

The Model International Mobility Convention: Beyond Migrants and Refugees¹

MICHAEL W. DOYLE

University Professor
Columbia University

Two demographic snapshots below illustrate the current challenges of migration regulation and refugee protection. They call out for a new legal regime for the movement of persons across borders. After describing the challenges, I note six elements of a Model International Mobility Convention that is designed to provide a global “floor” level of protection for migrants, refugees, and others moving across borders. I conclude with the compliance prospects for this proposed new regime for international mobility. My hope is that you will read it and join others in signing.

CURRENT CHALLENGES

There are about 258 million migrants today in the world,² by the UN definition of someone who is living in a jurisdiction, not their own, for at least a year. That’s roughly a population somewhere in between Brazil and Indonesia,³ a significant number of people. They contribute immensely to global prosperity and cultural diversity, and at the same time, in some countries, including our own, we have parts of our citizenry who are nervous that we’ve lost control of our borders. Equally important, maybe even more so, many of these migrants are undocumented and don’t have full legal protections for the new lives they’re attempting to create. But as important as migration is, equally important are the one and a half billion visits that take place every

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2 International Organization for Migration, *Global Migration Indicators 2018 Report*, <http://gmdac.iom.int/global-migration-indicators-2018-report>.

3 International Organization for Migration, *Migration in the World*, <http://www.iom.sk/en/about-migration/migration-in-the-world> [<https://perma.cc/43LJ-LD59>].

year.⁴ These are comprised of people moving across borders, as some of our APS International Members will have just done visiting us today, contributing to global mobility and the human face of globalization.

My second demographic snapshot is of refugees. There are about 25 million United Nations High Commissioner for Refugees (UNHCR)–recognized refugees and about 3 million asylum seekers seeking refugee status.⁵ The largest increase in the numbers of displaced in a single year (whether internally or externally across borders) was in 2014⁶—nearly double the numbers seen in the previous decade, and a level not seen since World War II.⁷ The numbers increased in 2015 but slowed in 2016 and 2017.⁸ Many others have temporary protection without the full legal protections embodied in the 1951 convention.⁹ They’re getting access to some legal protections by having crossed the border, but the circumstances they’re in are very challenging. The typical refugee displacement lasts about 20 years.¹⁰ It’s not a short-term displacement; and more than half of the refugees in the world are under 18,¹¹ so there’s a big question: Will they get that vital early education that allows them to create the kind of lives that they want? And 85 percent of the world’s refugees are being taken care of not in Germany, Sweden, the United States, or any of the other headline countries that we read about, but in the developing world,¹² which is paying for supporting a global responsibility to care for refugees.

The United Nations and President Obama convened two summits in 2016 to address the global challenges of massed migration. President Obama’s summit pledged new resources for refugees (few pledges were

4 “World Tourism Organization, Yearbook of Tourism Statistics, Compendium of Tourism Statistics and Data Files,” World Bank, 2016, <https://data.worldbank.org/indicator/ST.INT.DPRT>.

5 Both figures are from United Nations High Commissioner for Refugees (UNHCR), *UNHCR Global Trends Report: Forced Displacement*, 2017, <http://www.unhcr.org/5b27be547.pdf>.

6 UNHCR, *UNHCR Global Trends Report*.

7 “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>]. The BBC is counting the internally displaced with externally displaced refugees.

8 UNHCR, *UNHCR Global Trends Report*.

9 UNHCR, “United Nations Convention and Protocol Relating to the Status of Refugees,” July 28, 1951, U.S.T. 6259, 189 *United Nations Treaty Series* 137, <http://www.unhcr.org/en-us/3b66c2aa10> [<https://perma.cc/R36L-MZ2F>].

10 Tim Gaynor, “2015 Likely to Break Records for Forced Displacement—Study,” United Nations High Commissioner for Refugees, December 18, 2015, <http://www.unhcr.org/en-us/news/latest/2015/12/5672c2576/2015-likely-break-records-forced-displacement-study.html>.

