

The International Organization for Migration and New Global Migration Governance

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This Article examines the role of the International Organization for Migration (“IOM”) in global migration governance and its implications for migrant workers’ rights and well-being. After 65 years of independent operations, the IOM joined the U.N. system in 2016 and quickly assumed the role of global lead migration agency—a status later affirmed by the 2018 U.N. Global Compact on Safe, Orderly, and Regular Migration. In this capacity, the IOM can influence whether and how states address the gaps in international migration law and policy that foster the continued exploitation and abuse of migrant workers worldwide. Critics worry, however, that the IOM’s new role as “U.N. Migration” could enable a “blue-washing” of its activities—projecting the appearance of humanitarianism while operating to migrants’ detriment. After all, before joining the U.N. system, the IOM was widely known as a “bureaucratic entrepreneur” that served the foreign policy interests of the Global North—and had a checkered human rights record to show for it.

Whether the IOM’s past presages a future marked by a lackluster commitment to migrants’ rights largely remains to be seen. This Article offers some initial insights through close examination of the IOM’s efforts to promote ethical recruitment of migrant workers. The IOM’s work in this area unfortunately aligns with a trend in transnational labor governance away from binding labor regulations and towards incrementalist, soft law governance. It both legitimates the privatization of migration governance and diminishes state accountability for failing to prevent and address migrant worker abuse. In so doing, the IOM falls short on its promises to transform the recruitment industry and to advance migrant workers’ rights and well-being.

INTRODUCTION

In February 2020, Singapore was widely heralded as a COVID-19 success story, boasting single digit caseloads due to its aggressive efforts to forestall community transmission and imported cases.¹ Two months later, Singapore was reporting 1000+ cases per day—the then-largest per capita infection rate in the world. The cause of this dramatic increase: the government’s failure to consider the impact of COVID-19 on its massive, overlooked mi-

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1. Hillary Leung, *Singapore Was a Coronavirus Success Story – Until an Outbreak Showed How Vulnerable Workers Can Fall Through the Cracks*, TIME (Apr. 29, 2020), <https://time.com/5825261/singapore-coronavirus-migrant-workers-inequality/> [https://perma.cc/K7Y8-QGN7].

grant worker population.² Migrant workers represent thirty-eight percent of Singapore's total workforce, and at least two-thirds of them are low-wage workers performing jobs in construction, shipping, domestic work, and janitorial services.³ The "hidden backbone" of Singaporean society, low-wage migrant workers have long been relegated to living in cramped and unsanitary dormitories on the outskirts of the city-state.⁴

The Singaporean government was hardly unique in failing to attend to its migrant worker population during the pandemic.⁵ The pandemic has emphasized how marginalized migrant workers are despite their substantial contributions to the world's economies. In the United Arab Emirates, migrant workers—who represent 88% of the population⁶—construct the gleaming buildings that signal to the world the country's vast wealth. In the United States, migrant workers provide flexible and affordable labor, which sustains the agricultural system and scientific and engineering expertise. Throughout the world, migrant workers provide care to the elderly, the youth, and the disabled. During the pandemic, migrant workers have kept supply chains operating and have provided critical services to the consuming public—all while at heightened risk of virus exposure and death.⁷

Regrettably, the rights afforded to the world's approximately 150 million migrant workers are incommensurate with the vital contributions they make to both their origin and destination countries.⁸ Migrant workers worldwide have long lacked sufficient labor protections, yet governments have had lit-

2. Shibani Mahtani, *Singapore Lost Control of Its Coronavirus Outbreak, and Migrant Workers are the Victims*, WASH. POST (Apr. 21, 2020), <https://www.washingtonpost.com/world/2020/04/21/singapore-lost-control-its-coronavirus-outbreak-migrant-workers-are-victims> [https://perma.cc/N2UC-RE8V].

3. Eileen Ng, *Tale of 2 Outbreaks: Singapore Tackles a Costly Setback*, ABC NEWS (May 11, 2020), <https://abcnews.go.com/Health/wireStory/tale-outbreaks-singapore-tackles-costly-setback-70609503> [https://perma.cc/2P3V-9CXY].

4. Leung, *supra* note 1; see also Weiyi Cai & K.K. Rebecca Lai, *Packed with Migrant Workers, Dormitories Fuel Coronavirus in Singapore*, N.Y. TIMES (Apr. 28, 2020), <https://www.nytimes.com/interactive/2020/04/28/world/asia/coronavirus-singapore-migrants.html> [https://perma.cc/PM4F-RTH9].

5. Similarly unseen, for example, were the hundreds of thousands of migrant workers across India who were left stranded and hungry after the Indian government placed the country on lockdown with only four hours' notice. With no access to transportation, some were forced to walk hundreds of miles just to return home. Maria Abi-Habib & Sameer Yasir, *India's Coronavirus Lockdown Leaves Vast Numbers Stranded and Hungry*, N.Y. TIMES (Mar. 29, 2020), <https://www.nytimes.com/2020/03/29/world/asia/coronavirus-india-migrants.html> [https://perma.cc/PJL9-GLK9].

6. INT'L ORG. FOR MIGRATION, WORLD MIGRATION REPORT 75 (2022), <https://publications.iom.int/books/world-migration-report-2022> [https://perma.cc/HE6N-R4RV].

7. See, e.g., Sally Hayward et al., *Clinical Outcomes and Risk Factors for COVID-19 Among Migrant Populations in High-Income Countries: A Systematic Review*, 3 J. MIGRATION & HEALTH 100041 (2021) (concluding that migrant workers were at increased risk of infection and were disproportionately represented among COVID-19 cases); *Migration Data Relevant for the COVID-19 Pandemic*, MIGRATION DATA PORTAL, <https://www.migrationdataportal.org/themes/migration-data-relevant-covid-19-pandemic#key-migration-trends> [https://perma.cc/7SG9-JM6B] (updated December 2021) (reporting that, of the twenty countries with the highest number of COVID cases, at least six countries depend on foreign-born workers in the critical sector of healthcare services).

8. INT'L ORG. FOR MIGRATION GLOBAL MIGRATION DATA ANALYSIS CENTRE (IOM GMDAC), GLOBAL MIGRATION INDICATORS 9 (2018), https://publications.iom.int/system/files/pdf/global_migration_indicators_2018.pdf [https://perma.cc/A38X-QBSP].

the political will to scrutinize—much less reform—the situation. Favored countries of destination rely heavily on migrant labor, particularly to fill the so-called “3D” (dirty, dangerous, difficult) jobs that local workers find less desirable. A “reserve army of labor,” migrant workers are a flexible workforce that can be readily terminated and deported when no longer necessary.⁹ Meanwhile, countries of origin benefit from lowered unemployment rates and remittance revenues that the out-migration of their nationals generates. With remittances—or money transfers made by migrant workers to individuals in their home countries—accounting for as much as forty percent of the GDP in some countries,¹⁰ labor migration has become a *de facto* development policy. Despite reaping considerable economic gains from migrant workers’ labor, destination states have largely offloaded responsibility for workers’ wellbeing to private actors who have built a thriving labor recruitment industry with little to no oversight.¹¹

The inadequate protection of migrant workers reflects longstanding gaps in international norms and institutions designed specifically to address global labor migration—earning the field of international migration law a reputation for lacking basic “architecture.”¹² States have typically viewed any restrictions on their control over the entry and exit of migrant workforces as infringing on their sovereignty.¹³ Migrant workers are thus the subject of less than a handful of poorly-ratified treaties—the few ratifying states being primarily countries of origin, rather than the destination countries where migrant workers labor and most acutely need protections.¹⁴

9. Undocumented workers are especially poorly treated—their presence is maligned for political benefit, but widely exploited for economic gain. In the United States, approximately seven million undocumented migrant workers and their households pay \$79.7 billion in federal tax contribution and \$41 billion at the state and local level each year. During the pandemic, five million of these workers were employed in critical infrastructure work, working to keep the nation’s food supply chain working and providing services that enabled hospitals, nursing homes, and labs to keep functioning. See NICOLE PRCHAL SVAJLENKA, CENTER FOR AMERICAN PROGRESS, PROTECTING UNDOCUMENTED WORKERS ON THE PANDEMIC’S FRONT LINES, <https://www.americanprogress.org/issues/immigration/reports/2020/12/02/493307/protecting-undocumented-workers-pandemics-front-lines/> [<https://perma.cc/23T2-HZSR>].

10. For example, the Global Knowledge Partnership on Migration and Development (KNOMAD) reports the following amounts of remittances as a percentage of GDP for 2021: Tonga (43.9%), South Sudan (37.9%), Kyrgyz Republic (30.1%), Tajikistan (27.8%), El Salvador (26.2%), Nepal (24.8%), and Haiti (15.4%). KNOMAD, *Remittances Data*, www.knomad.org/data/remittances [<https://perma.cc/WX27-ZSAN>] (last visited Feb. 26, 2022).

11. See generally Jennifer Gordon, *Regulating the Human Supply Chain*, 102 IOWA L. REV. 445 (2017) [hereinafter Gordon, *Regulating the Human Supply Chain*]; JENNIFER GORDON, INT’L LAB. ORG., GLOBAL LABOUR RECRUITMENT IN A SUPPLY CHAIN CONTEXT (2015) [hereinafter GORDON, GLOBAL LABOUR RECRUITMENT]; Janie A. Chuang, *Using Global Migration Law to Prevent Human Trafficking*, 111 AJIL UNBOUND 147 (2017).

12. T. Alexander Aleinikoff, *International Legal Norms on Migration: Substance without Architecture*, in INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND CHALLENGES 469 (Ryszard Cholewinski, Richard Perruchoud & Euan MacDonald eds., 2007).

13. CATHERINE DAUVERGNE, MAKING PEOPLE ILLEGAL: WHAT GLOBALIZATION MEANS FOR MIGRATION AND LAW 2, 3 (2009) (describing border control as “the last bastion of sovereignty”).

14. Only fifty-six countries have ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990 [hereinafter Migrant Workers Conven-

Moreover, until recently, no international institution had been tasked with guiding and assisting states on labor migration matters, unlike just about every other issue of significant global concern—e.g., the World Trade Organization (trade), World Intellectual Property Organization (intellectual property), and the United Nations (“U.N.”) Office of the High Commissioner for Refugees (refugees).

We are now seeing, however, emergent scaffolding, as states increasingly recognize the need for international norms and institutions to address cross-border labor migration. The large-scale movements of migrants during the 2015 European migration crisis severely tested governments’ capacity to control their borders and made it impossible to continue ignoring the extent and severity of harms to migrants.¹⁵ At the same time, states and international development institutions have gradually come to embrace remittance-producing migration as a silver bullet for poorer countries’ development woes.

Thus animated by the desire to protect migrants—but also to profit off them—in 2018, states adopted the U.N. Global Compact on Safe, Orderly, and Regular Migration (“GCM”).¹⁶ The GCM offers a shared vision of global migration that carefully balances state interests in securing borders, protecting migrant workers, and maximizing the development gains from migration. Perhaps even more critically, the GCM fills the longstanding institutional gap by appointing the International Organization for Migration (“IOM”) as lead agency for the “U.N. Network on Migration” (“UNNM”). In that capacity, the IOM is expected to lead nearly forty U.N. agencies in providing member states with the U.N.’s system-wide support for the implementation, follow-up, and review of the GCM, and in a manner that prioritizes migrants’ rights and wellbeing.¹⁷

The IOM’s appointment as the global lead agency on migration has generated much controversy and concern over its suitability for the role. The IOM joined the U.N. system only in 2016, after sixty-five years of indepen-

tion), most of which are countries in Africa and Central and South America. See *Status of Ratification Interactive Dashboard*, U.N. OFF. HIGH COMM’R FOR HUM. RTS., <https://indicators.ohchr.org> [<https://perma.cc/BS9B-TH7E>] (last visited Feb. 26, 2022).

15. For background on the 2015 European migration crisis, see William Spindler, *2015: The Year of Europe’s Refugee Crisis*, U.N. HIGH COMM’R FOR REFUGEES (Dec. 8, 2015), <https://www.unhcr.org/en-us/news/stories/2015/12/56ec1ebde/2015-year-europes-refugee-crisis.html>; [<https://perma.cc/LY9E-SEPK>]; EUROPEAN UNION AGENCY FOR FUNDAMENTAL RTS, ASYLUM AND MIGRATION INTO THE EU IN 2015 5–7 (2016). The large-scale mixed movements of refugees and migrations prompted the U.N. General Assembly to recognize the need for closer cooperation, greater responsibility-sharing, and action to address the phenomenon. See G.A. Res. 71/1, New York Declaration for Refugees and Migrants (Sept. 19, 2016).

16. G.A. Res. 73/195, Global Compact for Safe, Orderly, and Regular Migration (Dec. 19, 2018) [hereafter “GCM”]. The GCM was developed alongside the U.N. Global Compact on Refugees, which builds upon established refugee law and policy to improve states’ responses to large movements of refugees and protracted refugee situations. See G.A. Res. 73/151, Global Compact on Refugees (Dec. 17, 2018).

17. See *infra* discussion at text accompanying notes 212–213.

dent operations carried out by its nearly 500 field offices throughout the world. Despite its omnipresence in the migration field, surprisingly little is known about the IOM.¹⁸ In addition to being long overlooked for operating outside the U.N. system,¹⁹ the IOM's lack of transparency, informality, and decentralized structure have made it difficult, as a practical matter, to access information regarding its activities.²⁰ However, based on what *is* known about its history and operations, the IOM has developed a reputation for being a “jack of all trades” “bureaucratic entrepreneur” that has functioned as an “instrument of Northern foreign policy.”²¹ The IOM has provided vital humanitarian assistance to vulnerable populations worldwide, especially with respect to the protection of trafficked persons.²² Yet its past projects assisting states in detaining and repatriating asylum-seekers and increasing cross-border labor mobility have raised alarms over the IOM's “shady”²³ operations and questionable “fidelity to the U.N.'s human rights standards.”²⁴

Critics worry, therefore, that the IOM's elevation to the role of “U.N. Migration” and lead agency under the GCM will lead to “blue-washing”—enabling the organization to project the appearance of humanitarianism

18. Jerome Elie, *The Historical Roots of Cooperation between UN High Commissioner for Refugees and the International Organization for Migration*, 16 *GLOBAL GOVERNANCE* 345, 346 (2010) (noting that IOM had been dismissed by scholars as an insignificant international actor); Megan Bradley, *The International Organization for Migration (IOM): Gaining Power in the Forced Migration Regime*, 33 *REFUGEE* 97, 97 (2017) (noting that “[t]he lack of in-depth analysis of IOM is striking”); Jan Klabbers, *Notes on the ideology of international organizations law: The International Organization for Migration, state-making, and the market for migration*, 32 *LEIDEN J. INT'L L.* 383, 383, 389 (2019) (noting the lack of attention to IOM is “curious” given its “worldwide presence,” “hefty budget,” and work on an issue that concerns many of us, and that the inattention is perhaps because IOM “is not particularly transparent”); Martin Geiger & Martin Koch, *World Organization in Migration Politics: The International Organization for Migration*, 9 *J. INT'L ORGS. STUD.* 25, 25–26 (2018) (observing that “for a long time [IOM] was an unfamiliar organization to the public, academics, and even policy makers. . . [v]ery little academic research has been published and very little is known about the precise interactions between the IOM, its member states, and its most important donor states.”).

19. Elie, *supra* note 18, at 346.

20. Antoine Pécoud, *What Do We Know About the International Organization for Migration?*, 44 *J. ETHNIC & MIGRATION STUD.* 1621, 1622 (2018). Some scholars have even noted the possibility of a chilling effect on critical examination of IOM's operations due to IOM having cultivated close relationships with leading migration scholars — whom IOM employs for paid consultative work. Martin Geiger & Antoine Pécoud, *The Politics of International Migration Management*, in *THE POLITICS OF INTERNATIONAL MIGRATION MANAGEMENT* 11 (Geiger & Pécoud eds., 2010) (citing ALEXANDER BETTS, *GLOBAL MIGRATION GOVERNANCE* (2008)).

21. Bradley, *supra* note 18, at 103.

22. IOM has provided direct assistance to victims of human trafficking since the mid-1990s, serving approximately 8,000 victims each year. See *Human Trafficking*, *MIGRATION DATA PORTAL*, <https://www.migrationdataportal.org/themes/human-trafficking> [https://perma.cc/6W2U-25S7] (last visited Feb. 26, 2022).

23. Ishan Ashutosh & Alison Mountz, *Migration management for the benefit of whom? Interrogating the work of the International Organization for Migration*, 15 *CITIZENSHIP STUD.* 21, 28 (2011).

24. Elspeth Guild, Stefanie Grant, and Kees Groenendijk, *Unfinished Business: The IOM and Migrants' Human Rights*, in *THE INTERNATIONAL ORGANIZATION FOR MIGRATION: THE NEW 'UN MIGRATION AGENCY' IN CRITICAL PERSPECTIVE* (Martin Geiger & Antoine Pécoud, eds. 2020).

while it operates to the detriment of migrant workers.²⁵ When the IOM joined the “U.N. family,” the IOM’s member states insisted that it do so only as a “related organization” and under terms permitting the IOM to maintain its operational independence and its “non-normative” status.²⁶ The IOM is thus neither subject to U.N. oversight mechanisms nor required to prioritize migrants’ rights under its institutional mandate,²⁷ unlike U.N. agencies working in the migration field—e.g., the U.N. High Commissioner for Refugees (“UNHCR”) or the International Labor Organization (“ILO”).

This is concerning. As the lead global migration agency under the GCM, the IOM is well-positioned to influence states’ efforts to balance the three competing interests that undergird the GCM (and indeed any migration policy): (1) securing borders and reducing irregular migration, (2) maintaining access to foreign labor markets, and (3) protecting migrants’ rights. Singapore’s experience exemplifies how states’ interests in border security and labor market access all too readily eclipse their concern for migrant workers’ wellbeing. The IOM’s past work on labor migration has similarly privileged profit and border control over migrant protection. The IOM’s efforts reflect a deliberate neoliberal calculation regarding which areas and which migrant populations are advantageous or appealing to global markets.²⁸ With its ideal migrant serving economic rather than humanitarian goals,²⁹ the IOM has focused on increasing the quantity, rather than the quality, of labor migration, to the detriment of migrants’ rights and wellbeing. However, the GCM’s attention to migrant workers’ rights—e.g., explicitly addressing ethical labor recruitment and decent working conditions—provides the IOM with a prime opportunity to change course. As “U.N. Migration” and the global lead agency under the GCM, the IOM could utilize its extensive networks and governance techniques³⁰ to encourage states to adopt and internalize core migrant worker protections.

25. Asher Lazerus Hirsch & Cameron Doig, *Outsourcing Control: The International Organization for Migration in Indonesia*, 22 INT’L J. HUM. RTS. 681, 684–86 (2018).

26. G.A. Res. 70/296, Agreement concerning the Relationship between the United Nations and the International Organization for Migration, art. 2(3) (Aug. 5, 2016).

27. Miriam Cullen, *The Relationship between the UN and the IOM: Legal Accountability, Normative Compliance and Human Rights*, in THE IOM: OBLIGATIONS, ETHOS AND ACCOUNTABILITY (Megan Bradley, Cathryn Costello & Angela Sherwood eds., forthcoming 2022) (draft on file with author). Note that the agreement establishing IOM as a U.N.-related organization includes a general obligation that the IOM undertake to conduct its activities with “due regard” to the policies and purposes of the U.N. Charter and to “other relevant instruments in the international migration, refugee and human rights fields.” U.N. General Assembly, *Resolution adopted by the General Assembly on 25 July 2016, 70/296 Agreement concerning the Relationship between the United Nations and the International Organization for Migration*, U.N. Doc. A/Res/70/296, para 5 (Aug. 5, 2016).

28. Ashutosh & Mountz, *supra* note 23, at 34.

29. Pauline Gardiner Barber & Catherine Bryan, *International Organization for Migration in the Field: ‘Walking the Talk’ of Global Migration Management in Manila*, 44 J. ETHNIC & MIGRATION STUD. 1725, 1728 (2018).

30. See *infra* discussion at Part II.B.

This Article explores the IOM's capacity and willingness to pursue a more rights-protective trajectory by examining its role in global labor migration governance, past and present—particularly its work on ethical cross-border labor recruitment. The Article begins, in Part I, by exploring how migration issues finally found a place on the international agenda through the back door of development. This culminated in the GCM, which began to address normative gaps in the migration field, and, even more significantly, elevated the IOM to the role of lead global migration agency. Part II provides insights into the IOM's capacity to advance migrant rights by examining the IOM's operational history, structure, and the governance techniques it has used to shape domestic migration policy agendas worldwide. It explores how the IOM's past projects reveal a troubling normative ambivalence concerning the rights of refugees and migrants, and a tendency to accept rights tradeoffs in order to create and expand labor migration corridors.

