in that State as seasonal migrant workers, taking into account the fact that they are present in that State for only part of the year.
2. The State of employment shall, subject to paragraph 1 of the present article, consider granting seasonal migrant workers who have been employed in its territory for a significant period of time the possibility of taking up other remunerated activities and giving them priority over other workers who seek admission to that State, subject to applicable bilateral and multilateral agreements.

206. G.A. Res. 45/158, *supra* note 12, at 19; MW, *supra* note 12, art. 58.

207. G.A. Res. 45/158, *supra* note 12, art. 59; MW, *supra* note 12, art. 59.

Article 114²⁰⁸**Itinerant Migrant Workers**

Itinerant migrant workers, as defined in article 53, paragraph 5 (f), of the present Convention, shall be entitled to the rights provided for in Part IV that can be granted to them by reason of their presence and work in the territory of the State of employment and that are compatible with their status as itinerant migrant workers in that State.

Article 115²⁰⁹**Project-Tied Migrant Workers**

1. Project-tied migrant workers, as defined in article 53, paragraph 2 (g) of the present Convention, and members of their families shall be entitled to the rights provided for in Part IV except the provisions of article 85, paragraphs 1 (a), (b) and (c), as it pertains to social housing schemes, and articles 94 and 95.

2. If a project-tied migrant worker claims that the terms of his or her work contract have been violated by his or her employer, he or she shall have the right to address his or her case to the competent authorities of the State which has jurisdiction over that employer, on terms provided for in article 27, paragraph 1, of the present Convention.

3. Subject to bilateral or multilateral agreements in force for them, the States Parties concerned shall endeavor to enable project-tied migrant workers to remain adequately protected by the social security systems of their States of origin or habitual residence during their engagement in the project. States Parties concerned shall take appropriate measures with the aim of avoiding any denial of rights or duplication of payments in this respect.

4. Without prejudice to the provisions of article 60 paragraph 2 of the present Convention and to relevant bilateral or multilateral agreements, States Parties concerned shall permit payment of the earnings of project-tied migrant workers in their State of origin or habitual residence.

208. G.A. Res. 45/158, *supra* note 12, art. 60; MW, *supra* note 12, art. 60.

209. G.A. Res. 45/158, *supra* note 12, art. 61; MW, *supra* note 12, art. 61 (modified by author).

Article 116²¹⁰**Specified-Employment Migrant Workers**

1. Specified-employment migrant workers as defined in article 53, paragraph 5 (h), of the present Convention, shall be entitled to the rights provided for in Part IV, except the provisions of article 85, paragraphs 1 (a), (b) and (c), as it pertains to social housing schemes, article 94, and article 95, paragraph 1 (c).

2. Members of the families of specified-employment migrant workers shall be entitled to the rights relating to family members of migrant workers provided for in Chapter VII of the present Convention.

Part VI: Promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers, residents, investors and members of their families**Article 117**²¹¹**International Coordination**

States Parties shall identify opportunities for employment - including specifying skills, fields and numbers of prospective employees - and facilitate the movement of migrant workers, residents and investors through the “Mobility Visa Clearing House” web platform established by article 216 of the present Convention, as well as through other policies and procedures, including bilateral, regional or multi-lateral agreements and integration schemes.²¹²

Article 118**International Recruitment – Laws and Regulations**

States Parties undertake to establish and promote legal practices to regulate recruitment of migrant workers and to promote the elimination of recruitment malpractices, including by:

1. Establishing laws or regulations, which provide for penalties, in-

210. G.A. Res. 45/158, *supra* note 12, art. 62; MW, *supra* note 12, art. 62 (modified by author).

211. ILO Multilateral Framework, *supra* note 95, at 13, guideline 5.2 (modified by author).

212. See generally Michael A. Clemens, *Global Skill Partnerships: A Proposal for Technical Training in a Mobile World*, Ctr. For Global Development, CGD Policy Paper No. 040 (2014), <https://www.cgdev.org/sites/default/files/clemens%20global%20skill%20partnerships%20cgd%20web.pdf>, [<https://perma.cc/69DS-Q49R>].

cluding prohibition of those private employment agencies which engage in fraudulent practices and abuses;²¹³

2. Establishing mechanisms for the regulation and accreditation of recruitment agencies and employers, and blacklisting of agencies that fail to meet the minimum standards for fair recruitment;²¹⁴

3. Adopting measures such as licensing and supervising recruitment and placement services for migrant workers²¹⁵ and suspending or withdrawing their licenses in case of violation.²¹⁶

4. States Parties shall provide for remedies from any or all persons and entities involved in the recruitment and employment of migrant workers for violation of their rights.²¹⁷

Article 119

Supporting Orderly Migration

1. States Parties, including States of transit, shall collaborate with a view to preventing and eliminating irregular or clandestine movements and employment of migrant workers, residents and investors in an irregular situation.²¹⁸

2. States of employment shall take all adequate and effective measures to eliminate employment in their territory of migrant workers in an irregular situation, including, whenever appropriate, sanctions on employers of such workers. The rights of migrant workers vis-à-vis their employer arising from employment shall not be impaired by these measures.²¹⁹

213. ILO, Private Employment Agencies Convention, C181, art. 8 (June 19, 1997), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312326, [<https://perma.cc/L7GW-C7XM>].

214. Assoc. of Southeast Asian Nations [ASEAN], Declaration on the Protection and Promotion of the Rights of Migrant Workers, at art. 14 (Jan. 13, 2007), <http://www.ilo.org/dyn/migpractice/docs/117/Declaration.pdf>, [<https://perma.cc/C4QT-NF22>].

215. ILO Multilateral Framework, *supra* note 95, at 24–25, guideline 13 (modified by author).

216. *Id.* at 25, guideline 13.5 (modified by author).

217. ILO Multilateral Framework, *supra* note 95, at 20, guideline 10.6 (modified by author).

218. G.A. Res. 45/158, *supra* note 12, art. 68; MW, *supra* note 12, art. 68 (modified by author).

219. G.A. Res. 45/158, *supra* note 12, art. 69; MW, *supra* note 12, art. 69 (modified by author).

3. Whenever the States Parties concerned consider the possibility of regularizing the situation of migrant workers, residents and investors in an irregular situation in accordance with applicable national legislation and bilateral or multilateral agreements, they shall take into consideration the circumstances of their entry, the duration of their stay in the States of employment and other relevant considerations, in particular those relating to their family situation.

4. States Parties should adopt measures to transform informal economy activities into formal activities and to ensure that migrant workers, residents and investors in these activities benefit from the rights referred to under this Chapter.²²⁰

Article 120²²¹

Orderly Return

1. States Parties concerned shall co-operate as appropriate in the adoption of measures regarding the orderly return of migrant workers, residents, investors and members of their families to the State of origin when they decide to return or their authorization of residence or employment expires or when they are in the State of employment in an irregular situation.

2. Concerning migrant workers, residents, investors and members of their families in a regular situation, States Parties concerned shall co-operate as appropriate, on terms agreed upon by those States, with a view to promoting adequate economic conditions for their resettlement and to facilitating their durable social and cultural reintegration in the State of origin.

3. Any type of return, including deportation, must respect the fundamental principle of the best interest of children.²²²

Article 121

Death

States Parties shall facilitate, whenever necessary, the repatriation to the State of origin of the bodies of deceased migrant workers or

220. ILO Multilateral Framework, *supra* note 95, at 19, guideline 9.13 (modified by author).

221. G.A. Res. 45/158, *supra* note 12, art. 67; MW, *supra* note 12, art. 67 (modified by author).

222. G.A. Res. 44/25, Convention on the Rights of the Child, art. 3 (Nov. 20, 1989) (modified by author).

members of their families.²²³

Article 122²²⁴

Remittances

1. States Parties shall take appropriate measures to establish conditions for cheaper, faster and safer transfer of remittances in both source and recipient countries,²²⁵ including by facilitating accessible financial services, reducing transaction fees, providing tax incentives and promoting greater competition between financial institutions, as well as by implementing the recommendations of the Remittance Subcommittee established in article 210 of the present Convention.

2. States Parties shall refrain from imposing taxes or fees on the sending of remittances.

Article 123

Foster Positive Relations Between Migrant Workers and Host Communities

States Parties should consider adopting measures to foster contacts between migrant workers, residents, investors and host communities²²⁶ and to work towards the achievement of harmony and tolerance between receiving States and migrant workers, residents and investors.²²⁷

223. G.A. Res. 45/158, *supra* note 12, art. 71; MW, *supra* note 12, art. 71.

224. G.A. Res. 45/158, *supra* note 12, art. 47(2); MW, *supra* note 12, art. 47(2) (modified by author).

225. Financing for Development, *Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda)*, at 19–20 (July 13–16, 2015); G.A. Res. 70/1, Sustainable Development Goals, *supra* note 186, at 21.

226. U.N. Secretary-General, *In Safety and Dignity: Addressing Large Movements of Refugees and Migrants*, ¶ 40, U.N. Doc. A/70/59 (Apr. 21, 2016).

227. ASEAN, *supra* note 214, art. 6.

CHAPTER V
REFUGEES, FORCED MIGRANTS, ASYLUM SEEKERS AND
INTERNATIONAL PROTECTION²²⁸

Part I: Scope and Definitions

Article 124

The purpose of this Chapter is to lay down standards for the qualification of persons as beneficiaries of international protection, to provide for a uniform status for refugees or other forced migrants eligible for international refuge, to establish standards for the provision of interim protection, and for the content of the protection granted.²²⁹

Article 125

1. For the purposes of this Convention the following definitions shall apply:

(a) The term “forced migrant” shall apply to:

Every person who owing to serious threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order in either part or the whole of her or his State of nationality or in the case of a stateless person her or his state of habitual residence, is compelled to leave his or her State of origin or place of habitual residence in order to seek refuge in another place outside his or her State of origin or habitual residence;²³⁰ and

Any person who owing to the risk of suffering serious harm is compelled to leave her or his State of origin, or in the case of a stateless person, her or his State of former habitual residence; and

Any person for whom there are substantial grounds for believing that the person concerned, if returned to his or her State of origin, or in

228. This chapter reflects the research and drafting of Kiran Banerjee and draws on research prepared for the SIPA Workshop on a Model Mobility Treaty, Spring 2015. The chapter reflects the many useful suggestions of T. Alexander Aleinikoff, Pierre Bertrand, Emma Borgnäs, Guy Goodwin-Gill, Daniel Naujoks, Susan Martin, and Sarah Deardorff Miller.

229. Directive 2011/95, of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast), art. 1, 2011 O.J. (L 337) 9, 13 (modified by author).

230. Based on UNHCR Resettlement Handbook (2011), <http://www.unhcr.org/46f7c0ee2.pdf>, [<https://perma.cc/V2TT-58N6>].

the case of a stateless person, to his or her State of former habitual residence, would face a real risk of suffering serious harm.

