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PREVENTING TRAFFICKING THROUGH NEW GLOBAL GOVERNANCE OVER LABOR MIGRATION

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The year 2020 marks the twentieth anniversary of the United Nations (U.N.) Trafficking Protocol—a treaty that established the foundation for global efforts to address the problem of human trafficking.¹ That treaty offered an early framing of the problem as a transnational crime, best addressed through aggressive prosecution of traffickers and international cooperation to that end.² Since the Protocol’s adoption, global antitrafficking law and policy have evolved significantly. The once near-exclusive focus on the prosecution prong of the treaty’s “3Ps” approach to trafficking—focused on prosecuting trafficking, protecting trafficked persons, and preventing trafficking—has given way to an increased emphasis on victim protection.³ Prevention, however, remains the 3Ps’ most neglected prong. Prevention efforts have narrowly focused on public awareness campaigns to warn vulnerable populations, as well

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1. 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. 15, 2000, 2237 U.N.T.S. 319.

2. *Id.* at arts. 2, 4.

3. *Id.* at arts. 5 (prosecution), 6–8 (protection), 9–11 (prevention); 3Ps: *Prosecution, Protection, and Prevention*, U.S. DEP’T ST., <https://www.state.gov/3ps-prosecution-protection-and-prevention/> [<https://perma.cc/6ST5-SGQS>] (last visited Apr. 5, 2020).

as potential consumers of trafficked goods and services, of the risks and many manifestations of human trafficking.⁴

We have reached a critical inflection point in our understanding of the trafficking phenomenon and how best to address it. With too few traffickers prosecuted and too few victims protected, more robust efforts to prevent trafficking are clearly necessary. In 2018, governments around the world identified a total of 85,613 victims, brought 11,096 prosecutions, and obtained 7,481 convictions.⁵ Considering the claim that purportedly 40.3 million people are in “modern slavery” worldwide,⁶ prosecution and post-hoc protection strategies have hardly made a dent in the problem.⁷ That is particularly so for nonsexual labor trafficking, which despite constituting 80% of forced labor/trafficking cases worldwide,⁸ accounted for only 4% of prosecutions, 3% of convictions, and 13% of victims identified by global law enforcement authorities in 2018.⁹

Efforts by advocates to draw attention to nonsexual labor trafficking have underscored how trafficking is not simply the product of deviant, criminal behavior that once rooted out can easily be eliminated. Also to blame are deeply embedded societal structures that facilitate and even reward exploitation—in particular, weak labor and migration frameworks that perpetuate precarity for migrant workers in their search for economic opportunities. Because worker exploitation and trafficking differ in degree, not in kind,¹⁰ addressing migrant worker

4. *Id.*

5. U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT* 38 (2019) [hereinafter 2019 U.S. TIP REPORT].

6. Int'l Labour Org. [ILO], *Global Estimates of Modern Slavery*, at 9 (2017), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf [<https://perma.cc/5H3V-ZG4P>] [hereinafter 2017 GEMS].

7. 2019 U.S. TIP REPORT, *supra* note 5, at 2–3.

8. 2017 GEMS, *supra* note 6, at 10. The estimated 40.3 million people in “modern slavery” include 15.4 million people living in forced marriage and 24.9 million in forced labor. *Id.* at 9. Of those in forced labor, 20.1 million were in nonsexual forced labor, while 4.8 million were in “forced sexual exploitation.” *Id.* at 10.

9. 2019 U.S. TIP REPORT, *supra* note 5. The statistics cited in the text accompanying note 5 include a breakout of the total prosecutions, convictions, and victims identified in cases involving nonsexual labor trafficking in 2018: 11,096 (457) prosecutions; 7,481 (259) convictions; 85,613 (11,009) victims identified. *Id.*

10. Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. 76, 110 (2012).

exploitation more broadly can prevent the abuses from escalating into trafficking.¹¹

Recent developments in the international migration field present an opportunity to address structural contributors to trafficking by establishing norms and institutions to foster safe labor migration. In 2015, large-scale mixed movements of refugees and migrants prompted the U.N. General Assembly to recognize the need for closer cooperation and greater responsibility-sharing and action to address the phenomenon.¹² This ultimately resulted in the U.N. General Assembly adopting, in December 2018, two global compacts: a Global Compact on Refugees (Refugee Compact)¹³ and a Global Compact for Safe, Orderly, and Regular Migration (GCM).¹⁴ While the Refugee Compact builds upon an established regime of laws, policies, and institutions, the GCM signifies a long overdue first attempt by the international community to develop a framework for pursuing a shared vision of safe and orderly global migration.¹⁵

Unlike refugees, migrant workers are the focus of only a handful of international treaties.¹⁶ These treaties suffer from notoriously low ratification rates, and the few States that have ratified them are primarily countries of origin—rather than the destination countries where migrant workers are in the most immediate need of worker protections.¹⁷ Moreover, no international institution exists to facilitate

11. *Id.*

12. G.A. Res. 71/1, New York Declaration for Refugees and Migrants (Sept. 19, 2016) [hereinafter New York Declaration].

13. G.A. Res. 73/151, Global Compact on Refugees (Dec. 17, 2018).

14. G.A. Res. 73/195, Global Compact for Safe, Orderly, and Regular Migration (Dec. 19, 2018) [hereinafter GCM].

15. GCM, *supra* note 14, ¶ 15.

16. Mariette Grange, Int'l Catholic Migration Comm'n, *Strengthening Protection of Migrant Workers and their Families with International Human Rights Treaties*, at 13 (Mar. 2006), https://www.unicef.org/socialpolicy/files/Strengthening_protection_of_migrant_workers.pdf [<https://perma.cc/333Y-M55Q>].

17. For example, only fifty-five countries have ratified the U.N. Migrant Workers Convention, most of which are countries in Africa and Central and South America. *Status of Ratification Interactive Dashboard*, U.N. OFF. HIGH COMMISSIONER FOR HUM. RTS., <https://indicators.ohchr.org> [<https://perma.cc/BS9B-TH7E>] (from the dropdown menu, select “International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families”) (last visited May 18, 2020).

global efforts to address labor migration, unlike institutions for just about every other issue of significant global concern—for example, the World Trade Organization (trade), the World Intellectual Property Organization (intellectual property), and the Office of the U.N. High Commissioner for Refugees (refugees), among others.

At long last, the GCM seeks to begin filling these normative and institutional gaps—suggesting the possibility of new global governance over migration. In addition to establishing a set of objectives for safe, orderly, and regular migration, the GCM assigns the International Organization for Migration (IOM) to the role of secretariat and coordinator for U.N. efforts to assist States with GCM implementation.¹⁸ The GCM, in effect, affirms the IOM's status as lead global migration agency, a role the IOM first quietly assumed in 2016 when it became a “related organization” of the United Nations after decades operating on the periphery of the international system.¹⁹

This Article offers initial thoughts on the possible impacts the GCM might have on global efforts to prevent and address trafficking, focusing on the newly elevated role of the IOM in this endeavor. Based on arguments I have made elsewhere,²⁰ my analysis takes as a given that a normative, rights-based approach to migrant work is necessary to prevent migrant worker exploitation and abuse from escalating into trafficking. From that perspective, the Article explores the possibility that, in advising States on GCM implementation, the IOM could take a more proactive role in advancing workers' rights in furtherance of the longer-term goal of preventing trafficking.

Part I assesses the GCM's potential for advancing the rights of migrant workers. The GCM reflects the three competing interests that typically animate migration policy: (1) concerns over border security, (2) the desire to derive labor market benefits from economic migration,

18. GCM, *supra* note 14, ¶ 17.

19. G.A. Res. 70/296, Agreement Concerning the Relationship Between the United Nations and the International Organization for Migration (July 25, 2016) [hereinafter UN-IOM Agreement].

