IOM Unbound?

Obligations and Accountability of the International Organization for Migration in an Era of Expansion

Edited by Megan Bradley, Cathryn Costello, and Angela Sherwood

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IOM UNBOUND?

It is an era of expansion for the International Organization for Migration (IOM), an increasingly influential actor in the global governance of migration. Bringing together leading experts in international law and international relations, this collection examines the dynamics and implications of IOM's expansion in a new way. Analysing IOM as an international organization (IO), the book illuminates the practices, obligations, and accountability of this powerful but controversial actor, advancing understanding of IOM itself and broader struggles for IO accountability. The contributions explore key, yet often under-researched, IOM activities including its role in humanitarian emergencies, internal displacement, data collection, ethical labour recruitment, and migrant detention. Offering recommendations for reforms rooted in empirical evidence and careful normative analysis, this is a vital resource for all those interested in the obligations and accountability of international organizations, and in the field of migration. This title is also available as Open Access on Cambridge Core.

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FOREWORD

In 2018, the United Nations concluded the first ever global agreement governing international migration, a move that speaks to the pressing need for more just, humane and effective governance of how people move across national borders. With the adoption of the Global Compact for Safe, Orderly and Regular Migration, the International Organization for Migration (IOM) assumed the lead agency role of coordinating the implementation of this agreement, placing it firmly and formally in a privileged and powerful position within the global governance of migration. Even prior to IOM's new role, its reach and influence in the lives of people on the move, especially in the global south, was both immense and under-accounted for in literatures on international migration governance and administration. In my role as UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, its influence on the day-to-day operation of borders around the world was palpable. In some places it provided life-giving aid to migrants in desperate situations, in others it formed part of the infrastructure of racialized border enforcement, and in yet others it played both roles. This volume makes a timely and much-needed contribution to our understanding of IOM and its complex and far-reaching mandate, and is a required reading for anyone interested in the present and future of international migration.

This volume makes a convincing case that IOM is at a 'critical juncture', with an increasingly visible operational and normative role in global migration governance. As this volume illuminates, IOM's range of activities is wide and diverse. The contributors engage with obligations – legal, political, and ethical – and are situated in both international legal and international relations scholarship. Overall, they demonstrate that IOM (as other IOs) has a range of international legal obligations, and that in its activities it both integrates and transforms international standards, sometimes for the worse. They evocatively characterize its role as a norm 'breaker, taker, and shaper'.

The volume reminds us of the 'power and pathologies' of international organizations. Some of the challenges identified are common across IOs, in particular the challenge of legal accountability. As the editors note in their powerful introduction:

> [T]he notion that IOM has no obligations, particularly in relation to human rights and humanitarian norms, simply because it has sometimes failed to recognize and adhere to them, does not withstand scrutiny. This view also overlooks significant recent changes in IOM's articulated commitments, policy frameworks, field operations and relationship to the UN system. This volume takes these commitments seriously, offering careful analysis and reconsideration of longstanding assumptions.

However, acknowledgement of commitments alone is never enough – accountability and oversight mechanisms are crucial. To this end, contributors examine a range of forms of accountability, including a careful assessment of IOM's internal rules as a source of obligation, and assessment of IOM's internal accountability mechanisms. Contributors demonstrate that IOM is now bound by the UN Human Rights Due Diligence Policy (HRDDP) and the principles underpinning it. While in general, contributors share the view that IOM is now clearer about its own human rights obligations, at least one contribution suggests that IOM has diluted its commitments in the 2016 Agreement whereby it acquired its 'related status' with the UN, challenging the assumed reading of that agreement. The chapters in Part II on 'IOM in Action' offer powerful insights into IOM's practices and policies, across a range of diverse fields, including crisis operations; migration and climate change; data governance; ethical labour recruitment; humanitarian assistance; internal displacement; immigration detention; and 'assisted voluntary return.' As well as the range of empirical insights, the contributors also reveal how IOM engages with international legal standards across these diverse fields, often transforming or diluting them.

As wide ranging as this collection is, many of the practices highlighted suggest further critical perspectives that future scholarship and advocacy ought to explore. Indeed, one of the volume's strengths is precisely that it prompts further reflection and many ideas for future research trajectories. At least one issue that requires greater attention is mapping more fully the role of IOM in remaking border regimes in the global south. Another is deepening our theoretical and normative understanding of how IOM's work interplays with transnational border injustice, including racial injustice. Scholars, including Professor Bradley, have already begun to explore the historical imbrication of IOM and white settler

migration, including to apartheid-era South Africa. This issue and the racialised exclusion embodied in many of the 'migration management' practices IOM has supported also warrants further examination and critique. Finally, before the institution can truly turn the page on its past, the questions of compensation and reparation for the practices it has enabled must be addressed. Serious questions remain regarding how best to hold IOM accountable for its role in human rights violations and other injustices, and what it would mean (and whether it is possible) to remake it in a manner that advances genuinely just and humane borders.

International law on migration reflects a capacious conception of state sovereignty, that in turn enables states to ignore their ethical and political obligations to outsiders. This conception of sovereignty is written into IOM's constitutional DNA, in its remarkably deferential stance to state sovereignty over migration control. To the extent that this historically contingent and deeply problematic conception of statehood itself needs a fundamental rethink, in particular in order to repair colonial injustices, IOM too needs, at the very least, radical reform at the level of its Constitution. While the editors conclude with a reform agenda, I might push them and other scholars further to consider in future work, what an abolitionist praxis might mean and do where IOM is concerned. This volume, however, makes a truly powerful contribution to the diverse and even competing perspectives on IOM's future by providing an informed foundation from which to engage.

E. Tendayi Achiume
1 February 2023

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The publication of this edited collection would not have been possible without the support and hard work of many individuals, and the institutional support of several organizations and funders.

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The *RefMig* project, of which Professor Cathryn Costello is Principal Investigator, aims to examine the global refugee and migration regimes, casting a spotlight on the evolving role of the International Organization for Migration (IOM) therein. Dr Angela Sherwood worked as a postdoctoral researcher on the *RefMig* project from 2019 to 2020 at the Refugee Studies Centre, University of Oxford, before taking up a lectureship in Law at Queen Mary University in 2021. While at Queen Mary, Angela's contribution to the collection was funded by the UK Research and Innovation Economic and Social Research Council. Professor Bradley's work on the collection was also supported by the Social Sciences and Humanities Research Council of Canada. We are grateful to our funders for enabling our cross-disciplinary approach, bridging legal analysis, and empirical engagement with IOM practices.

Based on an initial stock-taking workshop held at the University of Oxford in February 2019 and our own literature review, we identified the gap in the scholarship on IOM that this volume seeks to fill: rigorous, empirically well-informed assessment of IOM taking into account its legal obligations and current institutional features, including its 2016

[*] ERC grant *RefMig* grant under the European Union's Horizon 2020 research and innovation programme (Grant Agreement ERC STG 2016 REF-MIG (716968).

Agreement with the UN. We also aimed to bring scholars together who are both informed by and contributing to the burgeoning scholarship on the accountability of international organizations (IOs) in international relations and international legal scholarship generally. Contributors were invited in light of diverse criteria: we sought to invite scholars at all career stages, including several who have made recent important contributions to the scholarship on IOs in general, and those with sectoral expertise on key fields of IOM activity, often inviting them to focus on IOM in particular for the first time. We are grateful to all our contributors, including E. Tendayi Achiume for her insightful foreword. The majority of contributors to this volume came together for an online authors' workshop in November 2021, and we thank them all for their commitment to this project, their patience, and the expertise and insight they brought to their contributions.

This collection also benefitted from skilled editorial and research assistance throughout. We are grateful in particular to Jara Al-Ali (University of Hamburg) and Mitali Agrawal (Hertie School) for their research and editorial assistance. In addition, we would like to thank the Cambridge University Press reviewers who shared their supportive feedback to further strengthen this project, as well as colleagues who commented on particular chapters and provided insights on particular issues, including Professors Alexandre Skander Galand, Miles Jackson, Orla Lynskey, Linette Taylor, and Ruvi Ziegler.

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We each owe a deep debt to our families. Most of this editorial work was completed during the COVID-19 pandemic and its aftermath, so we have relied on our partners and others to take on childcare and other carework, to enable our academic work.

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ABBREVIATIONS AND ACRONYMS

ACABQ	Advisory Committee on Administrative and Budgetary Questions
ACHPR	African Commission on Human and Peoples' Rights
ADB	Asian Development Bank
AHRLR	African Human Rights Law Report
AI	Artificial Intelligence
AKO	Analytics, Knowledge, and Output Quality
ARIO	Articles on the Responsibility of International Organizations
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
ASEAN	Association of South East Asian Nations
ATD/ATDs	Alternative(s) to Detention
AVR	Assisted Voluntary Return(s)
AVRR	Assisted Voluntary Return and Reintegration
CCCM	Camp Coordination and Camp Management
CCEMA	Climate Change, Environment and Migration Alliance
CEB	United Nations Chief Executives Board for Coordination
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERF	Central Emergency Response Fund
COVID	Coronavirus Disease
CRC	Convention on the Rights of Child
CREST	IOM Corporate Responsibility in Eliminating Slavery and Trafficking
CSO	Civil Society Organization
CSR	Corporate Social Responsibility
DCIM	Directorate for Combating Illegal Migration
DCM	Digital Content Management
DDP	DTM and Data Partnerships
DFID	United Kingdom's Department for International Development
DIAC	Australian Government Department of Immigration and Citizenship
DIO	Data Initiated Operations
DML	Data Models and Learning
DMM	IOM Department of Migration Management
DOE	IOM Department of Operations and Emergencies
DSC	Data Systems and Centralization

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DSEG	Data Science and Ethics Group
DTM	Displacement Tracking Matrix
ECHO	European Civil Protection and Humanitarian Aid Operations
ECHR	European Convention on Human Rights
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
ERU	Emergency Response Unit
ETM	Emergency Transit Mechanism
ETU	Ebola Treatment Units
EU	European Union
EUTF	EU Trust Fund for Africa
EVD	Ebola Virus Disease
FMPs	Flow Monitoring Points
GAL	Global Administrative Law
GATT	General Agreement on Trade and Tariffs
GCIM	Global Commission for International Migration
GCM	Global Compact on Safe, Orderly and Regular Migration
GCR	Global Compact for Refugees
GDP	Global Detention Project
GDP	Gross Domestic Product
GDPR	General Data Protection Regulation
GFMD	Global Forum on Migration and Development
GMDAC	Global Migration Data Analysis Centre
GPN	Global Policy Network on Recruitment
GPs	Guiding Principles
GSA	Geospatial Analytics
GSM	Global System Management
GU	Georgetown University
HBM	Humanitarian Border Management
HBMM	Health, Border, and Mobility Management
HDS	Humanitarian Development Solutions
HEC	Humanitarian Evacuation Cell
HRDDP	Human Rights Due Diligence Policy
HRW	Human Rights Watch
IACtHR	Inter-American Court of Human Rights
IASC	Inter-Agency Standing Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICEM	Intergovernmental Committee for European Migration
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IDC	International Detention Coalition

IDM	International Dialogue on Migration
IDP	Internally Displaced Person
IHRL	International Human Rights Law
ILC	International Law Commission
ILO	International Labour Organization
IO	International Organization
IOM	International Organization for Migration
IPCC	Intergovernmental Panel on Climate Change
IR	International Relations
IRIS	International Recruitment Integrity System
IRO	International Refugee Organization
ISIL	Islamic State in Iraq and the Levant
ITC	International Tin Council
ITC	International Trade Centre
JDC	Joint Data Center on Forced Displacement
JIPS	Joint IDP Profiling Service
LCG	Libyan Coast Guard
MCIIP	Management and Care of Irregular Immigrants Project
MCOF	Migration Crisis Operational Framework
MDN	Migration Development Nexus
MICIC	IOM Migrants in Countries in Crisis Initiative
MiGOF	Migration Government Framework
MMC	Mixed Migration Centre
MSI	Multi-Stakeholder Initiative
MVP	Data Management, Verification, and Procedures
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
NSAG	Non-State Armed Groups
OCHA	UN Office for the Coordination of Humanitarian Affairs
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
OIG	(IOM) Office of the Inspector General
OMF	Operations and Methodological Framework
OPCW	Organisation for the Prohibition of Chemical Weapons
OPEC	Organization of the Petroleum Exporting Countries
OSCE	Organization for Security and Cooperation in Europe
PCA	Permanent Court of Arbitration
PICMME	Provisional Intergovernmental Committee for the Movement of Migrants from Europe
POS	Project and Operations Support
PRDS	Progressive Resolution of Displacement Situations
RCA	Regional Cooperation Agreement

RWG	Returns Working Group
SAAS	Social Accountability Accreditation Services
SAI	Social Accountability International
SDG	Sustainable Development Goals
SIDA	Swedish International Development Agency
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNEP	United Nations Environmental Programme
UNESCO	United Nations Educational Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UNFPA	United Nations Population Fund
UNGA/GA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNMEER	UN Mission for Ebola Emergency
UNNM	UN Network on Migration
UNODC	United Nations Office on Drugs and Crime
UNRWA	UN Relief and Works Agency for Palestine Refugees in the Near East
UNSC	United Nations Security Council
UNSMIL	UN Support Mission in Libya
UNTB	United Nations Technology Bank for the Least Developed Countries
US(A)	United States of America
USAID	United States Agency for International Development
VCLT	Vienna Convention on the Law of Treaties
VHR	Voluntary Humanitarian Return
WEC	World Employment Confederation
WHO	World Health Organization
WTO	World Trade Organization

1

Introduction

IOM Unbound? Obligations and Accountability of the International Organization for Migration in an Era of Expansion

MEGAN BRADLEY, CATHRYN COSTELLO, AND ANGELA SHERWOOD

Since its founding in 1951, the International Organization for Migration (IOM) has changed almost beyond recognition. Created with a narrow, time-bound mandate to support emigration from the ruins of post-war Europe, the agency was purposefully established outside the United Nations (UN) with a small membership comprising 16 states. Seven decades later, IOM is now among the largest international organizations (IOs) worldwide, with 175 member states, a budget of more than two billion dollars annually, and over 15,000 staff.[1] IOM became a related organization in the UN system in 2016 by virtue of the 2016 Agreement Concerning the Relationship between the United Nations and the International Organization for Migration ('the 2016 Agreement').[2] It now undertakes a striking range of activities, broadly related to human mobility, from humanitarian relief, emergency evacuations, resettlement, returns, and border management to counter-trafficking, data collection, and policy development. IOM can currently be seen surveying and distributing aid to internally displaced persons (IDPs) in Ukraine, receiving Haitians deported from the United States, renovating and facilitating returns from abysmal detention centres in Libya, coordinating the UN Network on Migration, and supporting the

[1] IOM, 'IOM Snapshot: Dignified, Orderly and Safe Migration for the Benefit of All' (2021) <www.iom.int/sites/g/files/tmzbdl486/files/about-iom/iom_snapshot_a4_en.pdf> accessed 14 July 2022.