(b) The term “refugee” shall apply to any person who owing to well-founded fear of being persecuted for reasons of race, gender, religion, nationality, membership of a particular social group or political opinion, is outside the State of her or his origin and is unable or, owing to such fear, is unwilling to return to that country; or who, not having a nationality and being outside the State of her or his former habitual residence is unable or, owing to such fear, is unwilling to return to it.²³¹

The term “social group” shall be taken to include: a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society; in some cases, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society.²³²

The term “refugee” is without prejudice to the origin or source of persecution, whether a State, agents of a State, or a non-State actor. It is recognized that a “well-founded fear of persecution” may arise in situations of international or national armed conflict, particularly when there are serious reasons for considering that genocide, crimes against humanity, war crimes or ethnic cleansing are being committed.²³³

(c) In the case of a “forced migrant” or “refugee” who has more than one nationality, the term “the State of her or his origin” shall mean each of the countries of which she or he is a national, and a person shall not be deemed to be lacking the protection of the State of her or his nationality if, without any valid reason based on well-founded fear of persecution or serious harm, she or he has not availed herself or himself of the protection of one of the countries of which she or he is a national.²³⁴

(d) “Serious harm” consists of a threat to an individual’s physical

231. 1951 Refugee Convention, *supra* note 5, art. 1 to include gender as ground of persecution (modified by author).

232. The U.N. Refugee Agency, Guidelines on International Protection: “Membership of a Particular Social Group” within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HGR/CIP/02/02 (May 7, 2002) 3, 4 (citing McHugh, J., in *Applicant A v. Minister for Immigration and Ethnic Affairs*, (1997) 190 CLR 225, 264, 142 ALR 331) (modified by author).

233. This article is based on a suggestion from Pierre Bertrand.

234. 1951 Refugee Convention, *supra* note 5, art. 1 (modified by author).

survival, which is external to her or him, or threats of torture or inhuman or degrading treatment or punishment or arbitrary incarceration, such as may arise during indiscriminate violence, severe international or internal armed conflict, environmental disaster, enduring food insecurity, acute climate change, or events seriously disturbing public order.²³⁵

(e) “Residence permit” means any permit or authorization issued by the authorities of States Parties, in the form provided for under that State’s law, allowing a person who is a beneficiary of international protection to reside on its territory;

(f) “Unaccompanied minor” means a child who arrives on the territory of the state unaccompanied by an adult responsible for him or her whether by law or by the practice of the state of arrival, and for as long as he or she is not effectively taken into the care of such a person; it includes a child who is left unaccompanied after he or she has entered the territory of the state;²³⁶

(g) “1951 Refugee Convention” means the Convention relating to the Status of Refugees done at Geneva on 28 July 1951, as complemented by the New York Protocol of 31 January 1967.

Article 126

Rights Granted Apart from this Convention

This chapter shall be without prejudice to the rights laid down in the 1951 Refugee Convention or in earlier chapters of this Convention.²³⁷ Nothing in this Convention shall be deemed to impair any rights and benefits granted by States in bilateral, regional or global multilateral treaties to refugees or other forced migrants apart from this Convention. International refuge or interim protection shall be without prejudice to recognition of refugee status under the 1951 Refugee Convention or under the other provisions of this Chapter.

235. Council Directive 2011/95, *supra* note 229, art. 15 (modified by author); *see also* Organization of African Unity [OAU], Convention Governing the Specific Aspects of Refugee Problems in Africa, art. 1 (modified by author), June 20, 1974, 14691 U.N.T.S. 46, 47-48; 2015 SIPA Model Mobility Treaty Workshop Memo (modified by author).

236. Council Directive 2011/95, *supra* note 229, art. 2(1).

237. *Id.* art. 20; *see also* Council Directive 2001/55 of 20 July 2001 on Minimum Standards for giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof, art. 3, 2001 O.J. (L 212) 12, 14 (EC) (modified by author).

Part II: Procedures for the Provision of International Protection**Article 127****International Protection**

A person who is a refugee or other forced migrant, as defined in article 125 shall be entitled to international protection. International protection shall be realized by States through the granting of international refugee status, or when urgent circumstances temporarily do not allow for the individual assessment of protection claims, by the granting of interim protection.

Article 128²³⁸**Protection Needs Arising Sur Place**

1. A well-founded fear of persecution or real risk of suffering serious harm may be based on events which have taken place since a person left her or his State of origin.
2. A well-founded fear of persecution may be based on activities which a person has engaged in since he or she left the State of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the State of origin.

Article 129**Assessment and Determination of Claims to International Protection**

1. States Parties shall establish appropriate procedures for the determination of claims to international protection in accordance with the provisions of the present Convention.
2. States Parties shall take measures to support the establishment of a single harmonized asylum procedure, to be conducted by a competent authority under globally uniform standards. The goal of such measures will be the implementation of a broadly comprehensive system in which a central and expert authority would determine, in a single procedure, the protection needs of an applicant. In cases in which UNHCR has performed a status determination this will be considered sufficient to entitle an individual to international protection under the provisions of the present Convention, although this shall not preclude States Parties from requiring additional security screening and other procedures following such recognition.

238. Council Directive 2011/95, *supra* note 229, arts. 2(l), 5 (modified by author).

3. States Parties shall ensure that appropriate guidance is provided to border, immigration and police authorities on the referral of such claims to the relevant authority and to proceed according to Articles 137 through 140 below with admission arrangements.

Article 130²³⁹

Internal Protection Option

1. As part of the assessment of the claim for international protection, States Parties may determine that a person is not in need of international protection if:

(a) She or he could find effective protection in another part of the State of origin, if under all circumstances it would be reasonable to expect her or him to do so; and²⁴⁰

(b) She or he can safely and legally travel to and enter that part of the country and can reasonably be expected to reside and settle there.

2. In examining whether a person has a well-founded fear of persecution or is at real risk of suffering serious harm, or has access to effective protection against persecution or other forms of serious harm in a part of the State of origin in accordance with paragraph 1 of the present article, States Parties shall have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant. States shall seek and have due regard to the views of UNHCR concerning the viability of access to protection against persecution or other forms of serious harm in either the whole or a part of the State of origin.

3. Where the actors of persecution or serious harm are the State or agents of the State, it will be presumed that effective protection is not available to an individual.

4. In the case of an unaccompanied minor, the assessment of effective protection shall take account of the existence of appropriate care and custodial arrangements, if any, which are in the best interests of child.

Article 131

More Favorable Standards

States Parties may introduce or retain more inclusive standards in addition to those listed in this chapter for determining who qualifies as a person eligible for international refuge or interim protection, and

239. Council Directive 2011/95, *supra* note 229, art. 8 (modified by author).

240. 2015 SIPA Model Mobility Treaty Workshop Memo, *supra* note 235.

for determining the content of international protection, in so far as those standards are compatible with this Convention and consistent with States' obligations under international law.²⁴¹

Article 132²⁴²

General Obligations

Every person enjoying international protection has duties to the country in which they find themselves, which require in particular that they conform to laws and regulations taken for the purposes of maintaining public order.

Article 133²⁴³

Non-Discrimination

In accordance with the rights enumerated in Article 5:

States Parties shall apply the provisions of the present Convention, in accordance with the international instruments concerning human rights, to refugees or other forced migrants without distinction of any kind such as to sex, gender, race, color, language, religion or conviction, sexual orientation, disability, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

Article 134²⁴⁴

Exemption from Exceptional Measures

With regard to exceptional measures such as internment, sequestration of property, or the blocking of assets, which may be taken against the person, property or interests of nationals of a foreign State, States Parties shall not apply such measures to a person entitled to international protection who is formally a national of the said State solely on account of such nationality. States Parties which, under their legislation, are prevented from applying the general principle expressed in this article, shall, in appropriate cases, grant exemptions in favor of such persons.

241. Council Directive 2011/95, *supra* note 229, art. 3 (modified by author).

242. 1951 Refugee Convention, *supra* note 5, art. 2 (modified by author).

243. *Id.* art. 3; G.A. Res 217 (III) A., Universal Declaration of Human Rights, art. 2 (Dec. 10, 1948), (modified by author).

244. 1951 Refugee Convention, *supra* note 5, art. 8 (modified by author).

Article 135²⁴⁵**Provisional Measures**

Nothing in this Convention shall prevent a State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the State Party that that person is in fact a person entitled to international protection and that the continuance of such measures is necessary in her or his individual case in the interests of national security. All such measures must remain reasonable and proportionate.

Article 136²⁴⁶**Exemption from Reciprocity**

1. Except where this Convention contains more favorable provisions, all persons entitled to international protection shall have the right to the same treatment by States Parties as is accorded to foreign nationals generally.
2. All persons entitled to international protection shall enjoy exemption from reciprocity in the territory of States Parties.
3. States Parties shall consider favorably the possibility of according to persons entitled to international protection, in the absence of reciprocity, rights and benefits beyond those to which they are entitled according to paragraph 2 of the present article.

Article 137²⁴⁷**Refugees and other Forced Migrants Unlawfully in a Country of Refuge**

1. States Parties shall not impose penalties, on account of their illegal entry or presence, on persons who, coming from a territory where they faced a well-founded fear of persecution or were at risk of serious harm enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
2. Individuals and their families while awaiting status determination will make their whereabouts known to the authorities. States shall not apply restrictions to the movements of persons awaiting status deter-

245. *Id.* art. 9 (modified by author).

246. *Id.* art. 7 as extensively modified.

247. *Id.* art. 31 (modified by author).

mination other than those which are necessary²⁴⁸ and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. Any such restrictions must remain reasonable and proportionate; detention must only be a choice of last resort, after exhausting all alternatives. States shall allow all such persons a reasonable period and all the necessary facilities to obtain admission into another country.

3. In applying this article, children should not, as a general rule, be detained. When considering whether minors should be subject to any form of detention, authorities should respect the principle of the best interests of the child. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof. Where detention is exceptionally justified for other reasons, it shall conform to the law of the relevant country and only be used as a measure of last resort and for the shortest appropriate period of time. In consequence, all efforts, including acceleration of relevant processes, should be made to allow for the immediate release of unaccompanied or separated children from detention and their placement in other forms of appropriate accommodation that provide adequate assistance and protection.²⁴⁹

Article 138²⁵⁰

Prohibition of Expulsion or Return (“refoulement”)

1. No State shall expel or return (“refouler”) a person in any manner whatsoever to the frontiers of territories where her or his life or freedom would be threatened on account of her or his race, gender, religion, nationality, membership of a particular social group or political opinion, or where the person would otherwise be at risk of serious harm.²⁵¹

248. Jane McAdam, *Guy S. Goodwin-Gill: The International Refugee Law Scholar*, 28 INT’L J. OF REFUGEE L. 552, 552-563 (2016) (Qualified in light of Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention and Protection, Oct. 2001, <http://www.unhcr.org/3bcfdf164.pdf>, [<https://perma.cc/8W5S-3YF2>]).

249. Convention on the Rights of the Child, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, ¶ 61 U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005) (modified by author).

250. 1951 Refugee Convention, *supra* note 5, art. 33 (modified by author in line with harm standard).

251. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra* note 235, art. II(3) (drawing on the expansive reading of non-refoulement protections) (modified by author). *See also* International Covenant on Civil and Political Rights, art. 7, Dec. 19, 1966, 999 U.N.T.S. 171, 175, S.Exec. Doc. No. E, 95-2; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Sept. 21, 1970, 213

2. The right not to be subject to refoulement applies to persons irrespective of their formal recognition or status thus including individuals whose status has not yet been determined. States shall not expel or return an individual who applies for international protection unless and until a final decision has been taken that he or she is not entitled to international protection, or other protection against the violation of his or her rights.

3. The duty not to refoule encompasses any measure attributable to a State which could have the effect of returning a person directly or indirectly to the frontiers of territories where she or he would be at risk of serious harm.

Article 139²⁵²

Protection from Expulsion

1. States Parties shall not expel a person entitled to international protection lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a person shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the individual shall be allowed to submit evidence to clear herself or himself, and to appeal to and be represented for the purpose before a competent authority or a person or persons specially designated by the competent authority.

3. States Parties shall allow such a person a reasonable period within which to seek legal admission into another country. States may apply during that period such internal measures as they may deem necessary, as long as such measures remain reasonable and proportionate. Detention must only be a choice of last resort, after exhausting all alternatives.

Article 140²⁵³

Duty to Admit and Prohibition of Carrier Sanctions

1. All States Parties having access to the Mobility Visa Clearing House described in article 209, Chapter VIII, for the resettlement of their protected refugees and receiving adequate funding from the Responsibility Sharing mechanism described in article 211, Chapter

U.N.T.S. 222, 224.

252. 1951 Refugee Convention, *supra* note 5, art. 32 (modified by author).

253. This article is based on a suggestion from Daniel Naujoks.

VIII, undertake to admit asylum seekers in accord with paragraphs 2 and 3 below.²⁵⁴

2. A person coming directly from a territory where she or he faced a well-founded fear of persecution or were at risk of serious harm, whose status has been confirmed by UNHCR, and who requests the benefit of this Convention at the frontier or in the territory of a Contracting State shall be admitted to the territory of that State pending a determination of her or his request, which shall be considered by a specially competent authority and shall, if necessary, be reviewed by a higher authority.²⁵⁵

3. States Parties shall ensure that persons coming directly from a territory where they faced a well-founded fear of persecution or were at risk of serious harm and whose status has been confirmed by UNHCR as entitled to international protection cannot be denied access to air, land, or sea carriers, solely because they do not have a valid right to enter the country of destination. This does not prevent States Parties from requiring carriers to identify such persons on arrival to the authorities and for States to establish specific reception procedures upon arrival.

Part III: Rights and Freedoms of All Persons Entitled to International Protection

Article 141²⁵⁶

Freedom of Thought, Conscience and Religion

In full accordance with the rights enumerated in articles 20 and 21:

All persons entitled to international protection within the States Parties territories shall always have the right to treatment at least as favorable as that accorded to nationals with respect to freedom to practice their religion and express beliefs as well as equal freedom as regards the religious education of their children.

254. U.N. General Assembly, Note on International Protection, 5-6, U.N. Doc A/AC.96/951 (Sept. 13, 2001) (modified by author); High Commissioner, Note on International Protection Addendum 1: Draft Convention on Territorial Asylum, art. 2, A/AC.96/508/Add.1 (Sept. 26 1974) (modified by author).

255. Draft Convention on Territorial Asylum, *supra* note 254, art. 4 (modified by author).

256. 1951 Refugee Convention, *supra* note 5, art. 4 (modified by author).

Article 142²⁵⁷**Personal Status**

1. The personal status of individuals entitled to international protection shall be governed by the law of the State of his or her domicile or, if he or she has no domicile, by the law of the State of his or her residence.

2. Rights previously acquired by such persons and dependent on personal status, more particularly rights attaching to marriage or other civil union, shall be respected by States Parties, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he or she not become entitled to international protection.

Article 143²⁵⁸**Movable and Immovable Property**

Individuals entitled to international protection shall have the right to treatment equal to that accorded to nationals of a State Party, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.

Article 144²⁵⁹**Artistic Rights, Industrial and Intellectual Property**

In respect of the protection of industrial and intellectual property, such as inventions, designs or models, trade marks, trade names, and of rights in literary, artistic and scientific works, a person entitled to international protection shall be accorded in the country in which he or she has his or her habitual residence the same protection as is accorded to nationals of that country. In the territory of any other States Parties, he or she shall be accorded the same protection as is accorded in that territory to nationals of the country in which he or she has his or her habitual residence.

257. *Id.* art. 12 (modified by author).

258. *Id.* art. 13 (modified by author).

259. *Id.* art. 14 (modified by author).

Article 145²⁶⁰**Right of Association**

As regards non-political associations and trade unions persons entitled to international protection lawfully staying in the territory of States Parties shall have the right to the same treatment as is accorded to nationals.

Article 146²⁶¹**Access to Courts**

In accordance with the rights enumerated in article 25, paragraphs 1-7 and paragraphs 8-9, and articles 26-28:

1. A person entitled to international protection shall have free access to the courts of law on the territory of all States Parties, as well as in all instances in which such a person is within the jurisdiction or effective control of a State.
2. A person entitled to international protection shall enjoy in the State Party in which he or she has his or her habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance.

Article 147²⁶²**Rationing**

Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, persons entitled to international protection shall be accorded the same treatment as nationals.

Article 148²⁶³**Public Relief**

Persons entitled to international protection lawfully staying in the territory of States Parties shall have the right to the same treatment with respect to public relief and assistance as is accorded to their nationals.

260. *Id.* art. 15 (modified by author).

261. *Id.* art. 16 (modified by author).

262. *Id.* art. 20 (modified by author).

263. *Id.* art. 23 (modified by author).

Part IV: Administrative Measures Under International Protection**Article 149²⁶⁴****Administrative Assistance**

1. When the exercise of a right by a person entitled to international protection would normally require the assistance of authorities of a foreign country to whom she or he cannot have recourse, State Parties in whose territory she or he is residing shall arrange that such assistance be afforded to her or him by their own authorities or by an international authority.
2. The authority or authorities mentioned in paragraph 1 of the present article shall deliver or cause to be delivered under their supervision to individuals such documents or certifications as would normally be delivered to foreign nationals by or through their national authorities.
3. Documents or certifications so delivered shall stand in the stead of the official instruments delivered to foreign nationals by or through their national authorities, and shall be given credence in the absence of proof to the contrary.
4. Subject to such exceptional treatment as may be granted to indigent persons, fees may be charged for the services mentioned herein, but such fees shall be moderate and commensurate with those charged to nationals for similar services.
5. The provisions of this article shall be without prejudice to articles 150 and 160.

Article 150²⁶⁵**Identity Papers**

States Parties shall issue identity papers to any person entitled to international protection in their territory who does not possess a valid identity document.

Article 151²⁶⁶**Fiscal Charges**

1. States Parties shall not impose upon persons entitled to international protection duties, charges or taxes, of any description whatso-

264. *Id.* art. 25 (modified by author).

265. *Id.* art. 27 (modified by author).

266. *Id.* art. 29 (modified by author).

ever, other or higher than those which are or may be levied on their nationals in similar situations.

2. Nothing in the above paragraph shall prevent the application to persons entitled to international protection of the laws and regulations concerning charges in respect of the issue to foreign nationals of administrative documents including identity papers.

Article 152²⁶⁷

Transfer of Assets

1. A State Party shall, in conformity with its laws and regulations, permit persons entitled to international protection to transfer assets which they have brought into its territory, to another country where they have been admitted for the purposes of resettlement. Any restrictions on the transfer assets may not exceed those placed on their nationals in similar situations.

2. States Parties shall give sympathetic consideration to the application of persons entitled to international protection for permission to transfer assets wherever they may be and which are necessary for their resettlement in another country to which they have been admitted.

Part V: International Refuge²⁶⁸

Article 153

Applicability of International Refuge

For the purposes of this chapter a “person eligible for international refuge” means a refugee or other forced migrant in respect of whom substantial grounds have been shown for believing that the person concerned is entitled to international protection. Such persons shall be granted “international refuge status” following either individual assessment or *prima facie* group-based determination of their claim to international protection.

267. *Id.* art. 30 (modified by author).

268. This section follows the analysis of international protection in JANE MCADAM, COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW (2007).

Article 154²⁶⁹**General Obligations Toward Beneficiaries of International Refuge**

The granting of international refuge status shall be without prejudice to recognition of refugee status under the 1951 Refugee Convention or any other Treaty, Declaration, or regional instrument pertaining to the status of refugees.

Article 155²⁷⁰**Duration of International Refuge and Cessation**

1. The cessation of international refuge status does not necessarily imply return:

(a) In situations of protracted displacement States shall as far as possible facilitate the integration and naturalization of beneficiaries of international refuge. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.²⁷¹

(b) Regardless of provisions facilitating naturalization, States shall provide persons under international refuge with permanent residency status or an equivalent legal status after a fixed period not exceeding six years. At this time, it should be assumed that the need for protection still remains and local settlement and integration should be more fully promoted.²⁷² Time spent lawfully present under international refuge shall be favorably considered for the purposes of fulfilling naturalization and permanent residency requirements. When individuals are granted international refuge status, time spent under interim protection shall be counted toward the maximum duration for which international refuge status may apply.

(c) States requiring support for resettlement programs and actions related to the integration of persons enjoying subsidiary whose stay is of a lasting and stable nature shall have access to financial and technical assistance provided by the Responsibility Sharing Mechanism”

269. Council Directive 2001/55, *supra* note 237, art. 3 (modified by author).

270. Council Directive 2001/55, *supra* note 237, arts. 4, 6; Council Directive 2011/95, *supra* note 229, art. 16 (modified by author).

271. 1951 Refugee Convention, *supra* note 5, art. 34 (modified by author).

272. European Council on Refugees and Exiles, *Position on Temporary Protection in the Context of the Need for a Supplementary Refugee Definition* (Mar. 1, 1997), <http://www.refworld.org/publisher,ECRE,POSITION,,3c0264b87,0.html>, [<https://perma.cc/X5TY-9UDC>].

and the “Global Refugee Fund” as established by Articles 211 and 213 of the present Convention.

2. A person may cease to be eligible for international refuge when the circumstances which led to the granting of international refuge status have ceased to exist or have changed to such a degree that protection is no longer required, within the fixed period noted in paragraph 1 of the present article.

3. In applying paragraph 2 of the present article, States shall have regard to whether the change in circumstances is of such a significant and non-temporary nature that the person eligible for international refuge no longer faces a real risk of serious harm.

4. Paragraph 2 of the present article shall not apply to a beneficiary of international refuge who is able to invoke compelling reasons arising out of previous fear of persecution or risk of serious harm for refusing to avail himself or herself of the protection of the State of origin or, being a stateless person, of the State of former habitual residence.