20. Janie A. Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AM. J. INT'L L. 609 (2014); Janie A. Chuang, *Using Global Migration Law to Prevent Human Trafficking*, 111 AJIL UNBOUND 147 (2017).

and (3) the imperative to protect migrants' rights.²¹ Whether and to what extent migrant workers are sufficiently protected against exploitation will turn on how States balance these competing concerns. Empowered to guide States in their efforts to implement the GCM, the IOM will play a crucial role in helping to translate GCM norms into State practice. Part II analyzes the IOM's operational history and structure for insights into how the IOM might balance the GCM's competing concerns in its efforts to advise States on GCM implementation. The IOM's checkered history and its unique status as a non-normative, U.N.-related organization show a tendency to prioritize States' concerns over border security and labor market access above those regarding migrant welfare.

In contrast, the IOM's recent efforts to promote ethical recruitment standards suggest the possibility of IOM assuming a more proactive stance towards migrant workers' rights protections going forward. Part III explores these efforts, situating them within broader development debates over whether and to what extent rights tradeoffs are necessary—or acceptable—to maximize the development gains from migration. In advising States on GCM implementation, how IOM responds to pressures to trade rights for labor market access will surely test IOM's professed commitment to ethical recruitment frameworks. Its response could prove to be a bellwether of IOM's broader approach to balancing migrant worker welfare interests against the GCM's other competing interests in border security and labor market access. In this environment, close scrutiny and strong advocacy by rights advocates will be necessary to fully realize the GCM's—and the IOM's—potential to advance migrant workers' rights and prevent trafficking.

I. The GCM and Labor Migration Norm Development

The latest available estimates indicate that in 2017 there were 258 million international migrants globally (i.e., 3.4% of the world's

21. See generally GCM, *supra* note 14 (adopting a global compact to address the challenges and benefits of migration).

population), of which 164 million were migrant workers.²² In 2018, migrants remitted approximately \$689 billion worldwide, of which \$529 billion was sent to developing countries—over four times the amount of official development assistance.²³ With remittances accounting for as much as 40% of a country's gross domestic product (GDP),²⁴ it is hardly surprising that out-migration for labor has become a de facto development policy.²⁵ Not only do struggling economies benefit from the revenues derived from remittances, but there is also the added benefit of reduced local unemployment rates. At the same time, favored destination countries have come to rely heavily on migrant labor—particularly to fill the so-called 3D (dirty, dangerous, and difficult) jobs that local workers find less desirable.²⁶

Despite their significant contributions to these economies, however, migrant workers worldwide suffer from a lack of meaningful labor protections. The absence of international labor recruitment regulations has enabled a rapidly growing private labor recruitment industry to enjoy impunity for a wide range of abusive practices (for example, exorbitant recruitment fees and contract switching).²⁷ In most destination countries, migrant workers enjoy limited labor protections, and, as a result, employers can exert inordinate control over whether and under what conditions migrant workers labor. For example, under most temporary guestworker programs around the world, migrant workers' visas are tied to specific employers—meaning that when a worker leaves the employment, even as a result of abusive treatment,

22. Int'l Labour Org. [ILO], *ILO Global Estimates on International Migrant Workers: Results and Methodology*, at 5 (2018).

23. *Remittances Data*, KNOMAD, www.knomad.org/data/remittances [https://perma.cc/FYL9-SCBY] (last visited Apr. 4, 2020).

24. *Id.* For example, KNOMAD reports the following amounts of remittances as a percentage of GDP for 2018: Tonga (40.7%), South Sudan (35.3%), Kyrgyz Republic (33.2%), Haiti (30.9%), Tajikistan (29%), Nepal (28%), El Salvador (20.7%). *Id.*

25. Kimberly Beaton et al., *Migration and Remittances in Latin American and the Caribbean: Engines of Growth and Macroeconomic Stabilizers?* 2 (Int'l Monetary Fund, Working Paper No. 17/144, 2017), <https://www.imf.org/~media/Files/Publications/WP/2017/wp17144.ashx> [https://perma.cc/W93Y-9LSF].

26. *Id.*

27. The GCM devotes an objective to addressing these issues. See GCM *supra* note 14, ¶ 22.

the worker's visa is immediately rendered invalid.²⁸ The threat of retaliatory termination of employment or deportation can compel migrant workers to endure abusive working conditions in silence. These structural features of cross-border labor migration can thus enable, if not encourage, exploitation of migrant workers that can all too readily reach trafficking or "modern-day slavery" extremes.

The glaring lack of norms 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,"²⁹ States have been deeply reluctant to commit to legal obligations towards nonnationals within their territories.³⁰ As Professor Tendayi Achiume states, "nonnationals are definitionally '*political strangers*' with no cognizable claims to shaping the trajectory of the respective nation-state."³¹ Sovereignty entails, after all, a nation-state's ability to define its political community, and hence the terms of admission and inclusion concerning nonnationals.³² The singular exception to this broad privilege to exclude is the obligation that most States have accepted—under the U.N. Convention Relating to the Status of Refugees and its Protocol³³—concerning refugees or those whose migration is compelled by fear of certain forms of persecution by their home governments.³⁴ Economic migrants, on the other hand—whose migration is viewed far less sympathetically (as motivated primarily by the desire for a better life)—have no claim to States' beneficence unless they are deemed trafficked.³⁵ And even then, trafficked persons' claims to the destination country's protections typically are contingent

28. DANIEL COSTA & PHILIP MARTIN, TEMPORARY LABOR MIGRATION PROGRAMS, ECON. POL'Y INST. 2 (2018), <https://www.epi.org/files/pdf/152373.pdf> [<https://perma.cc/QR3W-MPN3>].

29. CATHERINE DAUVERGNE, MAKING PEOPLE ILLEGAL: WHAT GLOBALIZATION MEANS FOR MIGRATION AND LAW 2 (2009).

30. *Id.*

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

32. *Id.* at 1523–24.

33. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259 (entered into force Apr. 22, 1954).

34. *Id.*

35. *Id.* (discussing factors that qualify an individual for refugee status, notably excluding economic disadvantage).

on their cooperation with efforts to pursue their traffickers—unlike refugees, whose status as refugees alone triggers State protections. States' adherence to a fundamental distinction between refugees and economic migrants accounts for why the existing normative and institutional architecture of global migration governance focuses almost exclusively on *refugee* populations.

Merely a decade ago, economic migration was viewed as best addressed at the regional level and through bilateral arrangements. Engagement at the international level was limited to a series of global dialogues and consultative processes—such as the U.N. High-Level Dialogue on International Migration and Development and the Global Forum on Migration and Development (GFMD).³⁶ These fora enabled States and other stakeholders to develop “a better common understanding of contested aspects of migration that are at the centre of [international] debates, buil[d] trust between participating Member States[,] and develop[] ideas and data”³⁷ These dialogues and consultative processes fostered greater confidence and willingness to engage in multilateral action. That foundation combined with the need to address large-scale movements of people over the last five years—for example, from or through the Middle East and North Africa to Europe, Central America to the United States, and Bangladesh and Myanmar to other Southeast Asian countries—incentivized the international community to finally treat economic migration as an issue of urgent international concern.³⁸ After all, large-scale movements can have significant and widespread political, economic, social, developmental, humanitarian, and human rights ramifications across borders. A global approach is necessary to prevent and address the negative repercussions—particularly for developing countries, which tend to be disproportionately affected and already severely

36. *Background*, GLOBAL F. MIGRATION & DEV., <https://www.gfmd.org/process/background> [<https://perma.cc/B5AG-4QYN>] (last visited Apr. 5, 2020).