11 UNHCR, *UNHCR Global Trends Report*.

12 UNHCR, *UNHCR Global Trends Report*.

met, including the U.S. ones when President Trump assumed office).¹³ The UN Summit reaffirmed long-standing principles of protection for refugees and the value of “safe orderly and regular migration.”¹⁴ And UN member states further promised to:

1. Adopt a global compact for safe, orderly, and regular migration in 2018, a set of guidelines for shared principles and approaches.¹⁵
2. Develop guidelines on the treatment of migrants in vulnerable situations.¹⁶ (These guidelines will be particularly important for the increasing number of unaccompanied children on the move.)
3. 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 2018.¹⁷

The pledges were welcome diplomatic advances. But the resulting two global compacts, approved in December 2018—one for migration and the other for refugees—did not greatly improve the coherence of the global regulatory framework for global mobility. Both were voluntary guidelines and both missed the opportunity to improve the protection of migrants in “vulnerable situations.”

THE MODEL INTERNATIONAL MOBILITY CONVENTION

The Model International Mobility Convention (MIMC) was put together by a self-appointed commission, including scholars of demography, refugee law, migration law, sociology, economics, and political science. We met for a year and a half, proposing and revising a convention that we planned as a “realistic utopia”—a set of rules that existing but better-motivated governments could reasonably endorse.¹⁸ Six features make it special.

The first distinctive feature of the convention is that it is both comprehensive and cumulative, unlike the rest of the international law that covers migration and refugees. It is comprehensive in that it covers

13 Office of the Press Secretary, “Fact Sheet on the Leaders’ Summit on Refugees,” White House, September 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.

14 United Nations General Assembly Resolution, 71/1, ¶ 4 (October 3, 2016).

15 United Nations General Assembly Resolution, 71/1, ¶ 63.

16 United Nations General Assembly Resolution, 71/1, ¶ 52.

17 United Nations General Assembly Resolution, 71/1, ¶ 68.

18 “Realistic utopia” is a concept of John Rawls. See *Law of Peoples* (Cambridge: Harvard University Press, 1999), 7.

the movement of people across borders' mobility, "soup to nuts." Everything from a visitor through a tourist, a foreign student, a labor migrant, an investor, and then a forced migrant and a refugee. It is also cumulative; that is, it rests on the principle that individuals need an increasing set of rights as they move across those different statuses. If you or I are a visitor, whether in Berlin, London, Mexico City, or Mumbai, we only need a few rights. We need basic freedom of thought, we need emergency medical care if we happen to get run over by a bus—we shouldn't just be left to bleed in the streets because we are not a national—and we need reasonable access to the courts so that if we rent a car and run over somebody, we will have our case properly adjudicated. We don't have a right to a local job. We almost certainly will not have a right to vote. As we move across the statuses, we need additional rights.

If you're a tourist, you need to have your travel and lodging contracts honored. If you're a student, you need equal access to the university and a transcript. If you're a labor migrant, you need equal pay for equal work, compared to nationals. If you're an investor, you need clarity on the terms of the return of your investment. And if you're a forced migrant or refugee, you need something much more. You need the whole panoply of rights that have been denied to you at home. You have been forced to flee your country to save your life; you need to have all the national rights of the country that will give you refuge. The realization of rights expands with these different statuses. Everyone should have all of their human rights met somewhere, but no one has a right to claim all of their rights everywhere. That's the logic underlying the convention.

The MIMC also includes two significant modifications of rights. The first covers temporary migration, or what's called "circular migration" (Articles 98–110, MIMC). A temporary migrant worker is someone who is resident in a jurisdiction, not their own, for a set period of time, and thus does not have a "green card" or a long-term visa. The commission came to the view that existing temporary migrants have both too few and too many rights under the existing legal framework for migrant workers, the Migrant Workers Convention of 1990.¹⁹ This convention is designed to provide protection for migrant workers in countries of destination, but no major country of destination (none in North America or Europe) has ratified this treaty. It means it's not doing its work; it does not provide a floor of protection for migrant workers.

19 "International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families," December 18, 1990, 2220 *United Nations Treaty Series* 3, https://treaties.un.org/doc/Treaties/1990/12/19901218%2008-12%20AM/Ch_IV_13p.pdf.