Article 156²⁷³

Exclusion

1. A person shall not be eligible for international refuge when there are serious reasons for considering that:

(a) He or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) He or she has committed a serious non-political crime outside the State of reception prior to his or her admission to that State. The severity of the expected harm is to be weighed against the nature of the criminal offense of which the person concerned is suspected. Particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes. This applies both to the participants in the crime and to its instigators;

(c) He or she has been guilty of acts contrary to the purposes and principles of the United Nations;

(d) There are reasonable grounds for regarding him or her as a danger to the security of the host State or, having been convicted by a final judgment of a particularly serious crime, he or she is a danger to the community of that State.

273. Council Directive 2001/55, *supra* note 237, art. 28 (modified by author); Council Directive 2011/95, *supra* note 229, art. 17 (modified by author).

2. The grounds for exclusion referred to in paragraph 1 of the present article shall be based solely on the personal conduct of the person concerned. Exclusion decisions or measures shall be based on the principle of proportionality.

3. An individual excluded from the benefit of international refuge under the provisions of this article shall be entitled to submit evidence to clear herself or himself, and to appeal to and be represented for the purpose before a competent authority or a person or persons specially designated by the competent authority²⁷⁴

Part VI: Obligations of States Towards Persons Enjoying International Refuge

Article 157²⁷⁵

Residence

As soon as possible after international protection has been granted, States shall issue to beneficiaries of international refuge status and their family members a residence permit which must be valid for at least three years and renewable, unless compelling reasons of national security or public order otherwise require.

Article 158²⁷⁶

Freedom of Movement

Beneficiaries of international refuge status shall have the right to choose their place of residence and to move freely within the territory of States Parties, subject to any regulations applicable to foreign nationals generally in the same circumstances.

Article 159²⁷⁷

Information

States Parties shall provide beneficiaries of international refuge, as soon as possible after international refuge status has been granted, with access to information, in a language that they understand or are reasonably supposed to understand, on the rights and obligations relating to that status.

274. Council Directive 2001/55, *supra* note 237, art. 29 (modified by author).

275. Council Directive 2011/95, *supra* note 229, art. 24 (modified by author).

276. 1951 Refugee Convention, *supra* note 5, art. 26 (modified by author).

277. Council Directive 2011/95, *supra* note 229, art. 22 (modified by author).

Article 160²⁷⁸**Travel Documents**

1. States Parties shall issue to beneficiaries of international refugee status who are unable to obtain a national passport, documents which enable them to travel outside their territory, unless compelling reasons of national security or public order otherwise require. Such documents shall comply with international standards governing the issue and recognition of travel documents. States Parties shall endeavor to provide machine readable, bio-metric travel documents to facilitate the identification of those entitled to international protection and to facilitate their mobility. States requiring such travel documents for entrance shall assist other States in making the technology affordable and available.
2. States Parties shall recognize the validity of travel documents issued in accordance with this article. Travel documents issued to refugees under previous international agreements by parties thereto shall be recognized and treated by the States Parties in the same way as if they had been issued pursuant to this article.
3. Each State Party undertakes to re-admit the holder of a travel document issued by it in accordance with this article at any time during the period of its validity.

Article 161²⁷⁹**Employment**

1. Beneficiaries of international refugee lawfully staying in the territory of States Parties shall have the right to the same treatment as is accorded to nationals as regards the right to engage in wage-earning employment immediately after international refugee status has been granted; or if the claim for international refugee remains undecided, no more than three months after the date of application for international refugee status has been filed or lodged.
2. Restrictive measures imposed on foreign nationals or the employment of foreign nationals for the protection of the national labor market shall not be applied to beneficiaries of international refugee, with the exception of general measures limiting the employment of foreign nationals in government service or in occupations specifically

278. *Id.* art. 25 (modified by author).

279. 1951 Refugee Convention, *supra* note 5, art. 17 (modified by author); aspects incorporated from 2015 SIPA Model Mobility Treaty Workshop Memo, *supra* note 235. See Council Directive 2011/95, *supra* note 229.

related to the fundamental national interests of the State.

3. States shall accord to beneficiaries of international refugee treatment as favorable as possible, and, in any event, not less favorable than that accorded to foreign nationals generally in the same circumstances, with respect to activities such as employment-related education opportunities for adults, vocational training, including training courses for upgrading skills, practical workplace experience and counseling services afforded by employment offices.²⁸⁰

4. The general law in force in States applicable to remuneration, access to social security systems relating to employed or self-employed activities and other conditions of employment shall apply. To this end, persons enjoying international refugee shall at the minimum enjoy the rights articulated in articles 58, 59, 60 paragraph 1, and 65.

Article 162²⁸¹

Self-Employment

Beneficiaries of international refugee lawfully in the territory of States Parties shall have the right to the same treatment as is accorded to nationals as regards the right to engage on their own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.

Article 163²⁸²

Liberal Professions

1. Beneficiaries of international refugee lawfully staying in the territory of States Parties who hold diplomas recognized by the competent authorities of that State, and who are desirous of practicing a liberal profession, shall be accorded treatment as favorable as possible and, in any event, not less favorable than that accorded to foreign nationals generally in the same circumstances.

2. States Parties shall promote to the fullest extent compatible with their national laws, the translation of degrees and credentials held by beneficiaries of international refugee into comparable credentials recognized by the State. When relevant, each State shall provide beneficiaries of international refugee with the opportunity to sit for qualifying exams that are relevant to their degree level.²⁸³

280. Council Directive 2011/95, *supra* note 229, art. 26 (modified by author).

281. 1951 Refugee Convention, *supra* note 5, art. 18 (modified by author).

282. *Id.* art. 19 (modified by author).

283. 2015 SIPA Model Mobility Treaty Workshop Memo, *supra* note 235.

Article 164²⁸⁴**Housing**

In so far as housing is regulated by laws or regulations or is subject to the control of public authorities, States Parties shall accord to beneficiaries of international refuge status in their territory treatment as favorable as possible, and, in any event, not less favorable than that accorded to foreign nationals legally resident in their territory.

Article 165²⁸⁵**Education**

1. All minors granted international refuge status shall have the right to primary and secondary education on the basis of equality of treatment with nationals of the State concerned. States may stipulate that such access must be confined to the state education system.

2. States Parties shall accord to beneficiaries of international refuge status treatment as favorable as possible, and, in any event, not less favorable than that accorded to foreign nationals, with respect to education other than primary and secondary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.²⁸⁶

Article 166**Access to Health Care**

1. Beneficiaries of international refuge status shall not be refused emergency medical care, including reproductive health care.

2. States Parties shall adopt measures to ensure that beneficiaries of international refuge status are provided with access to non-emergency health care that supports public health, such as immunization programs and treatment of communicable diseases.

3. States Parties shall adopt measures to ensure that beneficiaries of international refuge status receive, following a set period if there is one, the same treatment as nationals with regard to the provision of medical care.

284. 1951 Refugees Convention, *supra* note 5, art. 21 (modified by author) (baseline comes from Council Directive 2011/95, *supra* note 229).

285. *Id.* art. 22 (modified by author).

286. Council Directive 2011/95, *supra* note 229.

Part VII: Obligations of States Towards Persons Enjoying Interim Protection²⁸⁷

Article 167²⁸⁸

Applicability of Interim Protection

1. For the purposes of this chapter “interim protection” means a procedure of exceptional character to provide immediate and temporary protection, in the event of the presence, arrival, or imminent arrival of a large number²⁸⁹ of forced migrants who are unable to remain within or return to their State of origin because of the threat of serious harm of a recognizably limited duration.

2. States Parties may extend interim protection to groups not covered by paragraph 1 of the present article, in particular if there is also a clear and justified risk that the procedure for determining eligibility for international refugee status will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection.

3. Where, in the case of a sudden or mass arrival of forced migrants as described by paragraph 2 of the present article, or for other compelling reasons, a State experiences difficulties in granting or continuing to grant the benefits of international protection, other States Parties, in a spirit of international solidarity, shall take appropriate measures individually, jointly, or through the United Nations or other international bodies, to share equitably the responsibility of that State.²⁹⁰

Article 168²⁹¹

General Obligations Toward Beneficiaries of Interim Protection

1. Interim protection shall be without prejudice to recognition of refugee status under the Geneva Convention or any other Treaty, Declaration, or regional instrument pertaining to the status of refugees; it shall also be without prejudice to recognition of international refugee status under the conditions provided for in the present chapter.

287. See generally Guy S. Goodwin-Gill, *The Challenges to International Refugee Law in the Current Crisis*, 28 INT’L J. OF REFUGEE L. 552 (2016).

288. Council Directive 2001/55, *supra* note 237, art. 3 (modified by author).

289. *Id.*

290. U.N. General Assembly, *supra* note 255, art. 5; *Draft Convention on Territorial Asylum*, *supra* note 254, art. 5 (modified by author).

291. Council Directive 2001/55, *supra* note 237, art. 3 (modified by author).

2. The establishment, implementation and cessation of interim protection shall be the subject of regular consultations with the UNHCR and other relevant international organizations.

Article 169²⁹²

Duration of Interim Protection and Cessation

1. The duration of interim protection shall be one year. Unless ended under the cessation terms of this article, it may be extended automatically by six monthly periods for a maximum of one year.

2. The end of interim protection does not necessarily imply return. No later than two years after the grant of interim protection status, States Parties shall review the situation and, if the need for international protection continues, they shall grant international refugee status to the individuals concerned.²⁹³

3. A forced migrant may cease to be eligible for interim protection when the circumstances which led to the granting of interim protection status have ceased to exist or have changed to such a degree that protection is no longer required, within the fixed period noted in paragraph 1 of the present article.

4. In applying paragraph 3 of the present article, States shall have regard to whether the change in circumstances is of such a significant and non-temporary nature that the person eligible for interim protection no longer faces a real risk of serious harm.

5. Paragraph 3 of the present article shall not apply to a beneficiary of interim protection who is able to invoke compelling reasons arising out of previous serious harm for refusing to avail himself or herself of the protection of the State of origin or, being a stateless person, of the State of former habitual residence.

Article 170²⁹⁴

Exclusion

1. States may exclude a person from interim protection if there are serious reasons for considering that:

(a) He or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments

292. *Id.* arts. 4, 6. See also Council Directive 2011/95, *supra* note 229, art. 16 (modified by author).

293. ECRE, *supra* note 272, ¶ 30.

294. Council Directive 2001/55, *supra* note 237, art. 28 (modified by author).

drawn up to make provision in respect of such crimes;

(b) He or she has committed a serious nonpolitical crime outside the State of reception prior to his or her admission to that State as a person enjoying interim protection. The severity of the expected harm is to be weighed against the nature of the criminal offense of which the person concerned is suspected. Particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes. This applies both to the participants in the crime and to its instigators;

(c) He or she has been guilty of acts contrary to the purposes and principles of the United Nations;

(b) There are reasonable grounds for regarding him or her as a danger to the security of the host State or, having been convicted by a final judgment of a particularly serious crime, he or she is a danger to the community of the host State.