[2] 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 (hereafter 2016 Agreement).

implementation of the 2018 Global Compact on Migration, amongst numerous other roles.

Such activities have a profound impact on the rights and well-being of people on the move, many of whom are refugees and IDPs, and all of whom have human rights irrespective of their legal status. Strikingly, however, IOM has no formal protection mandate under its Constitution, an institutional feature often wrongly characterized as implying that it has no human rights obligations.[3] It also has a long-standing reputation for deference to states. This deference is built into its Constitution, which recognizes admissions decisions as falling 'within the domestic jurisdiction of States', and pledges that 'in carrying out its functions, [IOM] shall conform to the laws, regulations and policies of the States concerned'.[4] IOM's deferential posture is also amplified by its 'projectized' structure, whereby IOM has little core funding and is instead contracted to provide specific migration-related services. These features have propelled IOM's involvement in some migration management interventions in tension with, and indeed at times in clear violation of, human rights norms.[5] Yet in recent years, IOM has more actively integrated protection concerns into some of its field operations, adopted human rights discourses, and expressed commitment to international law.[6]

This is a critical juncture in terms of IOM's development and influence on the global governance of mobility. IOM's diverse and impactful roles raise pressing questions about the drivers and implications of its expansion, especially in terms of its obligations and accountability.

[3] Megan Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (Routledge 2020).

[4] 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), Article 1.3.

[5] See, for example, 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 21 July 2022; Asher Lazarus Hirsch and Cameron Doig, 'Outsourcing Control: The International Organization for Migration in Indonesia' (2018) 22 The International Journal of Human Rights 68; Azadeh Dastyari and Asher Hirsch, 'The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy' (2019) 19 Human Rights Law Review 435.

[6] On IOM's discourse, see, for example, Ishan Ashutosh and Allison Mountz. 'Migration Management for the Benefit of Whom? Interrogating the Work of the International Organization for Migration' (2011) 15 Citizenship Studies 21; Megan Bradley and Merve Erdilmen, 'Is the International Organization for Migration Legitimate? Rights-talk, Protection Commitments and the Legitimation of IOM' (2022) Journal of Ethnic and Migration Studies.

However, scholarship on IOM remains limited and has not entirely kept pace with these changes.[7] Most research on IOM comes from the field of migration studies and focuses on IOM's involvement in projects supporting states' interests in controlling movements from the global South to the global North – activities that are of critical importance but which do not on their own tell the full story of IOM's contemporary activities and influence. The fields of international law and international relations (IR) are well positioned to shed light on IOM but have rarely devoted significant attention to the organization, and very few general studies of IOs address IOM in any detail.[8] This book, uniquely, brings together IR and legal scholars with the goal of examining IOM *as an IO*, from both legal and political perspectives.[9] It concertedly addresses a wide range of IOM activities, including under-examined issues such as IOM's work in humanitarian emergencies, data collection, responses to internal displacement, migrant labour recruitment, and mobility related to climate change.

IOM's rapid expansion has raised the stakes in debates on its obligations and accountability. This volume aims to advance understanding of IOM itself as an increasingly powerful actor, while also using it as a prism through which to contribute to scholarship on IOs generally, particularly

[7] For an overview of scholarship on IOM, see Antoine Pécoud, 'What Do We Know about the International Organization for Migration?' (2018) 44 Journal of Ethnic and Migration Studies 1621. For exceptions engaging with these developments, see, for example, Martin Geiger and Antoine Pécoud (eds), *The International Organization for Migration: The New 'UN Migration Agency' in Critical Perspective* (Palgrave Macmillan 2020); Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (n 3).

[8] For notable exceptions in international law, see, for example, 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; Vincent Chetail, *International Migration Law* (Oxford University Press 2019); Vincent Chetail, 'The International Organization for Migration and the Duty to Protect Migrants: Revisiting the Law of International Organizations' in Jan Klabbers (ed), *Cambridge Companion to International Organizations Law* (Cambridge University Press 2022) 244–264; 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 20 July 2022, 1–24. For exceptions in the IR scholarship, see, for example, Nina Hall, *Displacement, Development and Climate Change: International Organizations Moving beyond Their Mandates* (Routledge 2016); Megan Bradley, 'The International Organization for Migration (IOM): Gaining Power in the Forced Migration Regime' (2017) 33 (1) Refuge 91.

[9] On IOM as an IO, see also, for example, Martin Geiger and Martin Koch, 'World Organizations in Migration Politics: The International Organization for Migration' (2018) 9 (1) Journal of International Organizations Studies 25.

burgeoning debates on IO accountability.[10] It does so by exploring the intersecting dynamics of institutional expansion, the gradual acknowledgement of obligations, and the key question of accountability mechanisms. The contributors are purposefully diverse in their approaches and perspectives. Some offer empirical explanations of IOM's development, while others offer normative analyses of IOM in relation to particular bodies of law, including international organizations law, international human rights, humanitarian and refugee law. Some authors concertedly bridge empirical and normative analysis, considering how the interplay between law and politics has shaped IOM's evolution and its contested contemporary position. The chapters are linked by a common approach of critical but constructive engagement with IOM's work and its place in the global governance of migration, taking seriously the notion that IOM has responsibilities not only to states but also to individuals. The diverse chapters also reflect the understanding that independent scholarship has a vital role to play in both illuminating institutional dynamics and identifying avenues for improvement. To this end, many conclude with reflections on the implications of the arguments offered for reform.

Much of the existing scholarship on IOM is highly critical, reflecting concerns about the ways in which IOM enables states' restrictive migration management goals. However, this scholarship tends to be unclear about the standards to which IOM can and should be held to account, and rarely grapples with the constraints and dilemmas it faces as an IO that has a distinct legal personality and a capacity for autonomous action, but is still largely governed by powerful states. In contrast, this book explicitly centres and wrestles with normative debates surrounding IOM as an IO. In particular, it refutes the misperception that IOM has no legal obligations simply because it was created outside the UN system and has no

[10] See generally Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (Cambridge University Press 2011); August Reinisch, 'Securing the Accountability of International Organizations' (2001) 7 Global Governance 131; Gisela Hirschmann, *Accountability in Global Governance: Pluralist Accountability in Global Governance* (Oxford University Press 2020); Monika Heupel and Michael Zürn, *Protecting the Individual from International Authority: Human Rights in International Organizations* (Cambridge University Press 2017); Carla Ferstman, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (Oxford University Press 2017); Kristina Daugirdas, 'Reputation and the Responsibility of International Organizations' (2015) 25 European Journal of International Law 991. On accountability of IOs in the field of migration, see Jan Klabbers, 'The Accountability of International Organizations in Refugee and Migration Law' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (University of Oxford Press 2021) 1157.

formal protection mandate. Admittedly, as many chapters evidence, IOM has certainly sometimes behaved *as if* it is unbound by the legal standards governing the fields in which it operates. Moreover, efforts to hold IOM accountable have been lacklustre, stymied both by deficits in IOM's own systems and by structural limitations on IO accountability generally. However, the notion that IOM has no obligations, particularly in relation to human rights and humanitarian norms, simply because it has sometimes failed to recognize and adhere to them, does not withstand scrutiny. This view also overlooks significant recent changes in IOM's articulated commitments, policy frameworks, field operations and relationship to the UN system. This volume takes these commitments seriously, offering careful analysis and reconsideration of long-standing assumptions.

This introductory chapter sets the stage for this contribution. First, it provides a brief overview of IOM's history and structure. Second, it offers a primer on IOM's entry into the UN system as a related organization in 2016, the consequences of which are examined in several chapters in this book. Third, it situates this collection in relation to the core concepts underpinning it, including IO obligations, accountability, and expansion dynamics. Fourth, it draws out key themes running through the volume, particularly in relation to grounding assessments of IOM in international law; understanding IOM's roles as a norm 'breaker, taker, and shaper'; analysing IOM as a protection actor; and developing more complex accounts of institutional change at IOM. Fifth, it maps out the structure, scope, and limitations of the book. Finally, it reflects on the legal and political implications of this volume, focusing on the need to recast the IOM Constitution to centre not only the organization's obligations to its member states but also to the migrants it claims to serve.

1.1 From Modest Beginnings to an Era of Expansion

IOM was established in Brussels in 1951 as the Provisional Intergovernmental Committee for the Movement of Migrants from Europe (PICMME). Shortly thereafter, its first Constitution was adopted, renaming it the Intergovernmental Committee for European Migration (ICEM).[11] Designed as a temporary, operationally focused institution, its creation was prompted by the need to resolve displacement and perceived overpopulation problems in post-war western Europe by promoting and facilitating the orderly migration and

[11] ICEM Constitution (n 4).

settlement of 'surplus populations', including displaced persons and refugees, to countries overseas. Its origins were distinctly shaped by US interests. Through ICEM's design, the United States and its allies sought to manage migration flows with full respect of sovereign rights, while delimiting membership (on US insistence) to non-Communist states by requiring that member states have a 'demonstrated interest in the principle of free movement of persons'.[12] As large-scale emigration from Europe declined, ICEM attempted to maintain its relevance by expanding its geographic scope and its portfolio of operational and logistical services. In recognition of its expanded global presence, its Council removed 'European' from its name in 1980.

In 1989, the agency was again renamed, emerging as a permanent institution, the International Organization for Migration (IOM). The IOM mandate, as articulated in its 1989 Constitution, is in some senses highly specific, but also vague and expansive.[13] Under its Constitution, IOM's purposes and functions are 'to make arrangements for the organized transfer of migrants … refugees, displaced persons and other individuals in need of international migration services'; to provide a range of related 'migration services', including in connection to voluntary repatriation; and to 'provide a forum … 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'.[14]

As Bradley discusses in Chapter 2, in her examination of the evolution of IOM's mandate and its identity as a 'multi-mandate' organization, the

[12] Article 2(b), ICEM Constitution (n 4). This provision remains in the 1989 Constitution of the International Organization for Migration, Article 2(b). On IOM's founding, see, for example, L. Lina Venturas (ed), *International 'Migration Management' in the Early Cold War: The Intergovernmental Committee for European Migration* (University of the Peloponnese 2015); Jerome Élie, 'The Historical Roots of Cooperation between the UN High Commissioner for Refugees and the International Organization for Migration' (2010) 16 Global Governance 345; Rieko Karatani, 'How History Separated Refugee and Migrant Regimes: In Search of Their Institutional Origins' (2005) 17 International Journal of Refugee Law 517. For IOM's own institutional account of its history, see Marianne Ducasse-Rogier, *The International Organization for Migration, 1951–2001* (International Organization for Migration 2002). On the history of IOM's involvement in colonial migration projects, see Megan Bradley, 'Colonial Continuities and Colonial Unknowing in International Migration Management: The International Organization for Migration Reconsidered' (2022) Journal of Ethnic and Migration Studies.

[13] IOM's current Constitution draws from the ICEM Constitution and several amendments adopted in 1987. On the IOM constitutional reforms, see Richard Perruchoud, 'From the Intergovernmental Committee for European Migration to the International Organization for Migration' (1989) 1 International Journal of Refugee Law 501, 504.

[14] IOM Constitution (n 4) Article 1.

IOM Constitution is a 'permissive' document in the sense that it identifies a swath of activities IOM *may* undertake without ruling out other possibilities.[15] Similarly, the Constitution identifies some populations with whom IOM may work, including refugees and displaced persons, but does not legally define these categories or limit IOM's engagement to these groups. In practice, IOM has come to embrace a remarkably broad operational definition of migrants, positioning it to work with a vast array of populations, including many who have never left their home country.[16] The Brussels Resolution through which the organization was founded recognized the significance of human rights norms to the new agency's work, indicating that its goal was to bring migrants 'to overseas countries where their services can be utilized in conformity with generally accepted international standards of employment and living conditions, with full respect for human rights'.[17] Strikingly, however, neither this reference to human rights nor humanitarian principles appear in the organization's Constitution, although the lion's share of IOM's budget and field staff is related to humanitarian action and 'post-crisis' support for migrants, including IDPs, who now comprise IOM's largest group of 'beneficiaries'.[18] In this way, as Chetail argues, the 'loosely defined terms of its mandate' under its Constitution 'has created a hiatus, if not a gulf, between what IOM can do and what it must do'.[19] Indeed, most of IOM's contemporary activities are not mentioned in the Constitution, at least not explicitly. What has survived is the notion of IOM as a service provider, and deference to states in migration decision-making, with the Constitution providing that IOM 'shall recognize the *fact* that control of standards of admission and the number of immigrants to be admitted are matters within the domestic jurisdiction of States, and, in carrying out its functions, shall conform to the laws, regulations and policies of the States

[15] See also Chetail, 'The International Organization for Migration' (n 8) 18–25.

[16] IOM defines a migrant as 'a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons'. Alice Sironi, Céline Bauloz and Milen Emmanuel (eds), 'Glossary of Migration' (3rd edn, IOM 2019) 132 <www.iom.int/glossary-migration-2019> accessed 20 July 2022.

[17] Resolution to Establish a Provisional Intergovernmental Committee for the Movement of Migrants from Europe' (Meeting of the Migration Conference, Brussels, 5 December 1951) Preamble <https://governingbodies.iom.int/sites/g/files/tmzbdl1421/files/council_document/0%20-%20Resolution%20to%20establish%20a%20Provisional%20Intergovernmental%20Committee%20for%20the%20Movement%20of%20Migrants%20from%20Europe%20%28headed%29.pdf> accessed 20 July 2022.

[18] Bradley, *The International Organization for Migration* (n 3) 4.

[19] Chetail, 'The International Organization for Migration' (n 8).

concerned'.[20] This constitutional deference is remarkable when compared to other IO constitutions, which typically explicitly reflect the orthodox international legal position of the binding nature of international norms (and hence their primacy over national laws),[21] or recognize domestic standards only to a limited extent. For example, ILO's Constitution defers to national laws only to the extent that they offer workers higher standards of protection.[22] If these constitutions refer to domestic jurisdiction at all, they do so only in defined fields. For example, the protection mandate of the Office of the UN High Commissioner for Refugees (UNHCR) refers to the need for additional state consent only where private actors are engaged.[23]

IOM's current 'era of expansion' has entailed dramatic growth on numerous levels, including in terms of IOM's membership, budget, employees, offices, activities, 'beneficiaries', and responsibilities. With these changes, IOM's influence has increased, fuelled also by new institutional partnerships, knowledge production activities, policy development efforts, and involvement in convening high-profile international dialogues and negotiations.[24] These developments have intensified dramatically over the last decade, but have their roots in the 1990s, when interest in international cooperation on migration increased, and IOM instituted

[20] IOM Constitution (n 4) Chapter 1, Article 1(3) (emphasis added).