Whether the IOM's past presages a future marked by a lackluster commitment to migrant rights remains to be seen, however. The IOM's current work to promote ethical recruitment—pursued with the explicit goal of protecting migrant workers from recruitment abuse—offers some initial insights. Part III therefore closely examines the IOM's International Recruitment Integrity System (“IRIS”), specifically its efforts to transform the private recruitment industry through a voluntary ethical certification process. IRIS programming reflects the IOM's neoliberal tendency to rely on markets and individuals to bring about social change. IRIS outsources the assessment of whether a recruiter is “ethical” to a powerful and lucrative private audit industry that has had an underwhelming track record with respect to identifying, much less addressing, rights violations. It thus further privatizes an area of governance that experts—and ethical recruiters themselves—believe instead should have strong state involvement in order to level a playing field rife with rogue actors. This anemic approach to rights protection reflects growing pressures to “harness the development potential of migration” through increased labor mobility—an objective too often pursued at the cost of migrants' rights. Close and continued scrutiny of the IOM's activities is necessary if the IOM is ever to succeed in its task of advancing the migrant workers' rights and wellbeing as “U.N. Migration.”

I. EMERGING ARCHITECTURE FOR GLOBAL MIGRATION GOVERNANCE

Until the pandemic struck,³¹ global labor migration had been on the rise due to persistent demographic and economic inequalities among countries.

31. COVID-19 has disrupted migration through the closing of borders and restrictions on travel worldwide. Prior to the pandemic, the number of international migrant workers had risen approximately three percent between 2017 and 2019, with international migrant workers constituting nearly five percent of the global labor force. INT'L LABOUR ORG., ILO GLOBAL ESTIMATES ON INTERNATIONAL MIGRANT WORKERS: RESULTS AND METHODOLOGY 11 (2021), <https://www.ilo.org/wcmsp5/groups/>

Population projections suggest that many developing countries, particularly in Africa and South Asia, are likely to have more workers than jobs in the foreseeable future, while developed countries in Europe and East Asia are more likely to experience the reverse due to their shrinking populations.³² The rapid demographic aging of such wealthier societies and their corresponding growth in care needs in many countries have heightened demand for migrant domestic workers.³³ That migrants who move from low or middle-income countries can increase their incomes by almost ten-fold, makes migration an eminently rational choice.³⁴ For countries of origin, the prospect of developmental gains from migrant worker remittances—which have skyrocketed over the last two decades, from \$126 billion in 2000 to \$702 billion in 2020³⁵—has incentivized governments to establish and expand labor migration corridors worldwide.

Whether a migrant worker realizes the gains of migration is highly uncertain, however, given the longstanding gaps in international laws and institutions addressing migrant work.³⁶ For migration to finally claim space on the international agenda, it was crucial to reframe the issue from a potential threat (to border security) to a potential opportunity (for economic development). The GCM encapsulates this framing, carefully balancing migrants' rights protection with states' competing interests in border security and access to foreign labor markets.³⁷ The GCM also creates an institutional infrastructure to facilitate states' implementation of the GCM, designating the IOM as the lead agency for U.N. system-wide efforts to

public/@dgreports/@dcomm/@publ/documents/publication/wcms_808935.pdf. [https://perma.cc/6DCY-R8J5]. The post-pandemic landscape for global labor migration is impossible to predict. States have been focused on the immediate effects of the pandemic on migrant workers, many of whom have been rendered destitute and food insecure, and face challenges with reintegrating into local labor markets upon their return to their home countries. Whether and to what extent labor migration channels will be reopened remains uncertain, although one can expect that “[t]he ruling consideration will be the benefits to destination countries; benefits to origin countries are likely to be incidental.” Kathleen Newland, *Will International Migration Governance Survive the COVID-19 Pandemic?* Migration Policy Institute, Policy Brief (Oct. 2020). It bears noting that the need for foreign labor has persisted even under the pandemic, as “even the most severe lockdown in spring 2020 did not stop the recruitment of migrant workers in the agricultural sector,” for example. Antoine Pécoud, *What will migration look like after the pandemic?* OPEN DEMOCRACY, <https://www.opendemocracy.net/en/pandemic-border/what-will-migration-look-after-pandemic/> [https://perma.cc/97GM-792G].

Contrary to predictions that COVID-19 would result in a large decline in international remittances, 2020 saw only a slight drop (2.4%) from the 2019 global total. INT’L ORG. FOR MIGRATION, *World Migration Report 2022*, <https://worldmigrationreport.iom.int/wmr-2022-interactive/> [https://perma.cc/P742-SF3A] (last visited Feb. 26, 2022).

32. PHILIP MARTIN, *MERCHANTS OF LABOR: RECRUITERS AND INTERNATIONAL LABOR MIGRATION* 22 (2017).

33. INT’L LABOUR ORGANIZATION, *GLOBAL ACTION PROGRAMME ON MIGRANT DOMESTIC WORKERS AND THEIR FAMILIES, MIGRANT DOMESTIC WORKERS ACROSS THE WORLD: GLOBAL AND REGIONAL ESTIMATES 2* (2016).

34. MARTIN, *supra* note 32, at 22.

35. WORLD MIGRATION REPORT 2022, *supra* 6.

36. See discussion accompanying *infra* notes 37 to 48.

37. See discussion accompanying *infra* notes 70 to 78.

provide states with guidance and technical assistance to that end.³⁸ Efforts to address migrants' wellbeing thus arise within the context of developing standards to facilitate and encourage their migration as a means of development. It is a tenuous compromise that could, at least in theory, enable greater recognition of migrants' rights protections. But whether migrants ultimately benefit from this emerging architecture will require an assiduous effort to prevent states' interest in protecting migrants from being subsumed by perennial concerns over border security and/or mounting pressures to increase remittance-producing cross-border labor mobility.

A. *Migration through the Back Door of Development: A Background*

The regulation of labor migration has always been a controversial public policy issue, especially in wealthy destination countries, where reliance on migrant labor often conflicts with the anti-migrant sentiments of their populaces. The lack of effective international laws and institutions pertaining to labor migration reflects a long-standing and deeply rooted bias against "economic migrants" in the international system. With border control aptly described as "the last bastion of sovereignty,"³⁹ states have been reluctant to commit to legal obligations with respect to non-nationals within their territories. As Professor Tendayi Achiume states, "non-nationals are definitionally *political strangers* with no cognizable claims to shaping the trajectory of the nation-state."⁴⁰ Sovereignty entails, after all, a nation-state's ability to define its political community, and hence the terms of admission and inclusion with respect to non-nationals. The singular exception to this broad privilege to exclude is the set of obligations most states have accepted under the U.N. Convention on the Status of Refugees and its Protocol,⁴¹ regarding refugees, whose migration is compelled by fear of certain forms of persecution by their home governments.⁴² Economic migrants, on the other hand, whose migration is motivated primarily by the desire for a better life—and thus are considered far less sympathetically than refugees and asylum-seekers—have no claim to special protections unless they are deemed trafficked.⁴³

38. See discussion accompanying *infra* notes 83 to 89.

39. DAUVERGNE, *supra* note 13, at 2.

40. E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1515 (2019).

41. U.N. Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137; U.N. Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

42. See generally Guy S. Goodwin-Gill, *The International Law of Refugee Protection*, in THE OXFORD HANDBOOK OF REFUGEE AND FORCED MIGRATION STUDIES (Elena Fiddian-Oasmiyeh et al. eds., 2014) (describing the provisions of the 1951 Refugee Convention, including non-refoulement and freedom from penalties for illegal entry).

43. See Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime art. 3, *opened for signature* Nov. 14, 2000, 2237 U.N.T.S. 319. Note that trafficked persons' claims to rights

This is not to say that migrant workers are not entitled to rights protections under international law. A diffuse set of norms derived from other areas of law (e.g., refugee, human rights, labor) apply, in varying degrees, to migrant workers.⁴⁴ But there is no coherent regime that synthesizes these norms for application to migrant workers as a defined population—in other words, the corpus of international laws specifically pertaining to labor migration is notably thin. Other core U.N. human rights treaties targeting specific populations (e.g., women, children, the disabled) or issues (e.g., racial discrimination, torture) enjoy nearly universal ratification. By contrast, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (“Migrant Workers Convention”) took ten years to negotiate and an additional thirteen years to finally enter into force in 2003.⁴⁵ The Migrant Workers Convention, like the two ILO treaties addressing migrant workers,⁴⁶ suffers from low ratification rates, with the few ratifying states being primarily countries of origin rather than countries of destination where the need for rights protections is most acute.⁴⁷ The fact that few states have ratified the Migrant Workers Convention—despite it largely reiterating rights enumerated in widely-ratified international human rights instruments⁴⁸—reflects deep resistance to the very notion of recognizing the rights of migrant workers.

Owing to the lack of a wider global consensus on protecting the rights of economic migrants, labor migration was long viewed as best addressed at the regional level and through bilateral arrangements. This began to change in 2006, when then-U.N. Secretary-General Kofi Annan established the first-ever U.N. High-Level Dialogue of the General Assembly on International Migration and Development (“HLD”), placing migration on the development agenda of governments worldwide.⁴⁹ Held every few years, these

protections are typically contingent on their cooperation with efforts to pursue their traffickers—unlike refugees, for whom refugee status itself triggers state protections.

44. For an in-depth discussion of the various legal regimes relevant to the situation of migrant workers, see Chantal Thomas, *Convergences and Divergences in International Legal Norms on Migrant Labor*, 32 COMP. LABOR L. & POL’Y J. 405 (2011).

45. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 87, *opened for signature* Dec. 18, 1990, 2220 U.N.T.S. 3. Article 87 of the Migrant Workers Convention establishes a threshold of twenty ratifications before the Convention enters into force.

46. ILO Convention C097: Migration for Employment Convention (Revised) (Convention concerning Migration for Employment (revised 1949)) 120 U.N.T.S. 71; ILO Convention C143: Migrant Workers (Supplementary Provisions) Convention (Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers), 1120 U.N.T.S. 324.

47. As of this writing, fifty-four countries have ratified the Migrant Workers Convention. The list of ratifying states is available at the United Nations Treaty Collection database, at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&clang=_en [<https://perma.cc/PYB7-E224>].

48. Ryszard Cholewinski, *The Rights of Migrant Workers*, in INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND CHALLENGES 255–74 (Ryszard Cholewinski, Richard Perruchoud & Euan MacDonald eds., 2007).

49. Secretary-General Annan stated:

dialogues sought to build on governments' increasing willingness to see international migration "through the prism of opportunity, rather than of fear," and framed potential opportunities not only in terms of money, but also the ability to "transfer technology, capital, and institutional knowledge."⁵⁰ Annan promoted the idea that cross-border labor migration offers a "triple win" for countries of origin, countries of destination, and the migrants themselves—countries of origin benefit from the remittance revenues generated through their nationals' access to foreign labor markets; countries of destination gain access to flexible labor; and migrants gain the ability to earn far more income abroad than they would have at home.⁵¹ The Secretary General also established the Global Forum on Migration and Development ("GFMD"), a forum to foster "practical, evidence-based cooperation among governments," in a government-led process that would be "informal, voluntary, consultative" given states' lack of appetite for binding norm-setting.⁵²

The HLD and GFMD meetings helped provide the necessary groundwork for mainstreaming migration into development policy. The dialogues coincided with a pendulum swing towards "migration optimism"—that is, faith that the "migration-development nexus" could be leveraged to reduce poverty and prompt economic development.⁵³ Globalization, by enabling increased mobility across borders, had resulted in rapid growth in remittances. A remittance "euphoria" took hold, and the idea of migration as a *solution* to bolster development became a "mantra" of development institutions and thinktanks.⁵⁴ According to migration optimists, remittances can

Just a few years ago, many people did not think it possible to discuss migration at the United Nations. Governments, they said, would not dare to bring into the international arena a topic on which their citizens are so sensitive. Yet here you are, and I sense that the mood is changing.

U.N. Secretary-General, *Secretary-General's Address to the High-level Dialogue of the General Assembly on International Migration and Development* (Sept. 14, 2006) [hereinafter UNSG HLD Address].

50. *Id.*

51. *Id.*

52. *Id.* With the intent to be "state-led but not state only," the GFMD established other processes—i.e., the GFMD Civil Society, the GFMD Business Mechanism, and the Mayors Mechanism—to include the voices and expertise of various stakeholders, including NGOs, academia, trade unions, migrants, the private sector, and local authorities in GFMD discussions. GLOBAL FORUM ON MIGRATION & DEVELOPMENT, *Background*, <https://www.gfmd.org/process/background> [<https://perma.cc/C2VU-4UX7>]. The GFMD has maintained close links through the U.N. Office of the Special Representative of the Secretary General on International Migration ("SRSG") and the U.N. Global Migration Group ("GMG"), a U.N. inter-agency group established at the 2006 HLD to coordinate the U.N. approach to international migration. The SRSG has provided "conceptual, political and policy advice" to the rotating GFMD chairs, and has participated in GFMD proceedings. The GMG—which was replaced by the U.N. Network on Migration established under the GCM—has provided the GFMD with technical support. GLOBAL FORUM ON MIGRATION & DEVELOPMENT, *The Relationship Between the GFMD and the United Nations System*, <https://www.gfmd.org/process/united-nations> [<https://perma.cc/SA4D-RPTD>].

53. Hein de Haas, *The Migration and Development Pendulum: A Critical View on Research and Policy*, 50 INT'L MIGRATION 8, 10–11, 19 (2012) (describing how the policy debate on migration and development "has swung back and forth like a pendulum," from optimism in the 1950s and 1960s, to pessimism since the early 1970s, and back towards optimism since 2000) [hereinafter de Haas, *Pendulum*].

54. Devesh Kapur, *Remittances: The New Development Mantra?* U.N. CONFERENCE ON TRADE AND DEVELOPMENT, G-24 DISCUSSION PAPER SERIES, NO. 29 (April 2004); Kerry Preibisch, Warren Dodd

produce a variety of macroeconomic benefits, including increased foreign currency reserves, improved credit ratings, and an arguably more stable source of income for a developing country than overseas development assistance or foreign direct investment.⁵⁵ Remittances can also reduce poverty—enabling remitters’ families back home to access education and healthcare, and supporting community infrastructure projects such as the building of septic systems and stadiums.⁵⁶ Beyond the economic gains, migration yields “social remittances” in the form of new ideas, values, skills, and practices that migrants gain while working abroad and share with their communities upon returning home.⁵⁷ For migration optimists, migration offers an appealing alternative to the top-down, state-centered macroeconomic solutions long imposed and mediated by (sometimes corrupt) government bureaucracies.⁵⁸ By contrast, remittance-producing migration provides a cost-effective, bottom-up solution that gives individuals and their communities direct access to funds and a greater role in promoting development in their country.⁵⁹

Migration optimism took hold notwithstanding trenchant critique of its assumptions. “Migration pessimists”—whose views held sway during the 1980s and 1990s—argue that though migration may have anti-poverty effects for individual families, there is scant evidence of migration fueling local investment and employment.⁶⁰ Consequently, available studies indicate that migration tends to beget even more migration, with rising incomes in migrants’ origin countries correlated with an increase in migration, at least in the short to mid-term.⁶¹ And in some cases, even after many decades of remittance-producing migration, the promised period of post-migration, stay-at-home development has yet to occur.⁶² Migration pessimists argue that remittances have fueled increased consumption to a far greater degree

& Yvonne Su, *Irreconcilable Differences? Pursuing the Capabilities Approach within the Global Governance of Migration*, SOLIDARITY CENTER, THE TRANSFORMATION OF WORK: CHALLENGES AND STRATEGIES (2013) [hereinafter Preibisch, Dodd & Su, *Irreconcilable Differences*].

55. Kerry Preibisch, Warren Dodd & Yvonne Su, *Pursuing the Capabilities Approach Within the Migration-Development Nexus*, 42 J. ETHNIC & MIGRATION STUD. 2111, 2116 (2016) [hereinafter Preibisch, Dodd & Su, *Pursuing the Capabilities Approach*].

56. Ezra Rosser, *Immigrant Remittances*, 41 CONN. L. REV. 3, 17–18 (2008).

57. *Id.* at 9.

58. Preibisch, Dodd & Su, *Irreconcilable Differences*, *supra* note 54, at 7; Martin Geiger & Antoine Pécoud, *Migration, Development and the ‘Migration and Development Nexus’*, 19 POPULATION, SPACE & PLACE 369, 371 (2013); Rosser, *supra* note 56, at 59–60.

59. Geiger & Pécoud, *supra* note 58, at 369; Rosser, *supra* note 56, at 52.

60. As Professor de Haas explains, the development impacts of migration are *strongly context-dependent*—with structural political and economic reforms as necessary prerequisites for “unleashing the development potential of migration.” de Haas, *Pendulum*, *supra* note 53, at 19.

61. Kathleen Newland, *Migration Development, and Global Governance: From Crisis Toward Consolidation*, in MIGRATION POL’Y INST., POLICY BRIEFS (June 2019); Geiger & Pécoud, *supra* note 58, at 370.

62. See, e.g., Barber & Bryan, *supra* note 29, at 1739 (noting that there has been no significant decline in the numbers of Filipinos willing to enter global labor markets, which suggests the idea that post-migration entrepreneurship will provide Filipinos with more employment at home is a “fiction of capitalism fuelling contemporary migration”); MARTIN, *supra* note 32 at 25 (noting that there are examples of migration leading to a “vicious circle” where stay-at-home development does not occur and instead

than investment in job-creating local enterprises, partly because many migrants come from areas that lack basic infrastructure for migrants to make such investments.⁶³ Because the poorest individuals lack the resources and social networks to migrate, migration can also increase the inequality between migrant and non-migrant populations within origin countries.⁶⁴ Moreover, reliance on remittance incomes can disincentivize local work, especially with respect to young people who grew up in remittance-receiving households and who now seek higher-paying jobs abroad themselves.⁶⁵ The resulting “brain drain” and “brawn drain” reduce the talent and energy available to pursue the political and economic reforms necessary to achieve sustainable development at home.⁶⁶ Relying on migration as the cure-all for development encourages states’ tendency to overlook the features of the global political economy that drive people to migrate in the first place—for example, poor governance and growing inequality between countries and within communities.⁶⁷ It also unfairly shifts the burden of development to migrants—who comprise only three percent of the world’s population—to engage in “self-help” development.⁶⁸

Notwithstanding these concerns—which continue to be voiced by rights advocates—migration optimist perspectives have come to dominate development policy. These views provided common ground for states and other stakeholders attending the HLD and GFMD to reach a “better common understanding of contested aspects of migration. . . [and] buil[d] trust between participating Member States and develo[p] ideas and data.”⁶⁹ These confidence-building exercises fostered a greater willingness to engage in multilateral action regarding migration, culminating in two major developments. First, the 2030 Sustainable Development Goals, adopted in 2015, posits a clear relationship between well-governed migration and sustainable development – obliging states to “[f]acilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies” in order to reduce inequality (Goal 10).⁷⁰ Second, in response to the 2015 European migration crisis, which demonstrated the inescapable necessity of addressing large-scale migration flows, states conceded the need to treat migration as an

migrants’ home villages “turn into nurseries for children and nursing homes for the elderly that depend on external lifelines”).

63. Martin, *supra* note 32, at 124.

64. Rosser, *supra* note 56, at 22; Preibisch, *supra* note 55, at 2116; de Haas, *Pendulum*, *supra* note 53, at 16–18; Hein de Haas, *Migration and Development: A Theoretical Perspective*, 44 INT’L MIGRATION REV. 227, 236 (2010).

65. de Haas, *supra* note 53, at 237–38.

66. Preibisch et. al, *supra* note 55, at 2117.

67. *Id.* at 2115–16.

68. Geiger & Pécoud, *supra* note 58, at 371; de Haas, *Pendulum*, *supra* note 53, at 8, 10.

69. U.N. Secretary-General, *Making Migration Work for All*, UN Doc. A/72/643, ¶ 79 (Dec. 12, 2017).

70. Sustainable Development Goals, Goal 10, Target 10.7, <https://www.un.org/sustainabledevelopment/inequality/> [https://perma.cc/RPW7-YQ6L/V5PK-TKZF].

issue of urgent international concern.⁷¹ This recognition ultimately culminated in the 2018 adoption of the U.N. Global Compact on Safe, Orderly, and Regular Migration, with the support of 152 countries.⁷²

B. Establishing New Global Architecture: The GCM & Elevation of the IOM

The GCM establishes a “cooperative framework” that seeks to optimize the positive impacts of migration “as a source of prosperity, innovation, and sustainable development,” and to reduce the negative impacts of irregular migration.⁷³ At its core are twenty-three wide-ranging “Objectives for Safe, Orderly and Regular Migration,” each accompanied by a list of actions that states can take to realize each objective.⁷⁴ While these include provisions that, if implemented, would significantly advance the rights and wellbeing of migrants, the GCM is not a human rights instrument. It does not prioritize rights protections in the face of competing state interests in border security and access to foreign labor markets, which the GCM also addresses. Moreover, prospects for implementation of these (and other) provisions of the GCM remain uncertain in the face of opposition to the instrument from the United States and others.⁷⁵ That said, the GCM could have an enduring legacy in one crucial aspect of migration governance: its elevation of the IOM to global lead migration agency.

