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BRAZIL AND THE FUTURE OF THE INTERNATIONAL MOBILITY REGIME

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ABSTRACT: To celebrate the current issue on the 70th anniversary of the Universal Declaration of Human Rights, our paper aims to briefly introduce how the United Nations (UN) is currently dealing with international mobility. We further discuss how Brazil has advanced the migrant and refugee agenda. Finally, we discuss the Model International Mobility Convention (MIMC) and how can it contribute to Brazil's aspirations on international mobility.

KEYWORDS: Brazil; Model International Mobility Convention; Migration; Refugees

BRASIL E O FUTURO DO REGIME DE MOBILIDADE INTERNACIONAL

RESUMO: Para celebrar este número a respeito dos 70 anos da Declaração Universal dos Direitos Humanos, nosso artigo tem como objetivo introduzir brevemente como a ONU está atualmente lidando com o tema da mobilidade internacional. Ademais, o artigo discute como o Brasil têm se portado na agenda de migração e refúgio. E, finalmente, o texto também apresenta o Model International Mobility Convention (MIMC) e em que medida ele pode contribuir com as aspirações brasileiras em matéria de mobilidade internacional.

PALAVRAS-CHAVE: Brasil; Modelo de Convenção de Mobilidade Internacional; Migração; Refugiados

1. The UN and International Mobility[1]

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.

There are many reasons why people move across borders. From fleeing conflicts to studying abroad, visiting our families or seeking medical treatment, we are in constant movement and our numbers are growing. According to the United Nations Global Migration Database (UNGMD), in 2017, there were a total of 257.7 million migrants around the world, or 6.4% of its population. It was 173 million in 2000, and 220 million in 2010. In 2017, 83% of international migrants were in either Asia (80 million), Europe (78 million) or North America, while the remaining 17% were distributed across Africa (25 million), Latin America and the Caribbean (10 million), and Oceania (8 million). Latin America and the Caribbean alone was the place of birth of 38 million migrants, most of whom were heading towards North America and Europe. Therefore, fair treatment of migrants and guaranteeing their rights should be a priority for the countries in the region.

A closer look at the numbers of international mobility helps to understand how dramatic the situation is. Among the 258 million migrants in 2017, 68.5 million were forcibly displaced people (UNHCR, 2018). Around 85% of these were hosted by developing countries. The forcibly displaced people are classified into internally displaced people (40 million), refugees (25.4 million), and asylum-seekers (3.1 million). Of these, refugees and asylum-seekers are most vulnerable from a legal standpoint. Governments often show resistance to broadening the concept of refugees, who frequently do not meet the “persecution” threshold. The definition of

[1] The paragraph below and the paragraphs in the item “The Model International Mobility Convention” draw on Doyle’s *“Introduction”*, pp. 219-237, at the “The Model International Mobility Convention”, *Columbia Journal of Transnational Law,* vol 56, no. 2 (2018) for the text of MIMC and commentary on its significance.

this threshold traditionally does not consider severe economic deprivation, gang violence, natural disasters or climate change.

In order to celebrate the 70th anniversary of the Universal Declaration of Human Rights and the core international laws on migration and refugees that are derived from it, and to restate the importance of compliance and enhancement, we present the Model International Mobility Convention (MIMC) and how Brazil could draw from it. The MIMC is an initiative, led by Columbia University, which aims to address the challenges of international migration and refugees by bringing States together to reaffirm existing rights and expanding the basic ones where they already exist. Before doing so, we briefly introduce the international regimes for migration and refugees, and the Brazilian international and domestic commitments to the agenda.

2. The International Regimes for Migration and Refugees

Migrants and refugees have their respective international and regional regimes. However, the regimes lack coherence. For instance, tourists, workers and students are distinctly treated by national regimes. However, the lines that define these categories are often blurred, and this generates additional bureaucracy and unclear procedures that impose unnecessary costs on states and heavy burdens on migrants.

