# 4

# An Assessment of IOM's Human Rights Obligations and Accountability Mechanisms

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## 4.1 Introduction[1]

Despite its rapid growth since the 1990s, the International Organization for Migration (IOM) remains an understudied actor in the migration field.[2] Today, IOM's size and the scale of its operations are closing in on those of the UN High Commissioner for Refugees (UNHCR).[3] The particular nature of IOM's work also carries with it obvious risks of human rights violations – particularly when it operates 'migrant processing centers', assisting with returns, and working in immigrant detention centers.[4] Nevertheless, the attention paid to, for example, the UNHCR, is several orders of magnitude greater than to IOM. Legal scholars in particular have paid very little attention to IOM.[5]

The extent of IOM's human rights obligations remains unclear. Like the vast majority of international organizations, IOM is not party to any human rights treaties, nor does its Constitution or internal law contain a human rights catalog. There is also widespread disagreement

[1] Thanks to the editors, the participants at the workshop leading up to this book, and the anonymous reviewers for helpful comments on earlier drafts.

[2] Antoine Pécoud, 'What Do We Know about the International Organization for Migration?' (2018) 44 Journal of Ethnic and Migration Studies 1621, 1622–1623 and *passim*; Megan Bradley, *The International Organization for Migration: Challenges, Commitments, Complexities* (Routledge 2020) 2–4.

[3] For example, IOM has over 15 000 staff members and a 2019 'revenue' of more than USD 2 billion, while the UNHCR employs just over 18 500 people and has a 2021 budget of USD 9,15 billion. See IOM, 'IOM Snapshot' (2021) <www.iom.int/sites/default/files/about-iom/iom_snapshot_a4_en.pdf> accessed 30 March 2022; UNHCR, 'Figures at a Glance' (16 June 2022) <www.unhcr.org/figures-at-a-glance.html> accessed 30 March 2022

[4] See Section 4.3.2.

[5] Jan Klabbers, 'Notes on the Ideology of International Organizations Law: The International Organization for Migration, State-Making, and the Market for Migration' (2019) 32 Leiden Journal of International Law 383.



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regarding the basis and scope of human rights obligations for international organizations under general international law.

Perhaps as a consequence of this uncertain state of the substantive law, IOM's human rights accountability mechanisms are completely unexplored legal territory. Their very existence was indeed (wrongly) denied in a 2003 report by Human Rights Watch, which unequivocally stated that 'there is no mechanism in place to hold the agency accountable for returning individuals to places where their lives or freedom could be under threat due to persecution'.[6]

In this chapter, I will argue that IOM does have some human rights obligations under general international law, and that there are some mechanisms that may – albeit indirectly, and only in certain circumstances – hold IOM to account.[7] The reality today is thus not quite as bleak as Human Rights Watch asserted back in 2003. Still, IOM's existing accountability mechanisms are clearly insufficient. They do not respect the right to an effective remedy for the potential victims of IOM human rights violations, nor do the mechanisms fulfill key procedural justice criteria.

To provide some background for the analysis and assessment, I will outline IOM's competences and activities in Section 4.2. Then, in Section 4.3, I will focus on the need for accountability, which arises due to the combination of the facts that IOM has human rights obligations (Section 4.3.1) and that it may plausibly violate those obligations (Section 4.3.2). Having established the need for accountability, I turn to the analysis and assessment of IOM's human rights accountability mechanisms in Section 4.4. Finally, I conclude in Section 4.5 with an overall assessment of IOM's human rights accountability, and some thoughts on potential avenues for reform.

## 4.2 IOM's Competences and Activities

The key function of IOM and its predecessors is to facilitate orderly migration flows by providing migration services.[8] Given the seemingly technical nature of this function, the amount of power wielded by IOM in providing

[6] Human Rights Watch, 'The International Organization for Migration (IOM) and Human Rights Protection in the Field: Current Concerns' (November 2003) <www.hrw.org/legacy/backgrounder/migrants/iom-submission-1103.pdf> accessed 30 March 2022.

[7] In doing so, I will apply the framework for analysing and assessing international organization accountability mechanisms developed in Stian Øby Johansen, *The Human Rights Accountability Mechanisms of International Organizations* (Cambridge University Press 2020).

[8] Bradley, *The International Organization for Migration* (n 2) 4. For a history of IOM's predecessors, see Richard Perruchoud, 'From the Intergovernmental Committee for European

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such services was long overlooked. IOM's immediate predecessor was, for example, 'dismissed by scholars as a significant international actor in its own right' and 'frequently […] derided as a "travel agency," booking passages for all kinds of migrants'.[9] In recent years, however, scholars have engaged more critically with IOM's work and technocratic ethos, thus revealing that it has evolved to become a powerful international organization.[10]

As is the case for many international organizations, the seemingly technocratic nature of IOM masks its true powers.[11] Pécoud explains this well:

> Formally, IOM is a mere go-between […] yet, in practice, it does play an important role: its bureaucratic skills, along with its experience of the field and expertise, make it a key partner for all parties, to the extent that it can propose new projects and elaborate the narratives to justify them. […] By occupying the intermediate space between states, IOM sits on both chairs and claims to be useful to both sides. […] This apparent neutrality reinforces IOM's political role by making it look like an 'impersonal, value-neutral, not self-interested and hence technocratic actor whose purpose is not the exercise of power but equitable problem-solving' […]. This enables the diffusion of norms and practices that would otherwise risk being rejected by states.[12]

Building on these insights, Klabbers has explained how IOM stands out from the ideal type of international organizations.[13] This ideal type is an entity with a will of its own, composed of several organs, performing technocratic tasks delegated to it by its member states in pursuit of global public goods.[14] It is inherent in this ideal type that there is a unidirectional

Migration to the International Organization for Migration' (1989) 1 International Journal of Refugee Law 501. See also, for a brief outline of IOM's recent history, Jürgen Bast, 'International Organization for Migration (IOM)' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law (online ed)* (Oxford University Press 2010) paras 6–7.

[9] Miriam Feldblum, 'Passage Making and Service Creation in International Migration: Intergovernmental Committee for European Migration (ICEM – Now Known as IOM)' (International Studies Association Annual Meeting, Washington DC, 16–20 February 1999) 5.

[10] For detailed analyses of this evolution, see e.g.: Megan Bradley, 'Who and What Is IOM For? The Evolution of IOM's Mandate, Policies and Obligations' in Megan Bradley, Cathryn Costello and Angela Sherwood (eds), *IOM Unbound? Obligations and Accountability of the International Organization for Migration in an Era of Expansion* (Cambridge University Press 2023); Christian Kreuder-Sonnen and Philip M Tantow, 'Crisis and Change at IOM: Critical Juncture, Precedents and Task Expansion' in Megan Bradley, Cathryn Costello and Angela Sherwood (eds), *IOM Unbound? Obligations and Accountability of the International Organization for Migration in an Era of Expansion* (Cambridge University Press 2023).

[11] See generally Michael N Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Cornell University Press 2004) ch 2.

[12] Pécoud (n 2) 1626–1627.

[13] Klabbers (n 5) 383.

[14] Ibid.

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line of influence: the member states should be in control of the organization.[15] To enable such ideal-type international organizations to effectively deliver global public goods on behalf of their collective memberships, without undue (political) interference, they are endowed with extraordinary privileges and immunities.[16]

IOM does not fully live up to this ideal type. Its service-oriented nature entails that IOM does 'some of the "dirty work" of states, at a larger scale than applies to most other international organizations and in ways that do not apply to most other international organizations, often commissioned by individual member states'.[17] It therefore acts less in the collective interest of its member states than what is typical for international organizations. The way IOM is financed contributes strongly to this service-oriented *modus operandi*, as it is dependent on earmarked funds to finance its activities, provided by states under contracts for services rendered (often in third states). IOM is thus forced to enter the 'market for migration', where it operates with considerable success.[18]

Another factor distinguishing IOM from this ideal type is its weak association with global public goods.[19] Notable in this regard is IOM's lack of a protection mandate. The service-oriented nature of the IOM Constitution contrasts sharply with, for example, the Statute of the UNHCR, which establishes the provision of 'international protection' to refugees as the UNHCR's core function.[20] Despite the lack of such a protection mandate, IOM 'has thrived by acting as an entrepreneur, capitalizing on its malleability and reputation for efficiency'.[21]

The flexibility of IOM's mandate has made it attractive to states. It may assist a broad range of persons – not only those who migrate voluntarily, for economic or social reasons, but also refugees and displaced persons.[22]

Moreover, IOM does not shy away from exercising what Bradley characterizes as 'compulsory power' over migrants.[23] It has operated detention

[15] Ibid 383–384.
[16] Ibid 384–385.
[17] Ibid 384.
[18] Ibid 391 and 384.
[19] Ibid 384.
[20] UNGA, 'UNHCR Statute: Annex to UN General Assembly Resolution 428 (V)' (14 December 1950) Article 1.
[21] Megan Bradley, 'The International Organization for Migration (IOM): Gaining Power in the Forced Migration Regime' (2017) 33 Refuge: Canada's Journal on Refugees 97, 97–98.
[22] Richard Perruchoud, 'Persons Falling under the Mandate of the International Organization for Migration (IOM) and to Whom the Organization May Provide Migration Services' (1992) 4 International Journal of Refugee Law 205, 210–211.
[23] Bradley, '(IOM): Gaining Power in the Forced Migration Regime' (n 21) 103.

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facilities, carried out returns that are 'voluntary under compulsion', assisted member states in managing their borders, and provided 'tailored operational assistance' to the migration and consular departments of states.[24] The nature of its work brings IOM into close contact with some of the most human rights-sensitive issues in the migration field.

## 4.3 The Need for Accountability

Over the last couple of decades, there have been repeated calls for increasing the human rights accountability of IOM. In 2003, Human Rights Watch 'urge[d] member states to request that IOM develop effective accountability mechanisms to answer criticism and allegations with respect to IOM practice in the field and its impact on human rights'.[25]

From a legal perspective, a need for human rights accountability mechanisms arises when two conditions are present. First, the organization in question must have human rights obligations. Second, the organization must plausibly be able to violate those obligations in the course of its conduct. In the following, I will first identify the human rights obligations of IOM (Section 4.3.1), and then demonstrate that IOM may plausibly violate those obligations (Section 4.3.2).

