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

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Invoking surging migration, national-populist movements and their allied governments all over the world have legitimated xenophobic policies and given rise to neo-sovereignist 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. At the same time, stakeholders mobilize to press for solutions

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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 retro-
gression.\(^3\) \textit{Inter alia}, the United Nations New York Declaration for
Refugees and Migrants\(^4\) 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 pro-
cesses, 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 negoti-
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tions: 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-

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\(^6\) 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.
ues 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 MMIC 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 repres-

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. 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. Like the New York Declaration, the MIMC provides assurances of State sovereignty with respect to border controls. Such assurances are accompanied by a commitment to inter-state cooperation in combating “irregular” migration, including through deportations. 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. 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{16}

States and advocates have acknowledged the perils inherent in the current context. In 2015, for example, States fearful of the poten-
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.\(^\text{17}\) 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.”\(^\text{18}\) The realization of this objective would require a radical revision of the discriminatory views of gender relations embedded in the current regime.\(^\text{19}\) Indeed, the MIMC includes gender, sex, sexual orientation and marital status in its general non-discrimination clause,\(^\text{20}\) provides specific protections for the rights of women,\(^\text{21}\) 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.\(^\text{22}\) It provides for assistance to victims of trafficking.\(^\text{23}\) 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


\(^{18}\) 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 harassment 25 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-


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 represen-
tation of female and male judges,” and that it include expertise on vi-
olence 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 in-
ternational policy for many years.32

But the MIMC cannot be read as a final answer to the regula-
tion of mobility. Rather, it constitutes a platform for discussion, and
as such can lead to both immediate and long-term effects. In the im-
mediate, 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 ju-
dicial authorities involved in the implementation of those elements
that are adopted in a binding treaty or otherwise incorporated into in-
ternational 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 es-
sentially 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

999 (1998), art. 36(8)(a), (b), https://www.icc-cpi.int/nr/rdonlyres/ea9aef77-5752-4f84-
be94-0a65eb30e16/0/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 CO-
OPERATION AND DEVELOPMENT (OECD), GLOBAL TRENDS IN FAMILY MIGRATION 11–12
(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, 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. 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.

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. 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. 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).


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. 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.

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 in close degrees of consanguinity to their spouses. 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 legitimize—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.

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 contravene[s] 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.\footnote{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).} 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 freight 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.