What we in the Commission proposed was to improve the provisions of the Migrant Workers Convention in order to make the MIMC attractive to temporary migrants as well as countries, both those sending workers and those receiving them. The Migrant Workers Convention provides social housing and other taxpayer-funded social benefits, even to temporary workers, which seems to have deterred its ratification by countries of destination. It also has too few protections for temporary migrant workers; they need multiple visas, for example, so that they can maintain links with family who may have stayed at home. They also need portable pensions so that earned pension rights as a temporary worker can be drawn when the temporary worker goes back home. And we need a limitation on temporary worker status so that they don't become a temporary worker forever, because that bifurcates the labor market and reduces the bargaining power that is claimable by permanent workers. The expectation is that a better regime will meet the needs of both migrants and countries of destination and generate new opportunities for mutually beneficial arrangements.

A third feature of the MIMC is protection for "forced migrants" (Articles 124–176, MIMC)—protections for vulnerable migrants that supplement the protections now afforded to refugees. We all know that the 1951 Refugee Convention is an immense landmark in human rights law. It provided for protection, that is, asylum from "persecution," which requires a *mens rea* intent to persecute on the grounds of "race, religion, nationality, social group, or political opinion."²⁰ Unfortunately, many people fleeing situations where their lives are at stake don't qualify, because they can't meet the standards of persecution for those specific five elements. Many Syrians, for example, can't prove they're being persecuted. They're being killed and they're fleeing for their lives to survive, but they can't prove the persecution on those particular grounds. So, we suggest a different, more encompassing, standard of "serious harm," meaning anyone who is fleeing because they face an external threat to their life, whatever the cause might be. It might be a civil war that's not targeting them politically but is affecting their family. It could be drought. It could be flooding. It could be any particular cause. Organized criminal violence such as occurs today, for example in Honduras, would be an adequate cause if it posed a direct threat to a person's life. Many countries do offer temporary protection on similar grounds, as the United States used to do. But please remember it was in 2018 that Attorney General Sessions said that the United States was removing temporary protections for Central Americans because they couldn't qualify as being persecuted on the grounds

²⁰ "United Nations Convention and Protocol Relating to the Status of Refugees," Article IA(2).

of race, religion, etc.—the standards of the 1951 Convention.²¹ Our aim is to create a better “global floor” level of protection, so that any forced migrant who is fleeing directly from a situation that puts them at serious harm, and has been preliminarily certified by UNHCR, would then have a claim on asylum.

The last three features concern improved governance. The first is the Commission’s proposal to organize a governing committee for international mobility (Article 203, MIMC). The International Organization for Migration, newly a member of the broader UN system, will be invited to co-chair with UNHCR a governance committee of the country ratifiers. Bringing together the concerns of migration and refugees, creating a seamless interface between the two, and adding other relevant organizations such as the International Labor Organization, cities, the private sector, NGOs, and representatives of migrants and refugees, the committee has the potential to greatly improve the governance of international mobility. The aim is a multi-stakeholder system of dispute resolution and rule development, one designed to associate authority with responsibility and capacity.

The last two features on governance are also important. One we call the “mobility visa clearinghouse.” States will create a web-based platform (Articles 209–213, MIMC) on which they will identify their likely foreign labor demand for the next 10 years or so, and make available visas that could be applied for by individuals, by recruiting firms, and by national governments. The aim is to open up a larger number of safe, regular, and orderly pathways for the movement of people across borders. The United States, like many aging developed countries, has high demand for immigrant labor in some sectors, but we don’t have adequate legal pathways that can be realized. This platform would increase the legalization pathways that would be available for migrant workers.

To the skeptics who say that “we do not know exactly how many workers we’ll need in the next few years,” we reply that your skepticism is justified. But within rough orders of magnitude we in the United States can estimate (as can other countries) the demand for the kinds of jobs that are not likely to be filled unless they’re filled by immigrants.²² For the United States, they include sectors like agricultural and gardening labor, home care, many aspects of the medical profession,

21 Katie Benner and Caitlin Dickersen, “Sessions Says Domestic and Gang Violence Are Not Grounds for Asylum,” *New York Times*, June 11, 2018.

22 Michael Clemens and Lant Pritchett, “Temporary Work Visas: A Four-Way Win for the Middle Class, Low Skilled Workers, Border Security and Migrants,” *CGD Paper*, 2013, <http://www.cgdev.org/publication/time-bound-labor-access-united-states-four-way-win-middle-class-low-skill-workers-border>.

and some Silicon Valley high-tech engineers. We can estimate those rough numbers and make those visas available on this kind of a platform, and so too could many other countries, improving the orderly quality of the movement of people across borders for employment. And as a valuable synergy, states will reserve 10 percent of these visas for the resettlement of refugees and forced migrants who qualify with the skills needed.