37. U.N. Secretary-General, *Making Migration Work for All*, at 18, U.N. Doc. A/72/643 (Dec. 12, 2017).

38. U.N. DEP'T OF ECON. & SOC. AFFAIRS, *INTERNATIONAL MIGRATION 2019*, at iv, U.N. Doc. ST/ESA/SER.A/438, U.N. Sale No. E.20XIII.16 (2019).

stretched in their efforts to maintain economic and social cohesion and development in face of these migrant flows.³⁹

The GCM was thus born of the recognition that international cooperation regarding economic migration is necessary to address the world's migration crises.⁴⁰ The GCM signifies an important turning point, albeit with some notable limitations. The GCM is a nonbinding instrument—an unfortunate but necessary concession to bring States to the negotiating table.⁴¹ The United States nonetheless withdrew from the negotiations in December 2017, and convinced others to follow suit, arguing that such agreements subvert governments' ability to control national borders.⁴² The GCM explicitly affirms, however, "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."⁴³

A few notable holdouts notwithstanding, 164 governments adopted the GCM in December 2018.⁴⁴ The GCM's substantive terms reflect a compromise among the competing interests of countries of origin, countries of destination, and the migrants themselves.⁴⁵ While the GCM recognizes migrants' contributions to the communities in which they reside, it also seeks to address the root causes of migration to enable people to remain in their home countries rather than have to migrate for survival. Regrettably, the GCM focuses more on

39. New York Declaration, *supra* note 12, ¶ 7.

40. GCM, *supra* note 14.

41. *Id.* ¶ 7.

42. Olivia Beavers, *US Pulls Out of Global Compact on Migration*, HILL (Dec. 3, 2017, 1:38 PM) <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.*

43. GCM, *supra* note 14, ¶ 15.

44. *General Assembly Officially Adopts Roadmap for Migrants to Improve Safety, Ease Suffering*, UN NEWS (Dec. 19, 2018), <https://news.un.org/en/story/2018/12/1028941> [<https://perma.cc/ZW9C-DAQE>].

45. Press Release, World Leaders Adopt First-Ever Global Compact on Migration, Outlining Framework to Protect Millions of Migrants, Support Countries Accommodating Them, U.N. Press Release DEV/3375 (Dec. 10, 2018).

preventing irregular and precarious migration than on creating additional legal migration pathways—the inclusion of which could help alleviate the need for migrants to rely on smugglers-cum-traffickers to facilitate their border crossings.

Limitations aside, however, the GCM could nonetheless be viewed as progress in acknowledging and beginning to address key structural contributors to migrants' vulnerability to exploitation and trafficking. The GCM contains a list of twenty-three objectives for safe, orderly, and regular migration, each accompanied by a list of actions States can take to realize each objective.⁴⁶ The objectives are wide-ranging in scope, and when taken as a whole, reflect the GCM drafters' effort to balance States' concerns over border control, their access to flexible labor markets, and their desire to reduce migrant vulnerability to harm and exploitation. For example, the objectives call upon States to ensure migrants have proof of legal identity; to promote faster, safer, and cheaper transfer of remittances; and to enhance consular protection and assistance throughout the course of migration.⁴⁷

One of the GCM objectives specifically targets trafficking (Objective 10: "[p]revent, combat and eradicate trafficking") and includes a list of ten suggested actions to realize that goal.⁴⁸ The recommended actions focus on law enforcement measures designed to suppress negative phenomena related to trafficking. These include, for example, monitoring irregular migration routes and cross-border intelligence sharing to disrupt financial flows associated with trafficking. The proposed actions also feature strategies to empower actual and potential victims—such as awareness-raising campaigns to educate migrants of the risks of trafficking and improved access to justice for victims and those at risk of becoming victims.⁴⁹ Indeed, the recommended actions go further than the U.N. Trafficking Protocol in at least two crucial respects. First, the GCM recommends that States "avoid criminalization of migrants who are victims of trafficking in

46. GCM, *supra* note 14, ¶ 6.

47. *Id.* ¶¶ 4, 14, 20.

48. *Id.* ¶¶ 16–17.

49. *Id.* ¶ 17.

persons for trafficking-related offen[s]es.”⁵⁰ Second, it recommends that States “[e]nsure that the victim receives appropriate protection and assistance, *not conditional upon cooperation* with the authorities against suspected traffickers.”⁵¹ Both are guarantees that human rights advocates had unsuccessfully sought to have included in the U.N. Trafficking Protocol.⁵²

But perhaps even more significant for antitrafficking efforts are the *non-trafficking-specific* provisions of the GCM that, if meaningfully implemented, would significantly reduce vulnerability to trafficking by targeting structural contributors to migrant worker exploitation. Many migrant workers throughout the world labor under conditions that do not rise to the level of trafficking, yet they suffer significant rights violations for which meaningful access to protection and redress is limited, if not nonexistent. If left unchecked, such exploitation can readily worsen and become trafficking. Attending to the structures that enable these *lesser* abuses to occur, therefore, can reduce migrants’ vulnerability to exploitation, and help prevent trafficking.

Take, for instance, GCM Objective 6, which seeks to “[f]acilitate fair and ethical recruitment and safeguard conditions that ensure decent work.”⁵³ Objective 6 targets abusive labor recruitment practices that can foster situations of debt bondage and forced labor.⁵⁴ The suggested actions States might take to fulfill Objective 6 include, for example, prohibiting recruiters and employers from charging or shifting recruitment fees or related costs to migrant workers; allowing migrant workers to change employers; and ensuring migrants safe access to effective complaint and redress mechanisms for workplace violations “in a manner that does not exacerbate vulnerabilities of migrants who denounce such incidents.”⁵⁵

50. *Id.*

51. *Id.* (emphasis added).

52. Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1677 (2010); Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 990–91 (2001).

53. GCM, *supra* note 14, ¶ 12.

54. *Id.*

55. *Id.* ¶¶ 12–13.

These suggested actions, if implemented, would address major factors that feed the exploitation and trafficking of migrant workers. The ability to charge recruitment fees provides unscrupulous employers (and recruiters) tremendous leverage to prevent migrant workers from leaving even extreme situations of exploitation. Many migrant workers cannot afford to pay the fees upfront, and often obtain loans—sometimes at exorbitant interest rates and with family assets put up as collateral—that they pledge to reimburse with their earnings. The penalties associated with defaulting on these loans further disincentivize migrant workers from complaining about workplace abuses, as doing so can result in retaliatory termination, retaliatory deportation, and blacklisting from future jobs. Moreover, if terminated, the worker may not be able to seek employment from a new employer if—as is the case for most guestworker programs around the world—the worker’s visa is tied to specific employers, such that leaving that employer immediately renders the visa invalid and the worker out of status.⁵⁶ Taking the suggested actions for Objective 6 to prohibit recruitment fees, eliminate employer-tying of visas, and provide anti-retaliation protections, would go a long way to reducing migrant worker vulnerability to trafficking.

None of these suggested actions are new recommendations. They encapsulate what rights advocates have long argued, with limited success, ought to be incorporated into laws and regulations governing migrant work. For example, rights advocates in the United States have sought laws to protect migrant workers who report labor violations from retaliatory deportation and termination, only to have proposed legislation languish in the U.S. Congress.⁵⁷ U.S. rights advocates have also sought a prohibition on recruitment fees. While they have succeeded with respect to workers employed by federal contractors and subcontractors that provide goods and services to the U.S. government,⁵⁸ they have made few inroads towards achieving a prohibition on recruitment fees for U.S. guestworker programs writ

56. COSTA & MARTIN, *supra* note 28.

57. See, e.g., Protect Our Workers from Exploitation and Retaliation Act, H.R. 5908, 115th Cong. (2018).

58. See FAR 22.1703(a)(5)–(7) (2019).

large—in no small part due to strong objections from business associations. Groups, such as the U.S. Chamber of Commerce, have argued, for example, that only *unreasonable* (as opposed to all) recruitment fees should be prohibited, and in any event, that the term recruitment fees should be narrowly construed to exclude many of the fees typically charged to workers (for example, visa processing and transportation fees).⁵⁹ On an even more discouraging trajectory, employer-tying remains the norm in guestworker programs in the U.S. and many countries abroad, particularly in Gulf States utilizing a *kafala* system.⁶⁰ Israel banned employer-tying (known as “binding” there) in the domestic work sector in 2010, only to reinstate it a year later in response to strong lobbying by elderly and disabled groups concerned about caregiver turnover.⁶¹ In a similarly regressive move in 2012, the United Kingdom introduced employer-tying of visas for domestic workers as part of a broader effort to restrict entry of low-skilled migrants⁶²—resulting in markedly increased rates of abuse as compared to the previous period when domestic workers were free to change employers.⁶³

