Labor Migration and International Mobility: Normative Principles, Political Constraints

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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); Josph 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 Pécard, *Obstacles to ratification of the United Nations Convention on the Protection of the Rights of Migrant Workers*, 75 DROIT ET SOCIETÉ 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.