The last governance feature addresses the humanitarian crisis I mentioned in the introduction. Currently, 85 percent of the world's refugees are being cared for by developing countries who cannot afford the cost. The Syrians, despite what we read, are not mostly in Europe. The term "refugee crisis" was invented when the Syrians got to Europe. Previously, in much larger numbers, they found refuge in Southern Turkey, Lebanon, and Jordan. Those three countries are among the least responsible for the multiple crises that have wracked the Middle East. The result is an inequitable and unsustainable distribution of the global responsibility to care for refugees.

What we propose, building on the Paris model for climate change, is a movement from what Peter Sutherland, former UN Special Representative for Migration, used to call "responsibility by proximity" to a new responsibility, one based on capability.²³ By that, he meant the Jordans, Lebanons, and Turkeys who are caring for the Syrian refugees should be able to share the burden with the many richer, more populous states in the world. Countries that can best provide or pay for asylum will be expected to do so. The MIMC proposes a system (Article 140, MIMC) wherein UNHCR would convene an annual meeting and survey the need for asylum: How many refugees? How many forced migrants? How much it was costing to sustain them where they were? How many of them need to move for humane reasons? UNHCR would define a budget of needs, and then it would assess the nominal responsibility for these refugees and forced migrants borne by each member country of the Model Convention, calculating based on at least initially the European formula (population, GDP, past unemployment, current refugee loads). This would be the nominal responsibility for each and all countries. Obviously, we don't live in a world of top-down, global governance. There's no one to enforce international norms and standards (and the UN never did have black helicopters). We live in a world where sovereignty provides authority, which means that one has to work through states' voluntary commitments. What we rely on here is that after UNHCR has identified the refugees' needs,

23 Peter Sutherland, "Interview: 'Refugees Are the Responsibility of the World . . . Proximity Doesn't Define Responsibility,'" UN News, October 2, 2015, <https://news.un.org/en/story/2015/10/511282-interview-refugees-are-responsibility-world-proximity-doesnt-define>.

countries would gather together and pledge what they were prepared to offer with respect to either or both resettlement and funding. UNHCR would then come in the next year and keep score. It would say, “Here was the global need, here were the pledges that were made, and here are the pledges that were kept.” The MIMC relies, for global governance, on naming and shaming. We know it doesn’t work well with shameless countries, but the MIMC is hoping that there are enough shameful countries that this would improve the level of global responsibility sharing.

COMPLIANCE

The Model Convention strengthens the human rights claims of all those crossing borders, including undocumented labor migrants, forced migrants, refugees, and those trafficked. And the Convention 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 do we 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 10, and skilled migrants find a ready market for their skills. Compliance by mobile persons is reliable.²⁴ Countries of origin lose skilled labor but, through remittances, gain \$550 billion p.a. (2018),²⁵ vastly more than foreign aid flows. According to most studies, migrants are either economically beneficial or of negligible cost to destination countries.²⁶ But they are also in nearly inexhaustible supply. According to a recent Gallup study, up to 700 million want to move.²⁷ As Professor Rey Koslowski has argued, these unequal dynamics have

24 Being in oversupply, they are not in position to bargain effectively.

25 World Bank Group, *Leveraging Economic Migration for Development: A Briefing for the World Bank Board*, September 2019, 14.

26 OECD, “Is Migration Good for the Economy?” *Migration Policy Debates*, May 2014, <https://www.oecd.org/migration/OECD%20Migration%20Policy%20Debates%20Numero%202.pdf>. And see a McKinsey study that concludes: “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.” McKinsey Global Institute, *Global Migration’s Impact and Opportunity*, November 2016, <https://www.mckinsey.com/global-themes/employment-and-growth/global-migrations-impact-and-opportunity>.