59. Note that these arguments were made in the context of prohibitions on recruitment fees in the U.S. government contracting context. See, e.g., Chamber of Commerce of the U.S.A., Comment Letter on Proposed Rule of the FAR Case 2015-0017, Combating Trafficking in Persons—Definition of “Recruitment Fees” (81 Fed. Reg. 29244) (July 11, 2016); Chamber of Commerce of the U.S.A., Letter on the Senior Policy Operating Group to Combat Trafficking in Persons Draft Definition for “Recruitment Fees” (FAR Case 2014-001—Ending Trafficking in Persons) (Mar. 18, 2015). Though the U.S. government ultimately released a broad definition of “recruitment fees,” it did so over three years after the prohibition was promulgated. Combating Trafficking in Persons—Definition of “Recruitment Fees,” 83 Fed. Reg. 65,466 (Dec. 20, 2018) (to be codified at 48 C.F.R. pts. 22, 52).

60. LAUREN A. APGAR, ECON. POLICY INST., AUTHORIZED STATUS, LIMITED RETURNS 1, 3 (2015), <https://www.epi.org/publication/authorized-status-limited-returns-labor-market-outcomes-temporary-mexican-workers/> [<https://perma.cc/GNQ3-QUJU>]; Zorana Knezevic, *The Kafala Labor-Sponsorship System in the Gulf States*, HUM. TRAFFICKING CTR. (Apr. 24, 2019), <https://humantraffickingcenter.org/the-kafala-labor-sponsorship-system-in-the-gulf-states/> [<https://perma.cc/VZ3M-SSW3>].

61. Adriana Kemp & Rebeca Rajman, *Bringing in State Regulations, Private Brokers, and Local Employers: A Meso-Level Analysis of Labor Trafficking in Israel*, 48 INT’L MIGRATION REV. 604, 617–18 (2014).

62. Siobhán Mullally & Cliodhna Murphy, *Migrant Domestic Workers in the UK: Enacting Exclusions, Exemptions, and Rights*, 36 HUM. RTS. Q. 397, 411, 413 (2014).

63. KALAYAAN, SLAVERY BY ANOTHER NAME: THE TIED MIGRANT DOMESTIC WORKER VISA (2013), <http://www.kalayaan.org.uk/wp-content/uploads/2014/09/Slavery-by-a-new-name-Briefing.pdf> [<https://perma.cc/74CD-HUMQ>]. Kalayaan, a London-based domestic workers’ rights organization, reported that after introduction of employer-tying, there was a significant increase in numbers of domestic

Although the GCM suggests States undertake targeted action in all of these areas, as the above shows, ensuring that States actually do so will require overcoming significant resistance by States and by powerful nonstate actors to whom States have long outsourced labor migration governance. The goal of improving migrant worker welfare will inevitably be weighed against the competing concerns of facilitating access to foreign labor markets and maintaining border control. As secretariat and coordinator of U.N. efforts to assist States with GCM implementation, the IOM is well-positioned to influence state actions on such matters. But determining how the IOM might weigh the competing concerns requires a closer look at the IOM's operational history and structure.

II. The IOM and "Migration Management"

Before becoming a U.N.-related organization in 2016, the IOM existed largely on the periphery of the international system. Despite its extensive operations on the ground, the IOM has rarely been examined in academic literature, in part due to misperceptions of its historical insignificance as a glorified travel agency and also its opacity as an institution.⁶⁴ Its newly elevated status, however, put a spotlight on the organization, illuminating two aspects of the IOM's structure and operational history that raise concerns over the human rights and labor rights implications of the IOM's new role. The first is the IOM's checkered history of operations that have both advanced but also severely constrained—if not violated—the rights of migrants. The second is the IOM's status as a related organization rather than a U.N. specialized agency.⁶⁵ Contrary to what one might assume from the IOM's self-description as "U.N. Migration," the IOM operates independently of the United Nations. Moreover, the IOM does not

workers who experienced decreased pay or no pay at all, confinement in the home, passport confiscation, and psychological abuse. *Id.*

64. See generally Antoine Pécoud, *What Do We Know About the International Organization for Migration?*, 44 J. ETHNIC & MIGRATION STUD. 1621 (2017).

65. Press Release, IOM Becomes a Related Organization to the U.N., Int'l Org. Migration (July 25, 2016), <https://www.iom.int/news/iom-becomes-related-organization-un> [<https://perma.cc/Y46M-JQ7W>].

have a normative protection mandate, unlike U.N. specialized agencies also dealing with migrant populations, such as the United Nations High Commissioner for Refugees (UNHCR), the Office of the United Nations High Commissioner for Human Rights (OHCHR), and the International Labour Organization (ILO).⁶⁶ Given the IOM's operational history and its non-normative mandate, whether the IOM would prioritize migrant welfare in advising States on GCM implementation is far from certain.

A. *The IOM's Operational History*

Founded in 1951, the IOM has grown from a small, intergovernmental body of sixteen Member States to an organization of 173 Member States (and a further eight States with observer status).⁶⁷ As a *non-normative* organization, the IOM is not required to engage in rights-based governance. Its constitution simply establishes that the IOM is to provide migration services to its Member States and that in carrying out its functions, the IOM is to cooperate with other entities concerned with migration and to recognize the primacy of national law.⁶⁸ To implement this mandate, the IOM maintains a small headquarters office in Geneva, while its approximately 10,000 employees primarily staff the IOM's 500 field offices and duty stations located in over 100 countries.⁶⁹ The IOM works in four areas of migration management: migration and development, facilitating migration, regulating migration, and addressing forced migration.⁷⁰ Its diverse activities have included, for example, refugee resettlement, repatriation of trafficked persons and unsuccessful asylum seekers,

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

67. *About IOM*, INT'L ORG. MIGRATION, <https://www.iom.int/about-iom> [<https://perma.cc/693V-DWBH>] (last visited Apr. 5, 2020) [hereinafter *About IOM*].

68. *Constitution, Chapter 1, Article 1*, INT'L ORG. MIGRATION <https://www.iom.int/constitution> [<https://perma.cc/3855-BVDX>] (last visited Apr. 5, 2020) [hereinafter *IOM Constitution*].

69. Megan Bradley, *The International Organization for Migration (IOM): Gaining Power in the Forced Migration Regime*, REFUGE, Mar. 23, 2017, at 97, 101; *About IOM*, *supra* note 67.

70. *U.N. Migration, Our Work*, INT'L ORG. MIGRATION, <https://www.iom.int/our-work> [<https://perma.cc/4RBG-4SKR>] (last visited Apr. 5, 2020).

labor recruitment, certification of third-party labor recruiters, and implementation of immigrant detention programs, among others.⁷¹

This wide range of activities is at least partly attributable to the IOM's funding model. Unlike U.N. specialized agencies, the IOM does not have a regular budget that funds its operations.⁷² Article 20 of the IOM Constitution provides that cash contributions from Member States will fund the IOM's administrative budget, while its operational budget will be funded through voluntary contributions provided in exchange for the IOM's migration services.⁷³ The IOM's operational funding thus relies on projectization or activity-based costing such that the IOM offices and staff depend on the acquisition of projects for survival. As Dr. Fabian 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."⁷⁴ 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.⁷⁵ This funding structure has created the perception that the "IOM as an agency will do anything as long as there's money with which to do it."⁷⁶ The IOM's heavy reliance on projects for mostly western governments of industrialized countries—which have come to rely on the IOM for its "jack of all trades" flexibility and its logistical efficiency in project delivery—has fed the perception that the IOM is an "instrument of Northern foreign policy."⁷⁷

The IOM's funding structure and its lack of a normative mandate have fostered the perception that the IOM is a "deeply ambivalent

71. *About IOM*, *supra* note 67.