### *4.3.1 The Human Rights Obligations of IOM*

There are several possible sources of human rights obligations for international organizations.[26] The constituent treaties or the internal law of the organization may contain human rights obligations.[27] Moreover, a select few

[24] Asher Lazarus Hirsch and Cameron Doig, 'Outsourcing Control: The International Organization for Migration in Indonesia' (2018) 22 The International Journal of Human Rights 681, 692; Klabbers (n 5) 392–393. See also Cathryn Costello and Angela Sherwood, 'IOM's Practices and Policies on Immigration Detention: Establishing Accountability for Human Rights Violations?' in Megan Bradley, Cathryn Costello and Angela Sherwood (eds), *IOM Unbound? Obligations and Accountability of the International Organization for Migration in an Era of Expansion* (Cambridge University Press 2023); Jean-Pierre Gauci, 'IOM and 'Assisted Voluntary Return': Responsibility for Disguised Deportations?' in Megan Bradley, Cathryn Costello and Angela Sherwood (eds), *IOM Unbound? Obligations and Accountability of the International Organization for Migration in an Era of Expansion* (Cambridge University Press 2023).

[25] Human Rights Watch (n 6) 2.

[26] See generally, and with further references, Johansen, *The Human Rights Accountability Mechanisms* (n 7) 45–59.

[27] International organizations are bound by their constituent treaties, even though they are not formally parties to them. See Christine Chinkin, *Third Parties in International Law* (Oxford University Press 1993) 94–96.

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human rights treaties allow for the accession of (certain) international organizations. Finally, international organizations are bound by any human rights obligations incumbent upon them under general rules of international law.

The IOM Constitution does not contain any clear-cut human rights obligations. Yet, there are some human rights aspects of the IOM Constitution that should not be overlooked, and which I will briefly discuss in Section 4.3.1.1. Thereafter, in Section 4.3.1.2, I will demonstrate the (lack of) treaty-based human rights obligations for IOM. Finally, I turn to outlining IOM's human rights obligations under general international law in Section 4.3.1.3.

#### 4.3.1.1 Human Rights and the IOM Constitution

The IOM Constitution contains no explicit references to human rights. Instead, it 'quickly gets down to business',[28] which for IOM is the provision of 'migration services' – in particular to make arrangements for the 'organized transfer' of migrants.[29] However, the IOM Constitution is not completely devoid of human rights-related language. As noted by Perruchoud, some fragments of the preamble to the IOM Constitution have 'a clear link with human rights'.[30] For example, the seventh preambular paragraph highlights the need for cooperation for research and consultation on migration issues, *inter alia* with regard to the 'needs of the migrant as an individual human being'. Fragments such as these are, however, counter-balanced by the references to the need for migration services to ensure the orderly flow of migrants across the globe which permeate both the preamble and the Articles of the IOM Constitution. The closest one gets to a human rights-related provision in the actual Articles of the IOM Constitution is Article 1(d), which provides that IOM may offer states services relating to '*voluntary* return migration, including *voluntary* repatriation' (emphasis added). This provision may limit IOM's competences when it comes to providing return services and assisting with voluntary returns,[31] but it cannot reasonably be interpreted as a substantive human rights obligation for the organization.

[28] Klabbers (n 5) 391.

[29] IOM, Constitution of 19 October 1953 of the Intergovernmental Committee for European Migration (adopted 19 October 1953, entered into force 30 November 1954) as amended by Resolution No 724 by the 55th Session of the Council (adopted 20 May 1987, entered into force 14 November 1989) and by Resolution No 997 by the 76th Session of the Council (adopted 24 November 1998, entered into force 21 November 2013) first, second and third preambular paragraph, and Article 1(1).

[30] Perruchoud (n 22) 211–212.

[31] Human Rights Watch (n 6) 8.

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#### 4.3.1.2 Treaty-based Human Rights Obligations for IOM?

Unsurprisingly, IOM is not party to any human rights treaties. With the sole exception of the European Union, which is party to the UN Convention on the Rights of Persons with Disabilities,[32] there are so far no international organizations that are party to human rights treaties.[33]

Human rights obligations may in principle also arise from other treaties. One potential candidate is the Agreement Concerning the Relationship between IOM and the UN.[34] It contains one provision alluding to human rights, in Article 2(5), according to which IOM 'undertakes to conduct its activities in accordance with the Purposes and Principles of the [UN Charter] *and* with due regard to [UN policies] furthering those Principles and to other relevant instruments in the international migration, refugee and human rights fields' (emphasis added).

As pointed out by Aust and Riemer, while this provision is 'anything but clear-cut', it can at least be divided into two parts, separated by the word 'and'.[35] Both of these must be read in their context, and informed by the purpose of the Agreement. Given the context – notably that Article 2 has the heading 'Principles' – one should be wary of reading too much into them. The purpose of the Agreement, which according to its Article 1, is to strengthen the cooperation between the two organizations and enhance their ability to fulfill their respective mandates, is arguably a further argument against reading substantive human rights obligations into Article 2(5).

The second part of Article 2(5), according to which IOM shall take 'due regard' to certain policies and instruments, is phrased in non-obligatory, aspirational language. Given the context and purpose of the Agreement, this part cannot be read as establishing human rights obligations for IOM.

The first part, on the other hand, is phrased on more obligatory terms. Aust and Riemer therefore argue that it gives rise to legal obligations.[36] Still, they underline that this first part is not much of a commitment

[32] UN Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, in force 3 May 2008) 2515 UNTS 3.

[33] Johansen, *The Human Rights Accountability Mechanisms* (n 7) 50.

[34] UNGA Res A/70/296, 'Agreement concerning the Relationship between the United Nations and the International Organization for Migration' (25 July 2016) UN Doc A/RES/70/296.

[35] Helmut Philipp Aust and Lena Riemer, 'A Human Rights Due Diligence Policy for IOM?' in Megan Bradley, Cathryn Costello and Angela Sherwood (eds), *IOM Unbound? Obligations and Accountability of the International Organization for Migration in an Era of Expansion* (Cambridge University Press 2023), section 5.2.3.

[36] Ibid.

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to human rights.[37] The articles on purposes and principles in the UN Charter, which this first part refers to, only contain a single provision mentioning human rights, which makes 'promoting and encouraging respect for human rights' one of the purposes of the UN.[38] Since this vague language does not establish substantive human rights obligations for the UN,[39] it cannot do so for IOM either. At most it obliges IOM to 'promote and encourage respect' for human rights *by others*.[40]

#### 4.3.1.3 IOM Human Rights Obligations under General International Law

As subjects of international law, international organizations are bound by 'any obligations incumbent upon them under general rules of international law'.[41] General international law is an umbrella term for two legal sources: customary international law and general principles of law. Human rights obligations flowing from any of these two sources are in principle binding upon *all* subjects of international law – international organizations included.[42] That said, international organizations are not sovereign, but have limited, conferred powers. It follows that not all obligations flowing from general international law are suitable for application to international organizations. Only those obligations that concern the sphere of competences of the organization may be applicable, and adaptations may have to be made to take into account the specific characteristics of the international organization in question or international organizations generally – notably their limited powers.[43]

Human rights obligations are generally well-suited for application to international organizations. Their cross-sectoral nature makes them

[37] Ibid.

[38] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) (UN Charter) 1 UNTS XVI Article 1(3).

[39] Johansen, *The Human Rights Accountability Mechanisms* (n 7) 185–186.

[40] Likewise: Aust and Riemer (n 35).

[41] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion) [1980] ICJ Rep 73 para 37.

[42] Frederik Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (Intersentia 2010) 394–395. See also Fernando Lusa Bordin, *The Analogy between States and International Organizations* (Cambridge University Press 2018), who argues that that the extension of rules of general international law from states to international organizations by analogy is generally justified.

[43] Gérard Cahin, *La coutume internationale et les organisations internationales: l'incidence de la dimension institutionnelle sur le processus coutumier* (Pédone 2001), as summarized in Naert (n 42) 392 fn 1740.

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relevant to powers, activities, and functions falling within the spheres of competences of most international organizations. Moreover, negative human rights obligations – i.e. obligations of abstention – can be applied to international organizations without any adaptations. No matter how limited the powers of an organization are, it will always be capable of abstaining from acting.[44] Positive human rights obligations are in principle also suitable for application to international organizations, provided that they have the necessary competences to fulfill them.[45]

Thus, only the elephant-in-the-room-question remains: which human rights obligations form part of general international law? This is a highly contested issue, with no clear answer, and which I can only scrape the surface of here.[46]

Indeed, even the fundamental question of how to identify customary human rights law is debated. Due to the lack of sufficiently uniform state practice, very few human rights obligations can be identified using the traditional two-element test, according to which both widespread practice and *opinio juris* are required.[47] Much of what is often put forward as evidence of state practice – e.g. incorporation of human rights into domestic law, practice of international organizations, decisions of international courts – does not constitute state practice according to traditional conceptions of custom.[48] Thus, the idea that the just-mentioned forms of 'paper practice' count as state practice, or that the state practice element of customary international law should be downplayed, is particularly prevalent in the human rights field.[49] But this may be more wishful thinking than

[44] Johansen, *The Human Rights Accountability Mechanisms* (n 7) 54.

[45] Naert (n 42) 395; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 68.

[46] For a fuller discussion, see Johansen, *The Human Rights Accountability Mechanisms* (n 7) 51–58.

[47] But see Cathryn Costello and Michelle Foster, 'Non-Refoulement as Custom and *Jus Cogens*? Putting the Prohibition to the Test' in Maarten den Heijer and Harmen van der Wilt (eds), *Netherlands Yearbook of International Law 2015: Jus Cogens: Quo Vadis?* (TMC Asser Press 2016) for a well-documented argument for the customary nature of the prohibition against refoulement.

[48] Oscar Schachter, *International Law in Theory and Practice* (Martinus Nijhoff Publishers 1991) 336.

[49] Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles' (1988) 12 Australian Year Book of International Law 82, 89; Jan Wouters and Cedric Ryngaert, 'Impact on the Process of the Formation of Customary International Law' in Menno T Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (Oxford University Press 2009), especially at 111.