The GCM’s sweeping smorgasbord of recommended state actions hews to a vision of migration as a phenomenon to be managed by carefully balancing states’ interests in fostering orderly and regular labor migration. For example, to protect migrants, the GCM recommends that states use detention only as a measure of last resort; eliminate all forms of discrimination; facilitate ethical recruitment and decent working conditions; invest in skills development; and enhance consular protection and assistance throughout the course of migration.⁷⁶ The GCM also has an eye towards maximizing the economic gains of migration, recommending that states establish mechanisms to enable the portability of social security entitlements and earned benefits; to promote faster, safer and cheaper remittance transfers; and to foster financial inclusion of migrants.⁷⁷ At the same time, the GCM calls upon states to strengthen their responses to smuggling and trafficking; to

71. G.A. Res. 71/1, New York Declaration for Refugees and Migrants (Sept. 19, 2016), Introduction (discussing the international community’s shared responsibility to manage large movements of refugees and migrants).

72. Forty-one out of 193 UN Member States chose not to endorse the GCM—five states voted against it (United States, Hungary, Czech Republic, Poland, and Israel), twelve countries abstained, and twenty-four countries did not vote. Press Release, General Assembly Endorses First-Ever Global Compact on Migration, Urging Cooperation Among Member States in Protecting Migrants (Dec. 19, 2018), <https://www.un.org/press/en/2018/ga12113.doc.htm> [<https://perma.cc/64MR-A4G6>].

73. GCM, *supra* note 16, ¶ 8.

74. *Id.* ¶ 16.

75. See discussion accompanying *infra* notes 80–81.

76. GCM, *supra* note 16, ¶ 19, ¶ 23, ¶ 34, ¶ 21, ¶ 30 (objectives 3, 7, 18, 5, 14).

77. *Id.* ¶ 38, ¶ 36.

manage borders in an “integrated, secure and coordinated manner”; and to cooperate in facilitating safe and dignified return and readmission.⁷⁸ However, an excessive focus on one set of objectives could compromise efforts to achieve the other two. States’ tendency to prioritize border controls and desire to increase labor mobility risks undermining their commitment to migrants’ rights and wellbeing.

In addition to the challenge of striking the right balance of priorities, the refusal of a few notable objectors to adopt the GCM renders its implementation uncertain. Although the United States was an early supporter of the GCM, it withdrew from GCM negotiations (and successfully encouraged others to follow suit) under the Trump Administration.⁷⁹ Despite the GCM’s non-binding status and its strong reaffirmation of states’ sovereignty over migration decisions,⁸⁰ the United States protested that the GCM nonetheless might provide a springboard for the development of soft law or customary law in the field of migration.⁸¹ As Geiger notes, the lack of support from the United States and other states (e.g., Australia, Brazil) could yield a “piecemeal approach” to implementation, with small groups of U.N. member states developing and testing new partnerships and approaches.⁸² Unfor-

78. *Id.* ¶ 16 (objectives 4, 9, 10, 11, 21).

79. See Olivia Beavers, *US Pulls Out of Global Compact on Migration*, HILL (Dec. 3, 2017), <https://thehill.com/homenews/administration/363014-us-pulls-out-of-global-compact-on-migration> [https://perma.cc/9WMV-KA29]. Austria, Australia, Brazil, Bulgaria, Chile, Hungary, Israel, Latvia, Poland, and Slovakia refused to sign the pact citing concern that doing so would infringe upon their sovereign right to decide issues relating to migration and security. Jessica Toale, *Why Have 12 Countries Pulled Out of the UN Migration Pact?*, MEDIUM (Dec. 7, 2018), <https://medium.com/@jitoale/why-have-12-countries-pulled-out-of-the-un-migration-pact-a48779aadf2d> [https://perma.cc/Q8Q7-597U]. Many of these countries objected that the GCM failed to sufficiently distinguish between legal and illegal migration. *Id.*

80. The GCM reaffirms “the sovereign right of states to determine their national migration policy and their prerogative to govern migration within their jurisdiction, in conformity with international law.” It provides that “States may distinguish between regular and irregular migration status, including as they determine their legislative and policy measures for the implementation of the Global Compact, taking into account different national realities, policies, priorities and requirements for entry, residence and work, in accordance with international law.” GCM, *supra* note 16, ¶ 15(c).

81. Upon the GCM’s adoption in December 2018, the United States further noted its concern that:

Compact supporters, recognizing the lack of widespread support for a legally-binding international migration convention, seek to use the Compact and its outcomes and objectives as a long-term means of building customary international law or so-called ‘soft law’ in the area of migration.

United States Mission to the United Nations, National Statement of the United States of America on the Adoption of the Global Compact for Safe, Orderly, and Regular Migration (Dec 7, 2018). Since then, the United States has continued to register its opposition by, for example, pressuring the IOM to refrain from mentioning the instrument in any of its work on U.S.-funded projects. Emanuel Stoakes, *Leak suggests UN agency self-censors on climate crisis after US pressure*, GUARDIAN (Sept. 11, 2019), <https://www.theguardian.com/global-development/2019/sep/11/leak-suggests-un-agency-self-censors-on-climate-crisis-after-us-pressure> [https://perma.cc/LH9L-27E2].

82. Martin Geiger, *Possible Futures? The New ‘UN Migration Agency’ and the Shifting Global Order*, in THE INTERNATIONAL ORGANIZATION FOR MIGRATION 293, 297 (Martin Geiger & Antoine Pécoud eds., 2020).

tunately, this might not necessarily include more rights-based approaches, but rather more restrictive activities seeking to limit migration.

What appears a far more certain result of the GCM, however, is the IOM solidifying its position as global lead migration agency. The GCM designates the IOM as the “coordinator and secretariat” of the UNNM, established “to ensure coherent system-wide support” for implementation of the GCM.⁸³ This marks a significant shift in the institutional landscape. Various U.N. specialized agencies (e.g., the ILO, OHCHR, UNHCR) along with the IOM, have addressed labor migration issues in a fragmented fashion — and, at times, at cross purposes. This fragmentation has enabled states to selectively decide what issues to address and in which institutional context.⁸⁴ For example, states can discuss ways to prevent and address migrant worker rights violations before the ILO and U.N. human rights organs, while simultaneously soliciting IOM assistance in implementing aggressive border control policies that arguably undercut migrants’ rights protections. Such fragmentation has hindered efforts to develop a coherent international institutional approach to labor migration.

As the global lead agency for the UNNM, however, the IOM is responsible for coordinating and fostering collaboration among nearly forty U.N. specialized agencies to provide support for member states’ efforts to implement the GCM.⁸⁵ Although the GCM is framed as an international cooperation framework, it contains actionable commitments. For example, states are to develop national and regional implementation plans, and to engage in evidence-based governance with the informal participation of non-state stakeholders.⁸⁶ Moreover, the GCM establishes a process by which states’ efforts to implement the GCM will be periodically reviewed at the global, regional, and state levels.⁸⁷ As coordinator and secretariat, the IOM is thus well-positioned to influence how states and institutions balance the competing interests underlying migration policy, and whether that balance meaningfully advances migrant workers’ wellbeing.

As Geiger cautions, however, the GCM’s uncertain future, combined with states’ tendency towards restrictive handling of migration, could result in the IOM fronting a management-based rather than a rights-based approach to migration.⁸⁸ This would likely lead to a “larger and more powerful IOM,” which may still not guarantee protection of migrants’ rights. The

83. GCM, *supra* note 16, ¶ 45.

84. Geiger & Pécoud, *supra* note 20, at 4.

85. U.N. Network on Migration, *Terms of Reference for the United Nations Network on Migration, Mission Statement*, https://www.un.org/en/conf/migration/assets/pdf/UN-Network-on-Migration_TOR.pdf [<https://perma.cc/6HMZ-EZDE>] [hereinafter UN Migration Network ToR]; U.N. Network on Migration, *Annex II: Network Membership*, https://migrationnetwork.un.org/sites/default/files/docs/annex_ii_-_network_membership.pdf [<https://perma.cc/S29S-CDB2>].

86. GCM, *supra* note 16, ¶¶ 50–53.

87. *Id.* ¶ 40.

88. Geiger, *Possible Futures*, *supra* note 82, at 297–98.

IOM, after all, pioneered the “migration management” approach and spent decades developing “management tools” for states to use.⁸⁹ A close examination of the IOM’s operational history reinforces Geiger’s concern regarding the rights implications of this approach, as the IOM’s projects have both benefited and undermined the rights of migrants and refugees, as discussed below.

II. ASSESSING IOM’S SUITABILITY FOR ADVANCING A RIGHTS-BASED APPROACH TO MIGRATION

Available research regarding the IOM’s operational history reveals how the organization’s keen ability to adapt and reinvent itself has enabled it to quietly move from the periphery of the international system to assume a central role in international migration policy. Over time, the IOM has adopted a capacious view of its mandate, providing its member states a wide range of migration services (and, indeed, non-migration-related assistance) that at times has overlapped, if not conflicted, with the work of U.N. agencies.⁹⁰ As Klabbers explains, the ideal type of international organization is “an entity, endowed with several organs and a will of its own, which performs technical tasks (said to be apolitical) delegated by its member states, in pursuit of the global common good, and usually at the behest or on behalf of the collective membership.”⁹¹ These features are key sources of the legitimacy presumptively afforded to an international organization’s supranational functioning. While other international organizations have fallen short of this ideal type,⁹² the IOM’s departure is quite significant, calling into question both whom the IOM serves, and whether the IOM advances a discernible public good.

The IOM influences states’ policies and practices far more than would be expected of an organization created to serve its member states.⁹³ The IOM has assumed a constitutive role in shaping states’ understanding of the “border problem” and how best to address it. This is in a sense consistent with the functions international institutions typically undertake – that is, they (1) classify the world, creating categories of problems, actors and action; (2) fix meanings in the social world; and (3) articulate and diffuse new norms

89. *Id.*

90. See Nicola Piper & Laura Foley, *Global Partnerships in Governing Labour Migration: The Uneasy Relationship Between the ILO and IOM in the Promotion of Decent Work for Migrants*, 1 *GLOB. PUB. POL’Y & GOVERNANCE* 256 (2021) (describing the relationship between ILO and the IOM as “an uneasy alliance along a “competition/class-cooperation spectrum”).

91. Klabbers, *supra* note 18, at 383.

92. See generally GUGLIELMO VERDIRAME, *THE UN AND HUMAN RIGHTS: WHO GUARDS THE GUARDIANS?* (2011) (exploring the ways in which the United Nations and other international organizations have failed to uphold their human rights obligations).

93. Klabbers, *supra* note 18, at 384.

and rules.⁹⁴ The IOM exerts power in subtle ways that often mask the significant influence it wields vis-à-vis both states and non-state actors. Through its “capacity-building” activities and its development of technical norms, standards, and regulations,⁹⁵ the IOM’s soft governance techniques guide and mobilize actors, “influencing how they think, act, and perceive.”⁹⁶

As discussed below, the IOM has deployed its extensive networks and cultivated expert authority to engage in a form of stealth governance in service of the wealthy Northern and Western countries that tend to fund the IOM’s projects (and therefore its existence). These projects have worked to both the benefit and detriment of migrants, resulting in the perception, if not the reality, of the IOM’s normative ambivalence when it comes to the rights of refugees and migrant workers.⁹⁷ Concerning migrant workers in particular, the IOM’s past interventions have prioritized destination countries’ desire to access cheap and flexible foreign labor, and origin countries’ reliance on remittances to fuel development over migrants’ need for greater rights protections.⁹⁸

A. *The IOM’s Founding and Structure*

The organization now known as the IOM was founded in 1951 as a European-centric intergovernmental organization to assist with the post-war emigration of unemployed “over-populations” (for example, persons displaced by war, former inmates of German concentration camps) out of Europe.⁹⁹ Governments were concerned that discontented, unemployed populations could pose a threat to post-war stability and prosperity.¹⁰⁰ The UNHCR, also founded in 1951, had been entrusted with working with states to provide appropriate protections to refugees rather than providing material assistance directly.¹⁰¹ A separate institution was needed to handle operations on the ground and to address non-refugee populations. Aspiring to fill that role, the ILO proposed establishing a Migration Administration within the ILO’s framework to “carry out an operating migration programme on the scale deemed necessary” to address European migration problems and to

94. Martin Geiger & Martin Koch, *World Organization in Migration Politics: The International Organization for Migration*, 9 J. INT’L ORGS STUDS 25, 28 (2018) (citing M. BARNETT & M. FINNEMORE, RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS 31 (2004)).

95. Rutvica Andrijašević & William Walters, *The International Organization for Migration and the International Government of Borders*, 28 ENV’T & PLANNING D: SOC’Y & SPACE 977, 987–90 (2010).

96. Inken Bartels, ‘We Must Do it Gently.’ *The Contested Implementation of the IOM’s Migration Management in Morocco*, 5 MIGRATION STUD. 315, 317 (2017).

97. See *infra* discussion at Part II.C.1.

98. See *infra* discussion at Part II.C.2.

99. Fabian Georgi, *For the Benefit of Some: The International Organization for Migration and its Global Migration Management*, in THE POLITICS OF INTERNATIONAL MIGRATION MANAGEMENT 45, 50 (Martin Geiger & Martin Koch eds., 2010).

100. Elie, *supra* note 18, at 349.

101. *Id.* at 348.

meet the immigration needs of other parts of the world.¹⁰² But the United States opposed the proposal, arguing that migration policy was a domestic matter and that such an entity would deprive states of control over immigrant selection.¹⁰³ The United States also viewed UNHCR and the ILO as potentially uncontrollable and communist-influenced.¹⁰⁴ The United States therefore advocated creating a separate, competing international body that would be independent of the United Nations, with membership limited to member states who supported “free movement” (which excluded Communist states). This new entity—then known as the Provisional Intergovernmental Committee for the Movements of Migrants from Europe (PICMME)¹⁰⁵—thus included “a homogeneous group of developed, ‘white’, and capitalist Western states.”¹⁰⁶

Although it was intended to be a temporary entity created to address European overpopulation, over time, the organization expanded its operations to address a wide range of migration issues worldwide. In 1989, it was transformed into a permanent international institution, renamed the International Organization for Migration,¹⁰⁷ and tasked with promoting “the organized transfer and the regulated mobility of migrants, migrant workers, refugees, displaced persons and other individuals in need of international migration services.”¹⁰⁸ Neoliberal reforms—deregulation, privatization, financialization and free trade—and intensified economic globalization had increased the international mobility of labor.¹⁰⁹ In the face of these new migration movements, Western industrialized countries began establishing institutions for migration control. As Georgi explains, the IOM’s expanded role “was part of a complex process in which hegemonic forces in Western industrialized countries tried to shift the balance of forces between their migration control capacities, on the one side, and the mobility strategies that populations, movements, and individuals employed as a reaction to ‘neoliberal’ reforms on the other.”¹¹⁰ The IOM thus transformed from an or-

102. Rieko Karatani, *How History Separated Refugee and Migrant Regimes: In Search of Their Institutional Origins*, 17 INT’L J. REFUGEE L. 517, 533 (2005).

103. *Id.* at 534–38; Richard Perruchoud, *From the Intergovernmental Committee for European Migration to the International Organization for Migration*, 1 INT’L J. REFUGEE L. 501, 503 (1989).

104. Georgi, *supra* note 99, at 50; Klabbers, *supra* note 18, at 389–90.

105. The IOM was initially called the Provisional Intergovernmental Committee for the Movements of Migrants from Europe (PICMME), but within the year, was renamed the International Committee for European Migration (ICEM). In 1980, the ICEM became the Intergovernmental Committee for Migration (ICM) to reflect the global reach of its operations. ICM was renamed the International Organization for Migration in 1989. See Perruchoud, *supra* note 103, at 503–05, 507, 512.

106. Pécoud, *supra* note 20, at 1624.

107. Klabbers argues that the IOM’s name changes over time are “suggestive”—whereas an “intergovernmental committee” suggests a fairly loose entity that operates at the behest of governments, “international organization” “suggests an entity that may have been created by states but nonetheless can claim some independence or autonomy.” Klabbers, *supra* note 18, at 390.

108. Georgi, *supra* note 99, at 52.

109. *Id.* at 52.

110. *Id.* at 53.

ganization that encouraged migration to one that focused on *managing* it, distinguishing between “good” and “bad” migration.

Since its founding seventy years ago, the IOM has grown from an inter-governmental body with sixteen members to an organization consisting of 174 member states (and a further eight states with observer status).¹¹¹ While the IOM maintains a small headquarters office in Geneva, its approximately 10,000 employees primarily staff the IOM’s 500 field offices and duty stations, which are located in over 100 countries. With the tagline of “making migration work for all,” the IOM works in four areas of “migration management,” namely—migration and development, facilitating migration, regulating migration, and addressing forced migration.¹¹² The IOM’s work has encompassed a wide range of activities, including, for example, refugee resettlement, repatriation of trafficked persons and unsuccessful asylum seekers, labor recruitment, certification of third-party labor recruiters, and implementation of immigrant detention programs.¹¹³

The IOM’s diverse array of activities is at least partly attributable to its unusual funding model. Article 20 of the IOM’s constitution (“IOM Constitution”) stipulates that the IOM’s administrative budget is to be funded by cash contributions from member states;¹¹⁴ by contrast, the IOM’s operational budget is to be funded through voluntary contributions (from states, international and nongovernmental organizations, or other legal entities or individuals) provided in exchange for the IOM’s migration services.¹¹⁵ Without a regular budget within which to balance its activities, the IOM must rely on projectization or activity-based costing such that IOM offices and staff survival depend on the acquisition of projects. As Georgi explains, projectization “creates an instrumental-rational logic that establishes the monetary value of a project as an independent and important factor in addition to its practical-use value or its normative justification.”¹¹⁶ Projectization combined with the IOM’s decentralized structure results in the IOM operating like a private company, or a “bureaucratic entrepreneur” whose first priority is survival.¹¹⁷ This funding structure has created the perception that “IOM as an agency will do anything as long as there’s money with

111. See INT’L ORG. FOR MIGRATION, *Who We Are*, <https://www.iom.int/who-we-are> [<https://perma.cc/FGK5-F32R>].

112. *Id.*

113. See INT’L ORG. FOR MIGRATION, *Migration Management*, <https://www.iom.int/migration-management> [<https://perma.cc/BG96-U4UD>] (describing the wide range of migration services IOM provides to states).

114. See INT’L ORG. FOR MIGRATION, *Constitution*, <https://www.iom.int/constitution> [<https://perma.cc/GG6S-WJQL>].

115. *Id.*, art. 20.

116. Georgi, *supra* note 99, at 63.

117. Martin Geiger & Antoine Pécoud, *International Organisations and the Politics of Migration*, 40 J. ETHNIC & MIGRATION STUD. 865, 870 (2014); Geiger & Koch, *supra* note 18, at 35 (noting that IOM’s decision to place its service centers in low-wage countries as opposed to Western Europe or North America indicates IOM’s business acumen and emphasis on cost efficiency).

which to do it.”¹¹⁸ Member states have thus come to rely on the IOM for its “jack of all trades” flexibility and its efficacy and logistical efficiency in project delivery.¹¹⁹

B. *The IOM’s Soft Governance Techniques*

Another aspect of the IOM’s operations that sets it apart is its extensive reach and subtle but significant influence over local migration policies. Its hundreds of field and regional offices enable the IOM to embed itself into a wider social context than is typical of international organizations. The IOM exerts influence not only horizontally across states (as is typical of international organizations), but also vertically within states, affecting local migration and border management strategies.¹²⁰ Utilizing this vast network, the IOM has cultivated and deployed its expert authority on migration issues, producing and disseminating knowledge regarding migration phenomena and normative views regarding how best to address them.

