# 5

# A Human Rights Due Diligence Policy for IOM?

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## 5.1 Introduction

The idea of cooperation occupies a central place in the construction of international law. It is a noble idea that symbolizes the overcoming of a narrow and selfish understanding of state sovereignty in which the main actors merely guard over their interests. In comparison, the law of cooperation stands for a departure to a more constructive and engaging international community in which states cooperate to protect and realize common interests.[1] Along these lines, it was assumed for a long time that international organizations (IOs) were precisely set up for the realization of these common goals and interests. This turned IOs into an apparently positive phenomenon, a force for good whose conduct would bring the world closer to a state of peace and justice.[2] Most likely, international cooperation can be both – a vice and a virtue, depending on the values it helps to defend or undermine.

This phenomenon is nowhere more apparent than in the field of international migration law. Notoriously complex, fragmented and unordered as a field of law, intergovernmental cooperation is at its base, cherishing it in its most prominent legal and policy documents.[3] Just as in its sister field of international refugee law,[4] there exists a normative expectation resulting from a practical necessity for states to cooperate when it comes to the transnational phenomenon of migration. This is equally apparent in the various

[1] Wolfgang Friedmann for example argues that international law evolved from a law of co-existence into a law of co-operation, see Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia University Press 1964) 60–71.

[2] See, for a critical analysis of IOs' typical functions and aspirations along these lines 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, 384.

[3] Vincent Chetail, *International Migration Law* (Oxford University Press 2019) 340–392.

[4] The Preamble of the 1951 Geneva Refugee Convention, the most relevant instrument governing international refugee law, highlights several times the necessity of states to cooperate inter alia regarding burden-sharing, which 'cannot be achieved without international co-operation'.



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legal and policy instruments governing this area. The Global Compact on Safe, Orderly and Regular Migration adopted in 2018 (GCM) is a prominent example[5] in this area.[6] Cooperation between states is deeply entrenched in the normative DNA of this document.[7] For states and migrants alike, cooperation can be a positive value associated with the Compact as explicitly highlighted in its Preamble where the signing parties agree to 'recognize that [migration] is a source of prosperity, innovation and sustainable development'.[8] The GCM calls *inter alia* for durable solutions and regular pathways for migration – which can only be realized by cooperation between 'sending' and 'receiving' states.[9] However, cooperation can certainly be menacing for migrants who find themselves without a legal title for residence in third states and whose return will also be administered through means of cooperation. Likewise, a lack of cooperation can have positive and negative consequences for all involved. Imagine a state's refusal to issue new identity papers or any at all, thereby significantly hampering the chances of a migrant to travel and seek a place of residence or to naturalize in her/his destination state. Such unwillingness may even contribute to the migrant's statelessness in a *de facto* sense. Conversely, for states aiming to return migrants without a title to remain in their territory, the inability or unwillingness of certain home countries to readmit their nationals (or even acknowledge them as nationals) is a significant challenge.[10]

The GCM foresees a central role for the International Organization of Migration (IOM) in overcoming these challenges of cooperation. This

[5] UNGA Res 73/195, 'Global Compact for Safe, Orderly, and Regular Migration' (19 December 2018) UN Doc A/RES73/195 (hereafter GCM).

[6] Chetail (n 3) 291.

[7] Cooperation is mentioned for example in its Preamble para. 3: 'The two Global Compacts, together, present complementary international cooperation frameworks that fulfil their respective mandates as laid out in the New York Declaration for Refugees and Migrants'. This notion is repeated in Preamble para. 4 and again para. 6: 'The Global Compact is a milestone in the history of the global dialogue and international cooperation on migration' and again mentioned in paras. 7, 8, 13, 14.

[8] GCM (n 5) Preamble, para. 8.

[9] GCM (n 5) Guiding Principle No. 5.

[10] For an assessment of this issues in the European Union context, see: Commission, 'Communication from the Commission to the European Parliament, the European Council and the Council, Progress Report on the Implementation of the European Agenda on Migration' COM(2019) 126 final 10–12. For another viewpoint of this analysis, see: European Council for Refugees and Exiles, *Return Policy: Desperately Seeking Evidence and Balance: ECRE's Assessment of Latest Developments in EU Policy and Law on Returns* (2019) <www.ecre.org/wp-content/uploads/2019/07/Policy-Note-19.pdf> accessed 2 March 2023.

prominent role for IOM was written into the GCM hard on the heels of what some have described as IOM's admission into the UN family.[11] In 2016, the UN and IOM entered into an agreement which has the purpose of strengthening their cooperation and enhancing 'their ability to fulfil their respective mandates in the interests of migrants and their Member States'.[12] The formalization of the decades-long relationship between the two organizations[13] has raised some concerns about the human rights of migrants[14] and the organization's accountability for possible breaches thereof.[15] These concerns stem from IOM's image as a managerial organization that has so far lacked a 'protection mandate'[16] and rather existed as a service provider for states in the context of the management of both international and internal migration flows. The design of IOM's 1989 Constitution has certainly contributed to bring about these critical viewpoints. It does not confer any protection mandate upon the organization, which is traditionally seen as the operational counterpart on some issues otherwise dealt with by the United Nations High Commissioner for Refugees (UNHCR). Instead, the Constitution seems to defer status rights questions entirely to host states with scant reference to migrants' rights. The only explicit reference to migrants in the Constitution is the duty of

[11] Chetail (n 3) 325.

[12] 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 (herafter 2016 UN-IOM Agreement).

[13] The relationship between the UN and IOM evolved since the 1950s. In 1992, IOM was granted observer status in the UN General Assembly (UNGA Res A/RES/47/4, 'Observer status for the International Organization for Migration in the General Assembly' (16 October 1992) UN Doc A/RES/47/4) and included by the GA as a 'standing invitee' in the Inter-Agency Standing Committee. In 1996, both organizations signed a cooperation agreement providing a formal basis for closer collaboration between the secretariats. In 2013, a MoU was signed.

[14] See for example: Jürgen Bast, 'Der Global Compact for Migration und das internationale Migrationsregime' (2019) (3) Zeitschrift für Ausländerrecht und Ausländerpolitik 96; Elspeth Guild, Stephanie Grant and Kees Groenendijk, 'IOM and the UN: Unfinished Business' (2017) Queen Mary University of London School of Law Legal Research Paper No 255/2017 <www.academia.edu/40090259/IOM_and_the_UN_Unfinished_Business> accessed 2 March 2023; Nicholas Micinski and Thomas G Weiss, 'International Organization for Migration and the UN System: A Missed Opportunity' (2016) *Future United Nations Development System Briefing* 42 <https://ssrn.com/abstract=2841067> accessed 2 March 2023; see also Guy Goodwin-Gil, 'A Brief and Somewhat Sceptical Perspective on the IOM' (2019) UNSW Sydney, Kaldor Centre Publication <www.kaldorcentre.unsw.edu.au/publication/brief-and-somewhat-sceptical-perspective-international-organization-migration> accessed 2 March 2023.