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*lex lata*.[50] Nevertheless, even if one takes a broad view on what constitutes state practice and/or *opinio juris*, only a limited catalog of human rights obligations can plausibly be identified.[51]

For those, like me, who are skeptical of modifying the two-element approach to identifying customary international law, general principles of law are a more fitting source.[52] According to the ICJ Statute Article 38(1), general principles of law are a source of international law hierarchically equivalent to custom. General principles of law perform many functions in international law, including an important role as gap-filler.[53] They constitute a 'dynamic source which adds new rules in spheres in which there is as yet no practice of states sufficient to give a particular rule the status of customary law'.[54]

General principles of law may be derived either from (a) principles of law common to all systems of domestic law, which are transposable to the international sphere, or (b) the clear acknowledgment by states, through treaties and other international instruments, that such norms exist.[55] The latter category of general principles appear to provide what the proponents of a wide understanding of the practice element of customary law are advocating: general international law derived primarily from *opinio juris*.[56] Indeed, more or less the same evidence is relevant regardless of whether one argues for the existence of human rights obligations under general international law by using (a flexible approach to) customary international law or by relying on general principles of law.

This evidence suggests that at least a limited set of fundamental human rights form part of general international law. First, human rights provisions comparable to those laid down in the Universal Declaration of

[50] Simma and Alston (n 49) 83. For a highly critical view on human rights as custom, see Fernando R Tesón, 'Fake Custom' in Brian D Lepard (ed), *Reexamining Customary International Law* (Cambridge University Press 2017) 106–109.

[51] Perhaps something comparable to the lists suggested in Schachter (n 48) 338–339; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford University Press 1991) 94–97.

[52] For a more comprehensive version of this argument, see Johansen, *The Human Rights Accountability Mechanisms* (n 7) 51–58.

[53] See e.g. Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press 2003) 128–129.

[54] Moshe Hirsch, *The Responsibility of International Organizations toward Third Parties: Some Basic Principles* (Martinus Nijhoff 1995) 37.

[55] ILC Special Rapporteur Marcelo Vázquez-Bermúdez, 'Second report on general principles of law' (9 April 2020) UN Doc A/CN.4/741, in particular paras 19 and 165.

[56] Bin Cheng, *General Principles of Law: As Applied by International Courts and Tribunals* (Stevens & Sons Ltd 1953) 24 (emphasizing *opinio juris* as *the* constituent element of general principles of law).

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Human Rights (UDHR) have been implemented – 'even sometimes almost literally reproduced' – in a vast number of domestic constitutions and bills of rights.[57] Second, domestic courts tend to refer to the UDHR rights as part of general international law.[58] Third, UN General Assembly resolutions frequently make reference to the duty of all states to faithfully observe the UDHR, and also condemn specific human rights violations as violations of international law.[59] Fourth, states criticize each other for serious human rights violations.[60] Fifth, the ICJ has 'unambiguously accepted that the obligation to respect fundamental human rights is an obligation under general international law' (though avoiding express references to customary international law).[61]

Regardless of which methodological view one subscribes to, there is, for these reasons, a fairly broad consensus that a core set of human rights obligations form part of general international law. These at the very least include some of the rights that are particularly relevant in the context of IOM's work: the right to life, the prohibition against torture and inhuman treatment (including the prohibition against *refoulement*),[62] and the prohibition against arbitrary detention. For the present purposes, the exact source of those obligations – custom or general principles – is immaterial. What matters is that, regardless of approach, these human rights obligations form part of general international law and are binding on all international organizations.[63]

### 4.3.2 *The Potential for Human Rights Violations by IOM*

Today, IOM has co-opted the language of human rights.[64] Perruchoud moreover suggests that IOM's role in providing services to ensure orderly migration flows indirectly contributes to ensuring the human rights of

[57] Olivier De Schutter, 'Human Rights and the Rise of International Organisations: The Logic of Sliding Scales in the Law of International Responsibility' in Jan Wouters and others (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia 2010) 72. See also the compilation of constitutional provisions referring to the status of international law and the UDHR in Annex 1 to Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995) 25 Georgia Journal of International and Comparative Law 287.

[58] Hannum (n 57) 298–312.

[59] Schachter (n 48) 336.

[60] Ibid.

[61] Simma and Alston (n 49) 105; De Schutter (n 57) 71–72.

[62] For a thorough study of the customary nature of *non-refoulement*, see Costello and Foster (n 47).

[63] Johansen, *The Human Rights Accountability Mechanisms* (n 7) 59.

[64] Bradley, '(IOM): Gaining Power in the Forced Migration Regime' (n 21) 99.

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migrants.[65] The opposite, 'irregular, unorganized, disorderly migration is likely to generate human rights problems: mass expulsion, exploitation of undocumented migrants'.[66] In the same vein, IOM's current strategy document includes among the organization's 'strategic goals' that it 'is guided by the principles enshrined in the Charter of the United Nations, including upholding human rights for all'.[67] Other official IOM texts that emphasize the rights of those affected by IOM's conduct, and the organization's accountability, include the 'Accountability to Affected Populations Framework', published in late 2020.[68]

While promising, this human rights-positive tone does not necessarily mirror the views of the entire organization.[69] As Bradley observes, 'views on IOM's roles and responsibilities vary significantly within the organization, particularly between its two main operational divisions, the Department of Migration Management and the larger Department of Operations and Emergencies'.[70]

More fundamentally, IOM's words and deeds do not appear to fully align. IOM often agrees to provide services that limit rather than advance the human rights of migrants.[71] As Pécoud argues, 'given its project-based and donor-driven nature, and its proximity to Western receiving states, IOM is bound to be involved in some of the toughest measures designed to fight undocumented migration'.[72] When providing migration services in such contexts, the risk of causing or contributing to human rights violations is high. There is also ample evidence that this risk has been realized in practice.

Warnings about the human rights impact of IOM's operations have indeed been sounded repeatedly since the turn of the millennium. In 2003, both Amnesty International and Human Rights Watch expressed concerns that some of IOM's activities were detrimental to migrants' human rights.[73] In 2013, the UN Special Rapporteur on the human rights

[65] Perruchoud (n 22) 211–212.
[66] Ibid 212.
[67] IOM, 'Strategic Vision: Setting a Course for IOM' (15 November 2019) IOM Doc C/110/INF/1 at 4.
[68] IOM, 'Accountability to Affected Populations Framework' (21 September 2020) IOM Doc PUB2020/003/E.
[69] Bradley, *The International Organization for Migration* (n 2) 6.
[70] Ibid.
[71] Bradley, '(IOM): Gaining Power in the Forced Migration Regime' (n 21) 99.
[72] Pécoud (n 2) 1632.
[73] Human Rights Watch (n 6); Amnesty International, 'Statement to the 86th Session of the Council of the International Organization for Migration (IOM)' (20 November 2003) <www.amnesty.org/download/Documents/108000/ior300112003en.pdf> accessed 30 March 2022.

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of migrants decried the 'structural problems' IOM's mandate and funding pose for the adoption of a human rights framework for the organization.[74] The Special Rapporteur also called for IOM's mandate to be 'considerably revised, with a solid basis in the international human rights framework', and for all IOM staff to be 'properly trained' in this regard before the organization could join the UN system as a related organization.[75] The key concern across these reports is IOM's willingness to engage in projects seeking to manage migration through 'control and containment', and to 'combat' irregular migration.[76]

Reports from some specific IOM projects further reveal that the risk of human rights violations is not a theoretical and illusory prospect, but a practical and serious concern.

IOM's role in operating so-called 'migrant processing centers' on Nauru from 2001–2008 provides a particularly egregious example.[77] These centers, which IOM operated on behalf of Australia, were in reality detention centers.[78] The detained migrants were 'largely beyond the reach of independent scrutiny or oversight, […] and none of them had access to appropriate procedural safeguards or legal mechanisms to challenge their detention'.[79] Australia and IOM were widely denounced for arbitrarily detaining migrants in conditions that did not meet international human rights standards.[80]

IOM directly managed these centers using its own staff and agents,[81] whose conduct is quite obviously attributable to the organization.[82] Although IOM operated under a 'service agreement' with the Australian

[74] UNGA 'Report of the Special Rapporteur on the human rights of migrants, François Crépeau' (7 August 2013) UN Doc A/68/283 para 60.

[75] Ibid para 112.

[76] See also Amnesty International, 'Statement to the 88th Session of the Governing Council of the International Organization for Migration (IOM)' (2 December 2004) <www.amnesty.org/download/Documents/96000/ior300252004en.pdf> accessed 30 March 2022.

[77] For further examples, and a more detailed analysis of IOM detention practice, see Costello and Sherwood (n 24).

[78] Human Rights Watch (n 6); Global Detention Project, 'Immigration Detention in Nauru' (March 2016) <www.globaldetentionproject.org/wp-content/uploads/2016/06/nauru_detention_profile.pdf> accessed 30 March 2022.

[79] Global Detention Project (n 78) 1.

[80] In addition to the sources already cited, see Ishan Ashutosh and Alison Mountz, 'Migration Management for the Benefit of Whom? Interrogating the Work of the International Organization for Migration' (2011) 15 Citizenship Studies 21, 31–32, with further references.

[81] Select Committee, 'Report on a Certain Maritime Incident' (23 October 2002) <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/maritimeincident/report/index> paras 10.81–10.83; Human Rights Watch (n 6) 9–10; Ibid 31.

[82] ILC, 'Articles on the Responsibility of International Organizations (ARIO)' annexed to UNGA Res 66/100 (27 February 2012) UN Doc A/RES/66/100 Article 6 cf Article 2(c)–(d).