[21] For example, Article XVI(4) of the 1994 Agreement Establishing the WTO indicates, 'Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.' WTO, 'Agreement Establishing the WTO' <www.wto.org/english/docs_e/legal_e/04-wto.pdf> accessed 20 July 2022.

[22] ILO Constitution (adopted 1919, entered into force 4 June 1934) Article 8: 'In no case shall the adoption of any Convention or Recommendation by the Conference, or the ratification of any Convention by any Member, be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation'.

[23] UNGA, 'UNHCR Statute: Annex to UN General Assembly Resolution 428 (V)' (14 December 1950) Article 1: 'The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities'.

[24] On these developments generally, see Susan F. Martin, *International Migration: Evolving Trends from the Early Twentieth Century to the Present* (Cambridge University Press 2014) 124–153. On IOM's knowledge production work, see, for example, Pécoud (n 7) and Shoshana Fine, 'Liaisons, Labelling and Laws: International Organization for Migration Bordercratic Interventions in Turkey' (2018) 44 Journal of Ethnic and Migration Studies 1743. On IOM's role in facilitating international dialogues and negotiations on

a series of projectization and decentralization reforms that positioned it to play a growing role on the international stage.[25] Under the projectization model, states contract IOM to provide services in the form of discrete projects, with more than 97 per cent of IOM funds linked to particular projects.[26] This model incentivizes IOM to behave as a highly entrepreneurial jack of all trades, logistically efficient, flexible, and responsive to states' priorities.[27] And yet, IOM is by no means unique amongst IOs in its dependence on donor funds; many other IOs are also highly dependent on earmarked or projectized funding.[28] This system amplifies donors' influence and leaves the agency with relatively modest resources – derived largely from project-based overheads – to support cross-cutting activities such as training, protection, gender mainstreaming, and policy development.[29] Although some reforms are underway to provide more regular funding to the core structure of the organization, IOM's donors generally consider the projectization model a resounding success, one that, in conjunction with its highly decentralized, operationally oriented structure, has kept the agency lean and nimble.[30] IOM clusters its diverse activities under the broad umbrella of 'migration management', a notion that suggests orderly, predictable migration may be 'beneficial for all', that is, for

migration-related issues, particularly the Global Compact on Migration (GCM), see Elizabeth G. Ferris, and Katharine M. Donato, *Refugees, Migration and Global Governance: Negotiating the Global Compacts* (Routledge 2019); Nicholas R. Micinski, *UN Global Compacts: Governing Migration and Refugees* (Routledge 2021).

[25] Martin (n 24).

[26] Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (n 3) 30–31.

[27] Ibid., 47–52.

[28] Erin R. Graham, 'Money and Multilateralism: How Funding Rules Constitute IO Governance' (2015) 7 International Theory 162, 183–187 (describing growth of restricted voluntary contributions in the UN system between 1990 and 2012); Kristina Daugirdas and Gian Luca Burci, 'Financing the World Health Organization' (2019) 16 International Organizations Law Review 299.

[29] On reforms to the funding of IOM's core structure, see IOM Standing Committee on Programmes and Finances, 'Draft Resolution on Investing in the Core Structure of IOM' (17 June 2022) IOM Doc S/30/L/4. On IO resourcing more broadly, see, for example, Klaus Goetz and Ronny Patz, 'Resourcing International Organizations: Resource Diversification, Organizational Differentiation, and Administrative Governance' (2017) 8 (5) Global Policy 5.

[30] Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (n 3) 40, 51. On donor dynamics at IOM, see Ronny Patz and 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).

states, migrants, and sending and receiving communities.[31] Yet, fuelled by a constant thirst for projects and a decentralized approach that leads to significant variation in what IOM does and how it operates in different contexts, IOM sometimes stands accused of undertaking states' 'dirty work' in controlling migration and papering over rights violations, particularly in relation to returns to unstable, insecure situations, and service provision in migrant detention centres.[32]

Critics often point to IOM's history, competitive bent, and institutional design to paint a picture of a Western-dominated, service-driven IO that, without a constitutionally assigned protection mandate, is naturally inclined to prioritize wealthy states' interests over individual rights. On this account, IOM's growth has been achieved on the back of its place outside the UN system, and its lack of obligations in relation to human rights and humanitarian norms.[33] While the ethical concerns underpinning such critiques remain prescient, they struggle to explain important recent developments, including the approval by IOM's governing Council of major institutional policies and frameworks recognizing and fleshing out IOM's normative obligations, the development of its internal policies and frameworks, and the key institutional development of its entry into the UN system in September 2016.[34]

1.2 A Watershed Moment? IOM Becomes a 'Related Organization' in the UN System

Although IOM was created outside the UN system, the organizations have entangled histories, with IOM and the Office of the UN High Commissioner for Refugees (UNHCR) working closely – if uneasily – together, and IOM

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

[32] See, for example, Hirsch and Doig (n 5); Ashutosh and Mountz (n 6); Rutvica Andrijasevic and William Walters, 'The International Organization for Migration and the International Government of Borders' (2010) 28 Environment and Planning D: Society and Space 977; Julien Brachet, 'Policing the Desert: The IOM in Libya beyond War and Peace' (2016) 48 Antipode 272; Fabian Georgi, 'For the Benefit of Some: The International Organization for Migration and Its Global Migration Management' in Martin Geiger and Antoine Pécoud, *The Politics of International Migration* (Palgrave MacMillan 2010).

[33] Alexander Betts, 'Institutional Proliferation and the Global Refugee Regime' (2009) 7 Perspectives on Politics 54; Ashutosh and Mountz (n 6).

[34] On IOM's entry into the UN system, see, for example, Megan Bradley, 'Joining the UN Family?' (2021) 27 Global Governance 251. Key IOM policies approved by the IOM Council include the 'Migration Crisis Operational Framework' (15 November 2012) IOM Doc MC/2355 and the 'Migration Governance Framework' (4 November 2015) IOM Doc C/106/40.

often operating in humanitarian emergencies as part of the UN country teams.[35] Since its founding, IOM staff and their UN counterparts have debated if IOM should join the UN system, whether as a specialized agency or in some other form.[36] IOM obtained observer status in the UN General Assembly in 1992, and in 1996 the organizations signed a cooperation agreement through which they pledged to 'strive for the maximum cooperation and coordination to ensure complementary action at headquarters and field levels'.[37] In practice, however, the IOM–UN relationship was often tense, given differences in approaches, normative commitments, and institutional culture. IOM's leadership recognized that it reaped some dividends from its place on the margins of the UN system, but also emphasized to its members the limitations of this liminal position, and suggested avenues to change it.[38] The member states demurred, however, with the United States' traditional position being, 'Never, over our dead body, will IOM join the UN'.[39]

This began to change, and rapidly, in 2014–2015, owing to a combination of timing, turf battles, and shifting perspectives on the value of IOM entering the UN system. Having invested considerably in improving IOM–UN relationships that were antagonized during IOM's aggressive expansion in the 1990s, IOM Director General Bill Swing (himself a former senior UN official) convinced member states to resurrect the dormant Working Group on IOM–UN Relations. At the same time, the perceived refugee and migration 'crisis' was gaining steam, which drew attention to serious gaps in the UN architecture for responding to migration, particularly operationally. Earlier discussions on IOM entering the UN system were stymied in part by the fact that IOM's membership was very limited. By this point, however, the vast majority of UN member states were also part of IOM. These states generally opposed the creation of a new UN migration agency to fill these gaps – a possibility the IOM bureaucracy was also eager to avoid. Instead, in November 2015, IOM's member states

[35] Élie (n 12); 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.

[36] Bradley, 'Joining the UN Family?' (n 34).

[37] UN ECOSOC, 'Cooperation Agreement between the United Nations and the International Organization for Migration' (25 June 1996) UN Doc E/DEC/1996/296, Article V(1) (hereafter 1996 Cooperation Agreement).

[38] Bradley, 'Joining the UN Family?' (n 34).

[39] Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (n 3) 29. For pre-2016 scholarly arguments on the merits of bringing IOM into the UN system, see, for example Kathleen Newland, 'The Governance of International Migration: Mechanisms, Processes, and Institutions' (2010) 16 Global Governance 331.

authorized Swing to approach the UN to 'develop with it a way in which the legal basis of the relationship between IOM and the United Nations could be improved'.[40] Swing proposed three options to UN Secretary-General Ban Ki-moon: IOM could become a UN specialized agency, a related agency in the UN system, or the agencies could negotiate a sui generis agreement. Historically, IOM leaders tended to argue in favour of IOM becoming a specialized agency of the UN, like UNESCO or the World Health Organization.[41] However, the agreement signed at the September 2016 UN Summit for Refugees and Migrants made IOM a related organization in the UN system. The timing was key to this decision. Member states wanted IOM to play a leading role in supporting the negotiation of the Global Compact for Migration (GCM) stemming from the September Summit. As a UN initiative, this mantle needed to be assumed by actors within the UN system – generating fresh urgency to bring IOM into the fold. Under the UN Charter, specialized agency status must be approved by ECOSOC and then the General Assembly. This was deemed too time-consuming; instead, related organization status was confirmed directly via the General Assembly in time for the September Summit.[42]

What this means, politically and legally, is a matter of some debate.[43] The UN Charter addresses specialized agencies, but it does not discuss the status of related organizations or define the 'UN system'. Addressing this gap, White contends that the 'UN "system" of organizations, organs and subsidiary bodies, agents, experts and employees is vast and diverse' and

[40] IOM Council Resolution 1309, 'IOM-UN Relations' (4 December 2015) IOM Doc C/106/RES/1309.

[41] Bradley, 'Joining the UN Family?' (n 34).

[42] Ibid.

[43] For differing perspectives, see Miriam Cullen, 'The Legal Relationship between the UN and the 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), as well as Guy Goodwin-Gill, '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 20 July 2022; Miriam Cullen, 'The IOM's New Status and Its Role under the Global Compact for Safe, Orderly and Regular Migration: Pause for Thought' (EJIL: Talk!, 29 March 2019) www.ejiltalk.org/the-ioms-new-status-and-its-role-under-the-global-compact-for-safe-orderly-and-regular-migration-pause-for-thought/> accessed 20 July 2022; Martin Geiger and Antoine Pécoud (eds), *The International Organization for Migration: The New 'UN Migration Agency' in Critical Perspective* (Palgrave MacMillan 2020); Chetail, *International Migration Law* (n 8) 366–397.

includes specialized agencies as well as related organizations.[44] The UN Chief Executives Board for Coordination (CEB), the highest-level coordination platform in the UN system, states that 'related organization' is 'a default expression, describing organizations whose cooperation agreement with the United Nations has many points in common with that of Specialized Agencies' but does not refer to the relevant articles of the UN Charter.[45] The related organizations include prominent IOs such as the World Trade Organization (WTO), the International Atomic Energy Agency, and the International Criminal Court, as well as several treaty secretariats. Like specialized agencies, related organizations are legally distinct from the UN itself, and are governed and funded autonomously by the principal organs of the UN. In this sense, Chetail argues, the suggestion that IOM has become the 'UN Migration Agency' is 'legally wrong' in that IOM is not technically a UN *agency*, even if it is in the UN *system*.[46] The UN Secretariat recognizes related organizations as functional parts of the UN system,[47] yet related organizations themselves vary considerably in how they interpret and present their relationship to the UN 'family'.

Notwithstanding these ambiguities, the 2016 Agreement establishes IOM as a formal, full member of all UN regional and country teams, as well as high-level UN governance bodies including the CEB, the UN Development Group and the Inter-Agency Standing Committee (IASC), the main platform for humanitarian response coordination.[48] Some suggest that the significance of these changes is limited, as IOM was already highly integrated into many UN mechanisms.[49] However, from IOM's institutional perspective, the Agreement provides the recognition,

[44] Nigel White, 'Layers of Autonomy in the UN System' in Richard Collins and Nigel White (eds), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (Routledge, 2011) 298, 305. See also Volker Rittberger, *Global Governance and the UN System* (United Nations University Press 2002) 3.

[45] UN CEB, 'Directory of United Nations System Organizations: Related Organizations' (2019).

[46] Chetail, *International Migration Law* (n 8) 366. On this issue, see also Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (4th edn, Oxford University Press 2021) 507–509.

[47] See, for example, UN, 'The United Nations System' (2019) <www.un.org/en/pdfs/18-00159e_un_system_chart_17x11_4c_en_web.pdf> accessed 20 July 2022.

[48] 2016 Agreement (n 2).