Reflecting its view that partnerships are “an essential component of well-managed migration policy” and global migration governance,¹²¹ the IOM collaborates with a wide range of U.N. agencies, research and academic institutions, civil society organizations, donors, and media.¹²² The IOM’s field operations often involve local government partners, other international organizations, NGOs (sometimes created by the IOM as quasi-NGOs, or QUANGOS), transnational humanitarian networks (for example, church-led organizations), and control oriented-agencies (for example, E.U. police assistance missions).¹²³ As the IOM explains, involving a variety of stakeholders “can contribute to a more proactive effort to identify new and innovative solutions as well as develop the capacity to learn from successes and failures to improve existing policies.”¹²⁴

Inasmuch as the IOM has engaged in extensive collaboration with other actors, it has also displayed a keen ability to navigate “rivalries on the humanitarian market place” and maintain institutional dominance in the migration field.¹²⁵ The IOM and UNHCR have managed to develop a task-sharing relationship, but only after an initial period of what critics viewed as

118. Georgi, *supra* note 99, at 63. Indeed, the IOM has even undertaken projects that have nothing to do with migration—e.g., compensation for non-Jewish victims of Nazi slave-labor programs. Anđrijašević & Walters, *supra* note 95, at 981.

119. Bradley, *supra* note 18, at 103.

120. Geiger & Koch, *supra* note 18, at 26, 28, 32.

121. INT’L ORG. FOR MIGRATION, INTERNATIONAL DIALOGUE ON MIGRATION, No. 28, INCLUSIVE AND INNOVATIVE PARTNERSHIP FOR EFFECTIVE GLOBAL GOVERNANCE OF MIGRATION 20 (2018).

122. INT’L ORG. FOR MIGRATION, *Partnerships*, <https://www.iom.int/partnerships> [<https://perma.cc/S4R7-P4CP>].

123. Geiger & Koch, *supra* note 18, at 32.

124. See INT’L ORG. FOR MIGRATION, INTERNATIONAL DIALOGUE ON MIGRATION, *supra* note 121, at 79.

125. Pécoud, *supra* note 20, at 1632.

the IOM's "trespass" onto the UNHCR's humanitarian space.¹²⁶ The IOM assigns NGOs key roles in its "capacity-building" activities, but has exerted compulsory power over those who become reliant on funding channeled through the IOM.¹²⁷ The IOM has even reportedly sponsored the creation of new NGOs to challenge existing ones.¹²⁸ Such actions have drawn criticism of the IOM for engaging in "creative exploitation and management of external relations to other policy actors."¹²⁹ Critics argue that the IOM's embeddedness in societies is perhaps "merely symbolic" and ultimately a "strategic tool to mitigate (potential) opposition from non-state audiences."¹³⁰ At the same time, "involv[ing] IOM as a local henchman, as opposed to true NGOs and local players, mitigates the risk of provoking governments in implementation countries, while potentially increasing cost effectiveness and sustainability of policy approaches."¹³¹

The IOM's ability to embed itself is at least partly attributable to its having carefully cultivated a reputation as an expert authority in the migration field. The IOM boasts a long history of producing research and analysis of migration phenomena, and in recent years, appears to have redoubled those efforts. The IOM has burnished its expert reputation by claiming a central role in data collection and analysis¹³²—areas explicitly identified as priorities in both the Sustainable Development Goals and the GCM. For example, in 2015, the IOM established the Global Migration Data Analysis Center ("GMDAC") to help member states develop capacity to collect and share data, and in 2017,¹³³ in collaboration with the Polaris Project, a U.S.-based NGO, created the Counter Trafficking Data Collaborative, touted as

126. See discussion accompanying *infra* note 172 (discussing human rights organizations' criticism of IOM's work on issues within the mandate of UNHCR); Tim Morris, *IOM: Trespassing on Others' Humanitarian Space?* 22 FORCED MIGRATION REV. 43 (2005) (same); Anne Koch, *The Politics and Discourse of Migrant Return: The Role of UNHCR and IOM in the Governance of Return*, 40 J. ETHNIC & MIGRATION STUD. 905 (2014) (arguing that after an initial period of competition, UNHCR and IOM engaged in a particular type of task-sharing vis-à-vis the involuntary return of migrants that legitimized each other's engagement, as well as the overarching return objectives of governments).

127. Bradley, *supra* note 18, at 103. For example, Pécoud observes that IOM's anti-trafficking campaigns are "almost systematically" established in partnership with NGOs that are trained and funded to run advice centers, answer calls to the hotlines, and distribute information booklets, among other activities. Although such projects are portrayed as joint IOM-NGO projects, civil society partners sometimes complain about their having little influence on their conceptualization. Antoine Pécoud, *Informing Migrants to Manage Migration? An Analysis of IOM's Information Campaigns*, in THE POLITICS OF INTERNATIONAL MIGRATION MANAGEMENT 184, 191 (Geiger & Pécoud eds., 2010).

128. Geiger & Koch, *supra* note 18, at 32.

129. *Id.* at 36.

130. *Id.*

131. *Id.*

132. See Bradley, *supra* note 18, at 103 (noting how the IOM has "dramatically expanded its involvement in data collection in humanitarian contexts, an activity that increases its compulsory power, but even more so its institutional power").

133. INT'L ORG. FOR MIGRATION, *Global Migration Data Analysis Center, Migratory Governance Indicators*, <https://gmdac.iom.int> [<https://perma.cc/F9RM-A5F6>].

“the first global data hub on human trafficking.”¹³⁴ Furthermore, the IOM joined the ILO and the Walk Free Foundation to produce the “2017 Global Estimate of Modern Slavery” (“GEMS”),¹³⁵ which followed years of disparate (and controversial) estimates released by different institutions regarding the extent of the problem of human trafficking, or “modern slavery.”¹³⁶ These various tools empower the IOM to define border problems, measure them, and assess governments’ responses, thus reinforcing its role in global migration governance.

Deploying its expert authority and extensive network, the IOM functions like other international organizations in “constructing the social world”: producing data about a migration situation, and issuing policy recommendations that establish influential cognitive and political frameworks.¹³⁷ As Pécoud explains, the IOM “makes sense of local migration realities by translating them into ‘international migration narratives’—or ‘normative knowledge’ or claims about best policies and practices—while also translating this knowledge into local expertise through training, capacity-building, and cooperation with local stakeholders.”¹³⁸ The IOM’s extensive partnership network leaves it well-situated to collaborate with local actors to “co-produce” this knowledge, further bolstering the IOM’s claim to both global and local expertise. Through such vehicles as the IOM’s annual International Dialogue on Migration (“IDM”),¹³⁹ the IOM serves as a knowledge “hub” for policy debates and discussions among these different actors, and regularly inte-

134. The Counter Trafficking Data Collaborative: Global Data Hub on Human Trafficking, <https://www.ctdatacollaborative.org/> [<https://perma.cc/769J-4BFJ>].

135. INT’L LABOR ORG., WALK FREE FOUNDATION, AND INTERNATIONAL ORGANIZATION FOR MIGRATION, GLOBAL ESTIMATES OF MODERN SLAVERY (GEMS) (2017) [hereinafter GEMS]. GEMS is intended to inform global anti-trafficking policy-making and for measuring progress of global efforts to achieve Sustainable Development Goal 8.7 (eradication of forced labor, trafficking, and the worst forms of child labor), among other initiatives.

136. See Janie A. Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AM. J. INT’L L. 609, 625–26 n.90 (2014) (surveying the numerous flawed statistics regarding human trafficking); Janie A. Chuang, *Giving as Governance? Philanthrocapitalism and Modern-Day Slavery Abolitionism*, 62 UCLA L. REV. 1516, 1536, 1548–50 (2015) (discussing flaws in the Global Slavery Index); Benjamin Harkins, *Constraints to a Robust Evidence Base for Anti-Trafficking Interventions*, 8 ANTI-TRAFFICKING REV. 113 (2017) (discussing possible reasons for flawed statistics in the field). Indeed, the 2017 GEMS estimate itself drew criticism for relying on limited source data and extrapolation, and questionable line-drawing regarding the phenomena it seeks to measure. Daniel Mügge, *40.3 million slaves? Four reasons to question the new Global Estimates of Modern Slavery*, openDemocracy, Policy Brief No. 1 (2017).

137. Pécoud, *supra* note 20, at 1632.

138. *Id.* at 1633 (citing Oleg Korneev, *Self-Legitimation through Knowledge Production Partnerships: International Organization for Migration in Central Asia*, 44 J. ETHNIC & MIGRATION STUD. 1673 (2018)).

139. INT’L ORG. FOR MIGRATION, *International Dialogue on Migration*, <https://www.iom.int/international-dialogue-migration> [<https://perma.cc/7XXA-A7GQ>] (noting that the IDM “provides a space to analyze current and emerging issues in migration governance and to exchange experiences, policy approaches and effective practices.”). The IDM is intended to have a capacity-building function – enabling experts from different regions to “develop networks for future action” – as well as to build confidence among the various migration stakeholders. *Id.* Prompted by the GCM’s emphasis on capacity-building, the IOM explored the theme of “inclusive and innovative partnerships for effective global governance of migration” for its 2018 IDM. See also INT’L ORG. FOR MIGRATION, INTERNATIONAL DIALOGUE ON MIGRATION, *supra* note 121.

grates new participants into these dialogues.¹⁴⁰ As Geiger and Pécoud have noted, such global policy discourses are “performative,” as policies may “shape the construction of reality and the very perception of the ‘problems’ to be addressed by governments.”¹⁴¹ Through extensive interactions with its vast network, the IOM is able to transmit its expertise horizontally, from country to country, by presenting itself as an “ally” of both (poorer) countries of origin and (wealthier) countries of destination. This dynamic encourages states and non-state actors to think and act in similar ways, thus “strengthen[ing] a kind of globally homogeneous governmentality of borders.”¹⁴²

In deploying this cultivated expert authority,¹⁴³ the IOM assumes the posture of a neutral, technocratic actor whose purpose is not to amass power, but rather to engage in equitable problem-solving “for the benefit of all.”¹⁴⁴ The IOM’s management model is akin to a consultancy that carries at least the appearance of being beyond politics—the IOM offers a diagnosis of the problem, develops projects ad hoc, dispenses advice, and estimates the efficacy of the interventions proposed.¹⁴⁵ Formulating migration strategies using management language and technocratic standards can have the effect of depoliticizing highly contested border politics.¹⁴⁶ But the resulting depoliticized consensus around adopting norms for “shared benefits” and “in the interest of all” downplays political divergences and power imbalances between states, thus enabling states to avoid the political costs of their politics.¹⁴⁷

The targeted states—and individuals—become active participants in the IOM-crafted construction of the problem and its solution. In helping states draft national action plans, the IOM engages in “shared sovereignty,” making important interventions that actually shape and define the ways in which states, through their national experts, policy makers, and border guards, among others, understand migration issues.¹⁴⁸ In Turkey, for example, the IOM actively cultivated Turkish high-ranking civil servants tasked

140. Julien Brachet, *Policing the Desert: The IOM in Libya Beyond War and Peace*, 48 *ANTIPODE* 272, 277 (2016).

141. Geiger & Pécoud, *supra* note 20, at 9.

142. Brachet, *supra* note 140, at 277.

143. Pécoud, *supra* note 20, at 1627; *see also* Andrijasevic & Walters, *supra* note 95, at 995 (noting that governments actively seek out the assistance of the IOM to improve management of their borders).

144. The IOM has long described its work as “promoting humane and orderly migration for the benefit of all.” Pécoud, *supra* note 20, at 1627. Its website includes the phrase “Making Migration Work for All” as part of the IOM logo. *See* INT’L ORG. FOR MIGRATION, <https://www.iom.int/> [<https://perma.cc/FBG7-9H2B>].

145. Brachet, *supra* note 140, at 273.

146. Bruno Dupeyron, *Secluding North America’s Labor Migrations: Notes on the International Organization for Migration’s Compassionate Mercenary Business*, in *REMOTE CONTROL: THE EXTERNALIZATION OF MIGRATION MANAGEMENT IN EUROPE AND NORTH AMERICA* 238, 244 (Ruben Zaiotti ed., 2016).

147. Pécoud, *supra* note 20, at 1627.

148. Andrijasevic & Walters, *supra* note 95, at 993.

with developing and implementing Turkish migration policy.¹⁴⁹ The IOM seconded consultants and staff to the Turkish government's then-new "migration management" bureau, while also recruiting Turkish "bordercrats" to work at IOM headquarters to "enculturate [them] into the IOM's ways of seeing and doing."¹⁵⁰ In Turkey and in other IOM sites, norms were not so much imposed as "learned" in training that utilized peer pressure to discipline the targeted state.¹⁵¹ The subtext of IOM messaging might suggest, for example, that failure to meet the international community's standards (as transmitted by the IOM) would risk encouraging the perception that the targeted state is a weak link in the security chain, or worse, a "failed state."¹⁵² Conversely, compliance could bring the targeted state desired international standing—for example, in the case of Albania and other Western Balkan countries, potential membership in the European Union.¹⁵³

Inasmuch as the IOM in effect disciplines states, it also frequently targets individual decision-making through strategic use of information campaigns to shape community attitudes. As Pécoud has observed, information has a normative function, and is a crucial element in distinguishing between good and bad migration. The IOM's information campaigns assume that informed migrants would be cognizant of the rules and respect them, while an informed public would support policies that aim to maximize the benefits of migration.¹⁵⁴ The campaigns target, for example, potential irregular migrants to inform them of the risks of irregular migration and to encourage them to use regular migration channels or to remain at home.¹⁵⁵ They also target the broader public—as 'potential facilitators' of irregular migration—with legal, moral, and religious warnings about helping irregular migrants.¹⁵⁶ The IOM's activities in Indonesia, for example, turned Indonesian public opinion strongly against migrant smuggling where it had previously

149. Shoshana Fine, *Liaisons, Labelling and Laws: International Organization for Migration Bordercratic Interventions in Turkey*, 44 J. ETHNIC & MIGRATION STUD. 1743, 1744 (2018).

150. *Id.* at 1750.

151. Andrijasevic & Walters, *supra* note 95, at 984; *see generally* Fine, *supra* note 149.

152. Andrijasevic & Walters, *supra* note 95, at 990.

153. *See* Martin Geiger, *Mobility, Development, Protection, EU-Integration! The IOM's National Migration Strategy for Albania*, in THE POLITICS OF INTERNATIONAL MIGRATION MANAGEMENT 141, 154 (Martin Geiger & Antoine Pécoud eds., 2010) (quoting a paper authored jointly by the IOM and the Government of the Republic of Albania) ("All efforts to manage migration will bring Albania closer to EU membership."). As Andrijasevic and Walters explain:

IOM can work with the grain of states that strive to join the EU. Since a crucial pillar of meeting the standards for EU membership is the demonstrated ability of the applicant states to properly govern their respective borders and exposure to migratory processes, the geopolitics of European 'enlargement' provides a particularly fertile ground for the development and implementation of IOM projects.

Andrijasevic & Walters, *supra* note 95, at 990.

154. Pécoud, *supra* note 127, at 187.

155. *Id.*

156. Hirsch & Doig, *supra* note 25, at 695.

been accepting or neutral.¹⁵⁷ In a similar vein, the IOM's trainings of immigration and border officials in Djibouti deployed messaging that equated African mobility with deviance, and sedentariness with allegiance to one's identity.¹⁵⁸

C. *The IOM's Checkered History*

The IOM's ability to shape societal and governmental perceptions and attitudes towards refugees and migrants has afforded the IOM subtle yet powerful influence over whether migration policy benefits or undermines migrant wellbeing. Unsurprisingly, the IOM's elevation to global lead migration agency has prompted closer scrutiny of the impact of its activities on the ground. Available research, discussed below, suggests a checkered history with respect to the effects of IOM projects on the rights and wellbeing of refugees and migrants. While the IOM has provided crucial humanitarian services to vulnerable populations in some instances, in others its activities have prioritized states' interests in border control and facilitating cross-border labor mobility over protecting migrants' rights.

1. *Migration Control*

The IOM's heavy reliance on projects from governments of Western, industrialized countries has fed the perception that the IOM is an "instrument of Northern foreign policy."¹⁵⁹ In that capacity, critics argue, the IOM has functioned "as a state apparatus in supranational disguise,"¹⁶⁰ or as "a state apparatus on a private market for profit."¹⁶¹ As such, the IOM has stepped into work "where the nation-state reaches its sovereign limits, finding itself constrained by international law and guided—if not restricted—by U.N. Conventions."¹⁶² In many instances, the IOM could be viewed as a very effective subcontractor, implementing Western/Northern states' migration policies, extending a state's sovereignty over border control beyond its territorial limits by constructing the border policies of other countries. Close analysis of the IOM's work in Libya,¹⁶³ Mauritania,¹⁶⁴ Albania,¹⁶⁵ and Tur-

157. *Id.* at 695–96.

158. Sabine Dini, *Migration Management, Capacity Building and the Sovereignty of an African State: International Organization for Migration in Djibouti*, 44 J. ETHNIC & MIGRATION STUD. 1691, 1700–02 (2018).

159. Bradley, *supra* note 18, at 103.

160. Ashutosh & Mountz, *supra* note 23, at 34.

161. Klabbers, *supra* note 18, at 385.

162. Ashutosh & Mountz, *supra* note 23, at 22.

163. *See, e.g.*, Brachet, *supra* note 140 (examining how the IOM has long participated in the implementation of European migration policies in Libya, and more widely in the Sahara, without accountability to the affected populations).

164. Philippe M. Frowd, *Developmental Borderwork and the International Organization for Migration*, 44 J. ETHNIC & MIGRATION STUD. 1656 (2018).

165. Geiger, *supra* note 153 (discussing how the migration strategy adopted by Albania in 2004 was actually developed by the IOM, which secured a commitment from the EU Commission to fund the strategy, before presenting the plan to the Albanian government for "ratification").

key,¹⁶⁶ for example, reveals how the IOM pro-actively introduced EU-driven concerns over irregular migration into domestic policymaking.

The IOM has thus developed a reputation for being a “deeply ambivalent organization” that engages in diverse activities that are contradictory, if not controversial.¹⁶⁷ On the one hand, the IOM claims a humanitarian mission—working “to ensure the orderly and humane management of migration” and “to provide humanitarian assistance to migrants in need, including refugees and internally displaced people.”¹⁶⁸ For instance, the IOM has been able to provide assistance to populations who do not meet the requirements of the refugee definition (and thus lie outside the purview of the UNHCR’s protection), yet nonetheless must migrate for basic survival.¹⁶⁹ It also devotes significant resources to projects where “care outweighs control,” and has increasingly introduced humanitarian methods and legal norms into its work; indeed, the IOM staff’s own worldviews reflect a commitment to humanitarianism.¹⁷⁰

On the other hand, the IOM’s involvement in the “ordering of movement” has drawn criticism from human rights organizations for using coercive practices and activities that arguably “constrain rather than advance the rights and well-being of migrants.”¹⁷¹ Indeed, critics note that states may strategically fund the IOM to undertake projects that are clearly within the mandates of normative institutions (for example, the UNHCR) to *avoid* more rigorous application of human rights standards.¹⁷² Critics have targeted, for example, the IOM’s role in detaining undocumented migrants and asylum-seekers. Most notoriously, for Australia’s Pacific Solution program, the IOM established and operated detention centers in Nauru and Papua New Guinea to prevent potential asylum-seekers and migrants from

166. Fine, *supra* note 149.

167. Georgi, *supra* note 99, at 47.

168. INT’L ORG. FOR MIGRATION, *Our Work*, <https://www.iom.int/our-work> [https://perma.cc/28SY-PYFM].

169. See Bradley, *supra* note 18, at 100 (noting how the ICEM was called upon to deal with “potential refugees”, or “persons who find themselves in the condition of refugees in their own country”); Elie, *supra* note 18, at 355 (discussing cooperation between the IOM and UNHCR regarding “potential refugees”).

170. Frowd, *supra* note 164, at 1657–58, 1661.

171. AMNESTY INT’L & HUM. RTS. WATCH, *Statement by Amnesty International & Human Rights Watch to the Governing Council, International Organization for Migration*, Dec. 2–4, 2002. In a 2013 report to the U.N. General Assembly, the U.N. Special Rapporteur on the Human Rights of Migrants called upon the IOM to cease its activities in relation to the construction and operations of detention centers, and to instead offer alternatives to detention, and to ensure that the IOM’s assisted voluntary return programs “are genuinely voluntary and carried out in strict compliance with human rights standards.” François Crépeau (Special Rapporteur on the Human Rights of Migrants), *Human Rights of Migrants*, ¶¶ 112–13, U.N. Doc. A/68/283 (Aug. 7, 2013).