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government,[83] it is implausible that the terms of that contract were so specific that all relevant conduct was attributed exclusively to Australia. Indeed, Australia even argued publicly that those detained there were not in 'Australian immigration detention' because the camps were managed by IOM.[84] The conduct of IOM staff and agents operating these centers, including human rights-violating conduct, thus appears attributable to IOM.[85]

The more recent case of Australian extraterritorial 'migration management' in Indonesia shows IOM playing a more typical role – as facilitator, rather than operator. IOM Indonesia, which is one of the organization's largest missions, is almost fully funded by Australia.[86] While it does not operate detention facilities itself, IOM Indonesia supports the migrant detention operations of Indonesian authorities, in an effort to dissuade migrants from seeking asylum in Australia.[87] IOM support is instrumental to these detention operations; 'Without the very generous Australian funding channelled through IOM, it is unlikely that Indonesia would detain thousands of transit migrants'.[88] However, while IOM has access to the Indonesian detention centers and provides them with technical assistance 'with the stated aim (yet questionable achievement) of bringing detention centres into line with international human rights standards', it has limited powers to demand changes.[89]

Given IOM's merely supporting and ostensibly human rights-promoting role, it is debatable whether human rights violations occurring in Indonesian detention centers may engage the responsibility of IOM. That is partly because the international law rules on derived responsibility (aid and assistance, direction and control, et cetera)[90] are still somewhat unsettled.[91] The lack of clarity is in part due to a dearth of practice.

[83] Report of the Select Committee on a Certain Maritime Incident (n 81) para 10.81.

[84] Oxfam, *Still drifting: Australia's Pacific Solution becomes a 'Pacific Nightmare'* (August 2002) 18 <https://web.archive.org/web/20061128121038/http://www.oxfam.org.au/campaigns/refugees/still_drifting/still_drifting.pdf> accessed 30 March 2022.

[85] For further details, see Costello and Sherwood (n 24).

[86] Hirsch and Doig (n 24) 687–688.

[87] Ibid 699.

[88] Antje Missbach, *Troubled Transit: Asylum Seekers Stuck in Indonesia* (ISEAS – Yusof Ishak Institute 2015) 241.

[89] Hirsch and Doig (n 24) 690.

[90] For an overview over the different forms of derived responsibility, see Stian Øby Johansen, 'Dual Attribution of Conduct to Both an International Organisation and a Member State' (2019) 6 Oslo Law Review 178, 194–195.

[91] See e.g. Vladyslav Lanovoy, *Complicity and Its Limits in the Law of International Responsibility* (Hart 2016) 258–259.

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There are, for instance, hardly any cases before international courts where responsibility due to aid and assistance has been as much as alleged.[92] At the same time, the rules on derived responsibility are well-suited for analysing the typical *modus operandi* of international organizations, which is that of influencing or directing state behavior.[93] This is because, in such cases, the human rights-violating conduct of the state will only exceptionally be directly attributable (also) to the organization.[94]

With regard to IOM's involvement with Indonesian detention operations, the key question is whether (derived) responsibility arises for IOM due to its aid and assistance. Although states and international organizations agree that they may be responsible for aiding and assisting the internationally wrongful acts of each other, they hold differing views on the exact content of almost every condition for such responsibility to arise.[95] Still, there is sufficient agreement that the three main criteria can be roughly outlined.[96] First, there must be an action or omission that facilitates the commission of an internationally wrongful act by another state or international organization.[97] Second, the assisting state or international organization must have knowledge of the circumstances of the wrongful act or omission.[98] Third, the act or omission in question must be internationally wrongful if it had been committed by the assisting state or organization.[99]

Considered in light of these criteria, IOM's conduct in relation to the Indonesian detention centers does not appear to constitute internationally wrongful aid and assistance. That is because IOM's conduct did not contribute toward the (alleged) human rights violations – as is required

[92] The notable exception being *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia)* [2007] ICJ Rep 43, particularly at para 420, where the ICJ affirms the customary status of Article 16 of the Draft Articles on State Responsibility (DARS), Annexed to UN General Assembly resolution 56/83 (28 January 2002) UN Doc A/RES/56/83.

[93] Johansen 'Dual Attribution' (n 90) 197.

[94] Ibid 197 and *passim*.

[95] Lanovoy (n 91) 258–259.

[96] ARIO Article 14; DARS Article 16; Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press 2011) chs 4–5; Lanovoy (n 91) chs 4–5.

[97] Lanovoy (n 91) 94–99 and 166–186.

[98] The exact nature of this subjective element is debated, with some arguing for a mere knowledge standard and other arguing that intention to facilitate the wrongful conduct is required. Compare, with further references: Aust (n 96) 230–249; Lanovoy (n 91) 218–240.

[99] There is some debate on whether this third criterion exists at all under customary international law. See, with further references: Lanovoy (n 91) 240–258 and 260; Aust (n 96) 249–265.

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under the first criterion.[100] Quite the contrary: IOM provides technical assistance aimed at *improving* the human rights situation in these detention centers. Whether it succeeds in that endeavor or not is immaterial.

Performing supporting functions alongside states is a typical of IOM's work. It may also at times be 'a useful tactic which may help to deflect attribution of responsibility if and when necessary'.[101] Still, some supporting functions performed by IOM may potentially engage its responsibility.

In particular, human rights violations caused by IOM's 'Assisted Voluntary Return' programs are likely to engage the responsibility of IOM, due to its direct involvement in the return operations themselves.[102] This is not an unlikely scenario, as there is a particularly high risk of human rights violations associated with such return operations.[103] Indeed, the very concept of voluntariness employed by IOM in this connection has been criticized:

> The IOM takes a different view of voluntariness to the UNHCR, offering a false choice between two different forms of return: 'Either as a free person receiving certain financial benefits in the form of return or reintegration assistance, or in shackles without any financial assistance' […] This is in contrast to […] the accepted international legal view of *refoulement*. If people have no basis to stay in the host country, they cannot freely choose to return.[104]

IOM has, for example, 'urged refugees, asylum seekers and migrants to repatriate by taking advantage of their lack of knowledge and advising against claiming asylum [and also] threatened refugees and asylum seekers with criminal charges for illegal entry'.[105] By thus assisting with – or carrying out – returns that are 'voluntary under compulsion', IOM risks violating the prohibition against *refoulement*.[106] Indeed, given the high volume of returns facilitated by IOM,[107] it is almost inevitable that at least

[100] Lanovoy (n 91) 185: 'The key question to be asked is whether a given action or omission made it easier for another State or international organisation to commit its wrongful act.'
[101] Klabbers (n 5) 387.
[102] For an overview of IOM's role in Assisted Voluntary Return programs, see e.g.: Frances Webber, 'How Voluntary Are Voluntary Returns?' (2011) 52 (4) Race & Class 98; Anne Koch, 'The Politics and Discourse of Migrant Return: The Role of UNHCR and IOM in the Governance of Return' (2014) 40 Journal of Ethnic and Migration Studies 905, 910–913; Kateřina Stančová, 'Assisted Voluntary Return of Irregular Migrants: Policy and Practice in the Slovak Republic' (2010) 48 (4) International Migration 186, 195–197.
[103] On the lack of safeguards in IOM 'Assisted Voluntary Return' operations, see Gauci (n 24).
[104] Hirsch and Doig (n 24) 692; See also Koch (n 102), particularly at 911.
[105] Hirsch and Doig (n 24) 691 (footnotes omitted).
[106] Ibid 692.
[107] IOM facilitates over 225 000 returns per year, see IOM, 'IOM Snapshot' (n 3).

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some violations occur. The conduct causing those violations will either be attributable to IOM directly (when IOM carries out returns itself), or IOM could be responsible for aiding and assisting states engaging in *refoulement*, provided that the above-described criteria are fulfilled.[108]

To summarize, IOM has a core bundle of human rights obligations, and it may breach them in the conduct of its operations. There is thus a clear need for human rights accountability mechanisms.

## 4.4 IOM's Accountability Mechanisms

### *4.4.1 An Overview*

To be able to identify IOM's accountability mechanisms, one must first know what to look for. In line with my previous work on the accountability mechanisms of international organizations,[109] I define them as mechanisms that:

- are distinct from the immediate power-wielder;
- are established by, and apply, law;
- operate according to predetermined rules of procedure;
- have a duty to handle complaints from individuals;
- have competence *ratione personae* in relation to one or more international organizations;[110]
- operate *ex post* (after the fact);[111] and
- conclude their consideration of complaints by issuing a decision or finding.

Since this chapter is concerned with *human rights* accountability mechanisms, I will limit my analysis and assessment to mechanisms that are capable of holding IOM to account for human rights violations. I will also limit the analysis and assessment to the mechanisms that may hold IOM

[108] See, by analogy, Thomas Gammeltoft-Hansen and James C Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2014) 53 Columbia Journal of Transnational Law 235, 276–282.

[109] Johansen, *The Human Rights Accountability Mechanisms* (n 7) in particular at 60–63.

[110] Mechanisms that may only indirectly or implicitly hold IOM to account thus fall outside my definition. For example, since IOM is not party to any human rights treaties (see Section 4.3.1.2), regional human rights courts are not IOM accountability mechanisms, since they only have jurisdiction over (some) IOM member states.

[111] Efforts to enhance IOM's accountability through *ex ante* measures, for example by implementing the UN Human Rights Due Diligence Policy discussed by Aust and Riemer (n 35), thus fall outside the definition.

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to account toward third party individuals. That is because staff members can hold international organizations to account through an entirely separate set of accountability mechanisms, notably so-called international administrative tribunals.

Even with these caveats, my definition casts a pretty wide net. Mechanisms ranging from simple administrative appeals procedures, through ombudspersons and internal oversight mechanisms, to national and international courts are caught by the definition.[112]

When this net is cast in IOM's waters, however, the catch is meager. There are only two potential IOM human rights accountability mechanisms: the Office of the Inspector General – an internal oversight mechanism – and domestic courts.[113] The former is IOM-specific, while the latter is always a potential accountability mechanism *vis-à-vis* international organizations. This puts IOM roughly on par with UNHCR in terms of the types of accountability mechanisms available – though that is far from a gold standard.[114]

In the following, I will analyse and assess both mechanisms, using the framework I developed in *The Human Rights Accountability of International Organizations*.[115] First, I will summarize this framework, in Section 4.4.2. Then, I will apply it to the Office of the Inspector General in Section 4.4.3, and finally domestic courts in Section 4.4.4.

### *4.4.2 The Analysis and Assessment Framework*

Each IOM accountability mechanism will be subjected to a two-step process: First, the *lex lata* applicable to and within each accountability mechanism is identified. Second, the *lex lata* is confronted with a set of normative yardsticks. These normative yardsticks are sourced from two well-established approaches to assessing accountability mechanisms generally: the right to an effective remedy and procedural justice.[116]

The right to an effective remedy should be familiar to most international lawyers, as it is enshrined in most global and regional human rights

[112] For details, see Johansen, *The Human Rights Accountability Mechanisms* (n 7) 63–90.