2. The grounds for exclusion referred to in paragraph 1 of the present article shall be based solely on the personal conduct of the person concerned. Exclusion decisions or measures shall be based on the principle of proportionality.

3. Persons who have been excluded from the benefit of interim protection by a State under the provisions of this article shall be entitled to mount a legal challenge in the State concerned.²⁹⁵

Part VIII: Obligations of States towards persons enjoying Interim Protection

Article 171²⁹⁶

Residence

1. States Parties shall adopt the necessary measures to provide persons enjoying interim protection with residence permits for the entire duration of the protection. Documents or other equivalent evidence shall be issued for that purpose.

2. Whatever the period of validity of the residence permits referred to in paragraph 1 of the present article, the treatment granted by States to persons enjoying interim protection may not be less favorable than that set out in articles 141- 152 and articles 172-176.

295. *Id.* art. 29 (modified by author).

296. *Id.* art. 8 (modified by author).

3. States shall, if necessary, provide persons to be admitted to their territory for the purposes of interim protection with every facility for obtaining the necessary visas, including transit visas. Formalities must be reduced to a minimum because of the urgency of the situation. Visas should be free of charge or their cost reduced to a minimum.

Article 172²⁹⁷

Freedom of Movement

Beneficiaries of interim protection shall have the right to choose their place of residence and to move freely within the territory of States Parties, subject to any regulations applicable to foreign nationals generally in the same circumstances.

Article 173²⁹⁸

Information

States shall provide persons enjoying interim protection with a document, in a language likely to be understood by them, in which the provisions relating to interim protection and which are relevant to them are clearly set out.

Article 174²⁹⁹

Employment

1. Persons enjoying interim protection shall have the right to engage in employed or self-employed activities for a period not exceeding that of interim protection, subject to rules applicable to the profession, immediately after interim protection has been granted; or if the claim for interim protection remains undecided, no more than three months after the date of application for interim protection has been filed or lodged. States Parties shall authorize persons enjoying interim protection to engage in activities such as educational opportunities for adults, vocational training and practical workplace experience.

2. The general law in force in each State Party applicable to remuneration, access to social security systems relating to employed or self-employed activities and other conditions of employment shall apply. To this end, persons enjoying interim protection shall at the minimum enjoy the rights articulated in articles 58, 59, 60 paragraph 1, and 65.

297. 1951 Refugee Convention, *supra* note 5, art. 26 (modified by author).

298. Council Directive 2001/55, *supra* note 237, art. 9 (modified by author).

299. *Id.* art. 12 (modified by author).

Article 175³⁰⁰**Housing**

In so far as housing is regulated by laws or regulations or is subject to the control of public authorities, States Parties shall accord to beneficiaries of interim protection status in their territory treatment as favorable as possible, and, in any event, not less favorable than that accorded to foreign nationals legally resident in their territory.

Article 176³⁰¹**Education**

1. All minors granted interim protection shall have the right to primary and secondary education on the basis of equality of treatment with nationals of the State concerned. States may stipulate that such access be confined to the public education system.

2. States Parties may allow adults enjoying interim protection access to the general education system.

Part IX: Return and Measures after International Protection has Ended**Article 177**³⁰²**Voluntary Returns**

1. States Parties shall take the measures necessary to make possible the voluntary return of persons enjoying international protection whose need for international protection has ended. In collaboration with the State of origin, States Parties shall ensure that the provisions governing voluntary return of persons enjoying international protection facilitate their return in safety and dignity, with due respect for human rights..³⁰³

2. The State of origin, on receiving back such persons, shall facilitate their reintegration. Persons enjoying international protection who re-

300. 1951 Refugee Convention, *supra* note 5, art. 21. *See also* Council Directive 2011/95, *supra* note 229, art. 21 (modified by author).

301. Council Directive 2001/55, *supra* note 237, art.14 (modified by author).

302. *Id.* art. 21 (modified by author).

303. Incorporating language from OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra* note 235, art. V(2), with reference to inter-state collaboration.

turn to their country shall in no way be penalized for having left it for any of the reasons giving rise to their need for international protection.³⁰⁴

3. Persons enjoying international protection who freely decide to return to their State of origin shall be given every possible assistance by host States, the State of origin, voluntary agencies and international and intergovernmental organizations to facilitate their return.³⁰⁵

4. States Parties shall, in collaboration with UNHCR, ensure that the decision of those persons to return is taken in full knowledge of the facts. States Parties, in cooperation with UNHCR, may provide for exploratory visits.

5. For such time as the international protection has not ended, States Parties shall, on the basis of the circumstances prevailing in the State of origin, give favorable consideration to requests for return to the host State from persons who have enjoyed international protection and exercised their right to a voluntary return.

Article 178³⁰⁶

Non-Voluntary Returns

1. States Parties shall take the measures necessary to ensure that the enforced return of persons whose need for international protection has ended and who are not eligible for admission is conducted with due respect for human dignity.

2. In cases of enforced return, States Parties shall consider any compelling humanitarian reasons which may make return impossible or unreasonable in specific cases.

3. Any type of return, including deportation, must respect the fundamental principle of the best interests of the child.³⁰⁷

4. States shall take the necessary measures concerning the conditions of residence of persons who have enjoyed international protection and who cannot, in view of their state of health, reasonably be expected to travel. They shall not be expelled so long as that situation continues.

304. *Id.* art. V(3-4) (modified by author).

305. *Id.* art. V(5), (modified by author).

306. Council Directive 2001/55, *supra* note 237, arts. 22, 23 (modified by author).

307. U.N. Secretary-General, In Safety and Dignity: Addressing Large Movements of Refugees and Migrants, *supra* note 126, ¶ 92.

CHAPTER VI
ASSISTANCE AND PROTECTION OF MIGRANT VICTIMS OF
TRAFFICKING AND MIGRANTS CAUGHT IN COUNTRIES IN CRISIS³⁰⁸

Part I: Scope and Definitions

Article 179³⁰⁹

The purposes of this Chapter are:

1. To prevent and combat the international trafficking in persons, paying particular attention to minors;
2. To protect and assist migrants who are victims of such trafficking, with full respect for their human rights;
3. To establish standards for assisting migrants caught in countries in crisis;
4. To promote cooperation among States Parties in order to meet those objectives.

Article 180³¹⁰

For the purposes of this Chapter:

1. The term “trafficking in persons” shall mean:
 - (a) The recruitment, transportation, transfer, harboring or receipt of a person who is a migrant, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.
 - (b) Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs;
 - (c) The consent of a victim of trafficking in persons to the intended exploitation set forth in paragraph 1 of this article shall be irrelevant

308. This chapter reflects the research and drafting of Kiran Banerjee and the many useful suggestions of Emma Borgnäs, Daniel Naujoks, and Susan Martin.

309. G.A. Res. 55/25, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 2 (Nov. 15, 2000) (modified by author).

310. *Id.* art. 3 (modified by author).

where any of the means set forth in paragraph 1 have been used;

(d) The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph 1 of this article;

2. The term “migrants in countries in crisis” shall apply to:

Any person outside her or his State of origin, or in the case of a stateless person, her or his State of former habitual residence, who is at risk of serious harm due to being caught in a country experiencing a crisis.³¹¹

3. The term “crisis” shall apply to:

Events constituted by natural disasters, such as hurricanes, earthquakes, or floods, or conflict, such as civil unrest, generalized violence, international or internal armed conflict, whose magnitude demands a significant humanitarian response by the authorities of the country experiencing a crisis and/or by the international community. A crisis can affect the whole country or parts of it.

Part II: Protection of Migrant Victims of Trafficking

Article 181³¹²

Assistance to and Protection of Migrant Victims of Trafficking in Persons

1. In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.

2. Each State Party shall provide the basic benefits and services described below to victims of trafficking in persons in their territory or jurisdiction without regard to the immigration status of such victims or the ability or willingness of the victim to participate in the investigation or prosecution of his or her alleged trafficker.³¹³

3. Each State Party shall ensure that its domestic legal or administra-

311. Int’l. Org. for Migration [IOM], *Migrants in Countries in Crisis Working Group Concept Note* (Feb 14, 2014) [hereinafter *MICIC Concept Note*] (modified by author).

312. G.A. Res. 55/25, *supra* note 309, arts. 6–7 (modified by author)..

313. U.N. Off. on Drugs and Crime, *Model Law Against Trafficking Persons*, art. 20(1), U.N. Sales No. E.09.V.11 (2009) (modified by author).

tive system contains measures that provide to victims of trafficking in persons, in appropriate cases:

- (a) Information on relevant court and administrative proceedings;
- (b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defense.

4. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of:

- (a) Appropriate housing;
- (b) Counseling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;
- (c) Medical, psychological and material assistance;
- (d) Employment, educational and training opportunities.

5. In appropriate cases and to the extent possible, assistance shall be provided to the accompanying dependents of the victim.³¹⁴

6. Victims of trafficking in persons shall not be held in any detention facility as a result of their status as victims or their immigration status.³¹⁵

7. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care. All assistance services shall be provided on a consensual and informed basis and while taking due account of the special needs of children and other persons in a vulnerable position.³¹⁶

8. Each State Party shall endeavor to provide for the physical safety of victims of trafficking in persons while they are within its territory.

9. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possi-

314. *Id.* art. 20(3) (modified by author).

315. *Id.* art. 20(4) (modified by author).

316. *Id.* art. 20(5) (modified by author).

bility of obtaining compensation for damage suffered.

Article 182³¹⁷

Child Victims of Trafficking in Persons

In addition to any other guarantees provided for in this Convention:

1. Child victims, especially infants, shall be given special care and attention;
2. When the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she shall be presumed to be a child and shall be treated as such, pending verification of his or her age;
3. Assistance to child victims shall be provided by specially trained professionals and in accordance with their special needs, especially with regard to accommodation, education and care;
4. If the victim is an unaccompanied minor the State party shall: Appoint a legal guardian to represent the interests of the child; Take all necessary steps to establish his or her identity and nationality; Make every effort to locate his or her family when this is in the best interest of the child;
5. Information may be provided to child victims through their legal guardian or, in case the legal guardian is the alleged offender, a support person;
6. Child victims shall be provided with information in a language that they use and understand and in a manner that is understandable to them.

Article 183³¹⁸

Non-liability and Non-punishment of Victims of Trafficking in Persons

Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.

317. *Id.* art. 22 (modified by author).

318. *Id.* art. 10 (modified by author).

Article 184³¹⁹**Status of Migrant Victims of Trafficking in Persons in Receiving States**

1. In addition to taking measures pursuant to articles 181 to 183 of this Chapter, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.

2. In implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors.

Article 185³²⁰**Repatriation of Migrant Victims of Trafficking in Persons**

1. The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State Party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.

2. When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence, such return shall be with due regard for the safety and dignity of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.

3. At the request of a receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who is a victim of trafficking in persons is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving State Party.