172. See, e.g., *Statement to the IOM Governing Council, 29 Nov–2 Dec 2005 (90th Session)*, HUM. RTS. WATCH, https://governingbodies.iom.int/system/files/jahia/webdav/shared/shared/main/site/about_iom/en/council/90/Human%20Rights%20Watch.pdf [https://perma.cc/G4P8-8AGZ]; Ashutosh & Mountz, *supra* note 23, at 22.

reaching Australian territory.¹⁷³ This program left migrants “stateless within an international regime that curiously only furthers their inability to make appeals to the guarantor of rights—the nation-state.”¹⁷⁴ The IOM’s “assisted voluntary return” (“AVR”) programs also draw frequent criticism on the grounds that they may place undue pressure on asylum-seekers to opt for repatriation—in effect, pressuring individuals to cooperate with their own expulsion—rather than remain in indefinite detention.¹⁷⁵ Critics have even gone so far as to argue that the IOM’s professed humanitarian concerns serve as a smokescreen for its actual intentions—promoting (Western/Northern) states’ interests in border controls and flexible labor—and as a strategic vehicle for raising funds.¹⁷⁶

2. *Migration for Profit*

Inasmuch as the IOM has served states’ interests in border security, its activities also implicitly recognize that complete control of migration flows is not only impossible, but potentially counterproductive because it could compromise the necessary circulation of workers in the globalizing economy.¹⁷⁷ For example, in its work with Albania, the IOM assumed a far more powerful role than simply that of an EU border security “henchman.” The IOM pitched its work as a development-generating strategy that would help increase Albania’s standing with the EU—addressing EU anxieties concerning irregular migration by creating additional channels for temporary and circular migration.¹⁷⁸ The IOM effectively moved the EU away from a control-oriented perspective that viewed migration as a threat, and toward a “managed approach” that could maximize the benefits of migration (that is, remittances to foster Albanian development).¹⁷⁹

This strategic pivot reflects how the IOM embraces “migration optimism,” or faith in the migration-development nexus.¹⁸⁰ The IOM has increasingly allocated resources towards “migration and development”

173. Hirsch & Doig, *supra* note 25, at 690; Ashutosh & Mountz, *supra* note 23, at 31–32; Morris, *supra* note 126.

174. Ashutosh & Mountz, *supra* note 23, at 33–34.

175. Hirsch & Doig, *supra* note 25, at 693; Andrijasevic & Walters, *supra* note 95, at 994 (describing the IOM’s AVR programs as deploying a neoliberal deportation model). Human Rights Watch has noted, for example, the IOM’s inability to determine “whether decisions to return are, in fact, made under duress or under circumstances that are directly or indirectly coercive, or to assess that conditions in certain countries are safe enough to allow for returns.” Morris, *supra* note 126, citing *Current Concerns Submitted by Human Rights Watch IOM Governing Council Meeting 86th Session November 18–21, 2003 Geneva*, HUM. RTS. WATCH, <https://www.hrw.org/legacy/backgroundunder/migrants/iom-submission-1103> [<https://perma.cc/3LL9-KMP4>].

176. Pécoud, *supra* note 127, at 195 (noting how this framing enables funding for these campaigns to be drawn from humanitarian as opposed to border control budgets).

177. Pécoud, *supra* note 20, at 1630.

178. Geiger, *supra* note 153, at 146.

179. *Id.* at 154.

180. Erin Newman-Grigg, *Between Migration and Development: The IOM’s Development Fund*, in *THE INTERNATIONAL ORGANIZATION FOR MIGRATION: THE NEW ‘UN MIGRATION AGENCY’* 99, 101–05 (Martin Geiger & Antoine Pécoud eds., 2020).

projects that encourage and facilitate remittances from diasporas and migrants to reduce poverty and promote sustainable development in their countries of origin.¹⁸¹ IOM publications also emphasize the need to create a favorable investment environment and facilitate remittance flows.¹⁸² More significantly, to address the needs of a globalizing economy, the IOM connects labor surpluses in resource-poor regions with demand for migrant workers in resource-rich regions of the world.¹⁸³ Operating labor migration programs in seventy countries,¹⁸⁴ the IOM has actively created labor migration corridors, facilitated governments' efforts to create temporary labor programs, and even taken on the role of recruiter itself.

The IOM's work bolsters state-promoted migration that has aptly been criticized for manifesting an "extreme liberal restructuring" that makes individual migrant citizens responsible for servicing the national debt with their remittances.¹⁸⁵ For example, IOM-Manila has capitalized on the idea of the Philippines as a "model" labor export regime, crafting pre-departure training sessions to create "ideal" migrant workers for the Canadian labor market.¹⁸⁶ By training Filipino workers to be "proactive and self-responsible" for their own successful integration into Canadian markets, the sessions help ensure the ongoing viability of the Filipino government's objectives for economic development.¹⁸⁷ IOM-Manila's success in promoting this labor stream has even positioned it to assist other countries, such as Indonesia, in developing new labor markets for their nationals.¹⁸⁸

The IOM has also undertaken to introduce migration as a development strategy to countries far less versed in this practice than the Philippines—but with underwhelming results with respect to building governments' long-term capacity to regulate migration and protect migrants' rights. For example, in response to Canadian interest in finding a new labor source, the Guatemalan government tasked IOM-Guatemala with creating and implementing a temporary worker program that would bring Guatemalan workers to Quebec for agricultural work.¹⁸⁹ Guatemala involved the IOM as the labor recruiter in order to avoid reliance on private labor recruiters,¹⁹⁰ and

181. *Id.* at 101.

182. *See, e.g.*, INT'L ORG. FOR MIGRATION, WORLD MIGRATION REPORT 174–75 (2020).

183. Pécoud, *supra* note 20, at 1630.

184. INT'L ORG. FOR MIGRATION, *Labour Migration*, <https://www.iom.int/labour-migration> [<https://perma.cc/95B8-347M>].

185. Barber & Bryan, *supra* note 29, at 1727.

186. *Id.* at 1728.

187. *Id.* at 1734.

188. *Id.* at 1736. For an in-depth analysis of the IOM's work in Indonesia, see Hirsch & Doig, *supra* note 25.

189. Dupeyron, *supra* note 146, at 248; Christina Gabriel & Laura Macdonald, *After the International Organization for Migration: Recruitment of Guatemalan Temporary Agricultural Workers to Canada*, 44 J. ETHNIC & MIGRATION STUD. 1706, 1714 (2018).

190. Barber & Bryan, *supra* note 29, at 1730; Gisele Valarezo, *Offloading Migration Management: The Institutionalized Authority of Non-State Agencies Over the Guatemalan Temporary Agricultural Worker to Canada Project*, 16 INT'L MIGRATION & INTEGRATION 661, 667 (2015).

with the goal of eventually having the IOM transfer knowledge and expertise to the Guatemalan government so that it could build its own capacity to independently manage the program in the future.¹⁹¹ From 2003 to 2013, the program grew from sending 215 to 5,400 Guatemalan temporary workers to Quebec and other parts of Canada, mostly in the agricultural sectors.¹⁹² But while the program was a quantitative success, it drew a great deal of criticism for the IOM's mistreatment of the workers.¹⁹³ The workers' contracts, which were drafted by IOM-Guatemala, included provisions that heavily favored the employer, with scant language concerning worker's rights and entitlements under the contract.¹⁹⁴ The workers endured verbal abuse and humiliation, ethnic and class discrimination, harassment for bribes, and a "naming system" that enabled growers to blacklist workers, resulting in a chilling effect on workers' complaints regarding abusive working conditions.¹⁹⁵ Curiously, the contracts placed responsibility for all worker protection on the Guatemalan Consulate in Canada, even though labor rights protection was within the purview of Canadian federal and local government agencies and trade unions.¹⁹⁶ However, rather than overseeing worker protections, the Guatemalan Consulate instead focused on disciplining workers—returning workers who complained about abuse back to Guatemala, warning workers that unions were deceptive and best avoided, and instructing workers to permit their employers to hold their passports and identification documents.¹⁹⁷

Ironically, the economic success of the program contributed to its demise in 2013. In 2011, after being forced to resign due to corruption allegations, the IOM-Guatemala Chief of Mission established a private recruitment business—the firm Amigo Laboral—and recruited former IOM-Guatemala employees to be on staff.¹⁹⁸ Amigo Laboral soon dominated the market for recruitment of Guatemalan workers destined for Quebec. IOM-Guatemala's

191. Valarezo, *supra* note 190, at 667.

192. *Id.* at 665 (Table 1 providing statistics regarding numbers of Guatemalans participating in the program each year between 2003 and 2010). In 2004, IOM Guatemala signed a Letter of Understanding with FARM, a placement organization operating out of Ontario. FERME handled placements in Quebec, while FARM placed workers in other parts of the country. Farmers in British Columbia and Alberta also contacted the IOM directly for help in placing workers on their farms. Gabriel & Macdonald, *supra* note 189, at 1714.

193. See also Dupeyron, *supra* note 146, at 246 (describing the IOM as "very liberal, laissez-faire and pleasant at the top of the hierarchy of the field, with employers and member states, and is conversely short-sighted, paternalistic and rude with those who are at the bottom: migrants, migrant workers and refugees"); Valarezo, *supra* note 190, at 668 (reporting that Guatemalan migrants confronted "systemic forms of exploitation" including but not limited to denial of information regarding rights, unwarranted repatriation, blacklisting, confinement on the farm, and racial discrimination).

194. Dupeyron, *supra* note 146, at 253–54.

195. Gabriel & Macdonald, *supra* note 189, at 1715; Valarezo, *supra* note 190, at 668; Dupeyron, *supra* note 146, at 247 (describing the "extremely discriminatory" selection of workers).

196. Dupeyron, *supra* note 146, at 252–54.

197. *Id.*

198. Gabriel & Macdonald, *supra* note 189, at 1716; Valarezo, *supra* note 190 (discussing the Guatemala Temporary Agricultural Worker to Canada Project); Dupeyron, *supra* note 146, at 250.

next Chief of Mission eventually also left IOM Guatemala to start his own lucrative recruitment business, supplying Guatemalan workers to the Anglophone provinces of Canada.¹⁹⁹ After losing market share to these and other private recruitment businesses, IOM-Guatemala ceased its recruitment operations, leaving the recruitment and welfare of Guatemalan workers entirely in the hands of the private recruitment industry.²⁰⁰ Since then, the Guatemalan government has exhibited neither the capacity nor the political will to regulate the recruitment industry, much less address recruitment abuse, while the Canadian government appears content to rely on the private recruitment firms (including Amigo Laboral) to provide a steady supply of flexible labor.²⁰¹

The IOM's work in Tajikistan tells a similar story of bold ambitions resulting in unaddressed rights abuses and failed government capacity-building. There, the IOM sought to establish a state system for the organized recruitment of low-skilled Tajik workers for work in Russia and Kazakhstan.²⁰² The IOM's aim was to legalize the employment of Tajik migrants abroad and maximize the economic benefits of migration through taxes paid in Russia and remittances sent back to Tajikistan.²⁰³ To encourage local acceptance of the migration-development paradigm, the IOM hired well-connected Tajik citizens to broker the IOM's ideas with Tajik policymakers and gain their approval and support for IOM projects in the country.²⁰⁴ But the IOM and the Tajik IOM "brokers" and policymakers had divergent views. The Tajiks saw organized recruitment as a way of protecting Tajik migrants from increasing exploitation and abuse abroad, whereas the IOM saw it as a vehicle for exporting Tajik surplus labor and maximizing developmental gains from migration.²⁰⁵ Pleas by the Tajik IOM brokers for IOM-Kazakhstan and IOM-Moscow to address complaints of severe exploitation of Tajik workers in Kazakhstan and Russia were met with refusal by the IOM leadership not only of those offices, but also of IOM-Tajikistan.²⁰⁶ The IOM ultimately lost interest in the project, leaving the Tajik government unable to manage labor recruitment beyond a "tiny" number of workers, and unlikely to improve the conditions of Tajik migrant workers abroad.²⁰⁷

199. Dupeyron, *supra* note 146, at 250.

200. Gabriel & Macdonald, *supra* note 189, at 1716–18; Valarezo, *supra* note 190, at 665; Dupeyron, *supra* note 146, at 250–51.

201. See Valarezo, *supra* note 190 (discussing the Canadian government's efforts to "exonerate itself from responsibility for the general health and welfare" of the workers, enabling employers to violate Canadian labor standards).

202. Karolina Kluczevska, *When IOM Encounters the Field: Localising the Migration and Development Paradigm in Tajikistan*, 47 J. ETHNIC & MIGRATION STUD. 4457, 4471 (2019).

203. *Id.* at 4459.

204. *Id.*

205. *Id.* at 4467.

206. *Id.* at 4469, 4471.

207. *Id.* at 4474.

These labor migration projects underscore how the IOM's neoliberal, market-oriented "managed" approach to migration seeks to enable states to maximize the economic benefits of new labor streams while minimizing their responsibility for migrant welfare. The persistent lack of assistance for the workers, combined with the workers' economic dependency on the temporary worker programs for economic survival, rendered the Tajik and Guatemalan workers vulnerable to manipulation and abuse.²⁰⁸ The Tajik policymakers' and brokers' goal of creating a structure that would better protect the rights of Tajik migrant workers was subsumed by the IOM's instrumentalist view of the workers as exports to be leveraged for economic gain. In Guatemala, the IOM ultimately strengthened and legitimized the privatization of migration governance, enabling the Guatemalan government to divest and offload its responsibility for migrant welfare to private actors enjoying impunity for widespread labor violations.²⁰⁹ Both projects illustrated critics' claims that the IOM acts *against* migrants, despite positioning itself as an international organization *for* migration.²¹⁰

III. THE IRIS INITIATIVE: A CASE STUDY ON THE IOM'S SHORTCOMINGS IN ETHICAL RECRUITMENT

Given the IOM's checkered history, the IOM's ascendance to a "U.N. related organization," and then to lead migration agency under the GCM prompted concerns that the move would undermine the rights of migrant workers. Some viewed the IOM joining the U.N. system as a strategic effort by the organization to lay claim to a prominent role in implementing the 2030 Agenda for Sustainable Development, adopted in 2015, rather than risk being marginalized by remaining outside of the U.N. system.²¹¹ During the High Level Dialogues, the IOM had, after all, sought "due recognition of IOM's current and future role as the global lead agency on migration in any outcomes of the HLD and that no parallel entity on migration be created in the U.N., duplicating work IOM has been doing globally for more than 60 years."²¹² The IOM achieved that goal, reflecting yet again its keen ability to adapt and maintain its foothold in the international system. But what does it mean, then, for an entrepreneurial, normatively ambivalent entity to assume the lead role on migration issues for a fundamentally normative institution?

208. See Valarezo, *supra* note 190, at 672; see Kluczevska, *supra* note 202, at 4468.

209. See Valarezo, *supra* note 190, at 671.

210. Kluczevska, *supra* note 202, at 4472, citing Pécoud, *supra* note 20, at 2, and Ashutosh & Mountz, *supra* note 23, at 34.

211. Geiger & Koch, *supra* note 18, at 25, 33.

212. INT'L ORG. FOR MIGRATION, 2013 UNITED NATIONS GENERAL ASSEMBLY HIGH LEVEL DIALOGUE ON INTERNATIONAL MIGRATION AND DEVELOPMENT, IOM POSITION PAPER, 3 (2013).

When the IOM joined the U.N. system in 2016, it did so as a U.N. “related organization” rather than as a specialized agency of the U.N.²¹³ Status as the latter would have bound the IOM to the obligation of impartiality, prohibiting any government influence in discharging IOM responsibilities.²¹⁴ The IOM would also have been brought under the oversight of the U.N. General Assembly and the checks and balances contained within the U.N. Charter, and expected to operate in line with the protective mandates of other U.N. agencies.²¹⁵ By contrast, the terms of the IOM’s relationship to the U.N. as a “related organization” establish that the IOM, “by virtue of its Constitution, shall function as an *independent*, autonomous and *non-normative* international organization in the working relationship with the United Nations.”²¹⁶ Unlike the OHCHR, UNHCR, and ILO, therefore, the IOM does not have a normative protection mandate establishing human rights and labor rights promotion as a core feature of its operations.²¹⁷ Instead, the IOM Constitution establishes only that the IOM will make arrangements for the “organized transfer” of migrants and refugees, and provide states with “migration services.”²¹⁸ Moreover, it affirms the primacy of national laws and makes no reference to international, much less human rights, laws.²¹⁹

Despite its independent, non-normative status, the IOM branded itself as “UN Migration” on its website shortly after becoming a related organization²²⁰— a move that some viewed as an effort to signal the IOM’s parity with UNHCR, a “real UN agency.”²²¹ The IOM was immediately tasked

213. Only six other entities have the status of “related organization.” The Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization, the U.N. Framework Convention on Climate Change Secretariat, the International Atomic Energy Agency, the World Trade Organization, the International Trade Centre, and the Organisation for the Prohibition of Chemical Weapons. See UNITED NATIONS, *UN System*, <https://www.un.org/en/about-us/un-system> (last visited Aug. 14, 2021) [<https://perma.cc/Z99W-GKHL>].

214. Miriam Cullen, *The IOM’s New Status and its Role under the Global Compact for Safe, Orderly and Regular Migration: Pause for Thought*, EJIL:TALK! (Mar. 29, 2019), <http://www.ejiltalk.org/the-ioms-new-status-and-its-role-under-the-global-compact-for-safe-orderly-and-regular-migration-pause-for-thought/> [<https://perma.cc/M2XR-V27G>].

215. *Id.*

216. G.A. Res. 70/296, *supra* note 26, at 3. For an in-depth discussion of the implications of the IOM becoming a U.N.-related organization, see Guild et al., *supra* note 24.

217. NICHOLAS R. MICINSKI & THOMAS G. WEISS, INTERNATIONAL ORGANIZATION FOR MIGRATION AND THE U.N. SYSTEM: A MISSED OPPORTUNITY 3 (2016).

218. INT’L ORG. FOR MIGRATION, *Constitution and Basic Texts*, art. 1 ¶ 1 (Mar. 19, 2021) (establishing “[t]he purposes and functions of the Organization”).

219. *Id.* art. 2 (“[T]he organization shall cooperate closely with international organizations, governmental and non-governmental, concerned with migration, refugees and human resources. . . .to facilitate the coordination of international activities in these fields.”); art. 3 (“[T]he fact that control of standards of admission and the number of immigrants to be admitted are matters within the domestic jurisdiction of States, and, in carrying out its functions, shall conform to the laws, regulations and policies of the States concerned.”).

220. Brachet notes that even prior to becoming a U.N.-related organization, IOM vehicles were frequently marked as “U.N.,” creating confusion on the ground regarding the IOM’s role in the international system. Brachet, *supra* note 140, at 275.

221. Geiger & Koch, *supra* note 18, at 32.

with increasing responsibilities for dealing with migration issues.²²² Rather than follow the standard procedure of having the U.N. Secretariat facilitate negotiations over the GCM, for example, the United Nations assigned the responsibility to the IOM.²²³ The IOM provided technical and policy expertise to the drafting sessions of the GCM, reaffirming its position as a central actor in global migration policy—a status the GCM reified by designating the IOM as lead agency for the U.N. Network on Migration. During the GCM negotiations, there remained the expressed hope that the IOM might one day come further into the U.N. fold as a U.N. specialized agency—and thus given a rights protection mandate—as the best means of strengthening the international community’s work on migrant workers’ rights.²²⁴ To this day, however, the IOM remains decidedly non-normative and independent of the United Nations.²²⁵

The IOM thus appears to have gained the best of both worlds in becoming a “related organization”: a U.N. affiliation in name and operational independence in practice. This dual nature has invited concerns of potential “blue washing” of any rights-compromising activities. That said, it bears noting that the terms of reference that guide the IOM’s work as lead agency for the UNNM retain migrant protection at their core. The Mission Statement for the UNNM states that “[i]n carrying out its mandate, the Network will prioritize the rights and well-being of migrants and their communities of destination, origin, and transit.”²²⁶ The UNNM’s listed objectives and working principles emphasize the promotion of international and regional human rights norms and a human rights-based approach to its work.²²⁷ Hence, while the IOM’s checkered human rights record is indeed concerning, it carried out those pre-GCM projects free of any normative expectations. Whether the UNNM terms of reference result in the IOM adopting a more rights-based approach to its work thus largely remains to be seen.

One aspect of the IOM’s work, however, offers some initial insights into the IOM’s commitment and ability to advance migrants’ rights protection as “UN Migration”: the IOM’s International Recruitment Integrity System (“IRIS”) initiative. With the support of the Swiss, Swedish, Australian, and Canadian governments, the IOM launched IRIS in 2016 as a “global multi-

222. Cullen, *supra* note 214.

223. *Id.*

224. U.N. Secretary-General, *Making Migration Work for All*, U.N. Doc. A/72/643, ¶ 73 (Dec. 12, 2017).

225. *A Conversation with António Vitorino, the Director General of the International Organization for Migration*, MIGRATION POLICY INSTITUTE (Mar. 6, 2019), <https://www.migrationpolicy.org/events/conversation-director-general-international-organization-migration> [<https://perma.cc/9252-3WBK>] (noting that the IOM does not have “the equivalent normative source that other agencies can build on . . . and everything will depend much more on . . . international cooperation with IOM member states, and international organizations. . .”).