[113] A third body within IOM, the Ethics and Conduct Office, comes close to meeting the definition, but is excluded by the fact that it can only receive complaints from staff members alleging whistle-blower retaliation. See IOM, 'Reporting and Investigation of Misconduct Framework' (1 August 2019) IOM Doc IN/275 paras 5 and 17.

[114] Johansen, *The Human Rights Accountability Mechanisms* (n 7) chs 5 and 7.

[115] Johansen, *The Human Rights Accountability Mechanisms* (n 7).

[116] For a broad overview over these two approaches and their relationship, see Ibid 93–106.

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treaties.[117] It consists of two core requirements:[118] First, individuals with arguable claims of human rights violations must have access to effective accountability mechanisms.[119] Second, those accountability mechanisms must be capable of providing victims of human rights violations with substantive redress.[120]

While most states are legally obliged to provide an effective remedy when the rights of individuals are violated, it is doubtful whether that is the case for international organizations. No international organization is party to human rights treaties providing for the right to remedy. Moreover, it is uncertain whether the right to remedy forms part of general international law and – even if it does – whether it is suitable for application to international organizations.[121] These uncertainties aside, the right to an effective remedy is in any event relevant as a *lex ferenda* standard. As Shelton argues, '[i]mpunity that leaves human rights victims without a remedy calls into serious question the integrity of human rights guarantees and the rule of law'.[122] When states establish international organizations capable of violating human rights, it is thus normatively justified to expect that the right to an effective remedy is ensured by those international organizations.[123]

The second approach, procedural justice, is a conception of justice that focuses on the procedures used to make decisions on how benefits and

[117] International Covenant on Civilian and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 Article 2(3); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 Article 25; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Article 13; Arab Charter on Human Rights Article 23 (English translation: <http://hrlibrary.umn.edu/instree/loas2005.html> accessed 30 March 2022; ASEAN Human Rights Declaration of 2012 principle 5. The African Charter of Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 does not have a specific provision on the right to remedy, but its Articles 7, 21(2), and 26 touch upon different aspects of the right to remedy, see Godfrey M Musila, 'The Right to an Effective Remedy under the African Charter on Human and Peoples' Rights' (2006) 6 African Human Rights Law Journal 442; Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, Oxford University Press 2015) 72–73.

[118] Shelton (n 117) 16–17.

[119] Ibid 17–18.

[120] Ibid 18–19.

[121] For a more detailed analysis of this issue, see Johansen, *The Human Rights Accountability Mechanisms* (n 7) 94–97.

[122] Shelton (n 117) 61.

[123] Johansen, *The Human Rights Accountability Mechanisms* (n 7) 97.

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burdens are allocated.[124] Legal theorists have discussed procedural justice in connection with the extensive debates on the rule of law. Even though the rule of law is a classic example of a contested concept, there appears to be a broad agreement that it includes the requirements that decision-makers are independent and impartial, and that those affected may participate in the proceedings.[125]

Outside the fields of law and philosophy, procedural justice has in particular been studied by social psychologists, who are interested in people's perceptions of justice.[126] After decades of research, the overarching conclusions reached by social psychologists is that people care more about how allocations are made (procedural justice) than the outcome of the allocation (distributive justice).[127] Two of the factors that affect people's perceptions of justice are particularly relevant for the assessment of international organization accountability mechanisms: participation and neutrality.

From these two approaches – the right to an effective remedy and procedural justice – it is possible to derive four groups of normative yardsticks that are relevant for assessing international organization accountability mechanisms. The four groups of yardsticks coincide with the aspects of international organization accountability mechanisms they are capable of assessing: access, participation, neutrality, and outcome. I will briefly outline each group of yardsticks in the following.[128]

#### 4.4.2.1 Access

The importance of access is emphasized by both the right to an effective remedy and procedural justice research.[129] An accountability mechanism can only serve as an effective remedy if it is accessible.[130] Access is also a precondition for participation.

[124] David Miller, 'Justice' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (Fall 2017 edn, Metaphysics Research Lab, Stanford University 2017) <https://plato.stanford.edu/archives/fall2017/entries/justice/> accessed 30 March 2022, section 2.3.

[125] See, e.g., Brian Z Tamanaha, 'A Concise Guide to the Rule of Law' in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Hart 2009) particularly at 11–12; Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' (2011) 50 Nomos 3, 6.

[126] Johansen, *The Human Rights Accountability Mechanisms* (n 7) 92.

[127] Tom R Tyler, 'Procedural Justice' in Austin Sarat (ed), *The Blackwell Companion to Law and Society* (Blackwell Publishing 2004) 438–441.

[128] For a comprehensive exposition, see Johansen, *The Human Rights Accountability Mechanisms* (n 7)106–115.

[129] For details, see Ibid 106–109.

[130] See e.g. UN Human Rights Committee, 'General Comment No 31' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 para 15; ACHPR, *Sir Dawda K. Jawara v. Gambia*

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To be sufficiently accessible, international organization accountability mechanisms must have jurisdiction to deal with all potential human rights violations the organization may cause. This means that they must have jurisdiction *ratione personae* over the organization and aggrieved individuals, jurisdiction *ratione materiae* over all factual and legal issues that may arise as a result of human rights-violating conduct of the international organization in question, and appropriate jurisdiction *ratione loci* and *temporis*.[131]

Accountability mechanisms must be available to aggrieved individuals both in theory and in practice.[132] This entails that the applicable admissibility requirements cannot be overly restrictive.[133] Moreover, aggrieved individuals must be given direct access to the accountability mechanism in question.[134]

#### 4.4.2.2 Participation

That people value participation when entrusting the solution of a problem or conflict to a third party is probably the most well-documented finding of procedural justice research.[135] But mere participation is not enough. 'People only value the opportunity to speak to authorities if they believe that the authority is sincerely considering their arguments.'[136]

Individuals should therefore be able to participate in the proceedings of international organization accountability mechanisms. The level of participation is not decisive, as long as aggrieved individuals perceive that they had the opportunity to express what was important to them.[137]

(2000) AHRLR 107 para 32; *Suárez Rosero vs. Ecuador,* Merits, IACtHR Series C No 35 (12 November 1997) paras 65–66; *McFarlane v. Ireland* [GC] no 31333/06 (ECtHR, 20 September 2010) para 114.

131 Johansen, *The Human Rights Accountability Mechanisms* (n 7) 107–108.

132 See e.g. *McFarlane v. Ireland* (n 130) para 114.

133 On the concepts of jurisdiction and admissibility, see Yuval Shany, 'Jurisdiction and Admissibility' in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2013).

134 Direct access is also an element of the right to remedy, see *Riener v. Bulgaria*, no 46343/99 (ECtHR, 23 May 2006) para 138 (emphasizing that an effective remedy must be made available 'to the individual concerned'); *Suárez Rosero vs. Ecuador (Merits)* (n 130) paras 65–66.

135 E Allan Lind, Ruth Kanfer and P Christopher Earley, 'Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments.' (1990) 59 Journal of Personality and Social Psychology 952, 952, with further references; Tyler (n 127) 445, with further references.

136 Tyler (n 127) 446.

137 Nancy Welsh, Andrea Schneider and Kathryn Rimpfel, 'Using the Theories of Exit, Voice, Loyalty, and Procedural Justice to Reconceptualize Brazil's Rejection of Bilateral Investment Treaties' (2014) 45 Washington University Journal of Law & Policy 105, 137; Tom R Tyler, 'Procedural Justice and the Courts' (2007) 44 Court Review 26, 30.

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Moreover, the decisions of international organization accountability mechanisms should make clear that the aggrieved individual has been listened to, and that their arguments have been considered.[138] This requires reasoned decisions. Unfavorable decisions must demonstrate that the individual's views 'were taken into account, but that they unfortunately could not influence the decision made'.[139]

#### 4.4.2.3 Neutrality

The right to an effective remedy requires that accountability mechanisms are neutral – i.e. independent and impartial.[140] Procedural justice research also highlights the neutrality of the decision-maker as a key factor affecting people's perceptions of justice.[141]

*Independence* is usually associated with institutional safeguards that allow decision-makers to 'free themselves to some extent from external pressures'.[142] An accountability mechanism is sufficiently independent if two conditions are fulfilled. First, it must be functionally independent from the alleged human rights violator. This does not mean that international organizations must be subject to external accountability mechanisms. An internal accountability mechanism – that is, a mechanism that is part of the international organization alleged to have violated human rights – is sufficient if it is established as an independent body of the organization.[143] Second, the appointment and removal of members of the accountability mechanism must be done in a manner that ensures independence and protects against abuse of authority.[144]

*Impartiality* is characterized by an emphasis on the subjective mindset and biases of the decision-maker.[145] As procedural justice research reveals, people believe that decision-makers 'should not allow their

[138] Eva Brems and Laurens Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' (2013) 35 Human Rights Quarterly 176, 181; Tyler (n 127) 446.

[139] Brems and Lavrysen (n 138) 181.

[140] UN Human Rights Committee, (n 130); IACtHR, *Judicial Guarantees in States of Emergency* (Advisory Opinion No 9) (6 October 1987) para 24; *Riener v. Bulgaria* (n 134) para 138.

[141] Tyler (n 127) 446; Welsh, Schneider and Rimpfel (n 137) 138.

[142] Diego M Papayannis, 'Independence, Impartiality and Neutrality in Legal Adjudication' (2016) 28 Revus 33, 35.

[143] Johansen, *The Human Rights Accountability Mechanisms* (n 7) 111.

[144] *Khan v UK*, no 35394/97 (ECtHR, 12 May 2000) paras 45–47; Michael Reiertsen, 'The European Convention on Human Rights Article 13: Past, Present and Future' (PhD thesis, University of Oslo 2016) 236.

[145] Papayannis (n 142) 37–38.

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personal values and biases to enter into their decisions, which should be made based upon rules and facts'.[146] It is not sufficient that members of international organization accountability mechanisms *are* impartial; they must also be *perceived* as impartial by reasonable observers.[147]

#### 4.4.2.4 Outcome

The final category – outcome – is concerned with the results that individuals may achieve by resorting to an international organization accountability mechanism. What kind of substantive redress should international organization accountability mechanisms offer?