[15] See Section 5.2.

[16] For an in-depth analysis of this term, see Chapter 1.

member states to cooperate regarding the 'needs of the migrant as an individual human being'.[17]

What does the new 'related status' of IOM to the UN bring for states and migrants alike? Does it solidify and enhance IOM's position as an organization that seems to pay insufficient attention to the rights of migrants, focusing instead on the interests of those states who pay the organization for its service? Or does the inclusion of IOM in the UN family instead point towards a long-overdue mainstreaming of human rights concerns in IOM's work – an issue that the organization can now no longer ignore due to its integration into the UN? Full answers to these questions can only be given based on empirical work and in the light of the future practice of both UN and IOM. This is not what this contribution can offer. Instead, it wishes to focus on a specific question that has not received much attention in this context.

In 2013, the Secretary-General of the United Nations formulated a 'Human Rights Due Diligence Policy' (HRDDP) for the organization,[18] which was amended in 2015 by a 'Guidance Note' clarifying the policy and should therefore be read in conjunction with it. This policy and its Guidance Note are meant to provide a general framework for cooperation between the UN and 'non-United Nations security forces'. The policy's significance laies in its aim at mainstreaming human rights principles and procedural character establishing concrete measures to ensure their protection while fostering awareness of how the UN should cooperate with national entities. These contributions of the policy paired with the mentioned discussions surrounding IOM's accountability regarding human rights violations merit a chapter in this volume assessing a possible relevance of the organization's policy due to its new status. In the following pages, we will introduce this instrument and discuss whether it can now be used as a normative yardstick for IOM's activities, which professes to remain a 'non-normative'[19] organization.[20] In

[17] 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) preamble para 7.

[18] Human Rights Due Diligence Policy on United Nations Support to non-United Nations Security Forces (HRDDP); UNGA and UNSC, 'Identical letters dated 25 February 2013 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council' (5 March 2013) UN Doc A/67/775-S/2013/110.

[19] The 2016 UN-IOM Agreement (n 12) highlights in its Article 2, Principle 3. That 'The United Nations recognizes that the International Organization for Migration, by virtue of its Constitution, shall function as an independent, autonomous and *non-normative* international organization in the working relationship with the United Nations' (emphasis added).

[20] For further analysis of the 'non-normative' approach see above, Chapter 1.

the first step, we will briefly recapitulate some features about the debate on the relationship between IOM and human rights protection (Section 5.2), before turning in greater detail to the impact that the HRDDP could have in this context (Section 5.3). The contribution will conclude with a summary of its arguments and some suggestions on how the HRDDP could be reformed in light of IOM's new relation with the UN (Section 5.4). Our main argument is that even though the HRDDP itself does not directly bind IOM due to the fact that the organization does not constitute a UN entity in the sense of the policy, it is, however, bound by the principles underlying the policy. At the same time, not too much hope should be levelled on this document which only aspires to prevent 'grave violations' of human rights. Those who wish to strengthen the human rights aspects of IOM's work will need to look elsewhere. However, the HRDDP is an important symbolical marker, as it makes it more difficult for IOM to escape debates about the human rights limits of its work. The analysis of the relevance of the HRDDP to IOM thus offers a particular analytical angle for the cross-cutting questions underlying this volume. It pertains to the human rights obligations that IOM has. It sets out a specific tool to provide for its accountability while being mindful of the limitations that this normative state of affairs and institutional set-up have. Arguably, overcoming these limits will depend significantly on the ethos of those in charge of implementing IOM policies.

## 5.2 IOM and Human Rights: Where Do We Stand?

Other contributions to this volume address the general history of IOM and its rapprochement with the UN. Accordingly, we need not go into the details of all this here. Suffice it here to point out some central considerations for the relationship between IOM and human rights law. These pertain both to the normative framework in which IOM is acting (Section 5.2.1), its sometimes controversial practices (Section 5.2.2) as well as its new relationship with the UN (Section 5.2.3).

### *5.2.1 A Normative Framework of a Non-normative Nature?*

The starting point for assessing the controversial relationship between IOM and human rights lies in its mandate, which is defined by the 1989 IOM Constitution, a document going back in parts to 1954. Article 1 of the IOM Constitution details the purposes and functions of IOM. These are vast and include making arrangements for the 'organized transfer of migrants', to concern itself 'with the organized transfer of refugees,

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displaced persons and other individuals in need of international migration services', to provide 'migration services' of various kinds as well as 'similar services as requested by States, or in cooperation with other interested international organizations, for voluntary return migration, including voluntary repatriation'. Besides that, the provision stresses that IOM shall 'provide a forum to States as well as international and other organizations for the exchange of views and experiences, and the promotion of cooperation and coordination of efforts on international migration issues, including studies on such issues to develop practical solutions'.

As mentioned above, the Constitution does not set forth what is called in the literature a 'protection mandate'.[21] In other words, it is not clear from its constitutive document that IOM is to act to ensure the rights of migrants. Instead, both its Constitution and subsequent practice portray IOM as a service-driven organization which operates at the behest of its member states and caters to their demands in the field of migration.[22] This is in and of itself neither surprising nor scandalous – after all, IOs are creatures of their member states, and it is to be expected that the member states have a considerable influence in the shaping of how a given IO will evolve. Simultaneously, IOM is criticized in the migration literature for going well beyond what is typical of IOs in this regard. This is attributed to the lack of the protection mandate and a general dependence of the organization on project-specific funding ('earmarking'), which makes the organization overly responsive to the demands of some of its member states, those which can pay for its services. Problematic in this regard is that some of these requested services infringe on or even violate human rights obligations, as shown in more detail below. Furthermore, from an organizational perspective, the substantial decentralization and significant independence of IOM's over 590 countries and sub-offices worldwide[23] from the organization's headquarters in Geneva contributes further to this problématique, especially as the country offices are mostly responsible for generating their funding.[24]

This, in turn, is connected with criticism about IOM's service-oriented nature and the lack of an explicit protection mandate which contributes to

[21] See, for instance, Elspeth Guild, Stefanie Grant and Kees Groenendijk, 'Unfinished Business: The IOM and Migrants' Human Rights' in Martin Geiger and Antoine Pécoud (eds), *The International Organization for Migration: The New 'UN Migration Agency' in Critical Perspective* (Palgrave Macmillan 2020) 29, 31.