4. In order to facilitate the return of a victim of trafficking in persons who is without proper documentation, the State Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving State Party shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

319. G.A. Res. 55/25, *supra* note 309, arts. 7-8 (modified by author).

320. *Id.* art. 8 (modified by author).

5. This article shall be without prejudice to any right afforded to victims of trafficking in persons by any domestic law of the receiving State Party.

6. This article shall be without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons.

Part III: Migrants Caught in Countries in Crisis

Article 186³²¹

General Responsibilities of States

1. States Parties acknowledge that, in accordance with general international law, States experiencing conflicts or natural disasters have responsibilities towards those present in their territory, including migrants, regardless of their immigration status.

2. States Parties recognize that, in accordance with general international law, States of origin also bear responsibility for the safety and welfare of their nationals, even when those nationals are living, working, traveling, or transiting in other countries.

Article 187³²²

Facilitating Internal Mobility in Countries in Crisis

1. Where protection cannot be provided locally, the host State should facilitate the immediate relocation of migrants in countries in crisis to other parts of the host State where they may escape harm during a conflict or natural disaster.

2. In host States where the ability of migrants in countries in crisis to move to safety may be limited by visa and work permits that restrict her or his to particular geographic areas or employers, States should waive restrictions or lift penalties for violating restrictions during a conflict or natural disaster on humanitarian grounds and to improve such persons access to help.

321. IOM, *Migrants in Countries in Crisis Initiative Guidelines to Protect Migrants in Countries Experiencing Conflict or Natural Disaster*, at 25-26, Guideline 3 (2016) (modified by author).

322. *Id.* at 33-34, Guideline 10 (modified by author).

Article 188³²³**Facilitating International Mobility in Countries in Crisis**

1. Where protection cannot be effectively provided to migrants in countries in crisis by a host State experiencing a conflict or natural disaster, efforts should be made to facilitate the temporary evacuation of individuals to States of transit or their direct repatriation to their State of origin. In doing so, States must ensure that individuals who may face persecution, or, as appropriate, serious harm or other life-threatening situations in their States of origin or other States, including refugees and other forced migrants, are protected against refoulement in manner consistent with the provisions of articles 138-140.

2. Host States should facilitate access to valid identity and travel documents for migrants in countries in crisis seeking to cross international borders to escape harm during a conflict or natural disaster, in particular by allowing States of origin to provide consular assistance to their nationals, or in the case of stateless persons, by supporting the relevant international authorities in providing similar assistance.³²⁴

3. Host States, and States of transit that migrants in countries in crisis may be compelled to enter while seeking safety during a conflict or natural disaster, should minimize the barriers individuals may face in meeting visa requirements, securing immigration exit visas, paying immigration fees or penalties for overstay, and fulfilling entry requirements.

Article 189³²⁵**Repatriation to State of Origin**

States Parties acknowledge that, in accordance with general international law, the State of origin of a migrant in a country in crisis holds special responsibility for the provision of assistance and effective protection. Accordingly, the State of origin should provide for appropriate measures, through consular action and negotiations with the host State or states of transit, to assist its nationals as well as support their voluntary repatriation when necessary.

323. *Id.*

324. *Id.* at 26, Sample Practices from Guideline 3 (modified by author).

325. *MICIC Concept Note*, *supra* note 311.

Article 190

Emergency Temporary Protection

In situations in which a crisis arising from a conflict or natural disaster presents an ongoing threat to a person in a host State and requires them to cross international borders to escape harm, States of transit should temporarily provide interim protection on humanitarian grounds to migrants in countries in crisis, pending their safe and humane repatriation to their State of origin or their ability to voluntarily return to the host State.

Part IV: Prevention of Trafficking, Cooperation and other Measures

Article 191³²⁶

Prevention of International Trafficking in Persons

1. States Parties shall establish comprehensive policies, programs and other measures:

- (a) To prevent and combat trafficking in persons;
- (b) To protect victims of trafficking in persons, especially women and children, from revictimization.

2. States Parties shall endeavor to undertake measures such as research, information and media campaigns and social and economic initiatives to prevent and combat trafficking in persons.

3. Policies, programs and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

4. States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.

5. States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially

326. G.A. Res. 55/25, *supra* note 309, art. 9 (modified by author).

women and children, that leads to trafficking.

CHAPTER VII FAMILY REUNIFICATION³²⁷

Part I: Scope and Definitions

Article 192

1. Family unity is a widely recognized legitimate reason for migration and is a central right protected by international human rights and humanitarian law. Numerous international legal instruments contain explicit references to the right to family life.³²⁸

2. Family reunification is equally widely recognized as an essential feature of both immigration and refugee law.³²⁹

327. This chapter has benefitted from the research and drafting of Hila Wesa, with suggestions from Yasmine Ergas, Diego Acosta and Donald Kerwin.

328. Examples include: Universal Declaration of Human Rights, *supra* note 244, art. 16 (which provides that anyone has the right to marry and found a family); International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171; ICESCR, *supra* note 109; European Convention for the Protection of Human Rights, *supra* note 252, art. 8 (providing that everyone has the right to respect for his private and family life); European Social Charter, art. 19, (May 3, 1996), 529 U.N.T.S. 89 (providing that states must make every effort to facilitate the family reunion of migrant workers resident in a foreign country); European Convention on the Legal Status of Migrant Workers, art. 12, (Nov. 24, 1997), E.T.S. 93 (providing for family reunion); and the United Nations Convention on the Rights of the Child, *supra* note 18 (stressing the protection of the children's best interests). In some jurisdictions family reunification is recognized as an individual subjective right. See in the EU's context among others: 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, 2004 O.J. (L 158) 77; Directive 2003/86, *supra* note 330; Directive 2009/50, of the Council of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, 2009 O.J. (L155) 17. This is implemented as a right in all domestic laws in twenty-five countries in the EU bound by these directives. Family reunification as a right can also be found in the laws of certain Latin American countries including Argentina, Law No. 25871, arts. 3(d) & 10, Jan. 20, 2004, B.O. (Arg.); Bolivia, Law No. 370, art. 12(II)(8), May 8, 2013, G.O. (Bol.); Brazil, Migration Law No. 13.445, art. 4(3), May 24, 2017; Peru, Legislative Decree No. 1350/2017, art. 37, Jan. 7, 2017; Uruguay, Art. 8 Law No. 18.250, art. 8, Jan. 6, 2008. This is also the case in the Residency Agreement for Nationals of MERCOSUR Member States, Bolivia, and Chile, art. 9, Dec. 6, 2002, MERCOSUR/RMI/CT/ACTA no. 04/02.

329. See Zoya Gubernskaya & Joanna Dreby, US Immigration Policy and the Case for

Article 193

States Parties, recognizing that the family is a natural and fundamental group unit of society and is entitled to protection by society and the state, shall take appropriate measures to ensure the protection of the unity of the families.

For the purposes of the present Convention, family³³⁰ shall include:

1. Members of the Nuclear Family, including:

- (a) The sponsor's spouse;
- (b) The sponsor's spouse; or the sponsor's unmarried partner, with whom the sponsor is in a duly attested stable long-term relationship, in accordance with the national law of the state of origin;
- (c) The minor children, including adopted children, of the sponsor and/or of his/her spouse;
- (d) The minor children, including adopted children, of the sponsor where the sponsor has full or partial custody and, where custody is shared, provided the other party sharing custody has given his or her consent;
- (e) The minor children, including adopted children, of the sponsor's spouse, where the spouse has full or partial custody and, where custody is shared, provided the other party sharing custody has given his or her consent; or
- (f) The adult unmarried children of the sponsor or his or her spouse, including adopted children, where they are objectively unable to provide for their own needs on account of their state of health, disability or other analogous circumstances.
- (g) In cases of conflicts of interpretation arising from different nationalities, States Parties shall adopt an interpretation most in line with the right to family life.

2. Members of the Extended Family, defined as:

- (a) The parents and other first-degree relatives in the direct ascending line of the sponsor or his or her spouse;
- (b) Any other person³³¹ who is dependent on the sponsor, or his/her

Family Unity, 5 J. ON MIGRATION AND HUM. SECURITY 417 (2017).

330. Directive 2003/86, of the Council of the European Union of 22 September 2003 on the Right to family reunification, art. 4, 2003 O.J. (L 251) 14-15 (EC).

331. See Rights and Guarantees of Children in the Context of Migration and/or in Need

spouse, and is recognized as such by the applicable legislation of the State of origin and the host State, or applicable bilateral or multilateral agreements between the States concerned, taking into consideration the provisions in paragraph 1 (g) of the present Article.

Part II: Visitors, Tourists and Students

Article 194

Visitors and Tourists

Unless the host State's applicable immigration legislation provides otherwise, third country nationals in tourist or visitor status do not qualify for family reunification privileges in the host State.

Article 195

Students

A third country national in student status may ordinarily apply to be joined by his or her Nuclear Family members in the host State provided the following conditions are satisfied:

1. The sponsoring student must hold a residence permit valid for at least one year;³³²

of International Protection, Advisory Opinion OC-21/14, Inter. Am. Ct. H.R. at 105 ¶ 272 (Aug. 19, 2014). *See also* Committee on the Rights of the Child, General Comment No. 7: Implementing Child Rights in Early Childhood, ¶ 15, 19, U.N. Doc. CRC/C/GC/ 7/Rev.1 (Sept. 20, 2006) (“The Committee recognizes that “family” here refers to a variety of arrangements that can provide for young children’s care, nurturance and development, including the nuclear family, the extended family, and other traditional and modern community-based arrangements, provided these are consistent with children’s rights and best interests. [...] The Committee notes that in practice family patterns are variable and changing in many regions, as is the availability of informal networks of support for parents, with an overall trend towards greater diversity in family size, parental roles and arrangements for bringing up children.”); U.N. Human Rights Committee, CCPR General Comment No. 19: (The Family), Protection of the Family, the Right to Marriage and Equality of the Spouses, ¶ 2, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), (May 27, 2008). (“The Committee notes that the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition”); U.N. Human Rights Committee, CCPR General Comment No16: Right to Privacy (Article 17), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, ¶ 5, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), (Apr. 8, 1998). (“Regarding the term “family”, the objectives of the Covenant require that for purposes of Article 17 this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned”).

332. Directive 2003/86, *supra* note 330, art. 3.

2. The sponsoring student shall provide proof of sufficient resources to cover the family's living expenses, including housing and medical insurance, without resort to the host State's public welfare system.
3. Host States may provide work visas to spouses.

Part III: Migrant Workers, Investors and Residents

Article 196

States Parties shall take appropriate measures to ensure the protection of the unity of the families, particularly the Nuclear Families, of migrant workers, migrant investors and migrant residents.³³³

Article 197

States Parties shall take the necessary measures that fall within their competence to facilitate the reunification of migrant workers with their Nuclear Families provided the respective migrant workers satisfy the following conditions:

1. The sponsoring migrant resident or migrant worker must hold a residence permit valid for at least one year;
2. The sponsoring migrant resident or migrant worker shall provide proof of sufficient resources to cover his/her family's living expenses, including housing and medical insurance, without resort to the host State's public welfare system, unless the host state extends rights and benefits to the family members of such workers;
3. Any other relevant conditions as prescribed by the applicable laws of the host State.