72. *IOM Constitution*, *supra* note 68, at ch. 7, art. 20.

73. *Id.*

74. 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, 63 (Martin Geiger & Antoine Pécoud eds., 2010).

75. Martin Geiger & Antoine Pécoud, *International Organisations and the Politics of Migration*, 40 *J. ETHNIC & MIGRATION STUD.* 865, 870 (2014).

76. Georgi, *supra* note 74.

77. Bradley, *supra* note 69, at 100, 103.

organization” that engages in diverse activities that are contradictory, if not controversial.⁷⁸ The IOM claims a humanitarian mission—working “to help ensure the orderly and humane management of migration” and “to provide humanitarian assistance to migrants in need, including refugees and internally displaced people.”⁷⁹ Yet, the IOM’s involvement in the “ordering of movement” has drawn criticism from human rights organizations for using coercive practices (such as immigrant detention and refugee repatriation) that arguably “constrain rather than advance the rights and well-being of migrants.”⁸⁰ Indeed, the fact that the IOM receives funding to undertake activities that are clearly within the purview of normative agencies (for example, UNHCR) has prompted human rights organizations to question whether States might strategically fund the IOM to undertake these activities to *avoid* more rigorous application of human rights standards.⁸¹

Regarding labor migration specifically, the IOM’s activities have reflected its entrepreneurial ethos and drawn concern regarding its normative commitment to migrant worker welfare. The IOM directly participated in labor recruitment in at least two pilot programs: working closely with governments to recruit Thai agricultural workers for work in Israel and to recruit Guatemalan agricultural workers for work in Quebec.⁸² Both programs were mired in controversy. The IOM’s involvement apparently did not curtail the rampant human rights abuses suffered by the Thai migrant workers—including 122

78. Georgi, *supra* note 74, at 47.

79. *About IOM*, *supra* note 67.

80. Bradley, *supra* note 77, at 99; Amnesty Int’l, *Statement by Amnesty International & Human Rights Watch to the Governing Council, International Organization for Migration*, AI Index: IOR 42/006/2002 (Dec. 2–4, 2002).

81. Ishan Ashutosh & Alison Mountz, *Migration Management for the Benefit of Whom? Interrogating the Work of the International Organization for Migration*, 15 CITIZENSHIP STUD. 21, 22 (2011); Human Rights Watch, *Human Rights Watch’s Statement to the IOM Governing Council 29 Nov. – 2 Dec. 2005 (90th Session)*, https://governingbodies.iom.int/system/files/jahia/webdav/shared/shared/main/site/about_iom/en/council/90/Human%20Rights%20Watch.pdf [https://perma.cc/AWD2-YCPL].

82. HUMAN RIGHTS WATCH, *A RAW DEAL: ABUSES OF THAI WORKERS IN ISRAEL’S AGRICULTURAL SECTOR* 16 (2015); Giselle Valarezo, *Offloading Migration Management: The Institutionalized Authority of Non-State Agencies over the Guatemalan Temporary Agricultural Worker to Canada Project*, 16 J. INT’L MIGRATION & INTEGRATION 661, 667 (2015).

deaths—detailed in a Human Rights Watch investigative report.⁸³ As to the Guatemala–Quebec program, the IOM essentially created a transnational labor migration corridor that ultimately rendered Guatemalan migrant workers “extremely vulnerable to manipulation and abuse.”⁸⁴ The workers were allegedly mistreated not only by IOM personnel directly but also by unscrupulous labor recruiters who emerged after the IOM was forced to end its involvement in the program, in the wake of corruption scandals involving the Director of the IOM–Guatemala office.⁸⁵

B. The IOM's Non-Normative Mandate

After several decades operating independently of the U.N. system, in 2016, the IOM chose to become a U.N. “related organization”—a status held by only two other institutions: the World Trade Organization and the International Atomic Energy Agency.⁸⁶ The IOM could have opted to become a U.N. specialized agency. In that capacity, the IOM would have been brought within the general accountability mechanisms of the U.N., bound by the U.N. Charter’s requirement of impartiality, and expected to operate in line with the normative protective mandates of other U.N. agencies.⁸⁷ Choosing instead to become a U.N. related organization enabled the IOM to maintain its independence. As stated in the U.N.–IOM Agreement establishing the relationship, the IOM “by virtue of its Constitution, shall function as an *independent*, autonomous[,] and *non-normative*

83. HUMAN RIGHTS WATCH, *supra* note 82, at 41.

84. Catherine Gabriel & Laura Macdonald, *After the International Organization for Migration: Recruitment of Guatemalan Temporary Agricultural Workers to Canada*, 44 J. ETHNIC & MIGRATION STUD. 1706, 1720 (2018).

85. Valarezo, *supra* note 82, at 671–72.

86. *Related Organizations*, U.N. SYSTEM, <https://www.unsystem.org/members/related-organizations> [<https://perma.cc/94DH-KF93>] (last visited Mar. 24, 2020).

87. 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), 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/ZQ38-ULGX>].

international organization in the working relationship with the United Nations.”⁸⁸

Notwithstanding its refusal to become a U.N. specialized agency, the IOM quickly rebranded itself on its website as “U.N. Migration”—a move interpreted by some as an effort to establish equal position as the UNHCR, also known as “The U.N. Refugee Agency.”⁸⁹ The IOM quietly assumed the role of lead migration agency not only in name but also in practice, as the U.N. transferred to the IOM increasing responsibility for migration issues that would otherwise have been handled by the U.N. Secretariat or a U.N. specialized agency.⁹⁰ It therefore came as little surprise that the GCM would ultimately designate the IOM to serve as “the coordinator and secretariat” of a U.N. network on migration, established “to ensure . . . coherent system-wide support” to GCM implementation, including its “capacity-building mechanism.”⁹¹ Assigning the IOM this responsibility was controversial, as it bypassed a number of U.N. specialized agencies that address labor migration-related issues within their portfolios and under *rights-protective* mandates (for example, the ILO, OHCHR, and UNHCR).⁹² Tellingly, the U.N. Secretary-General, in a report providing input on the first draft of the GCM, noted that strengthening the international community’s work on migration issues would best be “achieved if, in time, [the] IOM [was] brought more fully into the United Nations system as a specialized agency, properly equipped for that role.”⁹³

Contrary to the U.N. Secretary-General’s expressed hope, however, the IOM remains decidedly non-normative and independent of the United Nations. As the IOM Director General António Vitorino

88. UN-IOM Agreement, *supra* note 19 (emphasis added).

89. Martin Geiger & Martin Koch, *World Organization in Migration Politics: The International Organization for Migration*, J. INT’L ORG. STUD., Spring 2018, at 25, 32; *About IOM*, *supra* note 67; U.N. REFUGEE AGENCY, <https://www.unhcr.org/en-us/> [<https://perma.cc/5VDD-VCFG>] (last visited Apr. 5, 2020).

90. Cullen, *supra* note 87.

91. GCM, *supra* note 14, ¶ 45.

92. Cullen, *supra* note 87.

93. U.N. Secretary-General, *supra* note 37.

remarked at a March 2019 event, in response to a direct question regarding whether the IOM would promote a rights-based agenda:

[I]n the migration field, we do not have an equivalent normative source that other agencies can build on, like UNHCR, for instance [with the 1951 Refugee Convention and its 1967 Protocol], or like ILO who has the Convention on the Rights of Migrant Workers, in spite of fact that it's not widely [ratified]. In the migration policy field, there is no equivalent normative base, so everything will depend much more on cooperation, international cooperation of IOM member states, and international organizations and member states. That's the key issue. Life is what it is. And definitely if you see what has happened with the Global Compact—it's quite clear that there are no conditions for speaking of a normative role equivalent to the ones of other agencies.⁹⁴

Yet, as scholars have noted, although the International Convention on the Protection of the Rights of Migrant Workers and Members of their Families (U.N. Migrant Workers Convention) is poorly ratified,⁹⁵ many of its provisions echo rights guarantees contained in widely ratified international human rights treaties.⁹⁶ Moreover, the GCM's preambular language explicitly states that the GCM rests on international human rights treaties and the ILO conventions on promoting decent work and labor migration, among other treaties.⁹⁷ Hence, whether contained in international treaties or in the GCM itself,

94. *A Conversation with António Vitorino*, MIGRATION POL'Y INST. (Mar. 6, 2019), <https://www.migrationpolicy.org/events/conversation-director-general-international-organization-migration> [https://perma.cc/2YZ2-RWC3].