[49] 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 2 <https://ssrn.com/abstract=2841067> accessed 20 July 2022. See also Cullen, 'The Legal Relationship between the UN and the IOM after the 2016 Cooperation Agreement: What Has Changed?' (n 43).

standing and stability it craved, and removed barriers to its continued expansion. Although some UN officials expressed qualms, the move was vocally supported by member states and top UN officials including the Secretary-General and the heads of UNHCR and the UN Office for the Coordination of Humanitarian Affairs (OCHA).[50] As a practical matter, IOM is now widely recognized as the leading agency within the UN system on migration issues, and member states reportedly have little appetite for re-opening the question of its status.[51] Yet the conversation is not over: in 2017, UN Secretary-General Guterres argued that the IOM–UN relationship should be further consolidated by repositioning IOM as a specialized agency.[52]

The 2016 Agreement expanded IOM's legal obligations, while simultaneously exacerbating its constitutional ambiguities. The IOM's member states insisted that the agency retain its 'essential elements', including the notion that IOM is a 'non-normative organization with its own constitution and governance system, featuring a predominantly projectized budgetary model and a decentralized organizational structure', characterized by its 'responsiveness, efficiency, cost-effectiveness and independence'.[53] Accordingly, the 2016 Agreement noted these attributes, recognizing IOM as an 'independent, autonomous and non-normative international organization', yet also 'an essential contributor in the field of human mobility, [including] in the protection of migrants'.[54] In the 2016 Agreement, IOM also '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'.[55]

How, if at all, can these elements be reconciled? Notably, neither the 2016 Agreement nor the IOM Council has defined the term 'non-normative', which is not a legal term of art but was included on member states' insistence.[56] Some participants in the 2016 negotiations suggest

[50] Bradley, 'Joining the UN Family?' (n 34).
[51] Ibid.
[52] UNGA, 'Making Migration Work for All: Report of the Secretary-General' (12 December 2017) UN Doc A/72/643 para 73; Chetail, *International Migration Law* (n 8) 365.
[53] IOM Council Resolution 1309 (n 40) Article 2.a.
[54] 2016 Agreement (n 2), Article 2(2).
[55] Ibid, Article 2(5).
[56] Bradley, 'Joining the UN Family?' (n 34). On the difficulty of offering a coherent legal interpretation of this term, see Chetail, *International Migration Law* (n 8) 392–397.

that in this context the term carried a particular connotation: that IOM is not a forum for negotiating binding international standards on migration.[57] The reference to 'non-normative' is seemingly unique in major legal agreements pertaining to IOs, with most IOs embracing their normative functions, reflecting on them,[58] and seeking to secure funding to enable them further.[59] IO constitutional documents often specify and delimit some standard-setting role for the IO, whether that be to adopt recommendations or binding measures, develop policies or standards, or advocate for the ratification and effective implementation of particular international instruments.[60] Even IOs, such as the Organisation for Economic Co-operation and Development (OECD), which do not themselves have a role in creating binding international norms, nonetheless have constitutional functions that include the evaluation of domestic policies and practices in light of particular aims, and as such are understood by the IO itself as a 'normative role'.[61] While the IOM Constitution contains no express provisions on the organization's involvement in such processes, the reference in the 2016 Agreement characterising the IO as 'non-normative' is nonetheless rather question-begging in the context of the acknowledgement of its own obligations in the same 2016 Agreement, and the organization's leading role in normative processes, such as the Global Compact. IOM is routinely involved in the development of migration policies that are 'normative' in the sense that they often seek to guide the conduct of actors including IOM itself, states, NGOs, and in some cases private actors (for instance in the context of IOM's work on ethical labour recruitment by private agencies). IOM's recent organizational reform process suggests that it aspires to direct involvement in explicitly normative processes such as standard-setting and advocacy, despite the

[57] Bradley, 'Joining the UN Family?' (n 34).

[58] See, for example, WHO, 'Evaluation of WHO's Normative Function' (2017) <www.who.int/docs/default-source/documents/evaluation/evalbrief-normativefunction-15jan18.pdf?sfvrsn=bf320621_2> accessed 20 July 2022.

[59] Daugirdas and Burci (n 28) 326–327.

[60] See, for example Article 2 of the WHO Constitution: 'In order to achieve its objective, the functions of the Organization shall be … to propose conventions, agreements and regulations, and *make recommendations with respect to international health matters* and to perform such duties as may be assigned thereby to the Organization and are consistent with its objective' and 'to develop, establish and promote international standards with respect to food, biological, pharmaceutical and similar products' (emphasis added).

[61] To illustrate, in 2019, OECD published 'Better Criteria for Better Evaluation: Revised Evaluation Criteria Definitions and Principles for Use' (updating its 1991 Criteria). The 2019 Criteria are referred to within the document as playing a 'normative role'.

'non-normative' designation. For example, the IOM Headquarters is now identified as having responsibility for 'institutional policy, guidelines and strategy, [and] standard-setting', amongst other functions; the objective of the recently established Migration Protection and Assistance Division is 'to contribute to promoting and upholding the rights of migrants and their communities, including setting standards and advocacy and to manage migration in line with international legal and other internationally agreed standards and effective practices'.[62] Unsurprisingly, however, the use of the term 'non-normative' in such an important agreement has raised concerns that IOM may use this designation to sidestep its human rights and humanitarian obligations. This risk is amplified as the 2016 Agreement establishes no formal accountability mechanisms, leaving it to IOM's discretion whether to report to the UN through the General Assembly.[63] Many of the following chapters probe these and other tensions apparent in the 2016 Agreement, and the implications of this development.

1.3 Core Concepts

This book examines IOM in relation to three core concerns: IOs' obligations, accountability, and expansion dynamics. The chapters engage these concepts in different ways and to different degrees, with some, for example, focusing on IOM's obligations, both legal and political, and accountability structures, and others detailing the drivers of IOM's growth in particular areas. In this section, we do not, therefore, attempt to set out fixed definitions, but rather situate IOM and the collection in relation to ongoing debates on these interlinked issues.

1.3.1 Obligations

This book engages with legal as well as political obligations, looking at IOM's formal obligations as a matter of international law, arising from a variety of sources, including the legal agreements to which it is party, its own Constitution and internal rules, and the pertinent aspects of customary international law. These legal obligations partly overlap with the larger domain of its political obligations, as set out in its policies and programmatic commitments. Some contributors also examine the wider field of

[62] IOM, 'IOM Organizational Structure' <www.iom.int/iom-organizational-structure> accessed 20 July 2022; www.iom.int/migrant-protection-and-assistance

[63] Article 4 2016 Agreement (n 2).

its ethical obligations, considering the impact of its policies and practices on widely shared principles and values, such as 'ethical recruitment' and 'data responsibility'.[64]

IOM operates in fields regulated by various bodies of international law, including international migration law, human rights law, humanitarian law, labour law, refugee law, disaster law and transnational criminal law (for example as it relates to human smuggling and trafficking). As an IO, IOM has a legal personality and is a subject of international law. As the ICJ held in its 1980 Advisory Opinion on the *Interpretation of the Agreement of 25 Mary 1951 between the WHO and Egypt*, '[i]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties'.[65] Too often, however, the literature on IOM implies that the organization's legal obligations and its relationship to international norms can be understood simply in reference to its Constitution and its position outside the UN. The IOM Constitution is undeniably pivotal to understanding IOM's mandate and obligations. However, as Chetail stresses, 'The common complaint among scholars about the limits of its Constitution is not only ineffective but also misleading, as it fails to capture the potential of international law in addressing the responsibility of IOM towards migrants'.[66] A thorough account of IOM's legal obligations also requires careful consideration of all the sources identified in the ICJ 1980 advisory opinion, including *jus cogens* principles and other 'general rules',[67] as well as its internal rules, such as policies and frameworks

[64] For analysis of IOM's data work in relation to influential conceptions of data responsibility, see Anne Koch, 'The International Organization for Migration as a Data Entrepreneur: The Displacement Tracking Matrix and Data Responsibility Deficits' 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). On IOM's role in relation to ethical labour recruitment, see Janie Chuang, 'IOM and Ethical Labor Recruitment' 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).

[65] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (Advisory Opinion), [1980] ICJ Reports 73.

[66] Chetail, 'The International Organization for Migration and the Duty to Protect Migrants' (n 8) 244–264.

[67] While debates on the applicability of different principles of customary international law to IOs are ongoing, the notion that IOs are bound by *jus cogens* norms is more widely accepted – although this in turn raises the question of which principles are indeed *jus*

adopted by the IOM Council.[68] Indeed, the notion of the implied obligations of IOs is one ripe for further consideration, given that the doctrine of implied powers is so well established and enables IO expansion.[69] Accordingly, several contributors consider IOM's obligations and responsibility from the vantage point of developments in various bodies of international law, taking into account the implications of the International Law Commission (ILC) Articles on the Responsibility of International Organizations (ARIO) (2011).[70]

Regrettably, much of the existing scholarship on IOM wrongly regards IOM as having no human rights obligations simply because it has no formally articulated protection mandate in its Constitution. What does it mean for an IO to have a protection mandate, and how does this relate to IOM's obligations? The IASC offers an influential conceptualization of protection as 'all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law', particularly international human rights, humanitarian and refugee law.[71] As its operational activities may contribute to the protection

cogens. While we cannot address this issue in full here, there is strong support for the view that the prohibition of racial discrimination and torture, as well as refoulement to risk of torture, represent *jus cogens* norms. These principles are clearly applicable to IOM's field of work, and entail negative and positive obligations for the organization. See Chetail, 'The International Organization for Migration and the Duty to Protect Migrants' (n 8) 244–264. More broadly, see Jan Klabbers (ed), *Cambridge Companion to International Organizations Law* (Cambridge University Press 2022).

[68] On obligations stemming from IOs' internal rules and legal orders, see, for example, Pierre Klein, 'International Organizations or Institutions, Internal Law and Rules' *Max Planck Encyclopedia of Public International Law* (2019) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e503?prd=MPIL> accessed 20 July 2022; Laurence Boisson de Chazournes and Vassilis Pergantis, 'A Legal Framework on Internal Matters: Please Mind the Gap' in Jan Klabbers (ed), *Cambridge Companion to International Organizations Law* (Cambridge University Press 2022).

[69] Niamh Kinchin, 'With Great Power Comes Great Responsibility: Implied Obligations and the Responsibility to Protect' (2022) International Organizations Law Review.

[70] See Jan Klabbers, 'The (Possible) Responsibility of IOM under International Law' and Geoff Gilbert, 'The International Organization for Migration Humanitarian Scenarios' 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). On the obligations, responsibilities, and accountability of IOs from the perspective of the law of international organizations, see Jan Klabbers, *Advanced Introduction to the Law of International Organizations* (Edward Elgar Publishing 2015).

[71] IASC, 'IASC Policy on Protection in Humanitarian Action' (2016) <www.globalprotectioncluster.org/_assets/files/tools_and_guidance/IASC%20Guidance%20and%20Tools/iasc-policy-on-protection-in-humanitarian-action.pdf> accessed 20 July 2022.

of migrants' rights in practice, IOM now regularly asserts that it is a protection actor – a claim recognized in the 2016 Agreement with the UN.[72] The flip side, of course, is that IOM's activities may also undermine or violate migrants' rights. Rhetorically, IOM now recognizes its obligation to integrate protection concerns into its operations and has a bevy of internal policies and frameworks (some formally approved by the IOM Council) that address protection as a cross-cutting concern, and in relation to particular populations and operational issues.[73] Yet this differs from the sense in which some IOs have a formal, constitutionally inscribed mandate for legal protection in relation to particular populations. The most relevant comparison here is of course UNHCR, which serves as the custodian of international refugee law and is charged under its Statute with 'provid[ing] for the protection of refugees falling under the competence of his Office'.[74] When compared to UNHCR, IOM may seem odd in that it is not responsible for a particular convention or legally defined population, nor does it serve as a forum for the negotiation of binding new norms on migration. Whether IOM's Achilles heel is its lack of a formal legal protection mandate is a theme taken up throughout the volume, and addressed in more detail below.

[72] On IOM's deployment of human rights discourse, see Bradley and Erdilmen (n 6). In 2017–2018, IOM was subject to a major institutional performance assessment by the Multilateral Organisation Performance Assessment Network (MOPAN), a donor initiative that analyses IOs' effectiveness on a cyclical basis, in relation to agreed-upon benchmarks. Considering protection as a cross-cutting concern, the MOPAN assessment pointed to areas for improvement but ranked IOM's protection and human rights promotion performance as 'satisfactory', relative to established benchmarks. A survey of partners in the field conducted as part of the assessment also indicated that IOM's protection work is on balance well-regarded. As an assessment conducted on the behest of donor states, these conclusions should be taken with a grain – if not a spoonful – of salt. Nonetheless, they are noteworthy because they suggest that within important donor and practitioner communities, IOM is no longer seen as a major outlier or highly deficient regarding protection. See MOPAN, 'MOPAN 2017–2018 Assessments: International Organization for Migration' (2018) <www.mopanonline.org/assessments/iom2017-18/IOM%20Report.pdf> accessed 20 July 2022.

[73] For institutional evaluations addressing IOM's attempts to 'mainstream' protection, see, for example, Anders Olin, Lars Florin and Björn Bengtsson, 'Study of the International Organization for Migration and its Humanitarian Assistance' (SIDA Evaluations 2008) 1–96; MOPAN (n 72). On IOM's internal policies, including those related to protection, see 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).

[74] UNHCR Statute (n 23).

As well as being a duty bearer under international law, IOM's policies and practices may also support, or help undermine states' adherence to their international obligations. States often turn to IOM to strengthen their ability to effectively manage different forms of mobility within the parameters of international law but also, arguably, to circumvent their obligations towards vulnerable migrants in need of protection and assistance.[75] States cannot, as a matter of law, evade their own obligations by acting through IOs, and IOM and its member states of course insist that their activities are in line with international and domestic legal requirements.[76] However, IOM's work on issues such as returns and in migrant detention centres is normatively fraught and may result in human rights violations, which are either attributable to states, IOM itself, or more typically a combination of actors. Yet holding IOs responsible for their actions under international law has for the most part been 'eminently theoretical'.[77] Nonetheless, interest in this issue has grown alongside IO misconduct scandals, fiascos such as the UN's role in the cholera epidemic in Haiti, and massive protection of civilian failures in Rwanda and Bosnia.[78] Although criticized,[79] the ARIO represent a significant intervention in legal debates on IO responsibility, reflecting the fact that IOs are 'now seen as "mature" subjects of the international legal order susceptible to the application of a comprehensive regime of responsibility whenever they breach their – sometimes considerable – powers'.[80]

As Klein stresses, IOs 'incur international responsibility whenever conduct attributable to them amounts to a breach of an international

[75] See, for example, Hirsch and Doig (n 5); Dastyari and Hirsch (n 5) 435–465.

[76] Chetail, 'The International Organization for Migration and the Duty to Protect Migrants' (n 8) 244–264.

[77] Pierre Klein, 'Responsibility' in Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds), *Oxford Handbook on International Organizations* (Oxford University Press 2016) 1026.

[78] In relation to protection of civilians failures during UN peace operations in Bosnia and Rwanda, the UN has recognized its responsibility only on the political level. See Klein, 'Responsibility' (n 77) 1026–1047. On other significant cases, such as the UN-initiated cholera epidemic in Haiti, see, for example, Kristina Daugirdas, 'Reputation and Accountability: Another Look at the United Nations' Response to the Cholera Epidemic in Haiti' (2019) 16 International Organizations Law Review 11.

[79] See, for example, Armin von Bogdandy and Mateja Steinbrück Platise 'ARIO and Human Rights Protection: Leaving the Individual in the Cold' (2012) 9 International Organizations Law Review 67.