Although there is much to advance, signs of change can be seen in recent years. In 2016, the International Organization for Migration (IOM) finally became a related organization within the UN system, but it still lacks support for advancing specific items on the agenda. For instance, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families[2] has only been adopted by a few countries of origin. Most of the countries of destination have also failed to ratify it[3]. Considering that economic migrants account for half of all

[2] 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.

[3] Contrary to its tradition of compliance with multilateral treaties of protection, and despite domestic pressure from civil society, Brazil has yet to sign the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, even though it demonstrates a

the world's migrants[4], it is easy to understand the urgency of advancing the agenda effectively. In addition to the direct impact on migrants' lives, it would positively affect the development of countries of origin and destination[5].

The refugee regime also faces a defining moment. The United Nations High-Commissioner for Refugees (UNHCR), created in 1950, has the responsibility of implementing the refugee regime built on the pillars of the 1951 Refugee Convention and its 1967 Additional Protocol[6]. However, as the nature of conflict has changed in recent decades, the regime needs to be updated to fit new realities.

People will migrate, and when they do not find the right conditions they will do so irregularly. Refugees, on the other hand, have no choice but to flee from conflicts where their own existence is at risk, and seeking safety where it is most likely to be. As stated before, "failing to provide legal pathways for migrants indirectly encourages irregular migration and that in turn makes migrants vulnerable to exploitation and a domestic public concerned about a loss of control over its borders. The overlaps and gaps of these existing regimes need to be addressed" (Doyle, 2018, p. 220).

The current migration emergency is the worst since the birth of the Universal Declaration of Human Rights in 1948 and thus, a critical test of the Refugee Convention of 1951 and its 1967 Protocol. National adjustments and reforms are needed to address these challenges, in addition to further global multilateral action (MIMC), to establish a foundation on which national reforms can be built. It is a collective issue but individual leaderships is also crucial. Brazil has the domestic conditions and international aspirations, and the MIMC has a lot to contribute.

migration deficit due to the high number of Brazilians seeking economic prosperity mainly in North America and Europe. Brazil and Suriname are the only countries from South America not to sign the convention. The resolution approved by the UN General Assembly in December 1990, which came into force in July 2003, emphasizes the connection between migration and human rights, and could contribute to the implementation of the new national law on migrant workers.

[4] For statistical estimates on the proportion of labor migrant workers, see INTERNATIONAL LABOUR ORGANIZATION, ILO GLOBAL ESTIMATES ON MIGRANT WORKERS xi (2015).

[5] The 1994 Conference on Population and Development connected the issue of migration with development. The 2030 Agenda for Sustainable Development has included several migration-related targets.

[6] 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

3. Brazil

Brazil is a traditional player in the human rights multilateral system. Its representatives played a decisive role in the creation of the United Nations, and the country has been a strong supporter of the Human Rights Declaration since its adoption in 1948. As a multi-ethnic nation composed of waves of migrants from all parts of the world, successive Brazilian governments have kept the country committed to the developments of the international norms of mobility. However, there are still significant gaps between its international aspirations and its domestic politics when it comes to providing adequate protection and guaranteeing the rights to migrants and refugees seeking shelter in its territory.

Brazilians were active during the drafting of the Universal Declaration of Human Rights, and it was among the first 50 signatories when the document was presented to the General Assembly in 1948. By that time, the promise of prosperity and safety as a result of being far from the epicentre of the World War made South America an appealing destination for high-skilled immigrants and refugees, particularly from Europe (Stefoni, 2018, p. 54; Salles, 2004, pp. 554-574).

According to the United Nations Population Division, in 2017 Brazil had 736.6 thousand international migrants living in the country, which accounted for 0.4% of its total population. On the other hand, Brazil had a total of 1.6 million emigrants who had left the country as of 2017. Although Brazil accounts for 50% of South America's GDP, the country receives only 12% of all migrants to the region (IOM, 2017).