226. U.N. NETWORK ON MIGRATION, *supra* note 85.

227. *Id.* ¶¶ 1–2.

stakeholder initiative that supports governments, civil society, the private sector and recruiters to establish ethical recruitment as a norm in cross-border labour migration.”²²⁸ IRIS seeks to address the exploitation of migrant workers at the recruitment stage, when workers are often charged recruitment fees and other costs or misled about the job on offer.²²⁹ IRIS frames such practices as linked to “modern slavery,” noting that nearly half of the twenty-five million people subjected to forced labor globally are victims of debt-bondage.²³⁰ IRIS situates its work as a necessary addition to anti-“modern slavery” interventions that focus on the employment stage—for example, how workers are treated in a factory or farm setting—which come too late to tackle unethical recruitment and its consequences.²³¹

Cross-border labor recruitment is an issue explicitly addressed in the GCM, and for which the IOM has articulated a clear commitment to prioritizing the rights of migrant workers. Recruiter accountability has become a preoccupation of governments and anti-trafficking and labor advocates. Reflecting this concern, the GCM calls upon states to “facilitate fair and ethical recruitment” and “to guarantee decent work and maximize the socioeconomic contributions of migrants in both their countries of origin and destination.”²³² In addition to recommending a wide range of actions that states can take to achieve this objective,²³³ the GCM explicitly directs states to consider the recommendations of IRIS as they develop their national policies to achieve that end.²³⁴

IRIS’s work thus offers a useful case study of the IOM’s functioning as “U.N. Migration.” IRIS’s approach to recruitment reform features multiple

228. *What is IRIS?*, IRIS ETHICAL RECRUITMENT (last visited Mar. 24, 2022), <https://iris.iom.int/what-iris> [https://perma.cc/3449-4V4X].

229. INT’L RECRUITMENT INTEGRITY SYS. & INT’L ORG. FOR MIGRATION, FACTSHEET 1: OVERVIEW OF IRIS 2 [hereinafter IRIS FACTSHEET 1].

230. Debt bondage, which is prohibited under international law as a practice similar to slavery, is defined as:

the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined[.] Involvement of third-party recruiters as creditors challenges traditional conceptions of debt bondage, which presume the employer is also the creditor.

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, art. 1(a), 266 U.N.T.S 40.

231. IRIS FACTSHEET 1, *supra* note 220, at 2.

232. GCM, *supra* note 16, ¶ 22.

233. GCM Objective 6 offers specific guidance to states regarding measures they can take to facilitate fair and ethical recruitment. These include, for example, promoting the ratification and implementation of international instruments related to labor migration and labor rights; to establish mandatory and enforceable mechanisms for effective regulation and monitoring of the recruitment industry; and to enhance the abilities of labor inspectors to better monitor recruiters and ensure observance of international human rights and labor law. *Id.* ¶ 22(a), (c), (f).

234. States should also consider the recommendations of the ILO General Principles and Operational Guidelines for Fair Recruitment and the United Nations Guiding Principles on Business and Human Rights. *Id.*

components, including efforts at norm-setting, raising awareness, capacity-building, and establishing a voluntary certification process for international labor recruiters. IRIS's efforts to develop and promote its voluntary ethical certification program, in particular—which, until recently was the focus of IRIS's portfolio²³⁵—offer critical insights into IOM's approach to an issue that puts the IOM's articulated commitment to advancing migrant wellbeing to the test. As discussed below, IRIS's work in this regard reflects the IOM's neoliberal underpinnings, which favor markets over migrants, and underscore the need to develop greater focus and expertise regarding migrant workers' rights protection.

A. *The Problem of Cross-Border Labor Recruitment*

Whether for better opportunities or for survival, approximately 169 million people have migrated across borders in search of livelihood opportunities.²³⁶ Regrettably, failures in development policy and implementation have rendered cross-border migration a necessity rather than a choice for many individuals. But regardless of their individual circumstances, migrants often rely on the assistance of labor recruiters to find job opportunities abroad. Cross-border labor recruitment used to be largely mediated through bilateral agreements and state administration of migrant labor programs, as exemplified by the IOM-Guatemala experience.²³⁷ It now rests largely in the hands of a powerful, “ungoverned and ungovernable” private recruitment industry.²³⁸ The shift from a state-based to a largely unregulated, market-based system has rendered the search for decent job opportunities abroad an ever-more precarious enterprise. Apart from the poorly-ratified ILO Private Employment Agencies Convention,²³⁹ non-binding and voluntary corporate codes of conduct and guidelines have dominated the normative space.²⁴⁰ State efforts to regulate cross-border recruitment have been few and largely ineffective.²⁴¹

While most labor recruitment practices are beneficial for workers, abusive practices by some recruiters have helped fuel exploitation and even forced

235. IRIS appears to now be shifting its emphasis away from the program and towards other initiatives. Whether this is due to a change in IOM priorities, or a recognition of the program's low likelihood of success, remains unclear.

236. Note that this statistic represents the ILO's estimate of international migrant workers in 2019, which is the latest available estimate. ILO GLOBAL ESTIMATES ON INTERNATIONAL MIGRANT WORKERS, *supra* note 31, at 11.

237. See *supra* Section II.B.

238. GORDON, GLOBAL LABOUR RECRUITMENT, *supra* note 11, at 3. For a comprehensive discussion of the international recruitment industry, see MARTIN, *supra* note 32.

239. Convention Concerning Private Employment Agencies (No. 181), June 19, 1997, 2115 U.N.T.S. 249.

240. See *infra* note 279.

241. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 26–27 (2019) (discussing the “exponential growth in initiatives focused on eradicating exploitative labor recruitment practices”) [hereinafter U.S. TIP REPORT 2019].

labor in our global economy.²⁴² As IRIS correctly notes, migrant worker exploitation often begins at the recruitment stage, when workers are charged exorbitant recruitment fees and other costs—sometimes assuming large debts before the start of the job—or misled about the job on offer.²⁴³ Despite their exploitative practices, unethical recruiters can remain profitable due to their perpetually large client base—the supply of workers is seemingly limitless, especially for low skilled jobs, compared to the finite demand for their labor.²⁴⁴ A lax or non-existent regulatory environment enables recruiters to prioritize placing workers rather than ensuring that their jobs are decent, which leads to worker turnover rather than worker retention. Indeed, recruiters may offer financial incentives to employers to entice them to replace existing workers with new ones, thus enabling recruiters to earn fees from both the new and the terminated worker, who now must pay another recruitment fee for a new placement.²⁴⁵ Such practices can plunge workers into perpetual debt bondage when they are unable to pay off the debts accumulated as a result of the recruitment fees.²⁴⁶

Moreover, any attempt to regulate international labor recruiters poses its own set of challenges. Where foreign labor recruitment is regulated, recruitment practices have typically come under the purview of domestic labor laws, which may prohibit certain activities and assign civil penalties for non-compliance. That foreign labor recruitment practices span multiple jurisdictions enables easy deflection of legal responsibility, however, with blame redirected at the parties operating outside the jurisdiction. Meanwhile, government efforts to prevent and discipline recruiter abuse through registration and licensing requirements appear to have little impact, with fines for violations typically too low to deter future violations. While innovative legal strategies to hold recruiters to account for any abusive practices have been proposed—for example, imposing joint liability on employers and others in the labor supply chain for recruiter abuses—apart from a few isolated examples, the political will to adopt such strategies has yet to materialize.²⁴⁷

242. *Id.* at 26 (discussing how exploitative recruitment can lead to trafficking and forced labor).

243. GORDON, GLOBAL LABOUR RECRUITMENT, *supra* note 11, at 5–6.

244. OPEN WORKING GROUP ON LABOUR MIGRATION & RECRUITMENT, ETHICAL RECRUITMENT POLICY BRIEF #5 <http://mfasia.org/recruitmentreform/wp-content/uploads/2015/03/Policy-Brief-Support-for-Ethical-Recruitment.pdf> [<https://perma.cc/F99E-URRG>] [hereinafter OPEN WORKING GROUP].

245. *Id.*; AMNESTY INT'L, EXPLOITED FOR PROFIT, FAILED BY GOVERNMENTS: INDONESIAN DOMESTIC WORKERS TRAFFICKED TO HONG KONG 72–74 (2013).

246. Bassina Farbenblum, *Governance of Migrant Worker Recruitment: A Rights-Based Framework for Countries of Origin*, 7 *ASIAN J. INT'L L.* 152, 156–57 (2016).

247. *See, e.g.*, Gordon, *Regulating the Human Supply Chain*, *supra* note 11 (proposing different models for holding recruiters accountable for rights abuses); Judy Fudge & Daniel Parrott, *Placing Filipino Caregivers in Canadian Homes: Regulating Transnational Employment Agencies in British Columbia*, in *TEMPORARY WORK, AGENCIES AND UNFREE LABOUR: INSECURITY IN THE NEW WORLD OF WORK* 70 (2013) (discussing the challenges of regulating recruiters and highlighting an innovative approach undertaken in Manitoba, Canada that combines employer registration and foreign recruiter licensing).

Even where governments have attempted to address abusive recruitment practices, political and economic realities can undercut such efforts. The political influence wielded by the highly profitable recruitment industry in both origin and destination countries may exacerbate the weak and deficient enforcement of recruitment regulations. Moreover, where there is a persistent lack of decent work opportunities at home, unethical recruitment practices may become the accepted norm rather than the exception.²⁴⁸ In such contexts, aspiring migrant workers may view protections against recruitment abuse as impediments to securing their livelihood, and workers may even collude with recruiters to circumvent such protections to secure jobs abroad.²⁴⁹

B. *The IOM's International Recruitment Integrity System*

Given the complex structures and dynamics that enable and fuel recruitment abuse, systemic reform of the recruitment field requires a multi-stakeholder approach.²⁵⁰ As Professors Farenblum and Nolan explain, such an approach requires establishing both a global market that commercially incentivizes ethical recruiters and the suppliers that engage with them, as well as a transnational governance framework that identifies and sanctions those who engage in abusive recruitment practices.²⁵¹ The IOM's vast network and immersion in the communities where it operates situates IRIS in a prime position to promote and oversee recruitment industry reform. Moreover, as the lead agency for the UNNM, the IOM can now engage governments on their agreed-upon commitments under the GCM and relevant international human rights and labor law.

In establishing IRIS, the IOM takes up the task of multi-stakeholder coordination and engagement, with the ambitious goal of transforming the recruitment industry.²⁵² At the core of its work is the IRIS Standard,²⁵³ a benchmark for ethical recruitment designed to provide "a reference point for labor recruiters, employers, and state actors on how to integrate ethical recruitment principles into recruitment-related management systems, policies, regulations, processes, and procedures."²⁵⁴ Much of IRIS's programming centers on promoting the IRIS Standard through awareness- and capacity-building programs with the IOM's wide range of stakeholders.²⁵⁵ IRIS en-

248. OPEN WORKING GROUP, *supra* note 244.

249. *Id.*; MARTIN, *supra* note 32, at 149 (noting workers' willingness to pay, notwithstanding government caps on fees, in order to access limited foreign jobs).

250. See generally Bassina Farenblum & Justine Nolan, *The Business of Worker Recruitment: Who Has the Responsibility and Leverage to Protect Rights?*, 52 TEX. INT'L L. J. 1, 5 (2017).

251. *Id.*

252. IRIS FACTSHEET 1, *supra* note 220, at 1.

253. IRIS ETHICAL RECRUITMENT, THE IRIS STANDARD VERSION 1.2 (2019) [hereinafter IRIS STANDARD VERSION 1.2].

254. IRIS ETHICAL RECRUITMENT, *IRIS Standard*, <https://iris.iom.int/iris-standard> [<https://perma.cc/Q5TT-A96L>] (last visited Mar. 24, 2022).

255. IRIS ETHICAL RECRUITMENT, *supra* note 253, Preamble.

courages recruiters to implement the IRIS Standard through its IRIS Certification program, a voluntary mechanism through which cross-border labor recruiters can seek certification as an ethical recruiter.²⁵⁶

The IRIS Standard calls upon recruiters to respect all applicable laws related to labor recruitment, the ILO “core labor standards” (prohibiting trafficking, forced labor, and child labor, discrimination, and upholding freedom of association and collective bargaining rights),²⁵⁷ and relevant norms of professional and ethical conduct.²⁵⁸ The IRIS Standard also enumerates specific principles, prohibiting recruiters from charging recruitment fees and related costs to migrant workers (the “Employer Pays Principle”) and ensuring respect for freedom of movement, transparency of terms and conditions of employment, confidentiality and data protection, and access to remedy.²⁵⁹

To disseminate the IRIS Standard, IRIS taps into the IOM’s extensive network, collaborating with industry associations and other IOM programs. The IOM has worked with the Consumer Goods Forum and the Leadership Group for Responsible Recruitment, for example, to encourage its members to embrace the “Employer Pays Principle,”²⁶⁰ with prominent members such as Coca-Cola and Hewlett Packard committing to eliminate recruitment fees in their supply chains.²⁶¹ Working with the IOM’s Corporate Responsibility in Eliminating Slavery and Trafficking (“CREST”) initiative, the IRIS has sought to “create demand” for ethical recruitment by promoting the “business case” for ethical recruitment, such as by citing the ability

256. IRIS FACTSHEET 1, *supra* note 220, at 4.

257. The core labor standards are set out in eight fundamental ILO conventions and are among the most widely ratified ILO instruments. The ILO Declaration on Fundamental Principles and Rights at Work clarified that all ILO Members are bound to uphold these core labor standards, regardless of whether they ratified the ILO conventions from which they are derived. See International Labour Conference, *ILO Declaration on Fundamental Principles and Rights at Work*, INT’L LAB. ORG. (June 18, 1998), <http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm> [https://perma.cc/D2FA-2VNJ].

258. IRIS ETHICAL RECRUITMENT, *supra* note 254.

259. See generally IRIS STANDARD VERSION 1.2, *supra* note 253.

260. The Employer Pays Principle finds support in GCM Objective 6 on fair recruitment, the ILO General Principles and Operational Guidelines on Fair Recruitment, and even U.S. government contracting regulations. See GCM, *supra* note 16, ¶ 22(c); INT’L LABOR ORG., *ILO General Principles and Operational Guidelines for Fair Recruitment and Definition of Recruitment Fees and Related Costs* 13 (2019); 48 C.F.R. § 52.222-50(b)(6) (2021) (prohibiting federal contractors from charging employees or potential employees recruitment fees).

261. Other members of the Leadership Group for Responsible Recruitment include General Electric, Ikea, Mars Inc., Nestle, Nike, Walmart, Pepsico, Target, Tesco, among others. See *The Leadership Group for Responsible Recruitment*, RESPONSIBLE RECRUITMENT GATEWAY, <https://www.ihrb.org/employerpays/leadership-group-for-responsible-recruitment> [https://perma.cc/PJ6L-LM64]. Apple has also prohibited the charging of recruitment fees in its supply chains. See APPLE SUPPLIER CODE OF CONDUCT, APPLE 2 (“Workers shall not be required to pay employers’ or their agents’ fees for their recruiting and/or ongoing employment. This includes recruitment, application, recommendation, hiring, placement, processing, renewals, and/or recurring fees of any kind. If such fees are found to have been paid by Workers, such fees shall be repaid to the Worker.”).

to avoid the reputational costs, business risks, and the costs of civil and criminal litigation that recruitment abuse can produce.²⁶²

IRIS and CREST have developed “capacity building” training modules for recruitment agencies, employers, suppliers, and brands to introduce them to the IRIS Standard.²⁶³ These capacity-building efforts are designed not only to disseminate recruitment norms, but also to encourage private recruitment agencies to participate in the IRIS Certification program.²⁶⁴ Only after completing capacity-building training can cross-border labor recruiters apply to become IRIS-certified. If granted, certification offers inclusion in a public list of “IRIS certified labor recruiters” and the right to use the IRIS certified trademark on their websites and promotional materials. IRIS describes its certification model as taking a “management system approach,” requiring applicants to demonstrate that “the way [the recruiter] manages the different, interrelated parts of it[s] business, in order to meet its objectives” meets the requirements of the IRIS Standard.²⁶⁵ This approach is “based on similar global certification schemes,” and “includes a series of checks and balances to ensure the scheme is credible and robust.”²⁶⁶

The structure of the IRIS Certification model makes clear, however, that the IOM/IRIS does not certify labor recruiters itself, but rather outsources the certification process to a third party. The IOM Secretariat serves as “Scheme Owner,”²⁶⁷ responsible for developing the IRIS Standard and advocating for ethical recruitment, capacity building, and stakeholder engagement. But IRIS is not itself responsible for managing and supervising the IRIS Certification process. Rather, IRIS outsources that responsibility to an

262. IRIS FACTSHEET 1, *supra* note 220, at 2; IOM CREST (Corporate Responsibility in Eliminating Slavery and Trafficking), INT’L ORG. FOR MIGRATION, THE BUSINESS CASE FOR ETHICAL RECRUITMENT AND SUPPLY CHAIN MANAGEMENT (on file with author); INT’L ORG. FOR MIGRATION, *Corporate Responsibility in Eliminating Slavery and Trafficking*, <https://crest.iom.int> [<https://perma.cc/RM77-KZX6>].

263. See IRIS ETHICAL RECRUITMENT, IOM TRAINING ON ETHICAL RECRUITMENT 1–3. In a 2021 statement recounting its accomplishments over the prior five years, IRIS reports that it is now “well-established in Asia, Africa, Europe, and the Americas, and has trained more than 750 recruiters worldwide . . .” IRIS ETHICAL RECRUITMENT, *Taking Stock of 5 Years of Global Action*, <https://iris.iom.int/taking-stock-5-years-global-action> [<https://perma.cc/N5YY-ZPCH>].

264. IRIS ETHICAL RECRUITMENT, *Capacity Building*, <https://iris.iom.int/capacity-building> [<https://perma.cc/7C8L-56PE>]. Indeed, IRIS reports that “[a] growing number of champion recruiters are expected to be ready for IRIS Certification later this year.” See IRIS ETHICAL RECRUITMENT, *Taking Stock of 5 Years of Global Action*, *supra* note 261. For example, IRIS also launched its “first government to government (G2G) IRIS pilot project” between the Philippines and Canada (Alberta and Saskatchewan) to bring together the three jurisdictions to “create a framework to promote ethical recruitment” in the labor migration corridor between them. See IRIS ETHICAL RECRUITMENT, *Philippines to Canada IRIS Pilot Project*, <https://iris.iom.int/philippines-canada-iris-pilot-project> [<https://perma.cc/84BV-CQZV>] (noting that the project has identified two recruitment agencies for the Philippines and two for Canada). At the same time, the IRIS website for the Pilot Project has not posted any updates on the status of the project in nearly two years, which may indicate lack of progress towards recruiter certification.

265. INT’L RECRUITMENT INTEGRITY SYS. & INT’L ORG. FOR MIGRATION, *IRIS Factsheet 2: IRIS Certification System* (on file with author) [hereinafter IRIS Factsheet 2]. This factsheet used to be available on the IRIS website, but has now been removed.

266. *Id.* at 1.

267. IRIS ETHICAL RECRUITMENT, *IRIS Voluntary Certification Scheme*, <https://iris.iom.int/iris-voluntary-certification-scheme> [<https://perma.cc/4SSA-XRBW>].

IRIS-appointed “Scheme Manager” called the Social Accountability Accreditation Services (“SAAS”), an organization that accredits social auditors.²⁶⁸ As Scheme Manager, SAAS trains and certifies third-party auditors, who conduct the actual audits of the labor recruiters. Once IRIS-certified, a recruiter is then subject to continued compliance monitoring, which involves lighter “surveillance audits” every six months for two years, after which the recruiter undergoes recertification, and then is audited every twelve months.²⁶⁹

C. IRIS Certification: Governance by Audit?

In appointing SAAS to be the “Scheme Manager” for the IRIS Certification process, the IOM in effect outsources the running of the program to the private enforcement industry. The IOM explains its recusal from the certification decision-making process as designed “to deliver capacity building programs without conflicts of interest” and also out of recognition that “certification is beyond IOM’s mandate and expertise.”²⁷⁰ This justification is surprising, however, given the IOM’s history of “trespassing” into the humanitarian space of other international institutions, discussed above.²⁷¹ Outsourcing is, however, entirely consistent with the IOM’s neoliberal impulse to rely on market-based approaches to migration governance.²⁷² But it invites more skepticism than confidence that recruiter accountability will result from the certification program. As scholars and advocates have cautioned, the private enforcement industry is ill-equipped to root out workers’ rights violations, much less correct them.²⁷³

Since the 1990s, cuts to labor inspection budgets combined with the rise of corporate social responsibility (“CSR”) norms have led to the development and rapid growth of a private enforcement industry tasked with the social auditing of firm practices. As political scientist Genevieve LeBaron describes, social auditing has become a multibillion-dollar business, dominated by large multinational companies with publicly traded stocks,

268. SOC. ACCOUNTABILITY INT’L, *Social Accountability Accreditation Services*, <https://sa-intl.org/about-saas/> [https://perma.cc/Y3UR-RSWC] (last visited Mar. 24, 2022).

