

---

---

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

YASMINE ERGAS\*

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

---

\* Yasmine Ergas is the director of the Specialization on Gender and Public Policy at the School of International and Public Affairs of Columbia University.

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

that take into account the human rights of migrants and refugees.<sup>2</sup> In this context, as Michael Doyle recalls in his introduction to this issue, initiatives have taken shape that may presage a fairer and more open regulatory framework, although they may also carry the risk of retrogression.<sup>3</sup> *Inter alia*, the United Nations New York Declaration for Refugees and Migrants<sup>4</sup> has given rise to processes intended to lead to two new Global Compacts, one for refugees and the other for safe, orderly and regular migration, as well as to the development of guidelines for the treatment of migrants in vulnerable situations, all to be agreed on in 2018.

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

---

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

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

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

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

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

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

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

Such sites of contestation include but are not limited to those that might be identified by a reading of the New York Declaration. Unlike the Declaration, the MIMC addresses "mobility" as an all-encompassing category that includes, along with refugees and migrants, several types of border-crossers—such as tourists and students<sup>7</sup>—whose *prima facie* objectives do not entail a relocation of the primary sites of their lives (as with migration) and whose motivations cannot be ascribed to persecution and other causes of displacement that do, or should, elicit international protection (as with refugees).<sup>8</sup> Casting migrants and refugees as variants of a more generally mobile population reduces the visibility that xenophobic movements continuously seek to highlight; it contributes to their normalization by suggesting that they are part of the more general movement of people across borders associated with globalization. Because that movement also involves individuals crossing borders to realize the "normal" events of their everyday lives—to study, for example, or form families—the MIMC opens to international negotiations aspects of social organization strongly characterized by gender relations over which States have conventionally asserted exclusive domestic jurisdiction. The MIMC also draws to the negotiating table protagonists who might not have been involved in discussions strictly concerned with refugees or traditionally defined migrants, such as tourism lobbies or student associations, whose positions on women's rights will, whether implicitly or explicitly, also come into play.

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

---

7. MIMC, *supra* note 5, arts. 30–52.

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

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

From the perspective of gender rights advocates, the stakes

---

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

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

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

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

13. *Id.*

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

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

---

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

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

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

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

---

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

18. Doyle, *supra* note 3.

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

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

21. *Id.* arts. 5, 63. While the MIMC incorporates important safeguards against discrimination—including a specific prohibition against deprivations of residence or work authorizations on the basis of pregnancy (art. 76), it does not, however, explicitly commit States to conducting a gender analysis of their mobility policies. Such an analysis would limit States' ability to implement indirect forms of discrimination, as is entailed in visa policies that privilege job categories and other qualifications (for example, as implicated in investor visas) in which men predominate. See, CEDAW, *supra* note 14, ¶ 26(a), [http://www2.ohchr.org/english/bodies/cedaw/docs/GR\\_26\\_on\\_women\\_migrant\\_workers\\_en.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/GR_26_on_women_migrant_workers_en.pdf), [https://perma.cc/6BPT-7RQA].

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

23. *Id.* art. 181.

other family members in their States of origin.<sup>24</sup> It ensures, among the specific protections of migrant women, protection against violence and harassment<sup>25</sup> and access to emergency health care, including sexual and reproductive health services and maternity protection.<sup>26</sup> Additionally, it prohibits employers from firing women, and States from expelling either migrant workers or members of their families (or generally depriving them of their residency authorization or work permits), because of pregnancy.<sup>27</sup>

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

---

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

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

26. *Id.* art. 63.2.

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

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

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

30. *Id.*

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

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

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

---

31. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, July 17, 1998, 37 I.L.M. 999 (1998), art. 36(8)(a), (b), [https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf), [<https://perma.cc/3SKE-8EV3>].

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

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

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

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

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

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

---

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

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

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

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

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

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

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

---

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

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

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

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

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

---

---

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

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

---

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

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