Nonetheless, in the formation of the nation, Brazil's history of policies and legislations towards mobility is erratic. Immigrants, international workers, visitors, and refugees were unsatisfactorily defined in previous laws – or were not defined at all. Different legal instruments, decades apart dealt separately with migration issues, representing both a diverse perspective on how *migration* was understood during the 20th century and a reactive approach to those issues. But recent federal initiatives have transformed this situation. New laws on migration and refugees have been approved recently, indicating a political will for change. The challenge now is to implement them effectively in accordance with national and international human rights laws.

3.1. Brazil's new migration law

The Statute of the Foreigner[7] had ruled Brazilian legislation on international migration since 1980. The law conceived during the military dictatorship dealt with migrants as threats to national security. It was only in 2017 when the law was finally revised and the new Brazilian Migration Law[8] was approved, that a shift towards human rights principles started (Oliveira, 2017, pp. 171-179).

The new migration law defines the "rights and duties of the migrant and the visitor, regulates their entry and stay in the country and establishes principles and guidelines for public policies for the emigrant"[9] (Art.1). It is guided by non-discriminatory principles and forbids "discrimination based on the criteria or procedures by which the person was admitted to the national territory" (Art. 3).

Among the advances of the new law are the definitions of *immigrants* and their length of stay; *emigrants,* regarding the increasing number of nationals living abroad; *visitors* and their short-term stay; and, for the first time, *stateless persons*, recognizing the urgent situation of those without nationality.

Another important change brought about by the new law is the introduction of a humanitarian visa of one year to any "stateless person or national from any country" in "a situation of serious or imminent institutional instability, armed conflict, major disaster, environmental disaster or serious violations of human rights or international humanitarian law, or in other cases" (Art. 14). The law was approved in November 2017. However, it was not without constraints. A presidential decree from President Michel Temer limited or reversed some of its advancements. In the case of the humanitarian visa, presidential decree 9199/17 created bureaucratic steps and fees that could delay or eventually make the procedure unfeasible for some applicants.

[7] Law number 6,815, 19 Ago. 1980, available at: http://www.planalto.gov.br/ccivil_03/leis/L6815.htm (Last visited 11 Sep. 2018)
[8] Law number 13,445, 24 May 2017, available at: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/lei/L13445.htm (Last visited 11 Sep. 2018)
[9] It is worthwhile mentioning the new law innovated with its definition of `migrant` by not differentiating immigrant from foreigner. We are grateful to the reviewer for calling our attention to this point.

Family was also a concern of the new law – and again, of the presidential decree. The law grants a resident visa "without any discrimination" to the companion of the immigrant, their children and relatives up to the second degree. On the other hand, the decree states that the whole family must be in the national territory for the union to occur – which is often not possible given that most political asylees arrive alone and then bring their families.

Illegal migration is also treated differently after 2017. Chapter V of the new law, "Measures for Compulsory Removal", states that illegal migrants cannot be arrested because of their legal condition. Rather, they can have legal assistance from the government to avoid deportation. Moreover, refugees or stateless persons under the age of 18, whenever separated from their families, cannot be deported. In addition, a foreigner whose life may be under threat in their country of origin cannot be deported. In contrast, the decree is vague about the implementation of the chapter, limiting the deportation only of immigrants whose requests are still pending.

Foreigners were forbidden from engaging in any political activity in Brazil before the new migration law. They now can enjoy political liberties and freedom of expression and association as long as their activities are not forbidden by the Brazilian Constitution - such as being an apologist for Nazism. However, unless foreigners have been naturalized as Brazilian citizens, the Constitution still forbids them from voting in Brazil.

3.2. Refugees and asylum seekers

In 1951, Brazil signed and ratified the UN Refugee Convention - with geographic limitations[10] - and was then invited to be a founding member of the United Nations High Commissioner for Refugees (UNHCR) Advisory Committee – of which Brazil is still a member, after the replacement of the Committee with the Executive Committee. However, after the military coup in 1964, Brazil significantly changed its policy towards refugees and adopted a more restrictive policy due to security

[10] Moreira stresses that Brazil adopted the Convention but with geographical limitations due to its interest in boosting migration from European countries (Moreira, 2017, p.27).

concerns.[11] As the UNHCR was banned from operating in Brazil by the military government (1964-1985), the agency was informally established inside the United Nations Development Programme (UNDP) Office in Brasilia, where it could lobby for the return of South American refugees to the region. During those years, the international regime for refugees was not a priority of the Brazilian government.