269. See *supra* note 267.

270. *Id.*

271. See text accompanying *supra* note 126.

272. Genevieve LeBaron, Jane Lister & Peter Dauvergne, *Governing Global Supply Chain Sustainability through the Ethical Audit Regime*, 14 *GLOBALIZATIONS* 958, 971–72 (2017).

273. See generally GENEVIEVE LEBARON, *COMBATTING MODERN SLAVERY* (2020); Luc Fransen & Genevieve LeBaron, *Big Audit Firms as Regulatory Intermediaries in Transnational Labor Governance*, 13 *REGUL. & GOVERNANCE* 260 (2019); Carolijn Terwindt & Amy Armstrong, *Oversight and Accountability in the Social Auditing Industry: The Role of Social Compliance Initiatives*, 158 *INT’L LAB. REV.* 245 (2019); Genevieve LeBaron & Andreas Rühmkorf, *The Domestic Politics of Corporate Accountability Legislation: Struggles over the 2015 UK Modern Slavery Act*, 17 *SOCIO-ECONOMIC REV.* 709 (2019); Genevieve LeBaron & Andreas Rühmkorf, *Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance*, 8 *GLOB. POL’Y* 15 (2017); Genevieve LeBaron & Jane Lister, *Benchmarking Global Supply Chains: The Power of the ‘Ethical Audit’ Regime*, 41 *REV. INT’L STUD.* 905 (2015).

thousands of employees, and highly paid CEOs.²⁷⁴ Responsible for the vast majority of social audits conducted to verify compliance with environmental and labor standards, these for-profit firms fiercely compete for market share in the CSR certification and social auditing industry. These dynamics can compromise the quality of audits such that ethical certification programs have drawn criticism for “brokering in deception” and “profiting from the impression that they can rid supply chains of labor abuse, in spite of the mounting evidence that this is false and inaccurate.”²⁷⁵

Indeed, close examination of audit practices reveal industry norms that routinely undermine close scrutiny of a company’s labor practices. Audit firms increasingly resemble the global companies they monitor and assess, with their own long supply chains and incentives to keep costs low and executive salaries and stock values high. The downward pressure can cause audit firms to reduce the amount of time spent on worksites and training of auditors, or to outsource the audits to subcontractors who may not be adequately trained to conduct a thorough assessment of recruiter practices.²⁷⁶ Moreover, unlike other industries such as medicine or law, the audit industry is not subject to a set of professional standards. Auditors who neglect or conceal problems too often do so with impunity, as auditors are rarely held accountable for the content of their reports—whether by the companies, the workers who supposedly benefit from the auditing efforts, or by governments.²⁷⁷ Fierce competition among audit firms can even incentivize pandering to the audit targets, in hopes of retaining the targets as clients for future audits.

It can come as little surprise, therefore, that auditor negligence has resulted in some devastating tragedies. The 2012 Ali Enterprises fire, which claimed the lives of nearly three hundred workers in a single garment factory fire in Pakistan, is one such example. The factory had been deemed compliant with labor standards by the for-profit Italian auditing firm RINA, which had been accredited by Social Accountability International (“SAI”), for which IRIS Scheme Manager SAAS served as the accreditation department.²⁷⁸ RINA officials had never actually set foot in the factory themselves, however, having instead subcontracted the audit to a local Karachi-based firm that had issued a disproportionately large number of certifications to local factories. The local firm certified the factory despite its lack of fire safety measures (for example, safety exits were locked), its failure to register

274. LEBARON, *supra* note 273.

275. *Id.* at 149.

276. *Id.* at 126.

277. Terwindt & Armstrong, *supra* note 273, at 247; LEBARON, *supra* note 273, at 132–33 (noting that social auditors are not liable for the accuracy or reliability of their reports, or for the consequences of their failure to identify problems, enabling concealment or neglect of any problem with impunity).

278. The audit had been conducted utilizing the SA8000 Standard, which was developed by Social Accountability International in 1997 and remains the “gold standard” for workplace social audits. See SOC. ACCOUNTABILITY INT’L, SA8000® Standard, <https://sa-intl.org/programs/sa8000/> [https://perma.cc/62SZ-3ZJ9].

the factory with the Pakistani government, and the fact that a majority of the factory workers had no formal employment contracts.²⁷⁹ Notwithstanding the devastating loss of lives, SAI denied any responsibility for the Ali Enterprises incident, allowed RINA to retain its accreditation, and declined to prohibit its accredited auditors from subcontracting their audits to other firms.²⁸⁰

Apart from the subcontractor problem, other aspects of standard audit design can also prevent auditors from uncovering problematic recruiter practices. For example, when auditing a company with a long supply chain, auditors typically look only at the Tier 1 companies at the top of the supply chain, leaving the lower tiers—where abusive practices are often most prevalent—entirely unexamined.²⁸¹ But even when audit scrutiny extends to the bottom of the chain, companies can readily circumvent discovery of abusive practices. Advanced notice of a coming audit—a standard industry practice—enables audit targets to pass inspection by making affected workers unavailable for interviews and by engaging in double bookkeeping, unauthorized subcontracting, and superficial adjustments to their practices.²⁸² Uncovering these fraudulent practices is made all the more difficult by the strict confidentiality that typically attaches to audit reports. Nondisclosure shields the audit findings from government or public scrutiny that might otherwise enable the findings to be contested or corrected. Confidentiality requirements can even prohibit auditors from reporting any worker abuses to those positioned to provide assistance or to advocate on the workers' behalf, including government agencies and NGOs.²⁸³

Unfortunately, nothing in the IRIS Certification structure corrects for the fundamental failures of social auditing to detect deficient recruitment practices and worker abuse. The IRIS process does not explicitly prohibit SAAS-certified auditors from subcontracting the audits to other firms; IRIS audits are announced in advance;²⁸⁴ and the audit reports are the property of the labor recruiters and may only be shared with other parties with their express written permission.²⁸⁵ Confidentiality requirements make it exceedingly difficult to detect flaws in the audit findings, much less hold auditors to account for them. While the IRIS Certification procedures include a mechanism for workers and recruiters to lodge complaints about labor re-

279. BRIAN FINNEGAN, AM. FED'N OF LAB.-CONGRESS OF INDUS. ORGS., *RESPONSIBILITY OUT-SOURCED: SOCIAL AUDITS, WORKPLACE CERTIFICATION AND TWENTY YEARS OF FAILURE TO PROTECT WORKERS RIGHTS* 7, 37 (2014).

280. *See id.* at 37.

281. LEBARON, *supra* note 273, at 122.

282. *Id.* at 133.

283. *Id.* at 130.

284. INT'L RECRUITMENT INTEGRITY SYS., *IRIS CERTIFICATION SCHEME MANUAL: GENERAL REQUIREMENTS DOCUMENT* § 4.3.2.3 (2021), <https://iriscertification.org/wp-content/uploads/2021/10/IRIS-Scheme-General-Requirements-V-3-0.pdf> [<https://perma.cc/W3T7-V425>] (audit process requirements) [hereinafter *IRIS Certification Scheme Manual*].

285. *Id.* § 2.5.

cruiter performance or the integrity of the audit, complainants must first pursue their complaints with the auditor—only *after* exhausting the auditor’s complaint mechanism can the complaint be brought before SAAS.²⁸⁶ Moreover, the absence of meaningful anti-retaliation measures only further disincentivizes workers from jumping these bureaucratic hurdles to pursue complaints, as workers reasonably fear being blackballed for future jobs or subjected to retaliatory termination and deportation.

Even if one could correct for the flaws of audit design, IRIS’s attempt to incite industry-wide change—one IRIS-certifiable recruiter at a time—seems quixotic considering the highly competitive nature of the recruitment market. So long as market norms continue to place the burden of recruitment fees on workers instead of employers, IRIS-certified recruiters will be hard pressed to compete with fee-charging recruiters. Cost-conscious employers are far more likely to hire recruiters who charge recruitment fees to workers than recruiters who shift the costs to the employers. Meanwhile, recognizing that uncertified recruiters are likely to have greater access to placement opportunities, workers may actually prefer the services of uncertified recruiters over “ethical” recruiters, notwithstanding the risk of potential recruitment abuses. Ethnographic studies of migrant worker streams reveal the lengths to which migrant workers will go to secure job opportunities abroad, knowingly engaging in debt-financed migration—even at exorbitant rates and with the expectation of poor working conditions (at least temporarily).²⁸⁷ Absent a regulatory environment that prevents unethical recruiters from maintaining their market advantage, the benefits of IRIS Certification for either recruiter or worker remain unclear. As a voluntary system, therefore, IRIS Certification stands little chance of incentivizing large-scale norm change necessary for IRIS-certified, ethical recruiters to maintain their edge in the highly competitive recruitment market.

Only decent recruitment regulation and enforcement—including a prohibition on recruitment fees—can drive rogue recruiters out of the market and enable professional cross-border recruiters to develop “a decent free-of-charge service to jobseekers.”²⁸⁸ Even the World Employment Confederation (“WEC”)—which represents the private employment services industry at the global level—recognizes that “the best way to promote ethical recruitment is by creating an appropriate regulatory framework for private employment services in countries of origin and of destination.”²⁸⁹ WEC thus advocates for states to adopt the ILO Convention on Private Employ-

286. *Id.* § 6.1.

287. See, e.g., Antonella Ceccagno, Renzo Rastrelli & Alessandra Salvati, *Exploitation of Chinese Immigrants in Italy*, in CONCEALED CHAINS: LABOUR EXPLOITATION AND CHINESE MIGRANTS IN EUROPE 89, 135 (Gao Yun ed., 2010).

288. WORLD EMPLOYMENT CONFEDERATION, *Topics: Fair Recruitment and Migration*, <https://wec-global.org/topics-global/fair-recruitment-and-migration/> [<https://perma.cc/HM5A-7BTK>] [hereinafter WEC, Fair Recruitment].

289. *Id.*

ment Agencies (No. 181),²⁹⁰ which bans the charging of recruitment fees to workers.²⁹¹ Curiously, the IOM does not cite this treaty in support of IRIS Standard, Principle 1 (prohibition of recruitment fees and related costs to migrant workers), referencing instead the non-binding ILO instruments.²⁹² A regulatory framework would also safeguard against audit processes—for example, confidentiality requirements that undermine the reporting of rights violations uncovered in an audit—from being used to cover up abusive recruitment practices. IRIS’s focus on transforming the cross-border recruitment industry through voluntary certification without also pressing for government regulation and enforcement of ethical recruitment standards is thus a half measure at best, doomed to failure.

Even with a regulatory framework in place, whether and how IRIS Certification might prevent or lessen recruitment abuse requires closer scrutiny. In contexts where there is a strong regulatory framework (e.g., France), IRIS Certification offers little added value, and could even create complications. How are IOM member states to react to a situation, for example, of an IRIS-certified recruiter who is nonetheless found to have violated state or local recruitment laws? In other contexts, where the threshold for entry to the recruitment market is low, a private certification scheme, at least in theory, could create more market transparency and lend credibility to certain recruiters over others. But in that context, social partners (e.g., worker associations and NGOs) play an important gatekeeping role with respect to assessing and identifying ethical recruiters—a role that IRIS regrettably has dropped from its certification process.²⁹³ A voluntary certification system is thus a poor substitute for binding international standards and state action to implement them.

D. Neo-Liberal Governance and Abdication of State Responsibility: Roadblocks to Ethical Recruitment

The problems with IRIS Certification illustrate both how audits are ineffective at rooting out labor violations, and, perhaps more significantly, how

290. *Id.*

291. Private Employment Agencies Convention art. 7(1), Jun. 19, 1997. 249 U.N.T.S. 2115. Note that the Convention allows exceptions to this rule “in respect of certain categories of workers, as well as specified types of services provided by private employment agencies.” *Id.* art. 7(2). Where such exception was allowed, the member would need to provide reasons for the exception. *Id.* art. 7(3).

292. IRIS Standard Version 1.2, *supra* note 253, at 2.

293. An earlier description of the IRIS Certification process, provided in a factsheet that has since been removed from the IRIS website, states:

“A key element of IRIS certification model is the monitoring and compliance mechanism.

- This mechanism will be both complaints-driven and will occur through periodical surveillance and re-certification audits.
- This mechanism will be implemented in partnership with civil society, relevant authorities and private sector partners.”

IRIS Factsheet 2, *supra* note 265, at 2.

relying on them diverts attention and resources from much-needed efforts to pass regulations mandating worker protections.²⁹⁴ Audit regimes to assess labor standards compliance typically benefit workers far less—if at all—than they do the companies at the helm of global supply chains, the audit firms themselves, and the NGOs (e.g., SAI/SAAS) that profit from the regime.²⁹⁵ IRIS's reliance on private enforcement is symptomatic of a broader shift over the past three decades towards neoliberal economic governance. Greater privatization of regulation and global governance has enabled non-state actors to take on key roles in economic governance processes, acting as regulators who set and enforce standards in global supply chains.²⁹⁶ Audit regimes have thus increasingly become a tool of neoliberal labor governance.²⁹⁷

But what does it mean for verification of recruitment standards to be conducted via a voluntary system that does not include a role for either governments or workers? Not only does the IRIS Certification process advance the neoliberal push towards governance by audit, but, with the imprimatur of “UN Migration,” it lends credence to the notion that private enforcement is a reliable tool to assess compliance with labor standards. In doing so, it enables states' continued abdication of their responsibility to uphold labor standards and protect the rights and wellbeing of migrant workers.

As LeBaron and Lister explain, there is an underlying assumption that, due to inadequate state regulatory capacity—particularly for governments in the developing world—private governance tools such as audits offer efficient and effective strategies to fill the regulatory gap and promote desired change.²⁹⁸ There has been a decline in state-based monitoring of production processes in many countries, with a steep downturn in the number of labor inspections, and even outright elimination of labor inspectorates in some instances.²⁹⁹ In the void, auditing is being employed as a means of assessing compliance with labor standards—and, notably, even with the encouragement of some governments. Prior to the Ali Enterprises fire, for example, the Pakistani government had encouraged factories to seek SA8000 certification, offering to pay for the auditing (for those that gain certification) rather than devote its limited resources to improving government regulation and inspection.³⁰⁰ Civil society actors have also joined the auditing bandwagon

294. See generally Fransen & LeBaron, *supra* note 273; LeBaron & Rühmkorf, *The Domestic Politics*, *supra* note 273.

295. LeBaron, Lister & Dauvergne, *supra* note 272, at 964. Note that Social Accountability International (“SAI”), of which SAAS is a department, is a global NGO that claims as its mission “advancing human rights at work.” SOCIAL ACCOUNTABILITY INTERNATIONAL, *About SAI*, [https://sa-intl.org/about/\[https://perma.cc/7YWR-TRBF\]](https://sa-intl.org/about/[https://perma.cc/7YWR-TRBF]).

296. *Id.* at 959, 962.

297. LeBaron & Lister, *supra* note 273, at 906.

298. *Id.* at 907.

299. *Id.* at 909.

300. FINNEGAN, *supra* note 279, at 37–38.

in an age of proliferating and deepening collaborations between advocacy organizations and corporate actors. Frustration over slow progress towards “scaling” their outcomes have caused some NGOs to embrace market-based approaches, while other NGOs have come to depend on corporate collaboration as a direct source of or a condition of government funding.³⁰¹

Yet, while some might assume audit regimes to be benign tools, they are not as neutral or passively technocratic as they may appear to be. As LeBaron, Lister, and Dauvergne argue, audit regimes are a “productive form of power” and may be used to enhance the legitimacy of industry-led, privatized forms of global governance.³⁰² Indeed, audit firms may even strategically engineer the very governance gaps that audits and other corporate social responsibility mechanisms (e.g., voluntary codes of conduct) have emerged to fill.³⁰³ In other contexts where governments have considered addressing “modern slavery” in global supply chains, for example, audit firms’ lobbying efforts have diverted support away from binding labor regulations and towards more incrementalist soft-law governance.³⁰⁴ In addition to increasing the market for audit services,³⁰⁵ such efforts help elevate private enforcement over state labor inspection as the vehicle for ensuring compliance with labor standards. This shift advances what political scientists have identified as “a broader political agenda that steers NGOs, policymakers, and other governance actors toward the soft-law side of the spectrum of legal possibilities with respect to transnational labor governance.”³⁰⁶ In outsourcing IRIS Certification to the private enforcement industry, the IOM/IRIS regime perpetuates this dynamic, further enabling states to abdicate their responsibility to create structures that offer meaningful protection of migrant workers’ rights.

E. *Opportunities for IRIS Reform*

IRIS’s lackluster effort to advance migrant workers’ rights protection is in some respects unsurprising, given the IOM’s neoliberal, market-friendly, and migration-optimistic approach to migration governance. As discussed

301. LeBaron & Lister, *supra* note 273, at 910.

302. LeBaron, Lister & Dauvergne, *supra* note 272, at 961.

303. See *id.*; Fransen & LeBaron, *supra* note 273; LeBaron & Rühmkorf, *Steering CSR Through Home State Regulation*, *supra* note 273; LeBaron & Rühmkorf, *The Domestic Politics of Corporate Accountability Legislation*, *supra* note 273.

304. Audit firms’ lobbying efforts vis-à-vis the UK Modern Slavery Act, for example, resulted in a law that requires companies to *disclose* any efforts undertaken to prevent and address forced labor; it does not require companies to take such measures in the first place, much less assign civil or criminal liability for any forced labor that is disclosed. This move provided a ready-made role for audit firms to conduct audits to verify the claims companies make in their mandated disclosures. See LeBaron & Rühmkorf, *The Domestic Politics of Corporate Accountability Legislation*, *supra* note 273, at 715.

305. For example, the accounting firm Deloitte submitted evidence urging companies to be required to commission audits of their supply chains. Deloitte has used its active involvement in the development of the UK Modern Slavery Act as a marketing tool for their services. Fransen & LeBaron, *supra* note 273, at 269–70.

306. Fransen & LeBaron, *supra* note 273, at 271.

above, migration optimism tends to measure development in terms of economic gains, with inadequate attention paid to the distributional costs and impacts on migrant workers—for example, the negative effects of destination countries’ restrictive migration policies on migrant wellbeing.³⁰⁷ Guestworker programs typically impose rights restrictions on participating migrants—the lower the worker’s skill level, the greater the rights restrictions as a condition of entry.³⁰⁸ For migration optimists, the rights tradeoffs are an inevitable—and often acceptable—cost of increased access to remittance-generating jobs in foreign labor markets. Some migration optimists have even gone so far as to oppose the use of ethical recruitment frameworks, arguing that they create problematic barriers to labor mobility.³⁰⁹ They offer as justification a curious mix of migrant agency and government inability—for example, that prohibiting recruitment fees ignores migrants’ willingness to pay, and that governments cannot regulate an area where they can “exert little control.”³¹⁰

IRIS’s promotion of ethical recruitment norms in the face of such countervailing pressures is encouraging. But to fulfill its responsibilities as the global lead agency for the UNNM to “prioritize the rights and wellbeing of migrants,”³¹¹ the IOM should embrace a rights-based approach. This would entail moving beyond the anemic neoliberal portrayal of migrants as simply rational actors who may prefer accepting jobs abroad with unfavorable labor conditions—but higher wages—to opportunities with lower wages available back at home. Instead, understanding how migrants may be pushed and pulled across borders—sometimes due to economic circumstances beyond their control—a rights-based approach would recognize that migrants deserve state protection from exploitation or abuse.³¹² It would incorporate a far more robust understanding of what counts as a development gain, informed by the perspective of migrant workers.

As Preibisch, Dodd, and Su explain, development progress should be measured according to individuals’ ability to live a life of dignity and to achieve the outcomes they desire for themselves and their families.³¹³ This

307. Christiane Kuptsch & Philip Martin, *Low-Skilled Labour Migration*, in *GLOBAL MIGRATION GOVERNANCE* 34, 51 (Alexander Betts ed., 2011).