[22] Klabbers (n 2), 393–395.

[23] IOM, 'Where we work' (2022) <www.iom.int/where-we-work> accessed 2 March 2023.

[24] Martin Geiger and Antoine Pécoud (eds), *The International Organization for Migration: The New 'UN Migration Agency' in Critical Perspective* (Palgrave Macmillan 2020) 11, For an analysis of IOM's expenditure patterns and donor influence see Ronny Patz and

an institutional culture in which the organization does not understand itself as a watchdog of member states, overseeing their compliance with international human rights law. In recent years, IOM has expanded its work *inter alia* to data collection and migration analysis and strengthened its focus on humanitarian programs and cooperation *among other things* with UNHCR in resettlement programs. This refocusing arguably went hand in hand with a gradual shift of its ethos[25] leading to the circumstance that today the organization prides itself for engaging in various forms of humanitarian work, not least including to its facilitation of regular pathways of migration.[26]

### 5.2.2 *Controversial Practices of IOM*

However, the controversial practices that IOM engages in have led to a significant amount of criticism against the organization. Despite its various internal policies addressing human rights standards, it would lack a binding commitment to human rights obligations in its Constitution. Too often it would fall behind its commitments and no effective mechanisms would be available to hold the organization accountable. This is especially the case in cooperation with authoritarian and repressive governments in 'assisted voluntary return' and 'repatriation' programs like it was[27] the case with Libya in 2017.[28] Accordingly, NGOs and scholars

Svanhildur Thorvaldsdottir, 'Drivers of Expenditure Allocation in the IOM: Refugees, Donors, and International Bureaucracy' in Martin Geiger and Antoine Pécoud (eds), *The International Organization for Migration: The New 'UN Migration Agency' in Critical Perspective* (Palgrave MacMillan 2020) 75–99.

[25] Megan Bradley assessed in several interviews that IOM staff (particularly of the younger generation) place greater value on working with other agencies and in 'active support of migrants' right', see Megan Bradley, 'Joining the UN Family?' (2021) 27 Global Governance 251.

[26] Since 2004, IOM uses the Displacement Tracking Matrix in its humanitarian assistance work gathering and analysing data on the movement, vulnerability, and needs of displaced and mobile populations to provide decision makers with specific contexts. Another example for IOM's humanitarian work is its administration of accommodation sites for refugees and migrants such as in Bira, Bosnia since 2018.

[27] For further analysis on this see Angela Sherwood and Megan Bradley, 'Holding IOM to Account: The Role of International Human Rights Advocacy NGOs' 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).

[28] See, for example: Daniel Howden, 'The Central Mediterranean: European Priorities: Libyan Realities' (*Refugees Deeply,* 3 October 2017) <https://deeply.thenewhumanitarian.org/refugees/articles/2017/10/03/the-central-mediterranean-european-priorities-libyan-realities> accessed 2 March 2023.

alike[29] have criticized IOM repeatedly for only paying lip service to human rights, while violating them or contributing to such violations in practice in several situations. These include its strong focus on removal (including 'voluntary' return),[30] the facilitation of the assistance in 'voluntary returns' in clearly coercive circumstances of migrants from Libya to home countries such as Nigeria or Senegal[31] or the role in the administration of Australia's so-called 'Pacific solution' and its detention centres in Nauru. Human Rights Watch (HRW), which has had observer status with IOM since 2002, has publicly criticized IOM for years in its reports to the organization's Governing Council. According to HRW, IOM only pays lip service to human rights, while violating them in practice.[32] IOM has particularly been criticized for its involvement in the cases of Libya[33] and Australia.[34] The most recent example sparking loud criticism is IOM's contribution in facilitating the EU's externalization practices,[35] for instance, in the Sahel region by supporting the identification of persons arguably in need of international protection in offshore processing centres alongside UNHCR and African states.[36] Critics argue that this contribution in implementing

[29] Julien Brachet, 'Policing the Desert: The IOM in Libya beyond War and Peace' (2016) 48 Antipode 272.

[30] Martin Geiger and Antoine Pécoud, 'The Politics of International Migration Management' in Martin Geiger and Antoine Pécoud (eds), *The Politics of International Migration Management* (Palgrave MacMillan 2010).

[31] In 2017, for example, IOM's target from the EU to return migrants from Libya to their countries of origin was set at 15,000 individuals. See Daniel Howden (n 28) 30. For further analysis of IOM's involvement in these returns see 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).

[32] Human Rights Watch, 'The International Organization for Migration (IOM) and Human Rights Protection in the Field: Current Concerns' (IOM Governing Council Meeting, Geneva, 18–21 November 2003) 2 and 2004 report, 1–2.

[33] Anne-Line Rodriguez, 'Exploring Assumptions Behind "Voluntary" Returns from North Africa' (2019) University of Oxford Refugee Studies Center Research in Brief 13 <www.rsc.ox.ac.uk/files/news/rsc-research-in-brief_returns-from-north-africa_web.pdf> accessed 2 March 2023.

[34] Human Rights Watch (n 32) 1–2.

[35] Geiger and Pécoud (n 30) 7–8. The authors argue that IOM plays a significant and active role in the facilitation of negotiations on Agreements between EU and non-EU transit states and countries of origin such as Morocco, Albania, Turkey or Ukraine by making concrete recommendations and proposing funding opportunities.

[36] Daria Davitti and Marlene Fries, 'Offshore Processing and Complicity in Current EU Migration Policies (Part 1)' (*EJIL:Talk!*, 10 October 2017) <www.ejiltalk.org/offshore-processing-and-complicity-in-current-eu-migration-policies-part-1/> accessed 2 March 2023.

these offshore asylum determination policies triggers human rights and protection issues such as the questions how, under such circumstances, *non-refoulement* can be upheld, family unity ensured, and the right to a fair and impartial status determination be secured.[37]

Despite the 'non-normative nature' of the organization, it is not the case that these practices developed in a normative void. As introduced above, IOM's original area of work evolved significantly over the past decades – driven by, amongst other things, the need to reinvent itself as its initial reason for existence, namely assisting in the mass emigration of 'surplus' people to states outside Europe, was no longer pertinent.[38] The initial mandate of the organization (then called Provisional Intergovernmental Committee for the Movement of Migrants from Europe) focusing on arranging the transport of migrants from European countries to states overseas came to formally include the organization's involvement in humanitarian responses[39] to displacement,[40] emergency relief and data analysis.[41] The organization's humanitarian mandate is also reflected in recent policy instruments such as the 2012 'Migration Crisis Operational Framework (MCOF)',[42] the 2012 'Humanitarian

[37] Jane McAdam, 'Extraterritorial Processing in Europe: Is "Regional Protection" the Answer, and If Not, What Is?' (2015) UNSW Australia Kaldo Center Policy Brief No. 1 7-9, 16 <www.kaldorcentre.unsw.edu.au/sites/default/files/Kaldor%20Centre_Policy%20Brief%201_2015_McAdam_Extraterritorial%20processing_0.pdf> accessed 2 March 2023.