Regional initiatives, on the other hand, gave birth to a normative environment that would later reshape Brazilian engagement in the topic. In 1981, the Colloquium on Asylum and International Protection of Refugees in Latin American inspired the 1984 Cartagena Declaration on Refugees, which, based on the 1951 Convention and the 1967 Protocol, broadened the definition of refugees as "persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order"[12] According to Moreira, "due to its broad refugee definition, the Latin American refugee regime was considered more comprehensive than the international United Nations refugee regime and also more suitable to the refugee flows caused by conflicts and other political situations that threaten or violate human rights." (Moreira, op. cit., pp. 29-30; See also Okoth-Obbo et al., 2013).

In 1988, redemocratization brought a new Federal Constitution, and with it the political will to embrace human rights as guiding principles of foreign and domestic policies. The 1951 Convention was fully enforced and the 1984 Cartagena Declaration refugee definition was adopted. When the first National Program on Human Rights was approved in 1996, the inclusion of the refugee issue was a priority in the national agenda. The initiative further evolved into the Brazilian Refugee Act of 1997[13], with Brazil now conforming with the regional refugee regime. The national law also established severe and generalized human rights violations as a basis for refugee recognition and created the National Committee for Refugees (CONARE).

[11] Decree-law number 941, 13 Oct. 1969, available at: http://www2.camara.leg.br/legin/fed/declei/1960-1969/decreto-lei-941-13-outubro-1969-375371-publicacaooriginal-1-pe.html (last visited 10 Sep. 2018).
[12] Cartagena Declaration on Refugees, 22 Nov. 1984, available at: http://www.unhcr.org/about-us/background/45dc19084/cartagena-declaration-refugees-adopted-colloquium-international-protection.html (last visited 10 Sep. 2018).
[13] Law number 9,474, 22 Jul. 1997, available at: http://www.planalto.gov.br/ccivil_03/leis/l9474.htm (Last visited 11 Sep. 2018)

Since then, the Committee has been active in coordinating the assistance of refugees and asylum seekers and overseeing the compliance of national institutions with the regime.

As a matter of fact, in Brazil refugees currently have access to the same public services as nationals, such as universal healthcare and education. In addition, the law guarantees refugees access to mental health services, public housing and university education (Moreira & Baeninger, 2010) As a result, Brazil's commitment to refugee protection was recognized by the UN and its agencies as a model for the region. According to the former High Commissioner for Refugees, Antonio Guterres, "Brazil is already a regional leader on refugee issues. It is an important international player on a number of crucial issues and can also play a seminal role in combating racism and xenophobia worldwide" (UNHCR, 2005)

At the municipal level, initiatives such as the São Paulo Committee for Refugees and the Rio de Janeiro Committee for Refugees aim to foster the local integration of refugees. These ad-hoc institutions, however, lack specific guidelines and public policies for dealing with refugees and tend to become overloaded without the proper support at state and federal levels (Jubilut, 2010, pp. 46-7). In summary, "the Brazilian refugee policy can be characterized as a regulation policy, not accompanied by a properly structured immigrant policy in the country" (Moreira, op. cit. p. 25).

Brazil is broadly recognized for its positive record of engagement with multilateralism and human rights values. Its aspirations as a global player on international mobility is in accordance with the country's regional role and vocation. Brazil is not just a common destination for those looking for opportunities and shelter in South America; it is also the origin of thousands of Brazilians who constantly leave the country to seek better opportunities, especially in North America and Europe. In fact, there are more people leaving the country than arriving. In summary, the country would significantly benefit from a more comprehensive legal instrument for dealing with the complexities of international mobility.