Article 198

States Parties shall, on humanitarian grounds, favorably consider granting equal treatment to Extended Family members of migrant workers that meet the conditions of Article 119.

333. G.A. Res. 45/158, *supra* note 12, art. 44; MW, *supra* note 12, art. 44.

Part IV: Refugees, Forced Migrants and Asylum Seekers³³⁴**Article 199**

1. States Parties shall take appropriate and expedited measures to ensure the active protection of the family members of refugees and other forced migrants. In particular, States Parties shall take measures to facilitate the reunification of:

(a) The Nuclear Families of beneficiaries of international protection who cannot lawfully be returned to their State of origin;³³⁵ and,

(b) The Extended Families of beneficiaries of international protection who cannot lawfully be returned to their State of origin.

2. States Parties shall take measures to allow the children of beneficiaries of international protection to apply for derivative international protection and shall allow parents of children who are beneficiaries of international protection to apply for derivative international protection.

3. Resettlement and family reunification efforts taken in pursuance of this article should prioritize the discretion and interests of family members.

Article 200

The provisions of the present Convention pertaining to refugees and other beneficiaries of international protection are without prejudice to any rules granting refugee status or international protection to their family members, respectively. Such family members acquire all the

334. Refugees, as defined by the *1951 Convention relating to the Status of Refugees*, and other forced migrants accorded international protection in accordance with the international principle of *non-refoulement*, have a right to be reunited with their family in their country of asylum. While the Refugee Convention is silent on the question of family reunification, the *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons* provides that “[states] take the necessary measures for the protection of the refugee’s family, especially with a view to [...] ensuring that the unity of the refugee’s family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country.” See U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, U.N. Doc A/CONF.2/108/Rev.1, (July. 25, 1951). UNHCR’s Executive Committee has furthermore concluded that respect for family unification is a minimum basic human standard that must be provided to all forced migrants, including persons benefiting from interim protection. See Kate Jastram, *Family Unity: The New Geography of Family Life*, <http://www.migrationpolicy.org/article/family-unity-new-geography-family-life>, [<https://perma.cc/43QB-4GWJ>].

335. G.A. Res. 45/158, *supra* note 12, art. 44; MW, *supra* note 12, art. 44.

rights pertaining to refugees and those receiving international protection.

CHAPTER VIII TREATY BODY³³⁶

Part I: Application of the Convention

Article 201³³⁷

The Committee

1. (a) For the purpose of reviewing the application of the present Convention, there shall be established a Committee on the Rights and Duties of All Persons Moving from One State to Another and of the States they Leave, Transit or Enter (hereinafter referred to as “the Committee”);

(b) The Committee shall consist, at the time of entry into force of the present Convention, of ten and, after the entry into force of the Convention for the forty-first State Party, of fourteen experts of high moral standing, impartiality and recognized competence in the field covered by the Convention.

2. (a) Members of the Committee shall be elected by secret ballot by the States Parties from a list of persons nominated by the States Parties, due consideration being given to equitable geographical distribution, including both States of origin and States of destination, and to the representation of the principal legal systems. Each State Party may nominate one person from among its own nationals;

(b) Members shall be elected and shall serve in their personal capacity.

3. The initial election shall be held no later than six months after the date of the entry into force of the present Convention and subsequent elections every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to all States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties that have nominated them, and shall submit it to the States Parties not later than one month before the date of the corre-

336. Provisions for Articles 201-205 and 207 are drawn from the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (MW), *supra* note 12. This chapter has benefitted from the suggestions of Sarah Rosengaertner, Guy Goodwin-Gill, Kiran Banerjee and T. Alexander Aleinikoff.

337. G.A. Res. 45/158, *supra* note 12, art. 72; MW, *supra* note 12, art. 72 (modified by author).

sponding election, together with the curricula vitae of the persons thus nominated.

4. Elections of members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the States Parties present and voting.

5. (a) The members of the Committee shall serve for a term of four years. However, the terms of five of the members elected in the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting of States Parties;

(b) The election of the four additional members of the Committee shall be held in accordance with the provisions of paragraphs 2, 3 and 4 of the present article, following the entry into force of the Convention for the forty-first State Party. The term of two of the additional members elected on this occasion shall expire at the end of two years; the names of these members shall be chosen by lot by the Chairman of the meeting of States Parties;

(c) The members of the Committee shall be eligible for re-election if renominated.

6. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party that nominated the expert shall appoint another expert from among its own nationals for the remaining part of the term. The new appointment is subject to the approval of the Committee.

7. The Committee will request the Secretary-General of the United Nations to provide the necessary staff and facilities for the effective performance of the functions of the Committee.

8. The members of the Committee shall receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide.

9. The members of the Committee shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 202³³⁸**Reports**

1. States Parties undertake to submit to the Secretary-General of the United Nations for consideration by the Committee a report on the legislative, judicial, administrative and other measures they have taken to give effect to the provisions of the present Convention:

(a) Within one year after the entry into force of the Convention for the State Party concerned;

(b) Thereafter every five years and whenever the Committee so requests.

2. Reports prepared under the present article shall also indicate factors and difficulties, if any, affecting the implementation of the Convention and shall include information on the characteristics of migration flows in which the State Party concerned is involved.

3. The Committee shall decide any further guidelines applicable to the content of the reports.

4. States Parties shall make their reports widely available to the public in their own countries.

5. Agencies, funds and programs of the United Nations, other international organizations and civil society organizations are invited to submit complementary reports on the implementation of the present Convention.

Article 203³³⁹**Reporting and Dissemination**

1. The Committee shall examine the reports submitted by each State Party and shall transmit such comments as it may consider appropriate to the State Party concerned. This State Party may submit to the Committee observations on any comment made by the Committee in accordance with the present article. The Committee may request supplementary information from States Parties when considering these reports.

2. The Secretary-General of the United Nations shall be invited, in due time before the opening of each regular session of the Commit-

338. G.A. Res. 45/158, *supra* note 12, art. 73; MW, *supra* note 12, art. 73 (modified by author).

339. G.A. Res. 45/158, *supra* note 12, art. 74; MW, *supra* note 12, art. 74 (modified by author).

tee, to transmit to the Director-General of the International Organization for Migration, the Office of the United Nations High Commissioner for Refugees, the Director-General of the International Labor Office, the chair of the Global Migration Group and other officials what the Secretary-General deems relevant copies of the reports submitted by States Parties concerned and information relevant to the consideration of these reports, in order to enable those offices to assist the Committee with the expertise the offices may provide regarding those matters dealt with by the present Convention that fall within their spheres of competence. The Committee shall consider in its deliberations such comments and materials as the Office may provide.

3. The Secretary-General of the United Nations may also, after consultation with the Committee, transmit to other specialized agencies as well as to intergovernmental organizations, copies of such parts of these reports as may fall within their competence.

4. The Committee may invite the specialized agencies and organs of the United Nations, as well as intergovernmental organizations and other concerned bodies including nongovernmental organizations and representatives of migrants and refugees to submit, for consideration by the Committee, written information on such matters dealt with in the present Convention as fall within the scope of their activities.

5. The International Organization for Migration, the Office of the United Nations High Commissioner for Refugees, the International Labor Office and other relevant agencies shall be invited by the Committee to appoint representatives to participate, in a consultative capacity, in the meetings of the Committee.

6. The Committee may invite representatives of other specialized agencies and organs of the United Nations, as well as of intergovernmental organizations, to be present and to be heard in its meetings whenever matters falling within their field of competence are considered.

7. The Committee shall present an annual report to the General Assembly of the United Nations on the implementation of the present Convention, containing its own considerations and recommendations, based, in particular, on the examination of the reports and any observations presented by States Parties. Reports may indicate factors and difficulties affecting the degree of fulfillment of obligations under the present Convention.

8. The Secretary-General of the United Nations shall transmit the annual reports of the Committee to the States Parties to the present Convention, the Economic and Social Council, the Human Rights

Council of the United Nations and other relevant organizations.

Article 204³⁴⁰

Rules of Procedure

1. The Committee shall adopt its own rules of procedure.
2. The Committee shall elect its officers for a term of two years.
3. The Committee shall normally meet annually.
4. In the event of urgent and pressing circumstances related to the provisions of this Convention—such as those related to the effective provision of international protection—the Secretary-General of the United Nations shall convene an emergency meeting of the Committee and shall instruct it to report its findings to the General Assembly of the United Nations
5. The meetings of the Committee shall normally be held at the United Nations Headquarters in Geneva.

Article 205³⁴¹

Disputes Concerning Compliance

1. Communications under this article will be received and considered from all States Parties that have not made a declaration opting out of the reporting mechanism for claims that another State Party is not fulfilling its obligations under the present Convention. A State Party to the present Convention may at any time declare under this article that it does not recognize the competence of the Committee to receive and consider such claims on noncompliance and no communication shall be received by the Committee if it concerns a State Party which has made such an opting out declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Convention considers that another State Party is not fulfilling its obligations under the present Convention, it may, by written communication, bring the matter to the attention of that State Party. The State Party may also inform the Committee of the matter. Within three months after the receipt of the communication the receiving State shall afford the State that sent the communication an explanation, or any other statement in writing

340. G.A. Res. 45/158, *supra* note 12, art. 75; MW, *supra* note 12, art. 75 (modified by author).

341. G.A. Res. 45/158, *supra* note 12, art. 76; MW, *supra* note 12, art. 76 (modified by author).

clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available, effective and sufficient domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where, in the view of the Committee, the application of the remedies is unreasonably prolonged;

(d) Subject to the provisions of subparagraph (c) of the present paragraph, the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of the respect for the obligations set forth in the present Convention;

(e) The Committee shall hold closed meetings when examining communications under the present article;

(f) In any matter referred to it in accordance with subparagraph (b) of the present paragraph, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b) of the present paragraph, shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b) of the present paragraph, submit a report to all States Parties, as follows:

i. If a solution within the terms of subparagraph (d) of the present paragraph is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

ii. If a solution within the terms of subparagraph (d) is not reached, the Committee shall, in its report, set forth the relevant facts concerning the issue between the States Parties concerned. The written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. The Committee may also communicate only to the States Parties concerned any views that

it may consider relevant to the issue between them;

iii. If a dispute has not or is not likely to lead to resolution, the Committee can refer that dispute to the UN General Assembly or Security Council or, for States Parties that have accepted compulsory jurisdiction, to the International Court of Justice.

2. The provisions of the present article shall come into force when ten States Parties to the present Convention have made a declaration under paragraph 1 of the present article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter that is the subject of a communication already transmitted under the present article; no further communication by any State Party shall be received under the present article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

3. The provisions of paragraphs 1 and 2 of the present article shall be applied without prejudice to any procedures for settling disputes or complaints in the field covered by the present Convention laid down in the constituent instruments of, or in conventions adopted by, the United Nations and the specialized agencies and shall not prevent the States Parties from having recourse to any procedures for settling a dispute in accordance with international agreements in force between them.