[38] Geiger and Pécoud (n 30) 4–5. For a historical overview of the establishment of IOM see: Lina Venturas (ed), 'International "Migration Management" in the Early Cold War: The Intergovernmental Committee for European Migration' (University of the Peloponnese 2015).

[39] As Megan Bradley stresses in, '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), in the first decades after the organization's establishment, its basic humanitarian character and orientation was strengthened culminating in the adoption of the 1989 Constitution.

[40] For further analysis of IOM's mandate regarding individuals affected by forced migration see Megan Bradley, 'The International Organization for Migration (IOM): Gaining Power in the Forced Migration Regime' (2017) 33(1) Refuge: Canada's Journal on Refugees 97.

[41] For a deeper analysis of the organization's historical development and changing operational focus reflected in IOM's mandate see Bradley, 'Who and What Is IOM For?' (n 39) in this book.

[42] IOM Council, 'Migration Crisis Operational Framework' (2012) MC/2355, <www.iom.int/sites/g/files/tmzbdl486/files/migrated_files/What-We-Do/docs/MC2355_-_IOM_Migration_Crisis_Operational_Framework.pdf> accessed 2 March 2023 (herafter MCOF). The framework stipulates that the 'IOM is further bound and committed to the existing legal and institutional frameworks contributing to the effective delivery of assistance and protection and ultimately to the respect and promotion of human rights and humanitarian principles', 9.

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Policy'[43] or the 2015 'Migration Governance Framework'.[44] Also, the 2016 UN-IOM Agreement implicitly acknowledges IOM's humanitarian role, recognizing the organization as 'an essential contributor […] in operational activities related to migrants, displaced people and migration-affected communities, […] and in mainstreaming migration in development plans'.[45] Covering this broad array of different tasks from providing shelter to returning migrants while providing services for its member states necessarily puts the organization in a difficult conundrum of expectations.

One phenomenon exemplifying this inherent tension between the different tasks is the organization's approach to human rights and the question of how to include them into its policy. Human rights language, in particular references to the protection of migrants, increasingly received a significant status in its internal policy development processes. In 2007, for example, IOM acknowledged its role in this regard rather vaguely stating that even though it has no legal protection mandate, its activities '*contribute to protecting* persons involved in migration'.[46] Similarly, in 2009, the IOM Council stressed that international actors such as IOM 'have a key *supporting role* to play in achieving the effective *respect of the human rights* of migrants'.[47] The organization's role in *promoting* the human rights of migrants was also highlighted in its 2009 'Human Rights of Migrants Policy and Activities' report.[48] In contrast, the 2012 MCOF stresses that IOM is not only supporting other actors to the adherence to human rights

[43] IOM Council, 'Humanitarian Policy – Principles for Humanitarian Action' (2015) C/106/CRP/20 <www.iom.int/sites/default/files/our_work/DOE/humanitarian_emergencies/IOM-Humanitarian-Policy-Principles-on-Humanitarian-Action.pdf> accessed 2 March 2023. Here, IOM acknowledges that its 'mandate is consistent with the principle that States bear the primary responsibility to protect and assist crisis-affected persons residing on their territory, and where appropriate their nationals abroad, in accordance with international and national law, including international humanitarian, refugee and human rights law' (at 5).

[44] IOM, 'Migration Governance Framework' <www.iom.int/sites/default/files/about-iom/migof_brochure_a4_en.pdf> accessed 2 March 2023. Principle 1 stipulates IOM's 'adherence to international standards and fulfillment of migrants' rights.'

[45] 2016 UN-IOM Agreement (n 12) Article 2 principle no 2.

[46] Administration produced background paper, Protection of Persons involved in Migration: Note on IOM's Role, IC/2007/3, quoted in IOM, 'IOM Strategy: Report of the Chairperson' (27 May 2007) MC/2216 para 7 (emphasis added) <www.iom.int/sites/g/files/tmzbdl486/files/2019-01/MC2216.pdf> accessed 2 March 2023.

[47] IOM, 'The Human Rights of Migrants – IOM Policy and Activities' (12 November 2009) MC/INF/298 para 2 (emphasis added) <www.iom.int/sites/g/files/tmzbdl486/files/jahia/webdav/shared/shared/mainsite/microsites/IDM/workshops/human-rights-migration-november-2009/MC-INF-298-The-Human-Rights-of-Migrants-IOM-Policy-and-Activities.pdf> accessed 2 March 2023.

[48] IOM, 'The Human Rights of Migrants – IOM policy and activities' (n 47) para 12.

or promoting them but is itself '*bound* and *committed to* the existing legal and institutional frameworks contributing to the effective delivery of assistance and *protection* and ultimately to the *respect and promotion* of *human rights*'.[49] This meandering path of stipulating the organization's commitment to human rights is also visible in the 2016 UN-IOM Agreement. The Agreement does not explicitly mention IOM's adherence to human rights, but vaguely describes the organization as an '*essential contributor* in the protection of migrants'[50] which 'undertakes to conduct *its activities in accordance* with the Purposes and Principles of the Charter of the United Nations and *with due regard* to the policies of the United Nations furthering those Purposes and Principles and to other relevant instruments in the international migration, refugee and human rights fields'.[51] Considering only the organization's internal policies, particularly the straight forward language of the 2012 MCOF, which was unanimously adopted by the member states in Resolution 1243, it seems that IOM has indeed come around to self-commit to human rights acknowledging its obligations via its internal rules.