27 Gallup, “Number of Potential Migrants Worldwide Tops 700 Million,” June 2, 2017, <http://www.gallup.com/poll/211883/number-potential-migrants-worldwide-tops-700-million.esps7version-print>. Needless to say, not all of these potential migrants succeed in obtaining a visa or choose to migrate.

meant that destination countries can set unilateral terms.²⁸ 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 reciprocal threat of direct retaliation, as it is with the World Trade Organization.²⁹ But, clearly, the Model Convention cannot rely on this for many provisions. States are not likely to be moved by the statement: “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. Refugee hosting countries gain a Responsibility Sharing procedure (funding and priority access to labor visas for resettlement). Countries of destination like the United States and EU benefit from universal machine-readable and biometric passports to improve security at the border (Article 10, MIMC). And many countries, such as Mexico, Morocco, India, Pakistan, and South Africa, are countries of both origin and destination for migrants and refugees. They have a stake in a comprehensive regime.

There are also features of interest-based “diffused reciprocity” that make the Model Convention an attractive package for states.³⁰ Destination countries gain laborers and investors but, more indirectly and collectively, also gain a more regularized and orderly regime for the movement of people. The Convention, overall, promises a more reliable regime, including facilitation of the travel and tourism industry and of international education. In 2016 alone, international tourism generated \$4 trillion, 5 percent of global GDP, adding 145 million jobs worldwide;³¹ while foreign students spent \$32 billion in the United States alone in 2015 and helped generate 400,000 jobs.³²

28 Rey Koslowski, “Conclusions: Prospects for Cooperation, Regime Formation, and Future Research,” In *Global Mobility Regimes*, edited by Rey Koslowski (New York: Palgrave Macmillan US, 2011), 260–61.

29 See, for example, Andrew Guzman, “A Compliance Based Theory of International Law,” *California Law Review*, 90, no. 2 (December, 2002): 1826–87.

30 Robert Keohane, “Reciprocity in International Relations,” *International Organization*, vol 70, no.1 (Jan. 1986): 1–27.

31 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. World Travel Tourism Council, “Global Benchmarking Report 2017,” <https://www.wttc.org/research/economic-research/benchmark-reports/>.

32 Association of International Educators (NAFSA), “New NAFSA Data: International Students Contribute \$32.8 Billion to the U.S. Economy,” November 14, 2016, [https://www.nafsa.org/About_Us/About_NAFSA/Press/New_NAFSA_Data_International_Students_Contribute_\\$32_8_Billion_to_the_U_S_Economy/](https://www.nafsa.org/About_Us/About_NAFSA/Press/New_NAFSA_Data_International_Students_Contribute_$32_8_Billion_to_the_U_S_Economy/).

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 William Shakespeare in *Sir Thomas More*, a play by Anthony Munday that Shakespeare 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. According to Shakespeare, Thomas More, speaking to rioters who scorn the refugees, says:³³

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,
Plodding to th'ports and coasts for transportation,
. . . 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,
. . . what would you think
To be thus used? This is the strangers' case;
And this your mountainish inhumanity.³⁴

The Commission's long-run hope, its moonshot, is that after a lengthy process of development and promotion (one getting longer by the day!) well-motivated countries will take up the project and find the

33 Michael Hiltzik quotes the passage and describes the context in, “‘Your Mountainish Inhumanity’: Shakespeare’s Ringing Defense of Immigrants and Refugees,” *LA Times*, December 24, 2016, <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-shakespeare-20161224-story.html>. Curiously, this short, handwritten passage is the only literary manuscript of Shakespeare’s to survive. It matches the handwriting of the historical Shakespeare from Stratford.

34 Anthony Munday, Shakespeare, William, and others, *Sir Thomas More*, eds. Vittorio Gabrieli and Giorgio Melchiori (Manchester: Manchester University Press, 1990).

Convention useful in formulating a comprehensive multilateral treaty, as Canada did in taking up a civil society-generated initiative that began the successful Landmines Treaty process. But, well short of that outcome, we see value in the Model Convention. The Convention 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.

Following Brexit, the election of Donald Trump, the expulsion of the Rohingya from Myanmar, the bilateral ethnic cleansings of South Sudan, and the internment of families on the U.S.–Mexico border and the continuing hazards of the Mediterranean crossing, these are not auspicious times for creative multilateralism. 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.

My fellow members of the Model International Mobility Convention invite you to read and join the growing list of signatories.³⁵

35 The 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, can be found at: <https://mobilityconvention.columbia.edu/about>.

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