When answering this question, tensions emerge between procedural justice research and the right to an effective remedy. Procedural justice research has demonstrated that the fairness of the procedures is more important than outcomes.[148] At the same time, substantive redress is a core aspect of the right to an effective remedy. There is no direct conflict between the two approaches, though. Procedural justice research does not dispute that the outcomes of disputes affect people's perceptions of justice, but merely shows that the fairness of the procedure has an independent and significant impact on such perceptions.[149] Procedural justice research, in other words, does not oppose substantive redress, while at the same time, the right to remedy requires it.[150]

A fundamental normative outcome yardstick – which can be derived from the right to an effective remedy – is that international organization accountability mechanisms must be able to stop a continuing human rights violation, prevent its re-occurrence, and/or afford redress to those individuals whose rights have been violated.[151] That said, it is not possible to establish a general yardstick setting out the *forms* of redress that should be offered by international organization accountability mechanisms.[152] This will depend on the circumstances. In some cases, for example when

[146] Tyler (n 127) 446.
[147] Johansen, *The Human Rights Accountability Mechanisms* (n 7) 112–113.
[148] E Allan Lind and Tom R Tyler, *The Social Psychology of Procedural Justice* (Plenum Press 1988) 1–2 and *passim*.
[149] Rebecca Hollander-Blumoff and Tom R Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution' [2011] Journal of Dispute Resolution 1, 5.
[150] Johansen, *The Human Rights Accountability Mechanisms* (n 7) 105–106.
[151] UN Human Rights Committee, (n 130) paras 16–17 and 19–20; *Kudla v. Poland* [GC], no 30210/96 (ECtHR, 26 October 2000) paras 157–158; *Judicial Guarantees in States of Emergency* (n 140) para 24.
[152] Johansen, *The Human Rights Accountability Mechanisms* (n 7) 114.

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international organization accountability mechanisms hear arguable claims of violations of the right to life, they must be empowered to order compensation.[153]

At the very minimum, the right to an effective remedy requires that human rights accountability mechanisms may render binding decisions.[154] Additionally, international organizations must respect and carry out the decisions of their accountability mechanisms.[155]

### *4.4.3 IOM Office of the Inspector General*

Turning now to the assessment of IOM's accountability mechanisms, I begin with the Office of the Inspector General (OIG). The OIG exercises all the four key oversight functions that are typical for internal oversight mechanisms: auditing, evaluations, inspections, and investigations.[156] Only the latter function – investigations – is relevant for the present purposes, because it is the only one that entails handling complaints from individuals.[157]

The purpose of OIG investigations is to examine allegations of misconduct by IOM staff members.[158] Like other internal oversight mechanisms, the OIG suffers from the structural weakness that it lacks jurisdiction over the organization itself. It may only hold individual staff members to account. That said, the 'on duty' conduct of staff members is attributable to the organization they are employed by – even if the staff member acted in excess of his or her authority or in contravention of instructions.[159] If an internal oversight investigation concludes that a staff member has engaged in misconduct, that finding therefore indirectly implicates the organization, too.[160]

[153] UN Human Rights Committee, (n 130) para 16; ECtHR, *Mosendz v. Ukraine*, no 52013/08 (ECtHR, 17 January 2013) para 121. See also Reiertsen (n 144) 364–365, with further references.

[154] UN Human Rights Committee, (n 130) paras 15–19; *Silver and Others v. UK*, no 5947/72 (ECtHR, 25 March 1983) para 115 (finding that an accountability mechanism that could only render nonbinding decisions was by that fact alone an insufficient remedy).

[155] UN Human Rights Committee, (n 130) paras 15–19; ECtHR, *Iatridis v. Greece* [GC] no 31107/96 (ECtHR, 25 March 1999) para 66.

[156] For a boarder introduction to internal oversight mechanisms, see Johansen, *The Human Rights Accountability Mechanisms* (n 7) 67–73.

[157] For further reasons, see Ibid 68–70.

[158] IOM, 'Charter of the Office of the Inspector General' (1 December 2015) IOM Doc IN/74 Rev 1 para 2.4; IOM, 'Reporting and Investigation of Misconduct Framework' (n 113) para 5.

[159] ARIO Articles 6 and 8.

[160] Johansen, *The Human Rights Accountability Mechanisms* (n 7) 71.

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To fulfill its investigative tasks, the OIG as of 2021 employed 15 fixed-term investigators, four temporary investigators, and 12 consultants who are engaged 'on a roster basis'.[161] Since internal oversight investigations resemble police investigations, it should not come as a surprise that the OIG staff members consist of former law enforcement personnel, lawyers, and forensic accounting specialists.[162]

OIG investigations are opened on the basis of allegations of misconduct submitted by individuals within or outside the organization. The OIG's investigative process has two steps: a preliminary assessment and an investigation.[163]

The purpose of the preliminary assessment step is not just to weed out issues that fall outside the OIG's jurisdiction.[164] It is also possible to shelve a case at this stage if it is too complex, risky, or resource-intensive to handle. On the other hand, if the report itself contains conclusive evidence of misconduct, thus rendering further investigation unnecessary, the OIG may refer the case directly to the relevant Office of Legal Affairs.[165] It will then consider and advise the Director General on possible disciplinary measures (for staff) or contract termination (for contractors).

If the case is neither shelved nor closed at the preliminary assessment stage, an investigation is launched provided that the allegation(s), if proven, would constitute misconduct. The investigator(s) assigned to the case have wide powers of investigation. All IOM staff members are obliged to provide the OIG with 'information in any form, including testimony'.[166] When the investigation is complete, the findings are written down in an investigation report. It, together with all relevant documents, is then submitted to the relevant Office of Legal Affairs,[167] which will then consider the report and the supporting evidence, before advising the Director General on possible disciplinary measures (for staff) or contract termination (for contractors).

The number of allegations of misconduct reported to the OIG has increased substantially over the last couple of years. The OIG attributes this to the launch of its new, more user-friendly, and secure online system

[161] IOM, 'Report on the Work of the Office of the Inspector General' (6 October 2021) IOM Doc S/29/3 para 12.
[162] Ibid para 13.
[163] IOM, 'Reporting and Investigation of Misconduct Framework' (n 113) para 18.
[164] Ibid para 19.
[165] Ibid para 20.
[166] Ibid para 38 and at 3 (definition of 'Duty to cooperate').
[167] Ibid para 58.

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for reporting allegations of misconduct.[168] Between July 2019 and August 2020, the OIG received reports of 715 cases of alleged misconduct – more than twice the amount the year before.[169] Despite the sharp increase in case load, the OIG managed to process 852 cases – more cases than the number received – thus reducing its backlog.[170] These numbers reveal that the level of investigatory activity at the OIG is quite substantial when compared to other internal oversight mechanisms. For example, the UN's internal oversight mechanism (the Office of Internal Oversight Services) received 628 reports of alleged misconduct in the fiscal year of 2019–2020, an increase of about 70 compared to the year before.[171] In this connection though, it must be added that the UNHCR, which is formally a UN body, has its own internal oversight mechanism (the Inspector General's office). In the fiscal year of 2019–2020, the latter received 1 140 reports.[172]

It should be noted, though, that 683 of the cases processed by the OIG were closed following an initial assessment, meaning that no particular investigative steps were taken.[173] The proportion of reported allegations of misconduct closed after an initial assessment was thus significantly higher in 2019–2020 than in the preceding years. The cause of this is unclear, since the OIG's annual report does not comment on it at all. The proportion of cases closed following an initial assessment appears to be higher for the OIG than the UN Office of Internal Oversight Services and the UNHCR Inspector General's Office. But the numbers are difficult to compare due to their statistics being reported in different ways, and in varying levels of detail. It is particularly difficult to assess the OIG's practice of closing most cases at the initial assessment stage, since its statistics do not distinguish between cases that are closed due to conclusive evidence of misconduct and cases closed for other reasons.

As one can glean from this brief introduction to the OIG, it is an accountability mechanism with some potential. In the following section,

[168] IOM, 'Report on the Work of the Office of the Inspector General' (6 September 2020) IOM Doc S/27/6 para 18. The new reporting system is available at <https://weareallin.iom.int/> accessed 30 March 2022.

[169] Compare the tables at IOM, 'Report on the Work of the Office of the Inspector General' (n 168) p. 4 and IOM, 'Report on the Work of the Office of the Inspector General' (1 October 2019) IOM Doc S/25/8 p. 4.

[170] IOM 'Report on the Work of the Office of the Inspector General' (n 168) paras 16–17.

[171] UNGA 'Activities of the Office of Internal Oversight Services for the period from 1 July 2019 to 30 June 2020' (10 August 2020) UN Doc A/75/301 (Part I) at 4 (Figure 1).

[172] UNGA 'Report on Activities of the Inspector General's Office' (27 July 2020) UN Doc A/AC.96/1204 para 28.

[173] IOM, 'Report on the Work of the Office of the Inspector General' (n 168) p. 4 (Table 4).

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I will analyse and assess the OIG's investigative function more closely, using the analysis and assessment framework developed above in Section 4.4.2.

#### 4.4.3.1 Access

Anyone can file a complaint with the OIG.[174] However, since the OIG can only investigate misconduct by IOM staff members, human rights violations caused by cumulative or anonymous conduct cannot be investigated. This restriction on the OIG's jurisdiction is in itself problematic in light of the right to an effective remedy.

Moreover, the OIG's investigative jurisdiction *ratione materiae* is limited to allegations of misconduct. The internal law of IOM defines misconduct as

> [T]he failure by staff members to comply with obligations under the [staff regulations and rules], administrative instructions and other administrative issuances and bulletins issued by the organization or to observe the standards of conduct expected of an international civil servant.[175]

There are no references to human rights in this definition. Nor are there (direct or indirect) references to human rights in the instruments referred to by the definition that are publicly available, such as IOM Staff Regulations.[176] In comparison, the UN Staff Regulations (which also apply to the UNHCR) require staff members to 'uphold and respect the principles set out in the [UN] Charter, including faith in fundamental human rights'.[177] It may be tempting to speculate that IOM's lack of a protection mandate explains this discrepancy, but it is rather the UN that is the outlier here, as there are rarely comparable human rights provisions in the staff regulations of other international organizations.