At the same time, one should not accept these IOM pledges to adhere to human rights blindly. For example, Human Rights Watch has raised concerns in this regard warning that IOM has fine-tuned the language of human rights in its policies and guidelines while disrespecting human rights in its practical work.[52] Scholars warn in this regard of a 'blue-washing' of the organization by its new relationship with the UN and of IOM portraying itself solely as a humanitarian organization 'while still maintaining its core role in conceptualising, proposing, and implementing migration control activities on behalf of states'.[53] At the same time, it should not be forgotten that IOM sees its humanitarian assistance as part of 'migration management'.[54] There are also human rights concerns

[49] IOM, MCOF (n 42) para 12.
[50] 2016 UN-IOM Agreement (n 12) Article 2 principle no 2 (emphasis added).
[51] 2016 UN-IOM Agreement (n 12) Article 2 principle no 5 (emphasis added).
[52] Human Rights Watch (n 32) 2.
[53] Asher Lazarus Hirsch and Cameron Doig, 'Outsourcing Control: The International Organization for Migration in Indonesia' (2018) 22 The International Journal of Human Rights 681.
[54] IOM self-describes its work as situated 'in the four broad areas of migration management: migration and development, facilitating migration, regulating migration, and addressing forced migration'. See: <www.iom.int/our-work> accessed 2 March 2023. IOM's Department of Operations and Emergencies *inter alia* directs, oversees and coordinates the organization's humanitarian assistance.

related to its humanitarian work in emergencies, not only in its migration management work.[55]

### 5.2.3 *The Formalized Relationship with the UN and Its Impact on IOM's Engagement with Human Rights*

This gradual turn towards including protection issues and human rights language into its strategies and policy documents seems to find a logical conclusion in the light of the intensified relationship between the UN and IOM, the 2016 Agreement constituting the 'formalization of an old relationship'[56] between the two international organizations.[57] In the run-up to the 2016 New York Declaration for Refugees and Migrants, the idea was also broached that IOM could be transformed into an UN-specialized agency, a specific status with clear connotations within the UN system. This was deemed impossible due to time constraints, as states wanted IOM to support the negotiation and eventual implementation of the Global Compact on Migration, following the New York Declaration. In particular, turning IOM into a 'specialized agency' would have required the ECOSOC's approval, which was considered unfeasible due to these time constraints.[58] Thus, the pragmatic solution was to choose the path of turning IOM into a 'related organization', which does not require such approval. This step was achieved via the 2016 Agreement. Irrespective of the 2016 agreement's exact legal nature, it undoubtedly formalized the close relationship between both actors.

This development of including human rights language into its policies culminated in the UN-IOM Agreement in 2016. Here several provisions of the Agreement speak of IOM's changed focus and responsibility for the

[55] One recent example in this regard is Amnesty International's criticism on shelters run by IOM in Bosnia and Herzegovina for its inhumane conditions. Amnesty International, 'Pushed to the Edge: Violence and Abuse against Refugees and Migrants along the Balkan Route' (13 March 2019) 27 <www.amnesty.org/en/documents/eur05/9964/2019/en/> accessed 2 March 2023.

[56] William Lacy Swing (September Summit and Signing of the UN-IOM Agreement, UNHQ New York, 19 September 2016) <www.iom.int/sites/default/files/about-iom/IOM-UN-Agreement-Sept19-2016.pdf> accessed 2 March 2023.

[57] Miriam Cullen takes a different approach on the legal effect of the 2016 UN-IOM Agreement arguing that IOM already constituted an internal UN organization prior to the signing. See Miriam Cullen, 'The Legal Relationship between the UN and IOM after the 2016 Cooperation Agreement: What Has Changed?' 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).

[58] Megan Bradley (n 25) 18, 19.

protection of the persons of concern involved in its work. Article 1, for example, establishes that both actors, the UN and IOM 'fulfil their respective mandate in the interest of migrants'. However, it should be noted here that the Agreement fails to define what this very general terminology means in terms of project implementation, whether the affected migrants are consulted, and even which migrants' interests shall be decisive.

Furthermore, Article 2, para. 2 explicitly 'recognizes' IOM as 'an essential contributor in the field of human mobility, in the *protection* of migrants in operational activities related to migrants, displaced people and migration-affected communities, including in the areas of resettlement and returns, and in mainstreaming migration in development'.[59] This provision highlights IOM's broadened mandate as 'protection'[60] was not part of the organization's initial mandate as laid down in its Constitution.

The crucial component of the Affiliation Agreement in this connection is Article 2, para. 5, which reads as follows:

> The International Organization for Migration undertakes to conduct its activities in accordance with the Purposes and Principles of the Charter of the United Nations and with due regard to the policies of the United Nations furthering those Purposes and Principles and to other relevant instruments in the international migration, refugee and human rights fields.

This commitment is anything but clear-cut. Its interpretation first of all hinges on the broader question of the exact legal nature of the Agreement. Does IOM become a formal part of the UN? This impression is conveyed in parts of the literature where it is at times written that IOM is now part of the 'UN family'.[61] However, This description alone throws up more questions than it answers. The Agreement itself is quite ambiguous on the future relationship between the UN and IOM. In any case, IOM retains a separate existence from the UN.[62] It remains an independent international organization for which specific cooperative ties with the UN have been formulated. Indications to this extent range from the language in the Preamble of the Agreement ('desiring to establish a mutually beneficial

[59] 2016 UN-IOM Agreement (n 12) Article 2 principle No. 2 (emphasis added).

[60] IOM defines protection as 'an obligation to respect, protect and fulfil the rights of individuals, and that States have the primary obligation to provide protection to all individuals on their territory or under their jurisdiction, regardless of nationality, statelessness or migration status and without discrimination. Protection is a question of securing rights.' See IOM Council, 'IOM Policy on Protection' (7 September 2015) IOM Doc C/106/INF/9 para 12.

[61] See, for instance, Klabbers (n 2) 390.

[62] 2016 UN-IOM Agreement (n 12) UN-IOM Agreement Article 2 para 3 highlights IOM's independent and autonomous status.

relationship', 'respective responsibilities') over operative parts like Article 3 on cooperation and coordination, Article 5 on reciprocal representation to Article 9 (cooperation between the Secretariats). IOM certainly does not become an organ of a subsidiary nature to the UN but retains a significant amount of independence.

If IOM has not become a part of the UN, what does the language in Article 2, para. 5 of the Agreement then mean? Interpreting it in the light of the general rule of interpretation of international agreements that is outlined in Article 31 of the Vienna Convention on the Law of Treaties (VCLT) – and which represents customary international law and is hence applicable beyond the cases of treaties directly covered by the VCLT – requires taking a look at its wording, its systematic context as well as its object and purpose.[63]

While we do not wish to engage in a mechanical application of the interpretive maxims of the VCLT, it is evident already from the ordinary meaning of the formulations outlined in Article 2, para. 5 that this clause differentiates between the Purposes and Principles of the UN on the one hand and a set of other commitments, that is policies adopted by the UN and other relevant instruments in 'the international migration, refugee and human rights fields' on the other. What to make of this distinction? It is clear from the wording of the provision that IOM only undertakes a formal commitment to conduct its activities in accordance with the Purposes and Principles of the UN. For the other commitments, only 'due regard' is required. There is accordingly a clear distinction between a legally binding commitment and a mere political undertaking to show due regard, which can be equated with a commitment to consider them when acting. However, assessing the broader systematic context of the Agreement and taking particularly Article 1 and Article 2 into account, one may conclude that IOM must indeed do more than just 'consider' these commitments. Instead, it must actively ensure that it acts not only in the interest of states but also of migrants (Article 1) and contributes to the protection of the migrants' rights (Article 2, para. 1).