Article 206

Issuance of Advisory Opinions and Authoritative Guidance

A State Party may at any time call upon the Committee to offer authoritative guidance on the interpretation of the present Convention. The Committee shall also have the capacity to issue general comments and advisory opinions regarding the interpretation of this Convention.

Article 207³⁴²

Individual Communications

1. A State Party to the present Convention may at any time declare under the present article that it recognizes the competence of the

342. G.A. Res. 45/158, *supra* note 12, art. 77; MW, *supra* note 12, art. 77 (modified by author).

Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim that their individual rights as established by the present Convention have been violated by that State Party. No communication shall be received by the Committee if it concerns a State Party that has not made such a declaration.

2. The Committee shall consider inadmissible any communication under the present article which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the present Convention.

3. The Committee shall not consider any communication from an individual under the present article unless it has ascertained that:

(a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement;

(b) The individual has exhausted all available domestic remedies; this shall not be the rule where, in the view of the Committee, the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to that individual.

4. Subject to the provisions of paragraph 2 of the present article, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to the present Convention that has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

5. The Committee shall consider communications received under the present article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned.

6. The Committee shall hold closed meetings when examining communications under the present article.

7. The Committee shall forward its views to the State Party concerned and to the individual.

8. The provisions of the present article shall come into force when ten States Parties to the present Convention have made declarations under paragraph 1 of the present article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter that is the subject of a communication al-

ready transmitted under the present article; no further communication by or on behalf of an individual shall be received under the present article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party has made a new declaration.

Article 208³⁴³

National Implementation and Monitoring

1. States Parties, in accordance with their system of organization, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.
2. States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, at the latest one year after the entry into force of the present Convention or of its ratification or accession, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights (The Paris Principles)³⁴⁴ and guarantee their functional independence as well as the independence of their personnel.
3. Civil society, including migrants and their representative organizations, shall be invited to participate fully in the monitoring process.
4. The States Parties shall take the necessary measures to ensure that the experts of the independent mechanism/s have the required capabilities and professional knowledge. They shall strive for a gender balance and the adequate representation of ethnic and minority groups in the country. The States Parties undertake to make available the necessary resources for the functioning of the national preventive

343. This article draws on valuable suggestions from Diego Acosta inspired by the following authorities: Convention on the Rights of Persons with Disabilities art. 33, Dec. 13, 2006, 2515 U.N.T.S. 3; Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment arts. 17-23, Dec. 18, 2002, 42 I.L.M. 26. This article also reflects reforms proposed by B.S. Chimni for "dialogic deliberation" in *Reforming the International Refugee Regime: A Dialogic Model*, 14 J.O. REFUGEE STUD. 2 151-68 (2001).

344. G.A. Res. 48/134, National Institutions for the Promotion and Protection of Human Rights (Dec. 20, 1993).

mechanisms.

5. The independent mechanism/s shall be granted at a minimum the power:

(a) To make recommendations to the relevant authorities with the aim of promoting, protecting and monitoring implementation of the present Convention;

(b) To submit proposals and observations concerning existing or draft legislation;

(c) To follow up on the effective adoption and implementation of the recommendations by the Committee on the Rights and Duties of All Persons Moving from One State to Another and of the States they Leave, Transit or Enter.

6. The competent authorities of the State Party concerned shall examine the recommendations of the independent mechanism/s and enter into a dialogue with it on possible implementation measures.

7. The States Parties to the present Convention undertake to publish and disseminate the annual reports of the national independent mechanisms.

Part II: Coordinating and Facilitating International Economic Migration

Article 209

Mobility Visa Clearing House

1. The Committee shall establish a “Mobility Visa Clearing House” web platform accessible by States Parties, corporations, nongovernmental organizations and individuals to facilitate the safe, orderly and regular migration of individuals.³⁴⁵

2. All States Parties to the present convention will list the number and kind of labor and investor visas they propose to offer for the following year and provide links to the government websites that provide visa application forms and information regarding application requirements to all and links to online visa application processes through which individuals may apply or employers may petition governments on behalf of prospective employees from abroad.³⁴⁶

345. Report of the Special Representative of the Secretary-General on Migration, U.N. Doc. A/71/728 (Feb. 3, 2017).

346. *Id.* ¶ 61; Rey Koslowski, *Shifts in Selective Migration Policy Models: A Compari-*

(a) The Committee shall assist state parties that do not have government website with visa application forms and information by requesting technical assistance from fellow state parties that do have such websites.

(b) State parties are further encouraged to establish online visa application processes in order to expedite and facilitate safe, orderly and regular migration.

(c) State parties that already have online visa application processes are encouraged to consider developing web platforms that enable prospective visa applicants to post “expressions of interest” detailing those individuals’ skills and qualifications and enable employers to view these expressions of interest and contact prospective employees whose work visa petitions they may choose to sponsor

3. The International Labor Organization will be invited to specify the skills classifications for these visas and assist States Parties in certifying the information needed to meet the classifications.

4. Individuals and sponsoring nongovernmental organizations, corporations, local governments and States Parties can propose candidates for those visas, including the requested documentation.

5. States Parties issuing the visas retain the discretion to accept or reject the credentialing guidelines provided by the International Labor Organization and determining whether a specific individual meets its criteria.

6. At the minimum States Parties will take measures to give preference to refugees and forced migrants in the allocation of at least 10% of all annual labor visas. This shall be met on the basis of States’ participation in the Mobility Visa Clearing House or, prior to implementation, as part of States Parties domestic immigration programs and policies. The award of these preferential labor visas does not subtract from or substitute for any of the protections granted to refugees and forced migrants on the basis of their protected status.

7. In allocating labor migration visas to persons covered in paragraph 6 due consideration will be given to the resettlement and mobility interests of refugees and to the circumstances of their current host communities.

son of Australia, Canada, and the U.S., in HIGH-SKILLED MIGRATION: DRIVERS AND DYNAMICS (Mathias Czaika eds., forthcoming Feb. 2018). Based on research by Michael Clemens, CENTER FOR GLOBAL DEVELOPMENT, <https://www.cgdev.org/expert/michael-clemens> [<https://perma.cc/ARX2-J8S7>] (last visited Dec. 8, 2017).

Article 210

Remittance Subcommittee

1. The Committee in cooperation with the International Fund for Agricultural Development, the International Organization for Migration and the World Bank will establish a Remittance Subcommittee.³⁴⁷
2. The Subcommittee will issue an annual report surveying the facility and costs of remittances from migrants to their designated recipients for the purpose of making recommendations for reducing costs and ensuring reliable delivery of funds.

Part III: Coordination and Cooperation on International Protection

Article 211

Responsibility Sharing

1. The Office of the United Nations High Commissioner for Refugees will be invited to issue an annual report documenting the number of recognized refugees and forced migrants and their current location of asylum and costs per person of that asylum.
2. The Committee in conjunction with UNHCR will host an annual meeting for all States Parties at which UNHCR will publish the “responsibility shares” of each State Party. At the first such meeting these shares shall be a combined function of 40% of the size of the population, 40% of GDP, 10% of the average number of refugee and forced migrant asylum applications in the previous year, and 10% of the unemployment rate.³⁴⁸ To avoid excessive shares occasioned by a single factor, such as large population, each factor of the top five States will be capped at the level of the fifth in rank order. In subsequent years, the States Parties by a two thirds vote of the Committee will set as it sees fit the appropriate proportions of the responsibility

347. Rep. of the Special Representative of the Secretary-General on Migration, *supra* note 345, ¶¶ 66-67.

348. Based on Commission Proposal for a Regulation of the European Parliament and of the Council Establishing a Crisis Relocation Mechanism and amending Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third Country National or Stateless Person, COM (2015) 450 final (Sept. 9, 2015). Based on European Commission (2015b) COM (2015) 450 final. 2015/0208 (COD). Proposal for a Regulation of the European Parliament and of the Council. Brussels: European Commission.

sharing formula.

3. Each State Party will pledge the number of resettlement visas for refugees and forced migrants and the amount of funding that it will provide in the coming year, explaining how it meets its responsible share of the global commitment to cooperate to assist refugees and forced migrants. No State Party will meet its responsible share solely by resettlement or solely by funding.

4. UNHCR will be requested to monitor these pledges, reflect upon their collective sufficiency, report on the fulfillment by each State Party of its responsible share of resettlement and funding and publish those assessments in each subsequent annual report on responsibility sharing.

5. States Parties will encourage the formation of bilateral and multi-lateral capacity-building networks aimed at (a) facilitating contact and exchange of international protection know-how between States Parties; and (b) refining and promoting best practices for accommodating refugees received via responsibility sharing.³⁴⁹

Article 212

Comprehensive Global Planning Platform

1. The Committee in cooperation with UNHCR and IOM will establish a "Comprehensive Global Planning Platform" in cooperation with donor States Parties, the World Bank and Foundations.³⁵⁰

2. The Comprehensive Global Planning Platform will establish working groups to propose solutions to protracted refugee situations with the aim of facilitating return, local integration or resettlement.

3. The Platform in order to improve the quality of global deliberation and problem solving for migrants and refugees will also establish a research function to report and assess the flow of global visitors, refugees and migrants as well as their impacts on countries of origin, transit and destination.

4. The Platform will liaise with the global private and nongovernmental sector to promote partnerships to better serve the interests of migrants, refugees and States Parties.

349. This subparagraph is a suggestion from Steven Nam.

350. This planning platform builds on a suggestion from T. Alexander Aleinikoff.

Article 213**Global Refugee Fund**

1. The Committee will establish a voluntary “Global Refugee Fund” inviting the cooperation of UNHCR, IOM, donor States Parties, the World Bank and other relevant agencies.³⁵¹
2. The Global Refugee Fund will be invited to supplement the responsibility sharing mechanism and directed to support:
 - (a) The efforts of States in receiving refugees and displaced persons and in guaranteeing access to consistent, fair and effective asylum procedures;
 - (b) Resettlement programs and actions related to the integration of persons whose stay is of a lasting and stable nature;
 - (c) The provision of emergency measures to address sudden arrivals of large numbers of persons who may be in need of international protection.
3. The Global Refugee Fund shall be governed by a Board composed of two members of the Committee as Chair and Chair designate; one representative each invited from UNHCR, IOM and the World Bank; and the four leading donor States and two private donors in the preceding two years.
4. States Parties can allocate financial pledges made in fulfillment of the “responsibility share” mechanism in article 211 to this Fund.

351. High Level Panel on Humanitarian Financing, Report to the Secretary General: Too Important to Fail—Addressing the Humanitarian Financing Gap (Jan. 2016), <https://reliefweb.int/sites/reliefweb.int/files/resources/%5BHLF%20Report%5D%20Too%20important%20to%20fail—addressing%20the%20humanitarian%20financing%20gap.pdf>, [<https://perma.cc/BKA8-K3P2>].