[80] Klein, 'Responsibility' (n 77). For an introduction to ARIO, see Mirka Möldner, 'Responsibility of International Organizations – Introducing the ILC's DARIO' in A von Bogdandy and R Wolfrum (eds), *Max Planck Yearbook of United Nations Law* (Vol 16, Brill 2012).

obligation *binding upon the organization* concerned'.[81] Determining which international obligations bind IOs is a matter of some contestation, in particular in the case of IOM, as its Constitution refers primarily to sovereign state control over admissions decisions, and does not clearly incorporate human rights and other pertinent international legal standards.[82] Although the 2016 Agreement and IOM's internal rules go some way towards clarifying IOM's legal obligations, the question of the precise scope of IOM's international legal obligations remains unsettled.[83] The crucial provision of the 2016 Agreement, in terms of IOM's international legal obligations, is Article 2(5), which provides that IOM 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'. Article 2(5) must be interpreted in light of the surrounding provisions. Article 2(3) provides, *inter alia,* that the UN 'recognizes that the International Organization for Migration, by virtue of its Constitution, shall function as an *independent, autonomous and non-normativ*e international organization in the working relationship with the United Nations established by this Agreement, noting its essential elements and attributes defined by the Council of the International Organization for Migration as per its Council Resolution No. 1309'.[84] It is notable that the previous cooperation agreement between the organizations, signed in 1996, did not mention the institutional independence of IOM, yet the 2016 Agreement does so expressly as a subparagraph of the same provision said to bring it under the UN umbrella.[85] IOM Council resolution 1309 provided the negotiating instructions for the 2016 Agreement. It directs that any new agreement should be made under the 'explicit condition' that certain 'essential elements' of the organization be preserved. As discussed above, these include that the 'IOM is the global lead agency on migration and is an intergovernmental, non-normative organization with its own constitution and governance system, featuring a predominantly projectized budgetary model and decentralized organizational

[81] Klein, 'Responsibility' (n 77).
[82] IOM Constitution (n 4) Article 1.3.
[83] On this issue, see Henry Schermers and Niels Blokker, *International Institutional Law: Unity within Diversity* (5th edn, Brill 2011); Klein, 'International Organizations or Institutions, Internal Law and Rules' (n 68).
[84] 2016 Agreement (n 2), Art. 2(3) (emphasis added).
[85] 1996 Cooperation Agreement (n 37).

structure'[86] and that IOM 'must' retain its 'responsiveness, efficiency, cost-effectiveness and independence'.[87] According to some scholars, IOM member states were concerned about potential 'mandate creep', towards a more protection-oriented agenda.[88] Such concerns may explain, at least in part, why the IOM Council insisted that in any new Agreement with the UN, the independence, mandate and efficiencies of IOM must be expressly retained.

Contributors to this volume offer varying interpretations of Article 2(5). Johansen, for example, suggests that the pledge to conduct its activities in line with the purposes and principles of the UN could signify that IOM commits to a wider set of human rights standards than it had previously, insofar as to 'promote and encourage respect for human rights' is among the purposes of the UN.[89] Yet, as others in this volume have also observed, it is unlikely that this clause adds much to pre-existing obligations. Cullen highlights the weakness of the 'due regard' standard, arguing that it merely establishes a procedural obligation requiring IOM to consider and weigh the norms in question. She argues further that in some ways IOM's previous agreement with the UN (that from 1996) entailed stronger obligations. Klabbers notes that 'at least it would seem to suggest that IOM has committed itself to act with a human rights sensibility'. In contrast, Aust and Riemer assume that the 'due regard' standard effectively renders IOM bound to respect human rights. They state 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)'.[90] In considering the effects of Article 2(5), it must be borne in mind that over the course of the past decade, IOM has advanced its human rights engagement through institutional policies such

[86] IOM Council Resolution 1309 (n 40) para 2(a).

[87] Other 'essential elements' include that IOM is 'an essential contributor in the field of migration and human mobility' and 'IOM must be in a position to continue to play this essential and experience-based role': IOM Council Resolution 1309 (n 40) para 2.

[88] On 'mandate creep' concerns pre-2016, see Hall (n 8) 100.

[89] Stian Øby Johansen, 'An Assessment of IOM's Human Rights Obligations and Accountability Mechanisms' 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).

[90] Helmut Philipp Aust and Lena Riemer, 'A Human Rights Due Diligence Policy for the 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).

as the 2012 Migration Crisis Operational Framework, the 2015 Migration Governance Framework, and since 2016 it has participated in programmes such as the UN Human Rights Up Front Initiative and the Human Rights Due Diligence Policy.[91] Policy is of course not legally insignificant. The internal rules of an organization, such as 'decisions, resolutions, and other acts of the organization adopted in accordance with those instruments, and established practice of the organization'[92] possess the potential to give rise to responsibility under international law.[93]

Like many IOs, IOM often acts jointly with national authorities. The imbrication of IO and member state responsibility raises particularly complex legal questions, with ARIO indicating that an IO 'may in certain circumstances incur responsibility as a consequence of its own conduct *in relation to* an internationally wrongful act of one or several of its members',[94] such as if an IO provides 'aid or assistance' in the conduct of an 'internationally wrongful act'.[95] IOM and its member states would, again, deny that any of their collaborative activities breach their obligations. However, IOM's involvement in activities such as training Libyan coast guard officials who intercept migrant vessels and refurbishing Libyan immigration detention centres raise complex questions about circumventing obligations and enabling rights violations, as these actors and facilities are linked to flagrant rights violations – abuses IOM itself has publicized and denounced.[96]

Beyond ambiguities in the source and scope of IOs' legal obligations, politically and ethically there is little consensus about the proper roles and obligations of IOs working on migration as a highly contested issue.

[91] Ibid; Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (n 3) 21–23.

[92] 'ILC Articles on the Responsibility of International Organizations' annexed to UNGA Res 66/100 (27 February 2012) UN Doc A/RES/66/100 (ARIO) Art. 2(b).

[93] Ibid Art 10(2).

[94] Klein, 'Responsibility' (n 77); ARIO Articles 14, 58.

[95] ARIO (n 92), Article 58.

[96] Dastyari and Hirsch (n 5). IOM, 'IOM Condemns Recent Violence in Libyan Detention Centre' (*IOM News-Global*, 5 March 2019) <www.iom.int/news/iom-condemns-recent-violence-libyan-detention-centre> accessed 20 July 2022; UNHCR and IOM, 'IOM and UNHCR Condemn the Return of Migrants and Refugees to Libya' (16 June 2021) <www.unhcr.org/uk/news/press/2021/6/60ca1d414/iom-unhcr-condemn-return-migrants-refugees-libya.html> accessed 20 July 2022. Amongst IOs, IOM is the largest recipient of money through the EU Emergency Trust Fund for Africa, which has bankrolled some of these interventions. See EU Emergency Trust Fund for Africa, '2020 Annual Report' 64 <https://ec.europa.eu/trustfundforafrica/sites/default/files/eutf-report_2020_eng_final.pdf> accessed 20 July 2022.

Indeed, while there has been extensive philosophical analysis of states' moral obligations in relation to diverse forms of migration, the duties of IOs such as IOM are remarkably under-examined.[97]

1.3.2 *Accountability*

Accountability eludes tidy definitions but is associated with the prevention and sanctioning of 'unethical, illegal, or inappropriate behaviour', particularly by authority figures, and ensuring adherence to legitimizing norms, standards and expectations.[98] IOs are subject to a repertoire of 'accountability regimes', which arise from the different ways they are evaluated and called upon to give an account of their actions.[99]

In global governance, the 'magic wand of accountability' is sometimes presented as 'a supervening force able to promote democracy, justice, and greater human decency through the mechanisms of transparency, benchmarked standards, and enforcement'.[100] Although the nebulousness of the concept has elicited scepticism in some quarters,[101] there has been a strong accountability turn in the study of IOs, both in legal scholarship and IR.[102]

[97] See, for example, David Miller and Christine Straehle (eds), *The Political Philosophy of Refuge* (Cambridge University Press 2020); Sarah Fine and Lea Ypi, (eds) *Migration in Political Theory* (Oxford University Press 2019).

[98] Edward Weisband and Alnoor Ebrahim, 'Introduction: Forging Global Accountabilities' in Alnoor Ebrahim and Edward Weisband (eds), *Global Accountabilities: Participation, Pluralism, and Public Ethics* (Cambridge University Press 2007). The literature on IOs frequently refers to Grant and Keohane's definition of accountability, which implies that 'some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met'. See Ruth Grant and Robert Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99 American Political Science Review 29.

[99] Jerry Mashaw, 'Structure a "Dense Complexity" Accountability and the Project of Administrative Law' (2005) 5(1) Issues in Legal Scholarship 1.

[100] Ibid.

[101] Peter Newell and Shaula Bellour, 'Mapping Accountability: Origins, Contexts and Implications for Development' (October 2002) 2 <https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/3930/Wp168.pdf?sequence=1&isAllowed=y> accessed 20 July 2022.

[102] See, for example Jan Wouters, Eva Brems, Stefaan Smis, and Pierre Schmitt (eds), *Accountability for Human Rights Violations by International Organisations: Introductory Remarks* (Intersentia 2010); Dan Sarooshi (ed), *Remedies and Responsibility for the Actions of IOs* (Brill Nijhoff 2014); Samantha Besson 'International Institutions' Human Rights Duties and Responsibilities for Human Rights: A Quiet (R)Evolution' (2015) 32 (1) Social Philosophy and Policy 244; Kristen E Boon and Frédéric Mégret 'New Approaches to the Accountability of International Organizations' (2019) 16 International Organizations Law

This scholarship emerges against the backdrop of concern that IOs enjoy legal immunities that sit uneasily with their often significant powers, and their involvement in activities that may violate the rights and compromise the interests of states, individuals and communities, often the very entities they purport to serve.[103] IOs are increasingly under pressure to demonstrate their accountability not only to states but also to individuals affected by their actions and to the 'international community' writ large, notwithstanding manifest tensions between what accountability to these different actors might involve.[104] Indeed, doing so has become crucial to the maintenance of IOs' authority and legitimacy, and preserving the notion that IOs serve public interests.[105]

In this connection, there has been widespread concern to ensure the legal accountability of IOs, in the sense of 'jurisprudence and legal sanctioning that is limited to rights that can be subjected to judicial review', particularly but not only for international human rights violations.[106] Yet, IO experiences and their pathways to enhanced accountability are uneven, with significant variation between organizations in how accountability has been understood and embedded institutionally. As currently configured, international organizations law, in particular on immunities, creates a serious gap in legal accountability.[107] Without systemic general reforms,[108] IOs' internal reforms are the main effective route to accountability. These emerge episodically, depending on a number of factors, such as coercion (by their member states); competition (market incentives); learning (changed beliefs); and emulation (of peers).[109] Interventions to

Review 1; Megan Donaldson and Surabhi Ranganathan, 'Accountability' in Jan Klabbers (ed), *The Cambridge Companion to International Organizations Law* (Cambridge University Press 2022); Pierre Schmitt, *Access to Justice and International Organizations: The Case of Individual Victims of Human Rights Violations* (Edward Elgar 2017); Rishi Gulati *Access to Justice and International Organisations: Coordinating Jurisdiction between the National and Institutional Legal Orders* (Cambridge University Press 2022).

103 See, for example, Ebrahim and Weisband (n 98).

104 Klaus Dingwerth and others, 'International Organizations under Pressure' in Klaus Dingwerth and others (eds), *International Organizations under Pressure: Legitimating Global Governance in Challenging Times* (Oxford University Press 2019).

105 Hirschmann (n 10); Heupel and Zürn (n 10).

106 Hirschmann (n 10) 5.

107 See generally August Reinisch (ed), *The Privileges and Immunities of International Organizations in Domestic Courts* (Oxford University Press 2013); Anne Peters and others (eds), *Immunities in the Age of Global Constitutionalism* (Brill 2015), 285–354.

108 See, for example Gulati (n 103).

109 See, for example, Heupel and Zürn (n 10); Ferstman (n 10); Stian Johansen, *The Human Rights Accountability Mechanisms of International Organizations: A Framework and Three Case Studies* (Cambridge University Press 2020); Kristen E Boon, 'The United Nations as

achieve improved IO accountability often materialize from a combination of bottom-up and top-down pressure, such as through alliances between civil society groups and governmental actors in a position to exert greater oversight and control.[110] While IOs broadly have struggled or simply refused to establish adequate mechanisms to deal with grievances related to their conduct, scholars have probed the optimal design of accountability mechanisms, taking into account criteria such as transparency, access, participation, fairness and access to justice.[111]

In terms of IOs working on migration and displacement, scholars have probed accountability concerns in relation to UNHCR, particularly in the context of camp administration.[112] IOM has, somewhat remarkably, not been extensively discussed in the accountability literature, despite its roles in several serious and well-documented cases involving human rights violations, such as in relation to its involvement in Australian offshore immigration detention.[113] To the limited extent that the existing literature on IOM broaches accountability, it tends to assume that the only or most pertinent form of accountability at play is vertical accountability of IOM as an agent towards its principals, especially donor states.[114] This book takes a more multi-faceted approach, integrating analysis of various forms and *fora* for accountability. Some chapters focus on formal legal responsibility and accountability, with Klabbers (Chapter 3) probing the ways in which the structure of international law itself limits the (possible) responsibility of IOM under international law. Other contributors consider the potential of internal accountability systems and accountability

Good Samaritan: Immunity and Responsibility' (2016) 16 Chicago Journal International Law 341.

[110] Jan Aart Scholte, 'Relations with Civil Society' in Jacob Katz Cogan, Ian Hurd, and Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (Oxford University Press 2016).

[111] Ruth W Grant and Robert O Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99 American Political Science Review 29, 30; Anne Peters, 'International Organizations and International Law' in Jacob Katz Cogan, Ian Hurd, and Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (Oxford University Press 2016); Ferstman (n 10); Johansen, *The Human Rights Accountability Mechanisms of International* (n 109).

[112] See, for example, Verdirame (n 10); Johansen, *The Human Rights Accountability Mechanisms of International* (n 109); Kristin Bergtora Sandvik and Katja Lindskov Jacobsen, *UNHCR and the Struggle for Accountability: Technology, Law and Results-based Management* (Routledge 2016).

[113] For a notable exception, see Klabbers, 'The Accountability of International Organizations in Refugee and Migration Law' (n 10). On IOM's role vis-à-vis Australian offshoring, and human rights violations in this regard, see Hirsch and Doig (n 5).