What does the legally binding commitment to conduct IOM activities in accordance with the Purposes and Principles of the UN mean, in

[63] The Affiliation Agreement between UN and IOM appears to be a clear-cut example of a binding agreement between IOs. Its language ('have agreed as follows') indicates as much. The rules of interpretation set forth in Articles 31–33 VCLT are identical to the ones in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986 which has, however, not yet entered into force.

particular concerning questions of human rights law? The Purposes and Principles of the UN are set out in Articles 1 and 2 of the Charter. They only contain a fleeting mention of human rights, discreetly tucked away in Article 1, para. 3 of the Charter stipulating that it is a purpose of the UN

> To achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without discrimination as to race, sex, language, or religion (…).

This is not much of a commitment to human rights. First of all, it is only directed to a specific issue area of UN action – particularly *not* for UN action in the field of peace and security. Second, it then calls for 'promoting and encouraging respect for human rights', which is a considerably weaker formulation than a requirement to act in conformity with human rights. It is subject to a considerable debate whether the meaning and content of the UN's purposes and principles have expanded over time. Anne Peters, for instance, argues that through the practice of the UN organs, additional internal policies have emerged and that, for instance, the Security Council would now also be bound by the protection of human rights, the prohibition of genocide, the principle of self-determination and basic principles of international humanitarian law.[64] It is convincing to hold that the UN's purposes and principles are not frozen in time but rather evolve dynamically in the light of the UN and its member states' organizational practice. However, this also does not mean that any normative development in the field of human rights law can now claim to fall entirely in line with the UN's purposes and principles. And the precarious framing of human rights in Article 1, para. 3 of the Charter need to be accounted for what it is. Of course, one can argue that a teleological reading of Article 1, para. 3 of the Charter also implies that an organization that is supposed to encourage and promote respect for human rights should not violate them. On a general level, this is true. Yet, it remains the case that the UN Charter itself does not demand a lot from the UN organs when it comes to protecting human rights. In any case, the binding commitment to act only in conformity with the Purposes and Principles of the UN does not necessarily provide for a far-reaching obligation on the side of IOM. Read literally, it requires IOM to also 'promote and encourage respect' for human rights.

[64] Anne Peters, 'Article 24' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (Volume 1, 3rd edn, Oxford University Press 2012) 57.

In our case, the considerable progress in human rights instruments instead speaks to the second prong of Article 2, para. 5 of the Agreement between IOM and the UN. 'Due regard' is to be had both concerning UN policies as well as to 'other relevant instruments in the international migration, refugee and human rights fields'. Here, a whole panoply of instruments that are not explicitly mentioned in the Agreement, related to migration matters is indeed relevant, from the non-binding 1948 Universal Declaration of Human Rights (representing customary international law in wide parts) to the 1965 Convention against Racial Discrimination, the 1966 Covenants, the 1979 Convention on the Elimination of All Forms of Discrimination Against Women to the 1989 Covenant of the Right of the Child. The wide-open language of this specification also extends to non-binding instruments like the GCM and agreements in refugee law. More difficult to assess is whether the formulation 'relevant instrument' also extends to customary international law. On the face of it, this would seem to be difficult to reconcile with the wording as customary norms are certainly not an 'instrument'. However, this particular question seems to be of limited importance as IOM is bound to human rights that form part of the general norms of customary international law by its status as an international organization. An interlinked debate, however, remains open regarding their internalization and their specific content. For this chapter's purpose, we can hold that IOM is bound to these norms regardless of the interpretation of its Agreement with the UN.

The Achilles heel of the formulation in Article 2, para. 5, however, is undoubtedly the formulation 'due regard'. From a human rights perspective, this can only be described as a very weak and indeed disappointing component of the Agreement. At the same time, IOM member states may welcome such a 'soft' formulation as it allows for more flexibility in the implementation of its human rights policies and adaptability depending on the concrete circumstances of the various tasks the organization fulfils for its members. Looking at this formulation in other international instruments such as the United Nations Convention on the Law of the Sea (UNCLOS) (Articles 56 para. 2, 58 para. 3 and 87 para. 2) may help clarify the meaning of the term in Article 2, para. 5 of the Agreement. Applying general interpretative conclusions on the UNCLOS provisions[65] to the UN-IOM Agreement and the organization's internal policies, 'due regard' implies a certain degree of legal commitment.

[65] Julia Gaunce, 'On the Interpretation of the General Duty of "Due Regard"' (2018) 32 Ocean Yearbook Online 27.

'Due regard' can also mean that IOM takes a good look at a given human rights norm but considers it irrelevant and then basically moves on. The question is, what precisely is 'due'. A systematic interpretation of Article 2, para. 5, certainly signals that 'due regard' must be something else than 'in accordance with', as this is the formulation concerning the Purposes and Principles. This comparative look can only mean that 'due regard' means less than acting in conformity with something. At the same time, interpreting this term in the systematic context of the Agreement, in particular with Articles 1 and 2, para. 1, it becomes apparent that IOM must not act in any way that would go against the 'interest of migrants' or their 'protection'. While this does not give IOM a *carte blanche* to entirely disregard human rights, it is less than what advocates of a clearer set of human rights obligations regime for IOM would have hoped for. Simultaneously, the vagueness, the heterogeneity of the broad group of migrants and the lack of a definition of what their 'interest' implies for IOM's work make it difficult to assign this wording a clear scope of duties to IOM.

## 5.3 The UN Human Rights Due Diligence Policy as an Answer?

This rather bleak finding might be compensated by applying the UN Human Rights Due Diligence Policy (HRDDP). As mentioned in the introduction to this chapter, the HRDDP was formulated by the UN Secretary-General in 2013 and amended by the 2015 Guidance Note. It shall provide general normative guidance to cooperation between UN and non-UN forces. The fundamental principle underlying this policy is that

> Support by United Nations entities to non-United Nations security forces must be consistent with the Organization's purposes and principles as set out in the Charter of the United Nations and with its obligations under international law to respect, promote and encourage respect for international humanitarian, human rights and refugee law.[66]

Even though the HRDDP itself is a non-binding policy document, UN entities are obliged to respect it,[67] establish an implementation framework,[68] and report on their activities concerning the policy.[69] These elements aim at reducing the accountability deficits of UN entities in such

[66] HRDDP (n 18) Annex para 1.
[67] HRDDP (n 18) the entities 'must [.] pursue a policy of due diligence', I. Core Principles, para. 2.
[68] See, for example, HRDDP (n 18) 'III. Ensuring Effective Implementation' para 21.
[69] HRDDP (n 18) 'III. Ensuring Effective Implementation' paras 24–25.

operations, one of the key aims of the HRDDP.[70] The HRDDP refers clearly to already existing obligations under international law that bind these entities. Hence, it can be best characterized as an effort to provide guidance on the relevant law and the implications that these existing legal obligations have on cooperation between the UN and other security forces.