That aside, the UN and IOM instruments referred to by their respective misconduct definitions contain provisions that cover (at least some) human rights. The UN Staff Rules contain a range of broad-ranging provisions prohibiting different forms of 'abuse' that could potentially cover a broad range of human rights violations.[178] The internal law of IOM contains comparable prohibitions against 'abuse of authority' and 'sexual

[174] IOM, 'Reporting and Investigation of Misconduct Framework' (n 113) particularly para 5.
[175] IOM, 'Reporting and Investigation of Misconduct Framework' (n 113) 3.
[176] IOM, 'Staff Regulations as of 1 January 2018' (14 February 2018) IOM Doc C/108/INF/2.
[177] UN, 'Staff Rules and Staff Regulations of the United Nations' (1 January 2018) UN Doc ST/SGB/2018/1 regulation 1.2(a).
[178] UN, 'Staff Rules and Staff Regulations of the United Nations' (n 177) rule 1.2(e) and (f); Johansen, *The Human Rights Accountability Mechanisms* (n 7) 197–198.

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exploitation and abuse'.[179] The OIG's jurisdiction *ratione materiae* therefore covers at least some of the human rights violations that IOM can potentially commit.[180] However, the fact that many potential IOM human rights violations stem from institutional policies might in practice restrict the OIG's jurisdiction *ratione materiae*. That is because staff members that are merely implementing organizational policies can hardly be said to perform misconduct.

Apart from these, there are no other restrictive jurisdictional limitations or admissibility criteria. However, there may be practical access hurdles. Migrants may not know about the OIG, which is arguably a quite obscure and remote accountability mechanism, and there may be difficulties associated with contacting and communicating with the OIG.[181]

Overall, though, the OIG is fairly accessible. But it nevertheless does not live up to the normative access yardsticks – particularly due to its lack of jurisdiction *ratione personae* over the organization itself, as well as the legal and practical limitations to its jurisdiction *ratione materiae*.

#### 4.4.3.2 Participation

Due to the nature of the OIG's investigatory function, which is intended to hold staff members accountable toward the organization, victims play a minor role. They are in principle not considered parties to the proceedings, but may provide information and arguments to the OIG like any other witness.

Victims who file the complaint themselves do gain some additional rights, though. Complainants are informed if the OIG closes an investigation after a preliminary assessment.[182] Complainants alleging to be victims of harassment, sexual exploitation, and sexual abuse shall in addition be given 'sufficient and relevant information regarding the closure of the case', and have a subsequent 'right to submit further evidence for consideration by OIG'.[183]

[179] IOM, 'Reporting and Investigation of Misconduct Framework' (n 113) para 5.

[180] The scope of the OIG's jurisdiction *ratione personae* would likely expand to cover more or less all human rights violations IOM could potentially commit if the UN Human Rights Due Diligence Policy, discussed by Aust and Riemer (n 35), is made an integral part of the IOM staff regulations/rules.

[181] See, by analogy: Mark Pallis, 'The Operation of UNHCR's Accountability Mechanisms' (2005) 37 New York University Journal of International Law and Politics 869, 897; Johansen, *The Human Rights Accountability Mechanisms* (n 7) 199. The launch of the OIG's new online system for receiving complaints may alleviate some, but far from all, of these practical difficulties.

[182] IOM, 'Reporting and Investigation of Misconduct Framework' (n 113) para 22.

[183] Ibid para 23.

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Except in cases concerning allegations of harassment, sexual exploitation, and sexual abuse, victims do not have a right to access the OIG's investigation reports.[184] This is typical for internal oversight mechanisms; the UNHCR's Inspector General's Office and the UN Office of Internal Oversight Services have rules that are at least as restrictive.[185]

The limited opportunities for victim participation before the OIG are nevertheless inconsistent with the normative yardsticks concerning participation. Notably, it is virtually impossible for victims of most forms of human rights violations to confirm that their voice has been heard – an aspect of participation that procedural justice research has demonstrated the particular importance of.[186]

#### 4.4.3.3 Neutrality

As is customary for internal oversight mechanisms, the OIG is an independent organ of the organization it is tasked with holding to account.[187] The OIG's broad powers of investigation, which it freely decides whether and how to make use of in misconduct cases, further contributes to its independence.[188] Moreover, while the OIG reports to the Director General,[189] there are safeguards in place to protect the OIG against undue interference. A key safeguard is the Audit and Oversight Advisory Committee, which is composed of persons external to – and independent of – IOM.[190] This committee *inter alia* supervises the interactions between the OIG and other IOM bodies, and acts as an outlet for complaints from the Inspector General against encroachments on the OIG's independence.[191] The OIG has also been delegated the authority to manage its budget and operations without the constraints that apply to other bodies within IOM.[192] The functional independence of the OIG therefore appears to be sufficient.

[184] Ibid paras 48 cf 49.
[185] Johansen, *The Human Rights Accountability Mechanisms* (n 7) 200 and 213–214, with further references.
[186] See Section 4.4.2.2.
[187] See *inter alia*: IOM 'Charter of the Office of the Inspector General' (n 158) particularly paras 1.1.1, 2.2, and 4.4.1; IOM, 'Reporting and Investigation of Misconduct Framework' (n 113) para 13.
[188] IOM, 'Reporting and Investigation of Misconduct Framework' (n 113) para 7; IOM 'Charter of the Office of the Inspector General' (n 187) paras 4.2.1.
[189] IOM, 'Charter of the Office of the Inspector General' (n 158) para 4.4.1.
[190] IOM, 'IOM Audit and Oversight Advisory Committee – Terms of Reference' IOM Doc IN/170 Rev 1 Article 5.
[191] IOM, 'Charter of the Office of the Inspector General' (n 158) para 5.1.
[192] IOM, 'Report on the Work of the Office of the Inspector General' (n 161) para 14.

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Next, the procedures for appointing and removing the Inspector General and the OIG staff must be assessed. The Inspector General is appointed by the Director General.[193] There do not appear to be any term limits or limitations on reappointment, which is common for heads of internal oversight mechanisms in order to protect their independence. More importantly, though, there appear to be no special provisions protecting the Inspector General from removal. This is a significant weakness, but it is counter-balanced by the fact that any removal decision can be challenged before the ILO Administrative Tribunal.[194] Therefore, on balance, the procedures for appointment and removal arguably protect the independence of the OIG to a sufficient degree.

The impartiality of the OIG can only be assessed in the abstract, due to the lack of public allegations of bias.[195] Generally, the legal framework around the OIG appears to provide fertile ground for impartiality. Moreover, IOM internal law proclaims that investigators 'have a duty of objectivity, thoroughness, ethical behavior, and observance of legal and professional standards'.[196] As yet, there are thus no indications that the OIG lacks impartiality.

#### 4.4.3.4 Outcome

If the OIG finds that misconduct has occurred, it will make a declaration to that effect in its investigation report. This declaration may, but does not have to, be followed up with the imposition of disciplinary measures. An array of such measures may be imposed – ranging from written reprimand to dismissal.[197] Consultants and interns are not subject to disciplinary measures, but may have their contract terminated.[198]

The decision to impose disciplinary measures is *not* taken by the OIG itself. It shall not even recommend whether or not to impose disciplinary measures. That is the domain of the Office of Legal Affairs, in coordination with the Office of Human Resources Management.[199] This separation of powers between the OIG (which determines whether misconduct has occurred or not) and management (which decides whether the imposition

[193] IOM, 'Charter of the Office of the Inspector General' (n 158) para 4.4.1.
[194] IOM, 'Staff Regulations as of 1 January 2018' (n 176) regulation 11.3.
[195] On the difficulties of assessing impartiality in the abstract, see Johansen, *The Human Rights Accountability Mechanisms* (n 7) 112–113.
[196] IOM, 'Reporting and Investigation of Misconduct Framework' (n 113) para 45.
[197] IOM, 'Staff Regulations as of 1 January 2018' (n 176) regulation 10.
[198] IOM, 'Reporting and Investigation of Misconduct Framework' (n 113) para 4.
[199] Ibid paras 14 and 16.

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of disciplinary measures is warranted) is typical for internal oversight investigations.[200]

For victims, knowledge that disciplinary measures have been imposed against staff members may offer some consolation. However, the victims may not even get to know about it, since reports about the imposition of disciplinary measures are only published in an internal IOM Information Bulletin, with names redacted.[201] Except for victims of harassment, sexual exploitation, and sexual abuse, the OIG is not obliged to – and likely does not – communicate its investigation reports to victims.[202]

The outcomes of OIG investigations are in other words quite weak. Given the real risk that IOM may cause serious human rights violations, they fall far short of what the normative yardsticks require.

#### 4.4.3.5 Overall Assessment

On its own, the OIG is clearly an insufficient accountability mechanism. This is not due to faults and weaknesses that are particular to the OIG, but rather due to the structural weaknesses inherent to internal oversight mechanisms generally. Notable among these is the fact that the OIG cannot investigate the organization as such, only staff members and contractors. This means that the OIG is particularly ill-equipped to deal with many of the more well-known allegations of IOM human rights violations, which are caused by broader institutional policies and practices, rather than deviant behavior by individual 'bad apples' among the staff or contractors.

### *4.4.4 Domestic Courts*

In theory, domestic courts may function as international organization accountability mechanisms. However, there are insurmountable hurdles that make them a completely inaccessible mechanism through which to hold IOM to account. While there are substantial legal and practical hurdles relating to the fundamental issue of jurisdictional competences (adjudicative jurisdiction),[203] the most insurmountable hurdle is IOM's jurisdictional immunity.

[200] For examples, see Johansen, *The Human Rights Accountability Mechanisms* (n 7) 206–207 (UNHCR), 218 (UN), and 280–281 (ICC).

[201] IOM, 'Reporting and Investigation of Misconduct Framework' (n 113) para 69.

[202] See, *a contrario*, ibid para 49.

[203] For discussions of this issue, both generally and in relation to specific international organizations, see Johansen, *The Human Rights Accountability Mechanisms* (n 7) 86–88, 155–156, and 219–221.