95. *Status of Ratification Interactive Dashboard*, OFF. U.N. HIGH COMMISSIONER HUM. RTS., <https://indicators.ohchr.org> [https://perma.cc/J4VW-33N8] (last visited Apr. 5, 2020) (indicating fifty-five ratifying States).

96. Ryszard Cholewinski, *The Rights of Migrant Workers*, in INTERNATIONAL MIGRATION LAW 255 (Ryszard Cholewinski et al. eds., 2007).

97. GCM, *supra* note 14, ¶ 2.

there is a normative base from which the IOM could draw if it chose to pursue a rights-based agenda.

III. Migrant Workers' Rights vs. "Migration as Development"

Close examination of global labor migration dynamics and the diverse roles the IOM has assumed in migration management underscore why its lack of a normative protection mandate matters. Global labor migration is marked by normative and governance gaps, particularly concerning transnational labor recruitment practices. Though States remain key players in labor migration, strategic nonstate actors have also assumed prominent roles. Governments have increasingly outsourced cross-border labor migration management—a “de-responsibilization” of state agencies for labor migrants’ rights and conditions⁹⁸—to these largely unregulated actors.⁹⁹ In doing so, they have fostered the creation of a highly competitive recruitment industry that tends to prioritize private profit interests over migrant welfare.¹⁰⁰ That countries of origin and countries of destination view these migration pathways as mutually beneficial disincentivizes close scrutiny of the myriad ways that labor migration structures render migrants vulnerable to exploitation. Even where States attempt to minimize the risks migrants face, power imbalances between States—and between migrants differently situated within racialized and gendered labor markets, on the one hand, and the various actors who profit from the migration industry, on the other¹⁰¹—can readily undermine such efforts.

Given these background dynamics, a rights-based approach is critical to ensuring meaningful protection of migrant workers. Otherwise, the balance of interests underlying the GCM could readily tilt in favor of perpetuating the status quo, prioritizing interests in border control or labor market access over migrants’ rights protections.

98. Kemp & Raijman, *supra* note 61, at 608.

99. *Id.*

100. Valarezo, *supra* note 82, at 674.

101. 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, 1726 (2018).

The antitrafficking field is already showing indications of a softening of rights standards, for example, concerning efforts to address trafficking in labor supply chains, where proposed interventions have arguably diverted focus away from state responsibility and towards corporate social responsibility. Rather than putting sustained pressure on States to adopt laws and regulations to strengthen labor protections and accountability mechanisms, pressuring businesses to adopt voluntary standards and codes of conduct has become an increasingly dominant rubric in antitrafficking advocacy.

As lead migration agency under the GCM, the IOM could be well-positioned to reinvigorate and promote a rights-based approach to labor migration governance. Although the IOM's past involvement in creating (and perhaps profiting from) new transnational labor streams has raised rights concerns, the IOM recently has made a concerted effort to promote ethical recruitment standards. Upholding those standards will require, however, the IOM to navigate growing pressures from development institutions to permit rights tradeoffs for the sake of increasing labor mobility.

A. A Rights-Based Approach

The GCM empowers the IOM to oversee a "capacity-building mechanism," to which Member States, the U.N., and other relevant stakeholders, including the private sector and philanthropic foundations, are invited to contribute resources.¹⁰² The mechanism includes a "connection hub that facilitates demand-driven, tailor-made[,] and integrated solutions"; a "start-up fund for initial financing to realize project-oriented solutions"; and a "global knowledge platform as an online open data source."¹⁰³ This, in effect, assigns the IOM the familiar role of collector and gatekeeper of ideas, through which it can identify, articulate, and disseminate rights standards. In its extensive operations on the ground, the IOM often

102. GCM, *supra* note 14, ¶ 39.

103. *Id.* ¶ 43.

serves as a hub for policy discussion and debate, integrating a wide range of state and nonstate actors to *incite* them to think and act in similar ways.¹⁰⁴ These interactions have enabled the IOM to shape perceptions of migration. As Professor Pécoud explains, the IOM makes sense of local migration realities by translating them into international migration narratives while also translating these narratives into local expertise via training, capacity-building, and cooperating with local stakeholders.¹⁰⁵

The choice of perspectives with which the IOM might engage in developing the GCM's capacity-building mechanism can predetermine whether the mechanism produces knowledge that advances rights standards. The IOM's work on labor migration issues, past and present, suggests contradictory impulses, however, as to whether or to what extent the IOM embraces a rights-based approach. On the one hand, the IOM's past operations have focused on controlling and facilitating migration. Its migration management approach could be viewed as an attempt to overcome the tension between protectionist border control and the economic need for a flexible migrant workforce. After all, full control of borders is not only impossible but potentially counterproductive because it would undermine the necessary circulation of workers in the globalizing economy.¹⁰⁶ The IOM's migration approach thus aims to sort good from bad migration—the orderly and regular from the disorderly and irregular—such that migration can thereby be “for the benefit of all.”¹⁰⁷ But as Professors Barber and Bryan observe, the IOM's policies have constructed “ideal migrants/immigrants as those serving economic rather than humanitarian interests.”¹⁰⁸

On the other hand, IOM's recent efforts to establish its International Recruitment Integrity System (IRIS)—“a global initiative that is

104. Julia Brachet, *Policing the Desert: The IOM in Libya Beyond War and Peace*, 48 ANTIPODE 272, 277 (2016) (emphasis added).

105. Pécoud, *supra* note 64, at 1633–34.

106. Antoine Pécoud, *Informing Migrants to Manage Migration?*, in THE POLITICS OF INTERNATIONAL MIGRATION MANAGEMENT 196 (Martin Geiger & Antoine Pécoud eds., 2012).

107. Pécoud, *supra* note 64, at 1627, 1630.

108. Barber & Bryan, *supra* note 101, at 1728.

designed to promote ethical international recruitment”¹⁰⁹—suggest a possible effort to expand migrant workers’ rights. Collaborating with a coalition of government, private sector, and civil society actors, IOM has established a benchmark for ethical recruitment known as the IRIS Standard and is developing a voluntary certification scheme for ethical recruiters to “provide assurance of compliance with the IRIS Standard.”¹¹⁰ Granted, IRIS might be yet another product of the IOM’s keen entrepreneurial ability to identify an opportunity and to stake a claim to expertise and a governance role in a growth area. The substance of the IRIS Standard reflects, however, a commitment to promoting international human rights and labor standards. The IRIS Standard calls upon recruiters to respect all applicable laws related to labor recruitment as well as the core labor standards recognized in the ILO Declaration on Fundamental Principles and Rights at Work (prohibiting trafficking, forced labor, and child labor, discrimination, and upholding freedom of association and collective bargaining rights).¹¹¹ The IRIS Standard further enumerates specific principles: prohibiting recruitment fees and related costs to migrant workers, and ensuring respect for freedom of movement, transparency regarding terms and conditions of employment, confidentiality and data protection, and access to remedy.¹¹²

These principles find support in the GCM, which includes a number of suggested actions that clearly prioritize humanitarian interests over economic ones. For example, the IRIS Standard’s prohibition on recruitment fees directly aligns with the terms of CGM Objective 6 (fair and ethical recruitment and decent work).¹¹³ Whether and to what extent the IOM relies on the IRIS Standard in advising States on implementing GCM Objective 6 will test the IOM’s professed commitment to ethical labor recruitment.