[114] For a valuable discussion of IOM's donor relations, see Patz and Thorvaldsdottir (n 30).

structures within the UN system. Still others concentrate on the potential role of civil society actors such as human rights advocacy NGOs in strengthening IOM's accountability (Sherwood and Bradley, Chapter 15), understood as a socio-political relationship in which accountability holders help establish and uphold standards, including through monitoring and sanctions.[115]

Debates about IO accountability typically unfold in relation to behaviour that is attributable to the organization or its employees, but which the agency clearly opposes as a matter of principle, such as sexual exploitation and abuse by peacekeepers or aid workers. In contrast, debates on IOM's accountability stand out in that they often pertain to activities that the organization actively *decides* to undertake, although they are the subject of more overt normative contestation and raise risks of human rights violations that could evoke accountability claims. For example, as Sherwood, Lemay and Costello discuss (Chapter 13), migrant detention practices generally raise serious human rights concerns, and detention is opposed by many human rights advocates, including within the UN system.[116] IOM encourages alternatives to migrant detention, but it also provides services in detention centres.[117] Should such interventions be welcomed as a means to temper violations associated with detention, or decried as enabling abuse for which IOM should be held to account? Such questions point to the complexity of accountability issues surrounding IOM, and the urgent need for careful attention to them, particularly as IOM continues to grow.

1.3.3 Expansion, Ethos, and Institutional Culture

In its 'era of expansion', IOM has grown in terms of its membership, staff, budget, and operations; it has accrued increased power, influence and stature, alongside heightened expectations, commitments and responsibilities.[118] Although IOM is sometimes presented as a confounding institutional outlier,[119] when viewed through the prism of the extensive IR literature

[115] Hirschmann (n 10) 5.
[116] Ashutosh and Mountz (n 6).
[117] See, for instance, IOM 'IOM Road Map on Alternatives to Migration Detention' (IOM 2020) <https://reliefweb.int/report/world/iom-road-map-alternatives-migration-detention-tools-series-n-1> accessed 21 July 2022.
[118] Bradley, 'The International Organization for Migration (IOM): Gaining Power in the Forced Migration Regime' (n 8).
[119] See, for example, Ashutosh and Mountz (n 6).

on IOs, the patterns, logics, and consequences of IOM's expansion can be apprehended with greater analytical clarity.[120] For example, building on insights from IR scholarship on historical institutionalism, Krueder-Sonnen and Tantow (Chapter 7) show how IOM strategically approached humanitarian crises as opportunities for growth and wielded the 'power of precedent' *ex-post* to formalize and normalize its role in executing new tasks. Relatedly, Hall (Chapter 8) traces how IOM established itself as a key player in migration and climate change, recasting understandings of its mandate and obligations. Bradley (Chapter 2) draws on theories of IO legitimacy and legitimation – that is, the strategies IOs deploy to cultivate the perception that they are compliant with socially requisite norms and values – to explain the puzzle of why IOM would commit to human rights and humanitarian principles when its *lack* of pesky normative obligations was long assumed to be one of its defining institutional advantages.[121]

More indirectly, the book also delves into the relationship between IOM's expansion dynamics, its institutional design and organizational culture,[122] illuminating the diverse ways in which IOM as an institution, its leaders and employees, understand, articulate and enact their own institutional and professional values.[123] Running throughout the book is

[120] Amongst this expansive IR literature, the project broadly is influenced by the sociological approach to understanding IOs as bureaucracies that are not simply the servants of states, but actors that strategically cultivate different forms of authority as they seek to exert greater influence of diverse aspects of global governance. Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Cornell University Press 2004). Relatedly, see Deborah D Avant, Martha Finnemore and Susan K Sell (eds), *Who Governs the Globe?* (Cambridge University Press 2010); Joel Oestreich (ed), *International Organizations as Self-Directed Actors: A Framework for Analysis* (Routledge 2012); and, from a legal perspective, Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press 2017).

[121] On this assumption, see, for example, Betts, 'Institutional Proliferation and the Global Refugee Regime' (n 33). On IO legitimacy and legitimation, see, for example, Jonas Tallberg, Karin Bäckstran and Jan Aart Scholte (eds), *Legitimacy in Global Governance: Sources Processes, and Consequences* (Oxford University Press 2018); Dominik Zaum (ed), *Legitimating International Organizations* (Oxford University Press 2013).

[122] For an overview of scholarship on IO culture, see, for example, Stephen C Nelson and Catherine Weaver, 'Organizational Culture' in Jacob Katz Cogan, Ian Hurd, and Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (Oxford University Press 2016).

[123] On this issue generally, see Jan Klabbers, 'Controlling International Organizations: A Virtue Ethics Approach' (2011) 8 International Organizations Law Review 285, 295; Guy Fiti Sinclair, 'The International Civil Servant in Theory and Practice: Law, Morality and Expertise (2015) 26 *European Journal of International Law* 747. Other relevant case studies include Galit Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (Stanford University Press 2012).

a recognition that IOM is neither static nor a monolith. Thinking about variations within the organization and shifts over time is critical to achieving a more robust and nuanced understanding of how and why IOM has changed – and the ways in which it has failed to do so. While IOM has historically had a reputation of being willing to 'do anything for money', IOM institutionally, and many within the organization, have a strong interest in challenging this view, although attempts to do so are constrained by entrenched ways of working and incentive structures.[124] Broadly, IOM's projectized, decentralized structure, coupled with its imprecise mandate, has cultivated an organizational culture that prizes flexibility, efficiency and entrepreneurialism, and typically devotes less attention to protection and related normative concerns.[125] As Koch (Chapter 9) demonstrates in her examination of IOM's emergence as a leading displacement 'data entrepreneur', these attributes have facilitated IOM's expansion into new and lucrative areas of work, but have sometimes left IOM ill-equipped to systematically and proactively address the ethical questions and normative responsibilities they entail. These tensions are also evident in Chuang's analysis (Chapter 10) of IOM's International Recruitment Integrity System (IRIS). Presented as an ethical labour recruitment framework, IRIS provides a springboard for IOM to expand into another major area of work, and suggests a commitment to migrant welfare and rights protection. Yet, Chuang argues, the initiative favours states' interests in controlling labour market access and perpetuates a trend towards reliance on incremental, soft law approaches rather than more robust and binding protections for migrant workers' rights. In this sense, IRIS reflects broader shifts and persistent tensions in IOM's organizational culture, which increasingly integrates recognition of migrants' rights and protection concerns, but does not yet have a cohesive approach to centring and addressing them in practice.

1.4 Key Themes and Tensions

IOM can be a lightning rod for disagreement. Some observers suggest IOM has served as the 'biggest driver' of international cooperation and recent normative developments on migration, and have urged IOM to

[124] On these dynamics see, for example, Philippe M Frowd, 'Developmental Borderwork and the International Organization for Migration' (2018) 44 Journal of Ethnic and Migration Studies 1656.

[125] MOPAN (n 72); Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (n 3) 39.

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take on more prominent and powerful roles.[126] Others have dismissed IOM as largely peripheral to global migration governance.[127] Still others are unshakably suspicious or decry IOM as an active threat to migrants' rights and wellbeing.[128] While united by an approach of critical but constructive engagement, the chapters in this volume also reflect tensions and even disagreements on questions ranging from IOM's proper place in global governance to its relationship with the UN and prospects for reform. Authors differ on matters such as whether IOM is really a humanitarian organization, the interpretation of the 2016 IOM-UN Agreement, and, more broadly, the extent to which international law provides a strong scaffolding for holding IOM accountable.[129] These divergent perspectives are to be welcomed, as they reflect the unsettled nature of debates regarding IOM specifically and the state of international law broadly. Notwithstanding these differences, important themes emerge across the chapters. This section elaborates on four key areas of convergence: grounding assessments of IOM in international law; IOM's roles vis-à-vis norms; its approach to protection; and the need for more nuanced explanations of institutional change at IOM.

1.4.1 Bound, Unbound? Grounding Assessments of IOM in International Law

IOM itself has sometimes suggested that it is not bound by key standards such as international human rights law.[130] This is no longer its position, although murkiness remains regarding IOM's interpretation of its legal

[126] Ferris and Donato (n 24) 70; Martin (n 24) 124–153; Newland (n 39).

[127] See, for example, Alexander Betts, 'Introduction: Global Migration Governance' in Alexander Betts (ed), *Global Migration Governance* (Oxford University Press 2011).

[128] See, for example, Goodwin-Gill (n 43); Georgi (n 32).

[129] For different perspectives on IOM as a humanitarian organization, versus as an IO working in humanitarian situations, contrast Bradley, 'Who and What Is IOM For? (n 73) and Gilbert (n 70). See Aust and Riemer (n 90) and Cullen, 'The Legal Relationship between the UN and IOM after the 2016 Cooperation Agreement: What Has Changed?' (n 43) for diverging perspectives on what 'due regard' requires vis-à-vis UN policies and relevant instruments in the 'international migration, refugee and human rights fields'. For varying perspectives on prospects for IO responsibility and accountability, see for example Klabbers, 'The (Possible) Responsibility of IOM under International Law' (n 70) and Johansen, 'An Assessment of IOM's Human Rights Obligations and Accountability Mechanisms' (n 89).

[130] See, for example, House of Lords European Union Committee, '11th Report of Session 2003–04: Handling EU Asylum Claims: New Approaches Examined' (HL Paper 74, 30 April 2004) paras 121–124, discussed in Goodwin-Gill (n 43).

obligations.[131] Furthermore, as discussed above, IOM, as an IO, is subject to a range of legal obligations. Nonetheless, this mistaken notion persists, hindering understanding of IOM and its duties, as well as opportunities to hold it accountable. One of the key contributions of this book is therefore to put this erroneous view to rest by examining IOM as an IO, from the vantage point of pertinent bodies of law including international organizations law, and international human rights, humanitarian and refugee law. Relatedly, the volume corrects the mistaken perception that IOM has no protection obligations simply because it does not have a legal protection mandate under its Constitution. To be sure, contestation continues over the parameters of IOM's obligations and protection responsibilities, but this conversation needs to move on from binary discussions of whether or not IOM is bound by international law, including in relation to protection, to a more nuanced discussion of the scope and implications of these obligations.

The idea also endures that states can and do use IOM to sidestep their own obligations under international law.[132] Yet, as discussed, while this is practically possible, it is a move international law seeks to thwart. International law may lack strong enforcement mechanisms, but states cannot escape their own obligations under international treaties by outsourcing migration 'dirty work' to IOM, nor can they legitimately contract IOM to provide services incompatible with international law. As Chetail stresses, 'as a matter of principle, the continuing opposability of States' duties under human rights law is well acknowledged in international jurisprudence'.[133] For example, the European Court of Human Rights has found that it 'would be incompatible with the purpose and object' of the European Convention on Human Rights if contracting states could be 'absolved from their responsibility under the convention' by outsourcing to IOs.[134] This again calls for a recalibration of assessments of IOM to

[131] For instance, IOM recognizes that it is bound by international human rights and humanitarian law in IOM, 'Humanitarian Policy: Principles for Humanitarian Action' (12 October 2015) IOM Doc C/106/CRP/20, welcomed by the IOM Council.

[132] See for example Hirsch and Doig (n 5); Brachet (n 32).

[133] Chetail, 'The International Organization for Migration and the Duty to Protect Migrants' (n 8) 256.

[134] Ibid; *Waite and Kennedy v. Germany*, no 26083/94 (ECtHR, 18 February 1999) 67. As Gulati (n 102) (p 162) reminds us, courts in Latin America anticipated this move. See, for example, *Washington Julio Efrain Cabrera v Comision Tecnica Mixta de Salto Grande* (CSJN, 5 December 1983) CSJN Fallos 305:2150, discussed in Raúl E Vinuesa, 'Argentina' in August Reinisch (ed), *The Privileges and Immunities of International Organizations in Domestic Courts* (Oxford University Press 2013) 19–21 (see for an analysis of Argentinian jurisprudence).

better account for the obligations attendant upon the agency and its member states under contemporary international law. It also calls for reconsideration of *why* states turn to IOM to provide particular, sensitive or controversial migration services, if in doing so they cannot – in principle at least – evade their own legal obligations. Does working through IOM lend a veneer of increased legitimacy to contentious if not overtly proscribed practices? Does it shield the contracting state from scrutiny? By scrutinizing longstanding tropes about IOM and anchoring assessments of the agency in contemporary international law, this work provides a foundation for making these essential shifts, and in turn navigating the new questions they raise.

1.4.2 IOM as a Norm Breaker, Taker, and Shaper

Beyond updating assessments of IOM in light of contemporary international law, understanding this increasingly powerful player also requires careful empirical examination of how IOM engages with international norms. The chapters point to how IOM occupies different roles in relation to international norms, operating as a norm breaker, taker, and shaper.

Many IOM staff have historically seen their organization as one that 'gets things done' on behalf of member states by preserving its flexibility and not getting bogged down by principles that are often seen as overly legalistic, academic and constraining.[135] IOM has played fast and loose with norms seen as sacrosanct by IOs such as UNHCR. For example, it has compromised the right to seek asylum by supporting Australia in implementing offshore deterrence policies and detention programmes; it also facilitated US efforts to curtail the exodus from Haiti after the 1991 coup by corralling would-be asylum seekers at Guantanamo Bay and facilitating an in-country processing programme.[136] Although it is now less overt, IOM still provides some services that break international norms – in spirit, if not in ways that would trigger formal legal accountability. This is evidenced, for example, in Gauci's discussion (Chapter 14) of how

[135] Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (n 3) 39, 62.

[136] Savitri Taylor 'Australian Funded Care and Maintenance of Asylum Seekers in Indonesia and Papua New Guinea: All Care But No Responsibility?' (2010) 33(2) University of New South Wales Law Journal 337; Elizabeth Ferris, 'Recurrent Acute Disasters, Crisis Migration: Haiti Has Had It All' in Susan F Martin, Sanjula Weerasinghe and Abbie Taylor (eds), *Humanitarian Crises and Migration: Causes, Consequences and Responses* (Routledge, 2014) 81; Ducasse-Rogier (n 12) 140.

IOM's assisted voluntary return (AVR) programmes sometimes fall short of international norms on voluntariness. Gauci traces how definitions and standards of voluntariness have eroded over time; in their analysis of IOM's role in detention scenarios, Sherwood, Lemay, and Costello (Chapter 13) demonstrate how IOM's AVR operational role and programming risks expanding arbitrary detention.