For this book chapter, there are three pertinent questions that will be addressed in turn. First, we need to assess whether the HRDDP applies to IOM in the light of the 2016 Agreement between the two organizations (Section 5.3.1). Second, we assess the potential contribution of the HRDDP (Section 5.3.2) before, third, turning to the limitations of the HRDDP as an instrument in general and in the specific case of IOM (Section 5.3.3).

### *5.3.1 The Preliminary Question: Is the Human Rights Due Diligence Policy Applicable to IOM?*

IOM officials answered this question in the affirmative. After several interviews with IOM staff, Megan Bradley highlighted that the 'IOM Legal Office has concluded that the organization is now obligated to uphold all the common laws and principles that bind UN agencies. IOM […] is obliged to support the implementation and monitoring of the UN's mandatory Human Rights Due Diligence Policy, which may have important implications for its work in countries such as Libya'.[71] But is this commitment to HRDDP only an ethical one or does the policy legally bind IOM due to its new status as a related organization?

HRDDP and its Guidance Note specify that the applicability of the policy requires three prerequisites, first, a 'UN entity'; second, 'support'; and third, 'non-UN forces' as counterparts. The 2015 Guidance Note clarifies that the HRDDP should be applied in a 'flexible' manner and 'complementary to each UN entity'.[72]

The last two requirements are applicable to IOM in various contexts of action without significant difficulties. The Guidance Note clarifies that 'support' in the sense of the HRDDP starts when an entity begins contemplating to provide support.[73] Support is defined in broad terms

[70] As visible for example in HRDDP (n 18) 'C. Risk Assessment' para 14 (b) and (c) or section 'F. Accountability' paras 29–31.

[71] Megan Bradley (n 25) 30.

[72] HRDDP (n 18) 'Guidance Note' 7.

[73] HRDDP (n 18) 'Guidance Note' 8. The Guidance Note makes clear that the 'text as well as the objectives of the policy make it clear that the latter applies to most forms of UN support and exceptions should therefore be interpreted restrictively' 9.

encompassing training, mentoring, advisory services, capacity- and institution-building and other forms of technical cooperation, as well as financial support, strategic or tactical logistical support to operations in the field or joint operations. As described above, IOM's current mandate encompasses *among other things* humanitarian services, training, advice-giving in different forms in various international contexts that unproblematically meet this requirement. The same is true regarding the requirement of lending support to 'non-UN security forces'. These also include border control forces, coast guards and similar security forces, police and those in charge of such forces.[74] IOM offers its expertise and practical support to such forces in various contexts from removing individuals to their country of origin in cooperation with the national police and security forces to assist them in implementing the 'Pacific Solution' including in Australia's detention, processing and return policies.[75] What is more, in our view, the term 'security forces' should be understood widely. Due to the securitization of many aspects of governing in today's world, it seems that the treatment of migration is inherently related to security concerns of states and other actors in the field. In any case, given that states have contributed to this security focus of migration policy, it would be questionable to evade the human rights obligations of IOs – creatures of member states – with a narrow definition of security forces in turn.

In contrast to these two requirements, the question of whether IOM constitutes a 'UN entity' in the sense of the HRDDP poses a more difficult problem. HRDDP defines this term as 'any office, department, agency, programme, fund, operation or mission of the United Nations'.[76] IOM, as a related organization, constitutes none of these entities. Even though UN-related organizations and UN agencies share several attributes, they are two distinct forms of entities[77] within the

[74] HRDDP (n 18) 'B. Definitions' para 7.

[75] Amnesty International, 'Australia-Pacific: Offending human dignity – the "Pacific Solution"'(26 August 2002) 6 <www.amnesty.org/en/documents/asa12/009/2002/en/> accessed 2 March 2023. For a detailed analysis of this practice, see 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).

[76] HRDDP (n 18) 'B. Definitions' para 13.

[77] Only specialized agencies are addressed in the UN Charter itself. The Chief Executive Board for Coordination states: 'The term "Related Agency" has to be understood as a default expression, describing organizations whose cooperation Agreement with the United Nations has many points in common with that of Specialized Agencies, but does

UN system.[78] Thus, as IOM was explicitly granted with the status of 'related-organization', instead of 'agency'[79] the narrower UN-entity requirement, set up by HRDDP, is not fulfilled.

Does HRDDP nevertheless apply to IOM, in a legal sense? We argue that it does. HRDDP constitutes the operational implementation of human rights standards which IOM indirectly committed itself to by signing the 2016 UN-IOM Agreement. The holistic and systematic reading of the provisions of the Agreement referring to the protection of migrants' rights and their interests in conjunction with the statement to pay 'due regard' to UN policies as well as to 'other relevant instruments in the international migration, refugee and human rights fields' speak in favour of a commitment of IOM to standards such as HRDDP by virtue of the Agreement between the UN and IOM. Therefore, the HRDDP and its Guidance Note have become indirectly applicable to IOM via the 2016 Agreement with the UN – at least to the degree that it cannot act against the principles laid down in the policy.

### *5.3.2 The Potential Contribution of the Human Rights Due Diligence Policy*

As then UN Secretary-General Ban Ki-moon highlighted in his letters to the President of the General Assembly and the President of the Security Council in February 2013, the policy aims at ensuring that any UN support provided to non-UN forces is 'consistent with the purposes and principles as set out in the Charter of the United Nations and with its responsibility to respect, promote and encourage respect for international humanitarian, human rights and refugee law'.[80]

not refer to Articles 57 and 63 of the United Nations Charter, relevant to specialized agencies.' Nonetheless, these organizations are part and parcel of the work of CEB (emphasis added), see www.unsystem.org/members/related-organizations accessed 2 March 2023.

[78] Nigel White, 'Layers of Autonomy in the UN System' in Richard Collins and Nigel White (eds) *International Organizations and the Idea of Autonomy* (Routledge 2011) 298.

[79] Article 58 UN Charter mentions such agencies stating that the UN will make 'recommendations for the co-ordination of the policies and activities of the specialized agencies'. There is no official definition of such agencies in the charter itself. The UN defines them as 'international organizations working with the UN, in accordance with relationship agreements between each organization and the UN. Specialized Agencies each have a process for admitting members and appointing their administrative head', see: Dag Hammarskjöld Library, 'UN Specialized Agencies' <https://ask.un.org/faq/140935> accessed 2 March 2023.