4. The Model International Mobility Convention

In 2016, the General Assembly adopted the New York Declaration for Refugees and Migrants. The Declaration called for the development of a Global Compact for Refugees, to be formulated by the UNHCR; and of a Global Compact for Migration to be negotiated by the General Assembly. Beginning about the same time, the Columbia Global Policy Initiative convened a commission of experts to write a "Model International Mobility Convention" (MIMC). The commission outlined a long-run agenda for comprehensive reform of the rules and regulations that govern the rights and duties of persons moving across international borders.

MIMC offers a holistic approach to human mobility at the international level in order to address gaps in protection, regulation and cooperation. It recognizes the large impact mobility has had on economic growth, development and security for all countries. At the same time, it reflects a commitment to establishing an international mobility regime that recognizes the human dignity of all while promoting the interests of countries of origin, transit and destination.

In order to address these gaps in international law, 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. The Commission established 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 articulated 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 was designed to be an ideal yet realizable framework for what States someday should adopt when comprehensively regulating international mobility.

The goal of the MIMC was thus both to reaffirm the existing rights afforded to mobile people (and the corresponding rights and responsibilities of States) 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 built on existing global and regional conventions, most notably the Refugee Convention of 1951 (with its 1967 Protocol) and the Migrant Workers Convention of 1990.

The aim of the Commission was to address the unrealized opportunities and the severe challenges in the regimes for migrants and refugees. Today, with 258 million persons, international migrants are the fifth most populous "nation," just below Indonesia and above Brazil. Although the total number of migrants moving across borders has grown substantially over the past 15 years, international migrants remain just three percent of the global population. Throughout history, 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. They make crucial contributions to productivity and innovation around the world.

The 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 could not address. We live in an incoherent world of sovereign States in which everyone has a right to leave any country[14] but no one has a right to enter any State except his or her country of origin, unless a special treaty regime permits it.[15]

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)[16] needs to be broadened to include flight from life-threatening drought or floods—such as are increasingly caused by climate change—(Sengupta, 2017) or from civil wars and generalized violence.[17] Refugees have a

[14] 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].
[15] 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].
[16] Refugee Convention, *supra* note 10.
[17] 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.

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.[18] Once refugees gain protected status, the Refugee Convention grants rights equivalent to other aliens,[19] but this 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.[20] 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 Model International Mobility Convention 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.[21] 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).[22]

With respect to migrant workers, the 1990 Migrant Workers Convention importantly mandated rights to unionization, pay equal to nationals in similar jobs,

[18] Refugee Convention, *supra* note, 10 art. 33.
[19] *Id.* arts. 17 and 21.
[20] 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.
[21] 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].
[22] *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].

legal process guarantees and many other rights.[23] 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, etc.[24] 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.[25] 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.[26] 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 (Massey, 1995).[27] It moreover proposes portable pensions so that temporary laborers can benefit from the retirement funds they earn in countries of destination wherever they retire.[28] 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.

[23] 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.
[24] *See, e.g.*, MARTIN RUHS, THE PRICE OF RIGHTS: REGULATING INTERNATIONAL LABOR MIGRATION (2013).
[25] Only Chile and Argentina are countries of net immigration (2007–2015) among the thirty-eight signatories.
[26] MIMC, *supra* note 16, arts. 98–110.
[27] *Id.* art. 104.
[28] 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).

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 House[29] and the other establishes a Responsibility Sharing procedure (modelled after the Paris Climate Agreement) to help countries pledge and implement commitments to extend funding and resettlement opportunities for refugees and forced migrants.[30] 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.