Yet as IOM aspires to occupy a more mature and increasingly visible place on the international stage, it is no longer in its interest to be an *enfant terrible* among IOs. Several chapters examine how IOM has attempted to jettison its reputation as a norm breaker and reposition itself as a dutiful norm taker, embarking on significant internal policy development processes through which it has (to some extent) mapped out its stance and commitments in relation to critical international standards and populations.[137] For example, Gilbert (Chapter 11) examines IOM's 2015 Humanitarian Policy, while Ní Ghráinne and Hudson (Chapter 12) analyse its frameworks on IDPs. IOM's uptake of international norms has been patchy but essential to its expansion, particularly its attempts to recast itself as a reliable and serious organization that can be trusted – not only by states but also by other IOs, NGOs and migrants themselves – to play a leading role in migration governance within and across borders. However, the extent to which such policies and commitments have affected IOM's operations in practice remains an open question. Undoubtedly, in some of its operations, IOM undermines its declared values; IOM is by no means alone amongst IOs in this sense.[138] Indeed, by articulating commitments to foundational international norms, IOM opens itself up to charges of hypocrisy if its behaviour does not match its purported principles. The possibility of organizational hypocrisy represents a counterintuitive sign of progress, at least in comparison to having no clear normative commitments to which it may be held accountable.[139]

IOM does not merely break or take norms. Despite its 'non-normative' designation, it is also extensively involved in shaping how existing norms are interpreted and applied, and advancing new (non-binding)

[137] For important analyses of IOs' reputational concerns, see, for example, Daugirdas, 'Reputation and Accountability' (n 78).

[138] This may be understood as a form of IO pathology, that is, bureaucratic dysfunctions that lead an 'IO to act in a manner that subverts its professed goals'. See Barnett and Finnemore (n 120) 8.

[139] On IO hypocrisy, see, for example, Avant, Finnemore and Sell (n 120); Catherine Weaver, *The Hypocrisy Trap: The World Bank and the Poverty of Reform* (Princeton University Press 2008).

norms.[140] IOs are often assumed to function as leading 'norm entrepreneurs' who play pivotal roles in introducing and (re)framing norms, and socializing states to accept them.[141] Yet IOM has long been dismissed as an outlier in this regard.[142] This is at odds with the fact that IOM has for decades assertively promulgated migration management norms intended to support states' claim to independent, sovereign control of entry and membership – arguably still the fundamental norm underpinning global migration governance.[143] However, IOM is now tentatively extending into other areas of norm entrepreneurship more closely connected to human rights, humanitarianism, and other norms associated with IOs as a 'force for good' in the world.[144] If promoting 'positive' norms such as human rights is a critical function of IOs, particularly in the UN system,[145] IOM is arguably now behaving something more like a quintessential IO, insofar as it rhetorically urges states to recognize and respect international laws related to displacement and other forms of migration, and shapes perceptions of how this may be achieved by working closely with states to implement interventions in a wide range of areas. IOM has helped consolidate and advance norms on the rights and well-being of migrant populations, such as in the context of the GCM and the Migrants in Countries in Crisis

[140] Ferris and Donato (n 24); Micinski (n 24).

[141] Finnemore and Sikkink identify norm entrepreneurs as 'agents having strong notions about appropriate or desirable behavior in their community' (Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 International Organization 896). UNHCR for examples serves as the key norm entrepreneur in the refugee regime, attempting to socialize states to recognize and adhere to international norms on the protection of refugees. On IOs' assumed leadership roles in norm entrepreneurship and socialization processes, see, for example, Asif Efrat, 'Professional Socialization and International Norms: Physicians Against Organ Trafficking' (2015) 21 European Journal of International Relations 647; Susan Park, 'Theorizing Norm Diffusion within International Organizations' (2006) 43 International Politics 342.

[142] See, for example, Sandra Lavenex, 'Multi-levelling EU External Governance: The Role of International Organizations in the Diffusion of EU Migration Policies' (2016) 42 Journal of Ethnic and Migration Studies 554.

[143] See, for example, Andrijasevic and Walters (n 32); Inken Bartels, '"We Must Do It Gently": The Contested Implementation of the IOM's Migration Management in Morocco' (2017) 5 Migration Studies 315.

[144] As Checkel has pointed out, studies tend to focus on norms that are perceived to be 'ethically good'. (Jeffrey T Checkel, 'The Constructivist Turn in International Relations Theory' (1998) 50 World Politics 324, 339. To be sure, many politicians and citizens consider sovereign control of borders to be ethically good, but many scholars are more sceptical or opposed to this view, which may help explain the limited attention migration management and border control norms have received within the IR literature on international norms.

[145] Guild, Grant and Groenendijk (n 8) 1–24.

Initiative (MICIC).[146] IOM's Director General now regularly joins with the heads of UN agencies to publicly denounce massive violations of migrants' rights, addressing situations such as mass deportations to Haiti and the 2021 crisis at the frontier of Belarus and Poland.[147] This practice suggests that IOM recognizes some public migrants' rights advocacy as part of its remit, and is acknowledged by UN leaders as a counterpart in these efforts.[148]

These activities underscore that while IOs' roles as norm standard-bearers have often been linked to their formal mandates, neither a designated protection mandate nor custodianship of a particular treaty are *necessarily* requirements for an IO to engage in such activities. Strikingly, little attention has been paid in IR scholarship to the ways in which IOs are themselves socialized in relation to different international norms, particularly if this is not part of the organization's historical or mandated identity.[149] Several chapters shed light on this issue, directly or indirectly, demonstrating how a desire to expand into new areas and be taken seriously as a reputable organization pushed IOM to expand its engagements as a norm taker and shaper – at the same time as its continued deference to states and lack of fully ingrained protection commitments mean it still functions as a norm breaker in some situations. While there is empirical evidence of IOM's shifting roles vis-à-vis international norms, whether these changes are normatively legitimate or desirable is yet another question that remains unsettled. However, many contributors argue that in the absence of constitutional provisions firmly tying the organization to international human rights and humanitarian law, and requiring it to prioritize protection, its interventions may too often dilute migrants' rights, rather than backstop and advance them. Certainly, there is a need for further analysis of these empirical developments in IOM's relationship with international norms, and their consequences, principled and practical.

[146] MICIC considered the implications of existing norms for assisting and protecting non-refugee migrants in crisis situations.

[147] Bradley and Erdilmen (n 6).

[148] Ibid. IOM's public interventions do not systematically take a migrant-centred, rights-based approach. Some aim for a purported 'neutrality' that shies away from direct criticism of state practices that lead to migrant abuses and deaths. For example, see Yussef Al Tamimi, Paolo Cuttitta and Tamara Last, 'The IOM's Missing Migrants Project: The Global Authority on Border Deaths', in Martin Geiger and Antoine Pécoud (eds), *The International Organization for Migration: The New 'UN Migration Agency' in Critical Perspective* (Palgrave Macmillan 2020).

[149] Efrat (n 141); Park (n 141); Megan Bradley, 'Realizing the Right of Return: Refugees' Roles in Localizing Norms and Socializing UNHCR' (2021) Geopolitics <https://doi.org/10.1080/14650045.2021.1994399> accessed 21 July 2022.

1.4.3 IOM as a Protection Actor

In refuting the notion that IOM has no protection obligations simply because it lacks a formal protection mandate, contributors trace the emergence and evolution of IOM commitments, policies and practices related to protection, and subject them to careful, critical analysis.[150] IOM's approach follows a path worn by other IOs that were also created without statutory protection mandates, but which have subsequently recognized that they have protection responsibilities, including an obligation to tailor their programming to address protection concerns. The World Food Programme and the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), for example, were not established with protection mandates although they have come to view themselves as protection actors and have adopted policies to underpin this stance.[151] Likewise, IOM now asserts that it is a protection actor, but to what extent has it gone beyond mere lip service to human rights and humanitarian principles, and created mechanisms to ensure their effective implementation? This volume suggests the record remains mixed, with IOM still struggling to integrate attention to and understanding of protection concerns across the organization and develop internal structures that incentivize and ensure accountability in relation to protection. Some of IOM's member states have pushed the organization to take a more active and reliable role in advocating for protection and integrating protection concerns into its interventions, but insist that IOM does not need a specialized, formal legal protection mandate akin to UNHCR's in order to undertake such work.[152] That said, the IOM Constitution does not securely anchor even

[150] In this volume, see, for example, Gilbert (n 70) on humanitarianism, Bríd Ní Ghráinne and Ben Hudson, 'IOM's Engagement with the UN Guiding Principles on Internal Displacement'; Cathryn Costello and Angela Sherwood, 'IOM's Practices and Policies on Immigration Detention: Establishing Accountability for Human Rights Violations?'; and Jean-Pierre Gauci, 'IOM and "Assisted Voluntary Return": Responsibility for Disguised Deportations?'.

[151] On WFP, see WFP, 'WFP Humanitarian Protection Policy' (2012) WFP Doc WFP/EB.1/2012/5-B/Rev.1. UNRWA asserts that it now has a formal protection mandate, conveyed upon it by the General Assembly, although the scope and sufficiency of this asserted mandate remain the subject of debate. See Lance Bartholomeusz, 'The Mandate of UNRWA at Sixty' (2009) 28 Refugee Survey Quarterly 452; Damian Lilly, 'UNRWA's Protection Mandate: Closing the "Protection Gap"' (2018) 30 International Journal of Refugee Law 444; Scott Custer, 'UNRWA: Protection and Assistance to Palestine Refugees' in Susan M Akram and other. (eds), *International Law and the Israeli-Palestinian Conflict: A Rights-Based Approach to Middle East Peace* (Routledge 2010).

[152] For analysis of such member state perspectives, see, for example, Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (n 3) 23–30.

the pragmatic, operational approach to protection espoused in IOM's discourse, leading many contributors to argue that the Constitution should be overhauled to clarify IOM's normative commitments, particularly its protection obligations.

1.4.4 Towards More Complex Accounts of Institutional Change at IOM

Critiques of IOM have focused primarily on the IOM bureaucracy, and often miss the mark insofar as they fail to consider why IOM behaves as it does, and the levers of power that could be applied to achieve change. This underscores the need for more nuanced accounts of institutional dynamics and organizational change within IOM. The IOM bureaucracy, its leadership, and its staff all have important roles to play in internalizing normative obligations and redressing accountability deficits, as discussed for example by Johansen (Chapter 4) in his assessment of IOM's internal accountability mechanisms. Yet a fulsome account of institutional change dynamics – and the strengthening of IOM's accountability systems – also requires attention to a wider range of actors, including member states, other IOs and civil society. Aust and Riemer (Chapter 5) and Cullen (Chapter 6) provide insight into how IOM's obligations and accountability structures have been shaped by its engagements with the UN system, including under the 1996 and 2016 IOM-UN relationship agreements, and IOM's involvement in UN human rights due diligence processes. Despite IOM's growing prominence, its increasingly explicit normative commitments, and its continued tendency to subvert some of these commitments in practice, IOM has rarely attracted sustained attention and critique from major international human rights advocacy organizations that serve as vital watchdogs for other IOs such as UNHCR.[153] Sherwood and Bradley (Chapter 15) analyse the causes and consequences of this curious disconnect, pointing to the important but underdeveloped role advocacy NGOs have to play in holding IOM to account for the norms it has taken on and encouraging continued institutional change.

[153] Critics often assume that IOM is routinely scrutinized and reprimanded by major advocacy NGOs. 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) for evidence to the contrary.

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1.5 Structure and Scope

This book is organized into two main parts. Part I considers how IOM's mandate, structure, and its place in the international system – under international law and in relation to the UN – affects its obligations and accountability. Melding historical and legal analysis with insights from theories on IO legitimation, Bradley (Chapter 2) provides a foundation for the following chapters by mapping the evolution of IOM's mandate and obligations, particularly in light of its expanded internal rules. Situating IOM in relation to international organizations law, Klabbers (Chapter 3) argues that difficulties surrounding attempts to hold IOM responsible for potential breaches of its obligations are attributable not only to IOM's own characteristics but even more so to the limitations of international law itself. Turning to questions of accountability from an internal institutional perspective, Johansen (Chapter 4) outlines IOM's current human rights obligations and assesses mechanisms through which IOM may be held to account for possible violations, considering questions of accessibility and claimant participation, neutrality, and potential remedial outcomes. The following pair of chapters grapple with the implications of IOM becoming a related organization in the UN system. Aust and Riemer (Chapter 5) examine how, as a result of the 2016 Agreement, IOM is now bound by the UN Human Rights Due Diligence Policy (HRDDP) and the principles underpinning it. Aust and Riemer warn against overstating the significance of this development, as the HRDDP aims only to avoid 'grave violations' of human rights, but highlights its symbolic significance. Cullen (Chapter 6) questions the legal significance of the shifts achieved through the 2016 Agreement compared to the 1996 Agreement, underscoring how IOM's position as a related organization rather than a specialized agency curtails opportunities to advance accountability, particularly through UN reporting mechanisms.

Chapters in Part II explore 'IOM in Action', examining the empirical dynamics and normative significance of IOM's dramatic expansion in different spheres. The first three chapters in this part trace and explain how IOM became a major player in the areas of crisis operations (Chapter 7), migration and climate change (Chapter 8), and data (Chapter 9). The next chapters offer more normative assessments of IOM's interventions and policy frameworks in relation to its expanded work in the fields of ethical labour recruitment (Chapter 10), humanitarianism (Chapter 11), internal displacement (Chapter 12), immigration detention (Chapter 13), and AVR (Chapter 14). These chapters underscore the significant normative

implications of IOM's expansion, and how IOM's obligations and accountability in these areas may be clarified and strengthened. Sherwood and Bradley (Chapter 15) close the volume by considering the potentially pivotal role of human rights advocacy organizations in this process.

Many of the contributors to this volume break new ground by concertedly analysing IOM in relation to different international legal standards. Yet the law does not and cannot provide comprehensive guidance on all the questions of obligations and accountability facing IOs generally or IOM in particular. Beyond legal obligations, it is also essential to think more broadly, in political, moral and ethical terms, about what IOM should and should not do. Addressing this gap requires further engagement with political theory and philosophy, as well as political analysis of the ways in which moral and ethical values shape institutional behaviour. While this is outside the aims of the present volume, this is an essential next step as debates on IOM's proper role in the global governance of migration continue.