308. See Martin Ruhs & Philip Martin, *Numbers vs. Rights: Trade-Offs and Guest Worker Programs*, 42 *INT’L MIGRATION REV.* 249, 251 (2008); see generally MARTIN RUHS, *THE PRICE OF RIGHTS* (2013).

309. CTR. FOR GLOB. DEV., *Labor Mobility Partnerships (LaMP): Helping Connect International Labor Markets*, <https://www.cgdev.org/page/labor-mobility-partnerships-lamp-helping-connect-international-labor-markets> [<https://perma.cc/4WZS-LRYM>] (criticizing the promotion of international standards as “hav[ing] little to do with local circumstances and needs” and “leav[ing] many countries with critical unanswered demand for support in an era when labor mobility is increasing and desperately needed”).

310. Rebekah Smith & Richard Johnson, *Introducing an Outcomes-Based Migrant Welfare Fund*, LAB. MOBILITY P’SHP (Jan. 16, 2020), <https://lampforum.org/2020/01/16/introducing-an-outcomes-based-migrant-welfare-fund/> [<https://perma.cc/VTM3-A8GK>].

311. UN Migration Network ToR, *supra* note 85, at 1.

312. MARTIN, *supra* note 32, at 130.

313. Preibisch, Dodd & Su, *Pursuing the Capabilities Approach*, *supra* note 55, at 2121–23. The capabilities approach derives from theorizing by Amartya Sen and Martha Nussbaum. *Id.* at 2114–15, citing

“capabilities approach” helps surface how, despite being valorized as “agents of development,” migrant workers often achieve economic gains at great social and economic cost to themselves and their families.³¹⁴ This approach accounts for the power imbalances between the workers and the recruiters and employers of the Global South and North, respectively, that enable recruitment abuse and poor working conditions. It also underscores the need for robust labor protections, including meaningful grievance and complaints mechanisms that enable migrants to access justice when their rights are violated. In doing so, the IOM would better advance multiple targets of the U.N. Sustainable Development Goals, including 8.7 (eradicate forced labor and trafficking), 8.8 (protect labor rights and promote safe and secure working environments), and 10.7 (facilitate safe migration).³¹⁵

There are two relatively new IRIS initiatives that hold nascent potential as springboards for a more rights-based approach to migration and development policy: (1) IRIS’s “Global Policy Network on Recruitment” (“GPN”) and (2) IRIS’s effort to promote “Migrant Worker Voice and Engagement.” The IOM’s December 2020 launch of the GPN³¹⁶ appears to have pulled focus away from IRIS Certification and redirected energies towards greater government engagement. Indeed, the fate of IRIS Certification is unclear: in the four years since the program was launched, the IRIS website has yet to list any recruiters as having achieved IRIS Certification. Moreover, for a website that is frequently revised, there have been few updates to the status of the program over the past year. This suggests the possibility that the certification program may be stalled—perhaps due to the lack of financial or political support, or perhaps recognition that transformative change via voluntary certification may be difficult to achieve. The two above-mentioned initiatives—with their greater focus on states’ roles and responsibilities to ensure migrant worker protection, and their recognition of migrant worker voice as a critical component of IRIS programming—are necessary components to any meaningful effort to advance ethical recruitment norms and implementation.

Amartya Sen, *Development as Capability Expansion*, 19 J. DEV. PLAN. 41 (1989), and MARTHA NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* (2011). As Briones argues, a capabilities approach allows development to be seen in “human” terms: “in terms of a quality of life and what people are able to do and be, rather than as a measure of how many resources people have or are given by the state.” It treats people “as agents of production,” rather than “as factors of production,” and “foregrounds the immediacy of capability over functionality.” Leah Briones, *Reconsidering the Migration-Development Link: Capability and Livelihood in Filipina Experiences of Domestic Work in Paris*, 15 POPULATION, SPACE & PLACE 133, 139 (2009).

314. Parvati Raghuram, *Which Migration, What Development? Unsettling the Edifice of Migration and Development*, 15 POPULATION, SPACE & PLACE 103, 104 (2009).

315. G.A. Res. 70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development* (Oct. 21, 2015).

316. IRIS ETHICAL RECRUITMENT, *IOM Launches Global Policy Network to Promote Ethical Recruitment* (Dec. 7, 2020), <https://iris.iom.int/news/iom-launches-global-policy-network-promote-ethical-recruitment> [https://perma.cc/LDV3-K8WD].

1. *Promoting State Responsibility to Protect Migrant Workers*

The idea of creating the GPN emerged from a conference IRIS held in 2019, in Montreal, Canada, that brought together over 100 senior policy makers from thirty IOM member states.³¹⁷ As IRIS describes it, the Montreal conference was the first time a global event of this scale on the regulation of recruitment had ever been held. The goal of the conference was to bring together those “engaged in the day-to-day job of drafting, implementing and enforcing the regulation of recruitment,”³¹⁸ recognizing that “it is governments that are primarily responsible for protecting human rights.”³¹⁹ The GPN was ultimately born out of conference participants’ concern and recognition that weak regulation and enforcement exacerbate migrant workers’ vulnerability to exploitation and forced labor.³²⁰

The GPN is, in effect, the long overdue government pillar of IRIS—a “Member State-led collaboration” to bring together government officials to engage in policy dialogue to “address challenges, identify solutions and highlight promising practices to strengthen recruitment regulation and migrant worker protection.”³²¹ Adopting a “whole of government” approach, the GPN involves representatives of all relevant ministries, agencies, and departments (horizontally) across all levels of government (vertically), including national and subnational authorities.³²² The GPN is led by a member state-led International Steering Committee, but also involves “Stakeholder Advisory Groups” representing the private sector, employers, and civil society organizations to advise the Steering Committee.³²³ IRIS serves as the Secretariat for the GPN, coordinating all administrative and logistical aspects of the GPN, including meeting preparation and support to the GPN’s various organs. The policy dialogues take place via “thematic working groups” that bring together members to discuss a range of themes.³²⁴

317. KATHARINE JONES, IOM, *THE MONTREAL RECOMMENDATIONS ON RECRUITMENT: A ROAD MAP TOWARDS BETTER REGULATION*, <https://publications.iom.int/books/montreal-recommendations-recruitment-road-map-towards-better-regulation> [<https://perma.cc/G4XH-M6D9>] [hereinafter *Montreal Recommendations*].

318. KATHARINE JONES & COLIN CLARK, IOM, *GLOBAL CONFERENCE ON THE REGULATION OF INTERNATIONAL RECRUITMENT DISCUSSION PAPER 1* (2019).

319. *Id.* at 4.

320. IOM *Labour Mobility and Human Development: Global Policy Network to Promote Ethical Recruitment*, INT’L ORG. FOR MIGRATION, <https://iris.iom.int/sites/iris/files/documents/Policy%20Network-Infosheet-Final.pdf> [<https://perma.cc/C72H-JYRH>] (last visited Jul. 27, 2021).

321. IRIS ETHICAL RECRUITMENT, *Global Policy Network on Recruitment*, <https://iris.iom.int/global-policy-network-recruitment> [<https://perma.cc/KY8W-N3W5>] (last visited Apr. 15, 2022).

322. IRIS POLICY NETWORK, *Global Policy Network to Promote Ethical Recruitment: FAQs – March 2021*, https://iris.iom.int/sites/g/files/tmzbd1201/files/documents/Policy_Network_FAQs_March_2021.pdf [<https://perma.cc/8W7B-NN2M>] [hereinafter *IRIS GPN FAQs*].

323. *Id.* at 2.

324. *Id.* The proposed themes include “(1) the licensing, registration, certification, and oversight of labour recruiters; (2) good practice in inspection and enforcement; (3) the role of consular officials and attachés; (4) good practices in data collection and research to inform policy making; (5) enhancing bilat-

The GPN utilizes a multi-pillar approach that includes: “(1) awareness raising and communications; (2) capacity building for effective regulation; (3) strategic advocacy; and (4) data and research.”³²⁵ This approach presents a valuable opportunity for the IOM to utilize its soft governance techniques to encourage governments to adopt a rights-based approach as a matter of states’ legal obligations under the GCM and international human rights and labor laws. Utilizing its extensive networks on the ground, IRIS could develop awareness-raising programming to address commonly-found chronic xenophobia that undermines efforts to reconcile states’ need for migrant workers’ labor with the responsibility to protect their rights. As part of such programming, IRIS could encourage greater recognition of the many contributions that migrant workers make to the prosperity of societies. Meanwhile, the IOM could bring its knowledge production skills to bear on better understanding the longer-term effects and socioeconomic costs to migrants of remittance-producing migration. This research could improve the design of labor mobility programs and enable migrant workers to exercise their rights and seek accountability for abusive practices.

Most critically, in its work as the GPN Secretariat, IRIS could make a far more concerted effort to encourage states to bring binding laws and regulations to bear on the problem of recruitment abuse. GCM objective 6(a) calls upon states to “[p]romote signature and ratification of, accession to and implementation of relevant international instruments related to international labour migration, labour rights, decent work and forced labour.”³²⁶ Given the IOM’s role as the lead agency under the GCM, IRIS has fallen short in encouraging states to comply with this objective. On the section of its website addressing “[h]ow governments support IRIS,” for example, IRIS recommends that governments “[a]lign policy and regulation with international standards for ethical recruitment.”³²⁷ But the website makes no mention of relevant ILO treaties, the GCM, or even the ILO General Principles and Operational Guidelines for Fair Recruitment (“ILO General Principles”).³²⁸ Instead, it suggests that governments review, adopt, and implement the IOM’s Montreal Recommendations on Recruitment (“Montreal Recommendations”).³²⁹ The Montreal Recommendations aim to provide practical guidance to governments “to enable more effective regulation of international recruitment and protection of migrant workers.”³³⁰ But like

eral cooperation to promote ethical recruitment; and (6) fundraising and donor engagement to enhance migrant worker protection.”

325. IRIS ETHICAL RECRUITMENT, *Global Policy Network on Recruitment*, *supra* note 321.

326. GCM, *supra* note 16, at 14.

327. IRIS ETHICAL RECRUITMENT, *Stakeholder Engagement*, <https://iris.iom.int/stakeholder-engagement> [<https://perma.cc/FUF5-UA8F>] [hereinafter IRIS Stakeholder Engagement].

328. INT’L LAB. ORG., GENERAL PRINCIPLES AND OPERATIONAL GUIDELINES FOR FAIR RECRUITMENT AND DEFINITION OF RECRUITMENT FEES AND RELATED COSTS, *supra* note 260.

329. IRIS Stakeholder Engagement, *supra* note 327; Montreal Recommendations, *supra* note 317, at 1.

330. Montreal Recommendations, *supra* note 317, at 1.

the ILO General Principles, which were debated and approved by the ILO's tripartite membership of governments, employers, and workers, the Montreal Recommendations resulted from a conference involving too few participants to reflect an international consensus.

Indeed, the Montreal Recommendations evince the IOM's soft touch when it comes to states' obligations to uphold the human rights and labor rights of migrant workers. The substance of the Montreal Recommendations is largely derivative of the ILO General Principles. But whereas the ILO General Principles³³¹ frame guidance in the language of states' responsibilities, citing extensive treaty law in support,³³² the Montreal Recommendations omit such references. This creates the overall impression that the contents of the Montreal Recommendations are aspirational, and thus misleadingly dilutes the binding nature of states' international legal obligations. Given the IOM's role as the lead agency under the GCM (particularly as defined by the UNNM Terms of Reference), IRIS should reorient its engagement with states to instead emphasize states' obligations under the GCM and binding international human rights and labor treaties.³³³

2. *Elevating Migrant Worker Voice and Engagement*

Another aspect of IRIS's work that could be redirected to advance a rights-based approach is its programming to enhance "migrant worker voice and engagement."³³⁴ IRIS defines "migrant voice" broadly to include "migrant-centered activities" designed to "empower migrant workers and the organizations that advocate on their behalf."³³⁵ IRIS's current plans for migrant engagement require significant revision, however, if IRIS is to meet its stated goal of developing "an ethical recruitment 'safety net,' promote remedy (when needed), and enhance a holistic safe migration experience for migrants."³³⁶

Elevating migrant voice and engagement is an issue that IRIS has struggled to address in its programming from inception. The IRIS certification scheme has always prominently featured a "monitoring and complaints mechanism" that would be "both complaints-driven and . . . occur through periodical surveillance and re-certification audits" and implemented "in

331. INT'L LAB. ORG., GENERAL PRINCIPLES AND OPERATIONAL GUIDELINES FOR FAIR RECRUITMENT AND DEFINITION OF RECRUITMENT FEES AND RELATED COSTS, *supra* note 260.

332. See INT'L LAB. ORG., APPENDIX TO THE GENERAL PRINCIPLES AND OPERATIONAL GUIDELINES FOR FAIR RECRUITMENT, https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_536263.pdf [<https://perma.cc/2MXC-8RXB>] (listing the treaty sources for each of the general principles and operational guidelines).

333. *Id.* Featured in a recently-added page on the IRIS website, the stated goal is "to empower migrant workers and the organizations that advocate on their behalf." IRIS ETHICAL RECRUITMENT, *Migrant Worker Voice and Engagement*, <https://iris.iom.int/migrant-worker-voice-and-engagement> [<https://perma.cc/UBB8-NM5N>].

334. *Id.*

335. *Id.*

336. *Id.*

partnership with civil society, relevant authorities and private sector partners.”³³⁷ But unlike other features of IRIS certification, this mechanism remains underdeveloped in both concept and practice. As discussed above, the IRIS certification process includes an anemic complaints mechanism—through which recruiters and workers can bring complaints regarding the audit *process*—that offers complaining workers no protection against retaliation, much less redress for rights violations.³³⁸

The IRIS website now has a webpage on “migrant worker voice and engagement” that lays out IRIS’s plans (1) to pilot “comprehensive training programmes” that provide migrants with “pre-departure, post-arrival, employment, cultural and pre-return orientation;” and (2) to “support civil society overseeing compliance of international recruitment practices and grievance mechanisms that link CSOs in countries of origin and destination.”³³⁹ Neither initiative’s descriptions suggest any opportunity for migrants to voice their concerns or offer policy input. There is no indication that the trainings will depart from the standard, top-down, and unidirectional imparting of information to the migrants. For example, there is no reference to incorporating migrant perspectives into either design or content of trainings. While the involvement of civil society organizations (“CSOs”) might, in theory, offer an opportunity for migrant voice and engagement, whether it actually does ultimately depends on the methods CSOs use in exercising oversight over recruiters and constructing and implementing a grievance mechanism.

IRIS’s decision to outsource to CSOs both design and implementation of compliance monitoring and grievance mechanisms perhaps suggests, at best, an implicit recognition of its own lack of expertise in the area, and at worst, a weak commitment to migrant worker protection. In designing the IRIS certification process, IRIS explicitly conceded its lack of experience and brought in SAAS, collaborating with SAAS to develop a detailed design for the certification scheme. In stark contrast, IRIS has simply outsourced the task of developing these crucial mechanisms for migrant engagement to a vaguely defined set of CSOs, with no plan of action for what these mechanisms should accomplish, much less how they should be structured. In any event, CSOs are poor substitutes for states in exercising oversight over recruiters, as CSOs have limited means of imposing sanctions for non-com-

337. A description of the IRIS certification process, provided in a factsheet that has since been removed from the IRIS website, states:

- “A key element of IRIS certification model is the monitoring and compliance mechanism.
- This mechanism will be both complaints-driven and will occur through periodical surveillance and re-certification audits.
 - This mechanism will be implemented in partnership with civil society, relevant authorities and private sector partners.”

IRIS Factsheet 2, *supra* note 265, at 2.

338. See discussion accompanying *supra* note 286.

339. IRIS ETHICAL RECRUITMENT, *Migrant Worker Voice and Engagement*, *supra* note 333.

pliance. Moreover, placing oversight responsibility on CSOs risks overburdening them and diverting resources from crucial direct services—including legal and social services—that they might otherwise provide to migrant workers.

Instead of outsourcing to CSOs, IRIS should assist states to fulfill their responsibilities under the GCM to “enhanc[e] the abilities of labour inspectors and other authorities to better monitor recruiters”³⁴⁰ and to ensure migrant workers have “safe access to effective reporting, complaint, and redress mechanisms in cases of exploitation [or] abuse. . .”³⁴¹ In order to facilitate migrant workers’ ability to access these mechanisms, IRIS should ensure that any findings of worker abuse are exempted from audit confidentiality, and that workers are referred to CSOs that can help them access grievance mechanisms and pathways to remedies. If state labor inspectorates lack capacity or willingness to address migrant worker complaints—as is too often the case—IRIS could work with CSOs and migrant workers to develop private grievance mechanisms. But the design of such mechanisms should apply the principles of worker-driven social responsibility, ensuring the participation of migrant workers and their representatives in both the design and implementation of the mechanism. Their participation ensures that the mechanism takes account of workers’ on-the-ground knowledge of the challenges they face in accessing such mechanisms—incorporating, for example, protections against retaliatory termination or deportation in response to complaints lodged against their recruiters and employers. Migrant workers should also have a role in implementing the mechanism—for example, by investigating and resolving complaints—to bring their on-the-ground knowledge to bear on determining whether and how violations occur, and also to bolster overall confidence in the mechanisms.

In its efforts to foster migrant worker voice and engagement, the IOM should draw upon the expertise of the ILO. In October 2020, the two organizations entered into a Memorandum of Understanding to strengthen their partnership by building on their complementarities and comparative advantages.³⁴² The ILO can bring its considerable expertise in designing policies and programs to promote fair recruitment and decent work for migrant workers. IRIS can draw upon these efforts—for example, by utilizing the Recruitment Advisor platform (“Recruitment Advisor”), which was developed by the International Trade Union Confederation (“ITUC”) with the support of the ILO’s Fair Recruitment initiative.³⁴³ Recruitment Advisor

340. GCM, *supra* note 16, ¶ 22(f).

341. GCM, *supra* note 16, ¶ 22(j).

342. Agreement Between the International Labour Organization (ILO) and the International Organization for Migration (IOM), Oct. 23, 2020, https://www.ilo.org/wcmsp5/groups/public/---dgreports/---jur/documents/genericdocument/wcms_759064.pdf [<https://perma.cc/WB5N-LSS5>].

343. INT’L. TRADE UNION CONFEDERATION, *ITUC Launches Migrant Worker “Recruitment Advisor” Platform* (Apr. 4, 2018), <https://www.ituc-csi.org/ituc-launches-migrant-worker> [<https://perma.cc/78LW-FXFN>].

helps protect migrant workers from abusive recruitment and employment practices by providing them with peer-to-peer reviews of recruitment agencies in their country of origin and destination. The platform allows migrant workers to comment on their experiences and rate the recruitment agencies.³⁴⁴ In encouraging migrant workers to utilize the platform, IRIS would not only foster migrant voice, but also incentivize recruiters to comply with ethical recruitment standards.

CONCLUSION

While the IOM might ultimately grow into the role of a rights-advancing U.N. migration agency over time, its work on labor recruitment suggests that it faces a steep learning curve when it comes to understanding how best to advance migrant workers' rights. As Pécoud explains, the IOM understands migration in a supply-demand framework, in which properly managed labor mobility connects labor surpluses in the Global South with demand for migrant workers in the Global North.³⁴⁵ Facilitating labor mobility has required the IOM to "overcome the contradiction between the nationalist/protectionist agenda over border control and the need for a flexible foreign workforce in a globalising economy."³⁴⁶ The IOM now must modify these control-oriented and market-oriented priorities to make room for policy approaches that meaningfully advance migrants' rights protections.

The IOM's activities and discourse tend to assume that the core features of the world's political and economic organization are unchangeable, and that individuals must adapt to this global macroeconomic context.³⁴⁷ As a result, the IOM's interventions have typically targeted individual choices, such as those of recruiters and workers to participate in voluntary ethical frameworks, rather than pressing for broader structural reforms. But migrant worker vulnerability to exploitation—whether in the context of recruitment or during the employment relationship—is a structural problem. As such, it requires a structural solution, one that begins with the states' adoption of laws and regulations that protect the rights of migrant workers and provide meaningful remedy when those protections fail.

344. RECRUITMENT ADVISOR, <https://www.recruitmentadvisor.org/> [<https://perma.cc/H3QU-9A5M>].

345. Antoine Pécoud, *Introduction* to *THE INTERNATIONAL ORGANIZATION FOR MIGRATION: THE NEW 'UN MIGRATION AGENCY' IN CRITICAL PERSPECTIVE 1*, 10 (Martin Geiger & Antoine Pécoud eds., Palgrave Macmillan 2020) (ebook).

346. *Id.* at 11.

347. *Id.*