4.1. 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.[31] Countries of origin lose skilled labor but, through remittances, gain $432B p.a. (World Bank Group, 2016), vastly more than foreign aid flows. According to most studies, migrants are either economically beneficial (or of negligible cost) to

[29] MIMC, *supra* note 16, art. 209.
[30] *Id.* art. 211. For an insightful analysis of the importance of labor mobility for refugees, see KATY LONG & SARAH ROSENGERTNER, 2016.
[31] Those same laborers, of course, and the businesses that exploit their labor are not good candidates for compliance with mobility restrictions.

destination countries (OECD, 2014).[32] But they are also in nearly inexhaustible supply. According to a recent Gallup study, up to 700 million want to move (Tsabutashvili, 2017).[33] As Professor Rey Koslowski has argued, these unequal dynamics have meant that destination countries can set unilateral terms (Koslowski ed., 2011, pp. 260-61). 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 (Guzman, 2002). 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).[34] Refugee hosting countries gain a Responsibility Sharing procedure (resettlement visas and funding) and priority access to labor visas for resettlement (Arts. 209-213, MIMC).[35] Countries of destination such as the U.S. and those in the EU benefit from universal machine readable and biometric passports to improve security at the border (Art. 10, MIMC).[36]

There are also features of interest-based, "diffused" reciprocity that makes the MIMC an attractive package for States (Keohane, 1986). 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 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

[32] *See also*, Jonathan Woetzel et al., *Global migration's impact and opportunity*, MCKINSEY GLOBAL INST. (Nov. 2016), 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.").

[33] Needless to say, not all of these potential migrants succeed in obtaining a visa or choose to migrate.

[34] MIMC, *supra* note 16, art. 150.

[35] *Id.* arts. 209–13.

[36] *Id.* art. 10.

tourism generated four trillion dollars, five percent of global GDP, adding 145 million jobs worldwide;[37] while foreign students spent thirty-two billion dollars in the US alone in 2015 and generated 400 thousand jobs.[38]

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).

4.2. Anticipated outcomes

The Commission's long run hope, its "moonshot", was that after discussing the MIMC in academic settings and with 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.

5. Conclusion: what Brazil can draw from MIMC

[37] 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].

[38] Consider that foreign students spent thirty-two billion in 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/ [https://perma.cc/A8EM-WKCR].

Compatible with Brazil's position during the negotiations of the Global Compact for Migration, the MIMC highlights the responsibility of states to guarantee the rights and protections to all individuals embodied in these documents, without prejudice to the rights of each state to decide on the best way of implementing these responsibilities within their borders. During the negotiations of the Global Compact for Migration, Brazil declared that

> we would like to highlight our strong belief that, while facilitating safe, orderly, regular and responsible migration and mobility of people, it is of utmost importance to address some of the root causes of involuntary movement of migrants, including through strengthened efforts in cooperation, poverty eradication and the implementation of the Sustainable Development Goals and targets of the 2030 Agenda for Sustainable Development.[39]

The MIMC is compatible with Brazil's modern and flexible position on migration. Inspired by the need of addressing the "root causes" of the phenomenon of migration, both Brazilian legislation and MIMC are built on the understanding that external factors such as economic crisis, natural disasters and armed conflicts force people to move in search of safety, shelter or better opportunities. Brazil endorses the 360-degree vision of the Global Compact, as does the MIMC, by recognizing that no country can address the challenges of the phenomenon on its own

Moreover, a better international regime for migration, refugees and asylum seekers is a priority for Brazil. While the country currently hosts 1.2 million migrants, there are 3.2 million Brazilians living abroad. Most Brazilians migrate for the same reasons as most Haitians, Bolivians and Venezuelans migrate to Brazil. From 2016 to 2017 the number of requests for asylum in Brazil jumped from 10,308 to 33,866, of which 17,865 were Venezuelans (Secretaria Nacional de Justiça, 2018). It is of great interest to Brazil that Brazilian citizens living abroad receive treatment that is as equal and fair as the new Brazilian Law of Migration guarantees to foreigners on its own soil. Supporting the MIMC could help in this task. Chapter IV on Migrant Workers, Investors and Residents is comparable with Brazilian legislation. The chapter foresees access to health care (Arts. 57 and 86), decent living conditions (Art. 62), children's right to education (Art. 87), social security (Art. 90), and social