[80] UNGA and UNSC, *Identical letters dated 25 February 2013 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council* (n 18).

In and of itself, the HRDDP can be seen as a faithful implementation of the UN's existing legal obligations. This finding is particularly true considering the rules on complicity in the law of international responsibility, requiring states and IOs alike not to render aid or assistance to the commission of internationally wrongful acts.[81] Further, the policy's main benefit in practical terms for preventing complicity in grave crimes is its procedural and preventive approach.[82] It demands a proactive and forward-looking assessment by the UN on whether support in a concrete situation can be provided. This is not the case when 'there are substantial grounds for believing there is a real risk of the receiving entities committing grave violations of international humanitarian, human rights or refugee law and where the relevant authorities fail to take the necessary corrective or mitigating measures'.[83] This is a standard which is reminiscent of commitments states have under Article 3, para. 1 of the Convention against Torture and other sources for the obligation of *non-refoulement* in international human rights law. What is more, the policy also demands from any UN entity that receives reliable information providing such substantial grounds, that it immediately 'must intercede with the relevant authorities to bring those violations to an end'.[84] Lastly, if such grave crimes continue to occur, despite the UN entities' efforts to end them, the policy demands the cessation of the support.[85] The 2015 Guidance Note to the HRDDP complemented this procedural, proactive and preventive approach by offering concrete models of risk assessments, monitoring frameworks, and procedures for intervention.[86] The policy's approach is flexible as it applies in different contexts and to the specific mandates of the various UN entities that fall under the definition provided above.[87]

In a nutshell, the practical impact and the main contribution of the HRDDP in the applicability to IOM are its requirement to conduct a preventive balancing exercise to examine whether a real risk of a grave violation of refugee and human rights law exists. This risk assessment is a tool applicable when IOM lends support to states and domestic entities such as

[81] Helmut Philipp Aust, 'The UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces?' (2015) 20 Journal of Conflict & Security Law 61, 71.
[82] Ibid.
[83] HRDDP (n 18) 'Annex I Core Principles', para 1.
[84] Ibid.
[85] Ibid.
[86] HRDDP (n 18) 'Guidance Note' 7.
[87] Ibid.

border patrol and demands continuous diligence before and throughout the entire duration of the collaboration with the respective partners in case reliable information suggests a change in the basis of the risk assessment.

### 5.3.3 *Limitations of the Human Rights Due Diligence Policy*

On the other hand, the normative impact of the HRDDP on IOM is quite another question. First of all, it needs to be noted that the HRDDP is not an all-encompassing human rights tool, the application of which will ensure that no human rights violations take place. It is quite limited in substantive scope. It only means to prevent 'grave violations of international humanitarian law, human rights or refugee law' in the context of providing support to non-UN security forces. Accordingly, the HRDDP does not require the UN to monitor whether its cooperation with third parties leads to any form of human rights violation. Furthermore, the wording regarding situations in which the UN receives information that grave crimes occur on the part of the cooperative entity is somewhat evasive and weak. The UN entity must only 'intercede […] with a view to bringing those violations to an end'. No immediate and direct cessation of support is necessarily demanded. Besides, it is only the furthering of 'grave violations' of human rights law which is falling within the scope of the HRDDP. This should caution against too sweeping hopes for the impact that the HRDDP might have on the practical work of IOM, given that it applies to IOM in the first place.

Some scepticism about the importance of the HRDDP for the work of IOM can also be better understood against the background of the general characteristics of the notion of due diligence. This concept is as ubiquitous in international law as it is unclear. It has a different meaning in different sectoral regimes of international law.[88] At times, it is understood as a primary obligation of states and other subjects of international law in and of itself. At times it is referred to as belonging to the realm of secondary rules and laying out a standard of fault. In general terms, it is described as a standard of conduct necessary for the avoidance of probable or foreseeable undesirable consequences.[89] It also comes with different normative

[88] For a comprehensive analysis across different fields of international law, see the contributions in Heike Krieger, Anne Peters and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (Oxford University Press 2020).

[89] Carla Ferstman, 'Human Rights Due Diligence Policies Applied to Extraterritorial Cooperation to Prevent "Irregular" Migration: European Union and United Kingdom Support to Libya' (2020) 21 German Law Journal 459, 464.

dynamics attached depending on the context in which it is used. In some contexts, insisting on 'due diligence' might mean reducing substantive protection as only a procedural screening of compliance with the law is needed. In other parts, it might mean an enhancement of control – where no substantive limits for certain conduct exist. Often, due diligence standards establish obligations for the duty bearer to protect others against violations of the law committed by third parties. Thereby, due diligence requires positive action.[90] Nevertheless, due diligence is a notion with variable geometry and certainly no panacea to ensure human rights compliance of IOM.

## 5.4 Conclusion

This chapter focused on the UN Human Rights Due Diligence Policy's applicability as introduced in 2013 and concretized in the 2015 Guidance Note, to IOM and possible implications thereof. Our main argument in this context is that by signing the 2016 UN-IOM Agreement, IOM is indirectly bound by the principles underlying the HRDDP as far as it cannot act against its core principles. At the same time, given the policy's limitations, one should not put too much hope into the applicability of the HRDDDP to IOM as it only aims at preventing 'grave violations' of human rights in specific contexts.

Despite these deficits, one should keep in mind that the HRDDP is at least a relevant symbol and prominent tool which forces IOM to face the human rights implications of its conduct as promised in the 2016 UN-IOM Agreement. Scholars and activists aspiring to hold IOM accountable for its complicity in human rights violations and demand IOM's explicit commitment to human rights will need to take another pathway. Different avenues of reform are conceivable. We have mixed views on whether IOM should just adopt its own due diligence policy, especially if it would be coupled with a weak enforcement form. More promising would be the creation of specific IOM avenues of redress. A well-tested approach by now consists of creating an office of an Ombudsperson who could receive complaints from affected individuals who were subject to measures carried out by or in conjunction with IOM. The IOM system already counts with an Office of the Ombudsperson. However, its mandate is strictly limited to internal employment-related issues excluding persons seeking redress from outside the organization. Expanding the current jurisdiction

[90] Ibid.

of the IOM's Ombudsperson to including the right to make recommendations to external complaints on the organization's conduct to which IOM would need to give 'due regard' could constitute such an avenue. It is another question, of course, how realistic such a proposal is. But in terms of curing a legitimacy deficit of IOM, it would go a long way. However, it might also reduce the attractiveness of IOM as a service provider to member states in the migration context. Whether this would be a good or a bad thing is in the eye of the beholder.