109. INT’L RECRUITMENT INTEGRITY SYS., <https://iris.iom.int> [<https://perma.cc/6L9R-349Y>] (last visited Apr. 5, 2020).

110. *IRIS Standard*, INT’L RECRUITMENT INTEGRITY SYS., <https://iris.iom.int/iris-standard> [<https://perma.cc/MB7S-2K4D>] (last visited Apr. 5, 2020) [hereinafter *IRIS Standard*].

111. *Id.*

112. *Id.*

113. GCM, *supra* note 14, ¶¶ 16(6), 22(c)

B. *The Migration-Development Nexus*

Adopting a rights-based approach, however, will require the IOM to resist calls from development institutions to prioritize increased labor mobility even at the cost of certain migrant workers' rights. The development field is currently in an "optimistic" period regarding the so-called "migration-development nexus"¹¹⁴—which views the remittances migrants send home as crucial tools for reducing poverty and promoting long-term economic growth.¹¹⁵ Proponents of this paradigm (MDN proponents) frame migration as a *solution* to development, and thus seek increased labor mobility—usually through proliferation of temporary migration (or guestworker) programs (TMPs). TMPs typically impose, however, rights restrictions on participating migrants—the lower the skill level, the greater the restrictions.¹¹⁶

For MDN proponents, rights restrictions are an acceptable tradeoff for increased access to remittance-generating jobs in foreign labor markets. Not only can remittances "bank the unbanked" but they can also produce macroeconomic benefits such as increased foreign currency reserves, an improved national credit rating, and an expanded tax base.¹¹⁷ Migration also yields social remittances in the form of new ideas, values, skills, and practices that migrants gain while working

114. Professor Hein De Haas likened the debate over the relationship between migration and development to a pendulum, with optimism regarding the migration-development nexus in the 1950s and 1960s, to pessimism in the 1970s and 1980s, towards more optimistic views in the 1990s and 2000s. See generally Hein De Haas, *Migration and Development: A Theoretical Perspective*, 44 INT'L MIGRATION REV. 227 (2010) [hereinafter De Haas, *Migration and Development*].

115. See Martin Geiger & Antoine Pécoud, *Migration, Development and the 'Migration and Development Nexus'*, 19 POPULATION, SPACE & PLACE 369 (2013); Hein De Haas, *The Migration and Development Pendulum: A Critical View on Research and Policy*, INT'L MIGRATION, June 2012, at 8 [hereinafter De Haas, *Pendulum*]; Ruby Khan, *Remittances: A Development Mantra or a Dutch Disease for a Developing Country*, INT'L J. RES. ECON. & SOC. SCI., Oct. 2019, at 1; Kerry Preibisch et al., *Pursuing the Capabilities Approach Within the Migration-Development Nexus*, 42 J. ETHNIC & MIGRATION STUD. 2111 (2016).

116. Martin Ruhs & Philip Martin, *Numbers vs. Rights: Trade-Offs and Guest Worker Programs*, 42 INT'L MIGRATION REV. 249, 251 (2008).

117. SOLIDARITY CTR., *IRRECONCILABLE DIFFERENCES? PURSUING THE CAPABILITIES APPROACH WITHIN THE GLOBAL GOVERNANCE OF MIGRATION* 7 (2014).

abroad and share with their communities upon their return home.¹¹⁸ Migration offers 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.¹¹⁹ This is a welcome alternative to top-down, state-centered macroeconomic solutions imposed and mediated by (sometimes corrupt) government bureaucracies.¹²⁰

The migration-development nexus has drawn its fair share of criticism, however, not the least of which is the lack of empirical evidence to support its claims to long-term development gains¹²¹—which, as it turns out, are highly context-dependent.¹²² Moreover, as Professor Rosser explains, “countries ignore at their own peril the economic challenges inherent when an economy is injected with extra capital divorced from national production,” including inflation and increased inequality between families that receive remittances and those that do not.¹²³ Indeed, reliance on remittance incomes can disincentivize local work and has actually fueled *increased* migration—especially as young people who have grown up in households reliant on remittance income now themselves seek higher-paying jobs abroad.¹²⁴ This exacerbates the problems of brain and brawn drain, which reduce the talent and energy required to pursue the political and economic reforms necessary for meaningful structural development. Indeed, critics argue, the migration-development paradigm overlooks features of the global political economy that drive people to migrate—for example, growing inequality between countries and within communities, development failures, and poor

118. *Id.* at 9.

119. Geiger & Pécoud, *supra* note 115, at 371; Ezra Rosser, *Immigrant Remittances*, 41 CONN. L. REV. 3, 52 (2008).

120. SOLIDARITY CTR., *supra* note 117; Geiger & Pécoud, *supra* note 115, at 371; Rosser, *supra* note 119.

121. Geiger & Pécoud, *supra* note 115, at 379; De Haas, *Migration and Development*, *supra* note 114, at 236, 242–43.

122. De Haas, *Pendulum*, *supra* note 115, at 256.

123. Rosser, *supra* note 119, at 21–22.

124. Geiger & Pécoud, *supra* note 115, at 370.

governance.¹²⁵ It thus absolves States of their responsibility to pursue necessary reforms to address these causal factors and instead shifts the burden to migrants to engage in “self-help” development.¹²⁶ Reflecting the paradigm’s neoliberal underpinnings, migrants and markets—instead of States—thus become responsible for bringing about development.¹²⁷

These criticisms notwithstanding, development actors have pressed for establishing more temporary migration programs worldwide to unleash the full potential of development gains to be had from remittance-producing migration. Take, for example, the new organization, Labor Mobility Partnerships (LaMP), launched by the Center for Global Development, a prominent think tank working to alleviate poverty.¹²⁸ LaMP “aims to be the first organization which actively works to increase rights-respecting labor migration, with a long-term goal of unlocking billions in income gains from people filling needed jobs.”¹²⁹ LaMP shares the IOM’s “triple win” view of migration—namely, that with productive policies in place, an increase in migration can create new opportunities and benefits for host countries, origin countries, and migrants.¹³⁰ Consequently, LaMP argues that rather than restricting migration (as most destination countries are inclined to do), governments should instead develop laws and policies to maximize the benefits of migration.¹³¹

125. De Haas, *Migration and Development*, *supra* note 114, at 236; Preibisch et al., *supra* note 115, at 2115–16.

126. Geiger & Pécoud, *supra* note 115, at 371; De Haas, *Migration and Development*, *supra* note 114, at 234, 236.

127. De Haas, *Migration and Development*, *supra* note 114, at 236, 245–46; Rosser, *supra* note 119, at 51–52.

128. *Labor Mobility Partnerships (LaMP): Helping Connect International Labor Markets*, CTR. GLOB DEV., <https://www.cgdev.org/page/labor-mobility-partnerships-lamp-helping-connect-international-labor-markets> [<https://perma.cc/RQ3Y-95ZJ>] (last visited Apr. 5, 2020) [hereinafter *Labor Mobility Partnerships (LaMP)*].

129. *Id.*

130. Host countries can benefit from higher incomes and employment rates for native workers, increased innovation, and net positive fiscal effects. Migrants and their origin countries can benefit from higher incomes for migrants’ families back home through remittances, which in turn can create other positive effects such as improved education and nutrition outcomes. Origin countries, furthermore, can benefit from knowledge and technology transfers that diversify and benefit the economy. MICHAEL CLEMENS ET AL., *MIGRATION IS WHAT YOU MAKE IT: SEVEN POLICY DECISIONS THAT TURNED CHALLENGES INTO OPPORTUNITIES*, CTR. FOR GLOB. DEV. 2 (2018).