[39] Brazil's statement during the informal thematic session "Human rights of all migrants, social inclusion, cohesion and all forms of discrimination, including racism, xenophobia and intolerance", 8-9 May 2017, Geneva, https://refugeesmigrants.un.org/sites/default/files/ts1_p1_brasil.pdf

rights including portable pensions (Art 106); the Chapter guarantees a comprehensive group of social rights, and these correspond with Article 4 of the Brazilian Law of Migration[40]. Likewise, the MIMC also covers the economic rights of migrant workers. Equality of Treatment, employment contracts and conditions of employment, and remuneration (Arts. 58-60), protection and rights of women (Art. 63), protection against termination of employment and the right to seek alternative employment (Arts. 77-78).

Like any other country with inclusive legislation in a time of rising waves of global migration, Brazil faces structural challenges in the implementation of the mechanisms provided in its national law. The wide range of visas corresponding to the various migratory causes as provided by the Brazilian law is a notable achievement, but its operation would benefit from better cooperation at local, national and regional levels, including data sharing and bureaucratic collaboration. In this sense, the Treaty Body proposed by Chapter VIII of the MIMC introduces a number of innovations for supporting and strengthening the provision of international protection, which include a Responsibility Sharing framework, a Comprehensive Global Planning Platform and a Global Refugee Fund. These cooperation mechanisms could help Brazil replicate the successful cases of the committees for refugees in the City and State of São Paulo and apply them to its border areas by a possible integration with the National Committee for Refugees (CONARE) to combine the initiatives at the municipal, state, and federal levels into a national project.

Brazil and the MIMC share similar expectations about the future of the Global Compact. The Treaty Body introduced by the MIMC could also contribute to the future of Brazilian leadership in the multilateral debate by creating a structure capable of reproducing successful experiences in Brazil. In the right platform, Brazil's case could help to transform the 23 points of the Global Compact into public policies worldwide. In fact, in the discussions for the Global Compact for Migration in 2018, Brazil strongly supported the creation of the International Migration Review Forum – to be negotiated at the General Assembly in 2019 - to guarantee the continuation of

[40] Art. 4 of the Brazilian Law of Migration states that the "the inviolability of the migrant is guaranteed in the national territory, on the basis of equality with nationals, of the right to life, liberty, equality, security and property"

discussions for the future implementation of the Compact. That is precisely the spirit of the Committee proposed in Chapter VIII of the MIMC.

The increasing number of Venezuelans seeking refuge in neighboring countries has also highlighted the need for better regional integration. The MIMC could help with this as its Treaty Body does not propose new regional instruments. Instead it proposes to strengthen the existing ones by promoting a structure of common governance and shared responsibility. The application of the MIMC International Cooperation Mechanisms could fortify the role of the Southern Common Market (MERCOSUL) and the Union of South American Nations (UNASUL) in regional coordination. Likewise, the United Nations Economic Commission for Latin America and the Caribbean (ECLAC), with its capacity to produce data analysis would benefit from integrating the Comprehensive Global Planning Platform, which aims to establish a research function to report on and assess the flow of global visitors, refugees and migrants as well as their impacts on countries of origin, transit and destination.

The MIMC does not meet the needs of every signatory in the same way. In the case of Brazil, Chapter IV may be more appealing in regard to the large number of Brazilians living abroad. Chapter V, on the other hand, restates most of the rights already provided in Brazilian domestic legislation. As a matter of fact, Brazil is even more progressive on some issues than the provisions proposed by the MIMC. For instance, health care is available to all individuals, irrespective of their nationality and status, including students, tourists and visitors[41]. This inclusive approach, combined with the new national law of migration, places Brazil in a favorable condition to lead the implementation of the Model. Additionally, Brazil's regional leadership would benefit greatly from the creation of the International Cooperation Mechanism as described in Chapter VIII. Due to its diplomatic tradition and history of multiculturalism, Brazil is a natural candidate to lead the implementation of a better international regime for migrants and refugees as provided for in the MIMC.

[41] "All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property", Article 5, Constitution of the Federative Republic of Brazil.

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