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The privileges and immunities of IOM are laid down in its Constitution and in bilateral agreements with states.[204] The IOM Constitution Article 23 contains a general provision granting functional immunity, while the bilateral agreements contain more detailed provisions, usually including absolute jurisdictional immunity for the organization itself. Up until 2013, however, there were large variations between the different bilateral agreements – including 'large gaps in privileges and immunities'.[205] In a 2013 resolution, the IOM Council called on the member states to grant the organization immunities 'substantively similar' to those of the UN specialized agencies.[206] The motivation for calling for such an immunity reform was not just the inconsistency observed – which could place some states in 'an unduly favourable position' – but also that 'improving IOM's status in host countries could significantly reduce the financial burden on the Organization'.[207]

This immunity reform has progressed far in its first seven years. As of 2020, IOM has a total of 102 agreements with states that grant the organization privileges and immunities substantially similar to those of the UN specialized agencies.[208] It is worth emphasizing that the jurisdictional immunity granted to UN specialized agencies is absolute.[209] Not even the 'commercial activities' (*acta jure gestionis*) exception, which is central to the modern doctrine of state immunity, is available.[210] IOM, in other words, enjoys absolute jurisdictional immunity from the domestic courts

[204] Since IOM is not a specialized agency of the UN, but merely a 'related organization', it cannot avail itself of the absolute jurisdictional immunity contained in the Convention on the Privileges and Immunities of the Specialized Agencies (adopted 21 November 1947, entered into force 2 December 1948) 33 UNTS 261.

[205] IOM, 'Improving the Privileges and Immunities Granted to the Organization by States' (17 October 2013) IOM Doc MC/2390 para 6.

[206] IOM, 'Council Resolution No. 1266 on Improving the Privileges and Immunities granted to the Organization by States' (26 November 2013) para 1.

[207] 'IOM, 'Report on the 103rd Session of the Council' (4 February 2014) IOM Doc MC/2398/Rev.1 para 37; IOM Council Resolution No. 1266 on Improving the Privileges and Immunities granted to the Organization by States (26 November 2013) sixth preambular paragraph.

[208] IOM, 'Ninth Annual Report of the Director General on Improvements in the Privileges and Immunities Granted to the Organization by States' (27 September 2022) IOM Doc S/31/6 para 6.

[209] Johansen, *The Human Rights Accountability Mechanisms* (n 7) 221–229.

[210] August Reinisch, 'Immunity of Property, Funds, and Assets (Article II Section 2 General Convention)' in August Reinisch (ed), *The Conventions on the Privileges and Immunities of the United Nations and Its Specialized Agencies: A Commentary* (Oxford University Press 2016) 65–66. Admittedly, the US Supreme Court recognized a 'commercial activities' exception in a case against an international organization in *Jam v. International Finance Corp* No 17–1011 (27 February 2019). However, that finding was based entirely on an interpretation

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in at least those 100 states.[211] Moreover, it appears that the 'partial' immunity agreements IOM has previously concluded with around 60 further states routinely include provisions providing for absolute jurisdictional immunity for the organization itself.[212]

IOM has immunized itself from the jurisdiction of domestic courts not just in (international) law, but also in practice. As of 2021, there are no reported examples of cases where domestic courts, sans waiver, have asserted jurisdiction over IOM by ignoring its absolute jurisdictional immunity under international law. Nor is this likely to happen in the future. Domestic courts therefore do not function as IOM human rights accountability mechanisms. While the organization may of course choose to waive its immunity in concrete cases, a system leaving access to accountability mechanisms up to the discretion of the alleged human rights violator is incompatible with the right to an effective remedy.

## 4.5 Conclusion

In this chapter, I have so far demonstrated that IOM has a core bundle of human rights obligations, and that its work carries with it real risks of serious human rights violations. IOM's lack of a protection mandate, and its corporate culture, are important contributing factors in this regard. There is also evidence of instances where IOM operations have directly caused human rights violations, or aided and assisted such violations by states.

For victims of IOM human rights violations, accountability mechanisms are either unavailable or insufficient. Domestic courts are in practice completely unavailable, due to IOM's absolute jurisdictional immunity. The only other potential accountability mechanism – the OIG – is not

of the particular US domestic law on sovereign and international organization immunities. It did not rule on the contents of the international legal rules, and it explicitly held (Slip Opinion at 14) that 'a different level of immunity' may be specified in treaties.

[211] For an example, see Cooperation Agreement between the Government of Ireland and the International Organization for Migration (adopted 5 June 2015, entered into force 23 December 2015) UNTC I-53615, in particular Article 2, which is practically identical to Convention on the Privileges and Immunities of the Specialized Agencies (adopted 21 November 1947, entered into force 2 December 1948) 33 UNTS 261 Article III, section 4.

[212] IOM, 'Annual Report for 2019' (25 June 2020) IOM Doc C/111/5 para 314. For examples, see *inter alia*: Convention between the Argentine Republic and the International Organization for Migration (adopted 8 March 1990, entered into force 24 April 1992) UNTC I-55275 Article VI; Agreement between the United Mexican States and the International Organization for Migration concerning the establishment of a representation office in Mexico (adopted 7 April 2004, entered into force 24 December 2004) 2428 UNTS 211 Article IV.

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accessible enough, does not offer sufficient participation rights, and the outcomes of its investigations are clearly inadequate.

At present, therefore, the human rights accountability of IOM is insufficient. Even when compared with other international organizations, IOM's human rights accountability mechanisms are among the weakest – despite the high risk of human rights violations associated with its work.[213]

While it is a straight-forward exercise to demonstrate the insufficiency of IOM's accountability mechanisms – as I have now done – suggesting appropriate reforms is more difficult. Although research on the accountability mechanisms of international organizations is still in an early phase, it *prima facie* appears that insufficient systems of accountability is the norm. There are few, if any, bright guiding stars to draw inspiration from. Moreover, it is uncertain whether the experiences of one organization can be transposed to another, since they have vastly different powers and functions. Despite these caveats, I will nevertheless attempt to sketch out some possibilities for reform.

One approach would be to strengthen IOM's existing accountability mechanisms. However, major reforms of the OIG seem unlikely, as its key limitations are inherent to its nature as an internal oversight mechanism.[214] That leaves domestic courts, which are prevented from acting as accountability mechanisms due to IOM's jurisdictional immunity.

It may seem tempting to simply do away with that immunity, or to establish a human rights exception. However, the apparent advantages of doing so may be mitigated by domestic courts using other avoidance techniques to shy away from litigating cases involving international organizations.[215] The enforcement of such domestic court judgments will likely also be difficult – both in law and in practice.[216] At the same time, the disadvantages of limiting the jurisdictional immunities of international organizations are clear and tangible: immunities are the only protection they have against undue interference.[217] Compared to states, international organizations are particularly vulnerable in this regard. Their functions can only be carried out on the territory of states, by nationals of states.[218]

[213] See generally Johansen, *The Human Rights Accountability Mechanisms* (n 7).
[214] Ibid 294.
[215] Ibid 299–300; For an overview of such avoidance techniques, see August Reinisch, *International Organizations before National Courts* (Cambridge University Press 2000) ch 2.
[216] Johansen, *The Human Rights Accountability Mechanisms* (n 7) 300.
[217] Ibid.
[218] Eric De Brabandere, 'Immunity of International Organizations in Post-Conflict International Administrations' (2010) 7 International Organizations Law Review 79, 83.

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Finally, restricting the immunities of international organizations is no 'quick fix', since the doctrine of absolute immunity is firmly entrenched in treaties.[219]

The preferred approach thus appears to be to establish new accountability mechanisms at the international level, for example within IOM itself. IOM's governing bodies may in principle establish independent organs that function as human rights accountability mechanisms. For example, it should be within their powers to establish a human rights ombudsperson or inspection panel, along the lines of the European Ombudsman or the World Bank Inspection Panel. That could solve the access and participation problems, although the non-binding outcomes that characterize such mechanisms still leave something to be desired.[220] Filling that gap would likely require some sort of court or tribunal.

Establishing an IOM-internal human rights court is not a completely utopian idea – at least legally speaking. As radical as it may seem, the IOM Council likely has the competence to establish judicial organs. Indeed, the plenary organs of international organizations have generally been regarded as having the implied competence to establish internal courts, in particular to litigate labor disputes between it and its staff members. In *Effect of Awards*, the ICJ affirmed that the UN General Assembly had the implied power to establish such a court, and it is worth quoting the key part of the reasoning given in support of that conclusion:

> [A] situation arose in which the relations between the staff members and the Organization were governed by a complex code of law. […] The [UN] Charter contains no provision which authorizes any of the principal organs of the United Nations to adjudicate upon these disputes, and Article 105 secures for the United Nations jurisdictional immunities in national courts. It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals […] that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.[221]

Could a similar line of argument support the conclusion that the IOM Council has the implied power to establish a court with jurisdiction over human rights disputes between the organization and third party individuals? Some of the reasons given by the ICJ appear quite easily transposable

[219] Johansen, *The Human Rights Accountability Mechanisms* (n 7) 300.
[220] Ibid 294.
[221] *Effect of Awards of Compensation Made by the UNAT* (Advisory Opinion) [1954] ICJ Rep 47 at 57.

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to such a situation: the relationship between IOM and third party individuals that allege that they are victims of human rights obligations is also governed by complex legal rules. Moreover, IOM's jurisdictional immunity is as absolute as that of the UN. But IOM lacks an express aim to promote freedom and justice for individuals, which the ICJ seems to have put quite a bit of emphasis on. Yet, in the more than 65 years since the ICJ handed down its advisory opinion in *Effect of Awards*, general international law has evolved in a significantly more human rights-oriented direction. It is thus entirely possible that the power to establish an internal human rights court is more easily implied than the *dictum* in *Effect of Awards* may suggest.

For reform at the international level, the legal hurdles for meaningful reform are, in other words, not insurmountable. At the same time, the opportunities for reform at the international level appear to fly under the radar of, for example, activists and NGOs, who often have their focus elsewhere – e.g. on immunities and domestic litigation. Perhaps a shift in focus could provide the necessary political pressure to surmount the hurdles that stand in the way of reform at the international level.

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