131. *Id.*

Although rights advocates would agree that labor migration could pose a triple win under certain conditions, the perspective LaMP articulates below offers a major point of disagreement:

If more legal channels for labor mobility were opened, the incomes of developing country citizens could increase fourfold while global GDP could as much as double. These potential gains make labor mobility one of the most powerful tools for poverty alleviation currently on the current development agenda.

Despite this fact, the international community provides little support to migrant sending and receiving countries struggling to connect potential migrants (who need jobs) to potential employers (who need workers). The available support *often promotes international standards which may have little to do with local circumstances and needs*.

This leaves many countries with critical unanswered demand for support in an era when labor mobility is increasing and desperately needed.¹³²

In other words, adherence to international rights standards is a problematic barrier to labor mobility. This perspective invokes the “numbers versus rights” debate in migration policy.¹³³ As Professors Ruhs and Martin explain, as an empirical matter, “there is a trade-off, *i.e.*, an inverse relationship between the number and rights of migrants employed in low-skilled jobs in high-income countries.”¹³⁴ Increasing migrant numbers comes at the sacrifice of migrants’ rights. The questions of whether and how to accept such conditions as a matter of migration policy are deeply divisive, and the responses reflect fundamentally divergent perspectives on migrant workers.¹³⁵

132. *Labor Mobility Partnerships (LaMP)*, *supra* note 128 (emphasis added).

133. See generally MARTIN RUHS, *THE PRICE OF RIGHTS* (2013); Ruhs & Martin, *supra* note 116.

134. Ruhs & Martin, *supra* note 116.

135. Compare RUHS, *supra* note 133, 154–86 (proposing a set of rights tradeoffs), with Preibisch et al., *supra* note 115, at 2120–23 (criticizing the policy focus on the “rights versus numbers” debate).

On the one hand are those (including human rights and labor advocates) who view migrant workers as, in a sense, victims of broader forces that push and pull them over national boundaries (e.g., inequality, climate change). As such, migrant workers are deserving of special rights protections, especially considering the significant economic and social costs of migration that migrants and their families must endure (e.g., the psychological impact of family separation). For migrants' rights advocates, the willingness to sacrifice migrants' rights in pursuit of uncertain economic gains signifies a disturbingly thin view of development that fails to appreciate the importance of expanding human capabilities as a measure of development progress.¹³⁶ On the other hand, are those (including MDN proponents) who perceive migrant workers as rational economic actors who can—and do—willingly assume rights tradeoffs to gain access to jobs abroad.¹³⁷ Hence, accepting rights tradeoffs is a pragmatic choice that also honors migrants' decisions to become “agents of development.”

Adopting the latter view, LaMP's policy prescriptions focus on the question of *which* rights to afford or deny to migrant workers to maximize labor mobility and harness the development gains from remittances. LaMP has argued, for example, against a prohibition on recruitment fees (or “zero-fee recruitment”)—a position contrary to the IRIS Standards, the GCM's suggested measures, and the preference of rights advocates.¹³⁸ According to LaMP, zero-fee recruitment (1) ignores migrants' willingness to pay recruitment fees as an “investment” that can yield “vast gains”; (2) ignores the fact that there are real costs associated with recruitment services; and (3) relies solely on governments' ability to regulate and enforce transactions over which, in practice, they exert little control.¹³⁹ LaMP acknowledges that migrants take on debt to pay (often exorbitant) recruitment fees, providing recruiters (and employers) leverage to

136. Geiger & Pécoud, *supra* note 115, at 372; Preibisch et al., *supra* note 115, at 2112.

137. RUHS, *supra* note 133, at 39–52; Ruhs & Martin, *supra* note 116, at 259.

138. Rebekah Smith & Richard Johnson, *Introducing an Outcomes-Based Migrant Welfare Fund*, LAMP F.: BLOG (Jan. 16, 2020), <https://lampforum.org/2020/01/16/introducing-an-outcomes-based-migrant-welfare-fund/> [https://perma.cc/2US5-MA5S].

139. *Id.*

engage in abusive practices. But instead of prohibiting recruitment fees, LaMP proposes creating an “outcomes-based migrant welfare fund” that would fund recruitment of workers as well as “the necessary government institutions for protections and oversight.”¹⁴⁰ The fund would begin with an infusion of funds from social investors, but eventually become self-financing through contributions from the migrant workers, who pay a percentage of their salary to the fund if they “successfully find and sustain quality employment.”¹⁴¹ The recruiters would have “outcomes-based contracts,” with payments for their services contingent on the quantity and quality of jobs they secure for workers. LaMP argues that this is a better model than zero-fees recruitment because it aligns the incentives of workers, employers, and governments using outcome-based contracting.

From a rights perspective, LaMP’s proposal perhaps has surface appeal for attempting to disincentivize recruitment abuse by making payment of recruitment fees contingent on satisfactory outcomes. But the proposal raises too many questions to inspire confidence in its workability. Who determines, and by what standards, whether an outcome is satisfactory? Are there protections against unsatisfied workers from being blacklisted by future recruiters? The realities of how unequal bargaining power between employer/recruiter and migrant worker manifests invites skepticism towards any proposal that does not meaningfully protect workers’ power to demand better working conditions.

But even beyond issues of practical application, LaMP’s proposal contradicts a core principle of ethical recruitment frameworks such as that embraced by IRIS: that no worker should have to pay for a job. Under the “Employers Pay” principle that IRIS promotes, the costs of recruitment should instead be borne by employers.¹⁴² Not only do employers benefit from access to flexible and affordable labor markets

140. *Id.*

141. *Id.*

142. *Fair for Employers*, INT’L RECRUITMENT INTEGRITY SYS., <https://iris.iom.int/fair-employers> [<https://perma.cc/PAZ6-VH83>] (last visited May 18, 2020) (discussing the “Employer Pays” principle); *IRIS Standard*, *supra* note 110 (Prohibition of Recruitment Fees and Related Costs to Migrant Workers).

but they are better positioned to cover recruitment costs. Moreover, the GCM explicitly recommends that States prohibit recruitment fees “in order to prevent debt bondage, exploitation and forced labor.”¹⁴³ Prohibiting recruitment fees is a crucial structural reform of cross-border labor recruitment practices that otherwise afford unscrupulous recruiters and employers leverage to maintain substandard if not abusive labor conditions. Rights tradeoffs in this context thus can only create and sustain migrants’ vulnerability to trafficking.

In advising States on GCM implementation, the IOM could hold the line with respect to the rights tradeoffs proposed by LaMP and other adherents of the migration-development paradigm. While a rights-based approach to recruitment coincides with IOM’s own work promoting ethical recruitment through IRIS, recruitment is but one of a number of areas for which the IOM could tilt the balance of competing interests towards migrants’ rights protections. The GCM is rife with suggested actions for States to take to reduce vulnerability to exploitation and abuse—many, if not all, of which find normative grounding in international human rights and labor laws.

CONCLUSION

Given the strong State and nonstate actor interests in prioritizing the border control and improved labor market access aspects of the GCM over those pertaining to migrant welfare, the IOM might not naturally be inclined to promote a rights-based agenda on its own initiative. At the same time, however, the IOM’s work on the IRIS project suggests an opportunity for the IOM to become a standard-bearer in the field of international labor recruitment. In this and other areas, the IOM could elevate and promote the GCM’s provisions that seek to improve migrant welfare. After all, the GCM remains a potentially useful tool for preventing trafficking on many other fronts. Eliminating employer-tying of visas and providing meaningful anti-retaliation

143. GCM, *supra* note 14, ¶ 22(c) (under Objective 6: facilitate fair and ethical recruitment and safeguard conditions that ensure decent work).

protections, for example, would address significant structural contributors to the problem of human trafficking. These features of how global labor migration is currently structured are deeply embedded in the practices and policies of countries of destination and of origin. Realizing the GCM's transformative potential will therefore require rights advocates to closely scrutinize and inform the IOM's efforts to guide States' implementation of the GCM. Doing so with an eye to ensuring that States incorporate these and other worker protections could meaningfully advance overdue efforts to prevent human trafficking in the long term.