1.6 Implications: Time for Constitutional Reform

As an increasingly influential but still under-examined IO, IOM represents a critical case study for IR and international law theories on IO dynamics and accountability. However, the implications of this project are not only scholarly. Many contributors recommend reforms on the basis of their analyses, ranging from revising IOM's projectized funding structure and recasting it as a specialized agency to shifting IOM's organizational culture to better inculcate human rights values and openness to external critique. Amongst these diverse suggestions, one recommendation stands out as fundamental: it is now time to revamp the IOM Constitution to better reflect and direct its expansive roles in contemporary global governance.[154]

This work suggests that constitutional reforms should achieve three core aims. First, they should update and clarify IOM's mandate. Second, they should clearly recognize that IOM is bound by and in its work must promote respect for international law, including international migration law, human rights, humanitarian and refugee law. Third, they should explicitly acknowledge and direct IOM to uphold its protection

[154] For related calls for constitutional reform, see, for example, Guild, Grant and Groenendijk (n 8) 1–24; Martin (n 24) 124–153; Chetail, 'The International Organization for Migration and the Duty to Protect Migrants' (n 8).

obligations to all those affected by its operations. This need not entail the establishment of a legal protection mandate for IOM in relation to a particular convention or body of law, in the way that UNHCR is charged with refugee protection and the International Committee of the Red Cross is the champion of international humanitarian law.[155] Rather, these reforms should provide clarity for IOM, its partners and 'beneficiaries' on its approach and commitments, creating greater predictability and reliability. The reform process should also provide clarity on the scope and limits of IOM's engagement in highly sensitive matters such as returns and immigration detention, and the correct interpretation of IOM's 'non-normative' designation. To be sure, constitutional reform would not be a silver bullet to remedy accountability deficits at IOM – a fact made all too clear by the complicity of IOs with more pristine normative mandates in flagrant and unremedied rights violations.[156] Constitutional reform is a high-risk undertaking in a political environment in which xenophobia and aggressive anti-migrant policies are widespread and rewarded. Yet tackling the gross mismatch between IOM's arcane Constitution and its new role as 'the global lead agency on migration' is essential to its continued maturation and meaningful accountability to all those affected by its work – including, most significantly, migrants themselves.[157]

Even without such reforms, IOM has obligations under international law to which it should be held to account – a task that requires strengthening formal mechanisms, looking beyond formal approaches to also reconfigure incentive structures and organizational culture, and encouraging greater engagement with external accountability holders. Recourse to indirect modes of holding IOM to account surely have a role to play also, such as turning to domestic and regional human rights courts, UN Treaty Bodies and indeed other UN mechanisms to indirectly scrutinize IOM's actions. In addition to other IOs and NGOs, researchers also have significant roles to play in holding IOM to account. Although IOM engages

[155] Linking a protection mandate for IOM to a single agreement is unlikely to be a successful approach because there is presently no overarching, binding international treaty on migration that could serve as a clear touchstone for IOM in this regard. While the Global Compact on Migration is a significant normative development, it is not binding; furthermore, given its focus on cross-border migration, it addresses only a subset of the populations with whom IOM engages, and who often face pronounced protection concerns.

[156] See, for example, Sandvik and Lindskov Jacobsen (n 112); Michael Barnett, *Eyewitness to a Genocide: The United Nations and Rwanda* (Cornell University Press 2012); Nico Schrijver, 'Beyond Srebrenica and Haiti: Exploring Alternative Remedies against the United Nations' (2014) 10 International Organizations Law Review, 588.

[157] 2016 Agreement (n 2).

many researchers in its networks and as consultants, it has often been less receptive or even hostile to independent scholarly critique.[158] Yet another consequence of IOM's era of expansion is that it will receive increased scholarly attention, much like other IOs such as the World Bank[159] and UNHCR.[160] From the perspective of the detached, censorious approach that has dominated past scholarship on IOM, our focus on critical but constructive engagement and organizational reform may seem quixotic. We hope, however, that it is welcomed by IOM as an opportunity for reflection, learning, and increased accountability – all vital aspects of continued institutional growth.

[158] See for example this exchange: Erlend Paasche, May-Len Skilbrei and Sine Plambech, 'What Happens after Victims of Trafficking Return to Nigeria?' (*Open Democracy,* 16 April 2019) <www.opendemocracy.net/en/beyond-trafficking-and-slavery/what-happens-after-victims-trafficking-return-nigeria/> accessed 21 July 2022; Frantz Celestin, 'Trying to Soften the Landing for Returning Migrants' (*Open Democracy*, 22 May 2019) <www.opendemocracy.net/en/beyond-trafficking-and-slavery/trying-soften-landing-returning-migrants/> accessed 21 July 2022; Erlend Paasche, May-Len Skilbrei and Sine Plambech, 'Do Not Dismiss the Voices of Returned Migrants: A Response to the IOM' (*Open Democracy*, 18 December 2019) <www.opendemocracy.net/en/beyond-trafficking-and-slavery/do-not-dismiss-voices-returned-migrants-response-iom/> accessed 21 July 2022.

[159] On the World Bank, see generally Ibrahim F I Shihata, *The World Bank Inspection Panel: In Practice* (Oxford University Press 2000); Yvonne Wong and Benoit Mayer, 'The World Bank's Inspection Panel: A Tool for Accountability?' in Jan Wouters and others (eds), *The World Bank Legal Review Volume 6: Improving Delivery in Development: The Role of Voice, Social Contract, and Accountability* (The World Bank 2015) 495; Kelebogilo Zvogba and Benjamin Graham, 'The World Bank as an Enforcer of Human Rights' (2020) 19 Journal of Human Rights 425.

[160] On UNHCR, see Sandvik and Lindskov Jacobsen (n 112); Ellen Reichel, 'Navigating between Refugee Protection and State Sovereignty: Legitimating the United Nations High Commissioner for Refugees' in Klaus Dingwerth and others (eds), *International Organizations Under Pressure: Legitimating Global Governance in Challenging Times* (Oxford University Press 2019); and Johansen, *The Human Rights Accountability Mechanisms of International* (n 111) 174.

PART I

IOM's Mandate, Structure, and Relationship with the UN

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2

Who and What Is IOM For? The Evolution of IOM's Mandate, Policies, and Obligations

MEGAN BRADLEY

2.1 Introduction

As with many other international organizations (IOs), the mandate and obligations of the International Organization for Migration (IOM) have changed considerably over time. Under its Constitution, IOM's explicit obligations are to its member states, rather than to migrants themselves; the organization has no formal mandate to protect migrants' rights. Its institutional features, in particular its dependence on project-based funding, marked deference to governments and involvement in some 'migration management' initiatives that sit in tension with human rights standards, raise concerns about IOM's obligations and accountability. These concerns are heightened as its profile and power in the international system have grown in recent decades.[1]

Integrating legal analysis and insights from international relations (IR) scholarship on the study of IOs, this chapter provides an introduction to the evolution of IOM's mandate and institutional obligations since its creation in 1951, as a foundation for examining the agency's accountability – a task taken up in more detail by other contributors to this volume. Much of the scholarly literature on IOM portrays the organization as devoid of normative obligations and available to unquestioningly advance states' interests in controlling migration, however nefariously.[2] Many critics charge that 'IOM is indeed not bound by the human rights frameworks that form the basis of the UN's work,' and suggest that the 'underlying issue' that drives IOM's engagement in risky and normatively vexed work such as returning migrants to insecure states is that 'IOM

[1] 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.

[2] See eg Fabian Georgi, 'For the Benefit of Some: The International Organization for Migration (IOM) and Its Global Migration Management' in Martin Geiger and Antoine Pécoud (eds), *The Politics of International Migration Management* (Palgrave Macmillan 2010).

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has no "protection mandate." Being situated outside the UN system, it is not committed to international human rights law.'[3] This chapter paints a more complex picture, considering IO mandates and obligations as both a legal *and* political matter. It charts how IOM's mandate and conceptions of its obligations – legal and political – have shifted inside and outside the organization.[4] In particular, it examines these changes in relation to IOM's identity as a 'multi-mandated' organization involved in humanitarian aid, development interventions and migration governance efforts, and its creation over the past two decades of a significant set of internal policies, frameworks and guidelines informing its work. Without minimizing the significant gaps and opacity that remain, the chapter explores changes in the organization's perceived purpose and obligations over time, expanding ideas about who and what IOM is for. IOM has gradually transformed from a logistics agency strapped to US interests to a global organization serving more diverse member states, with a still nascent but growing sense of its obligations, not only to states but also to people on the move – changes that have ultimately advanced IOM's efforts to secure its own position and accrue more influence in the international system.[5] Analyses of IOM and its roles in global governance must grapple with these developments, and critically assess their implications.

The chapter begins by situating this discussion in relation to analyses of IO mandates and obligations more generally. It then examines historical developments in IOM's formally articulated mandate and obligations, focusing on the Brussels Resolution through which the agency was originally established, and the revamping of its Constitution in 1987.[6]

[3] Antoine Pécoud, 'What Do We Know about the International Organization for Migration?' (2018) 44 Journal of Ethnic and Migration Studies 1621, 1625, 1632.

[4] That is, the chapter examines how notions of IOM's formal legal responsibilities have changed, as well as the ways in which shifting conceptions of IOM's mandate and obligations are manifested in broader policy frameworks and in the political positions of key players including the IOM bureaucracy and member states. The chapter thus has implications for understanding legal accountability in relation to IOM, and more wide-ranging political and advocacy efforts to hold IOM to account for its commitments.

[5] On these themes, see also Bradley, 'The International Organization for Migration (IOM): Gaining Power in the Forced Migration Regime' (n 1); Megan Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (Routledge 2020).

[6] 'Resolution to Establish a Provisional Intergovernmental Committee for the Movement of Migrants from Europe' (Meeting of the Migration Conference, Brussels, 5 December 1951) <https://governingbodies.iom.int/sites/g/files/tmzbdl1421/files/council_document/0%20-%20Resolution%20to%20establish%20a%20Provisional%20Intergovernmental%20Committee%20for%20the%20Movement%20of%20Migrants%20from%20Europe%20%28headed%29.pdf> accessed 10 May 2022.

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The chapter then maps out key shifts in conceptions of IOM's roles and responsibilities, as manifested in its own policies, examining how, as internal rules, these standards strengthen IOM's formal institutional obligations, particularly vis-à-vis protection.[7] Last, it draws on the IR literature on IO legitimacy and legitimation to help explain these shifts, and reflects on the implications of this analysis. In developing this account, the chapter draws on archival research and findings from a set of 70 in-depth interviews undertaken between 2015 and 2021 with IOM officials, member state representatives, UN agency staff, human rights advocates, NGO aid workers and independent experts.[8]

2.2 Interpreting IO Mandates and Obligations: Political and Legal Perspectives

Some scholarship on IOM proceeds from the legally incorrect premise that the organization's mandate and obligations are fully encapsulated in the IOM Constitution, and that to understand its responsibilities and the challenges posed by its role in the global governance of migration, one need look no farther than this rather peculiar document. Legally, however, neither IOs' mandates nor their obligations are reducible to the parameters of their constituent instruments. As the International Court of Justice (ICJ) recognized in its 1949 Reparations case, an IO's 'rights and duties … must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.'[9]

[7] This discussion is broadly informed by the Inter-Agency Standing Committee (IASC) definition of protection as 'all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law (i.e. International Human Rights Law (IHRL), International Humanitarian Law, International Refugee Law (IRL)).' While the chapter focuses primarily on human rights obligations, it also addresses humanitarian principles and obligations stemming from them. In taking this approach, the chapter builds on the recognition that humanitarianism and human rights protection are intertwined, but not identical, endeavours. However, clear commitments to rights protection are increasingly integral to claiming moral authority on humanitarian grounds. See IASC, 'IASC Policy on Protection in Humanitarian Action' (2016) <www.globalprotectioncluster.org/_assets/files/tools_and_guidance/IASC%20Guidance%20and%20Tools/iasc-policy-on-protection-in-humanitarian-action.pdf> accessed 10 May 2022; Michael Barnett, *Empire of Humanity: A History of Humanitarianism* (Cornell University Press 2011) 11.

[8] Key themes from these interviews were distilled through a grounded coding process. To facilitate open discussion of potentially sensitive institutional concerns, interviewees' identifying details have been removed. Archival research was conducted at UN Headquarters and the US National Archives and Records Administration.

[9] *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174.

Building on this view, the International Law Commission (ILC) defines IO constitutions broadly, as 'the constituent treaty together with the rules in force in the organization.'[10] Constitutional developments often do not involve formal revisions to IOs' founding treaties or other constituent instruments, but instead unfold through IOs' policies and practices and the ongoing interpretation of their constitutive instruments, particularly through the work of their governing bodies.[11] As Schermers and Blokker put it, most IOs have 'a "constitution," the interpretation of which changes with the development of society.'[12] As bureaucracies, IOs themselves shape this ongoing process of interpretation, helping to underpin their governance ambitions.[13]

Every IO has a 'legal order'[14] – even IOM, notwithstanding its vague Constitution and traditional 'cowboy' reputation. An IO's rules include its 'constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization.'[15] If the constitution is 'the skeleton of the legal order of an international organization, its decisions are its flesh and blood.'[16] IOs' constituent treaties typically empower the organization to develop more detailed rules needed for it to work. IOs' internal rules may address a wide range of issues including governance procedures, the creation of subsidiary organs and delegation of tasks to them, budget, finance and administration, as well as an IO's operational activities and field of responsibility – issues of particular

[10] ILC, 'Report of the International Law Commission on the Work in its 14th Session' (1962) GAOR 17th Session Supp 9 UN Doc A/5209, 7 Art. 3 para 3 Commentary; see also Henry G Schermers and Niels M Blokker, *International Institutional Law: Unity within Diversity* (5th edn, Martin Nijhoff Publishers 2011) 727.

[11] Schermers and Blokker (n 10) 954.

[12] Schermers and Blokker (n 10) 734.

[13] On the evolution of IO mandates and disjunctures between formal legal mandates and the politics of IO practice, see e.g. Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Cornell University Press 2004); Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press 2017); Niels M Blokker, 'The Governance of International Courts and Tribunals: Organizing and Guaranteeing Independence and Accountability' in Andreas Føllesdal and Geir Ulfstein (eds), *The Judicalization of International Law: A Mixed Blessing?* (Oxford University Press 2018).

[14] Schermers and Blokker (n 10).

[15] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986, not yet in force) Art 2.1 (j); see also 'ILC Articles on the Responsibility of International Organizations' annexed to UNGA Res 66/100 (27 February 2012) UN Doc A/RES/66/100 (ARIO) Art. 2(b) 20.

[16] Schermers and Blokker (n 10) 723.

importance to this discussion.[17] Understanding IOM's internal legal order thus requires looking not only at the IOM Constitution, but also at the resolutions of the IOM Council (IOM's governing body) and decisions of organs such as the Standing Committee on Programmes and Finance, particularly those pertaining to the interpretation of the Constitution and the development and adoption of new policies and frameworks intended to guide its work. It additionally requires examination of important agreements IOM has entered into, such as the 2016 Agreement concerning the Relationship between the United Nations and the International Organization for Migration.[18] Beyond their constitutions and internal rules, IOs also have obligations under general rules of public international law, which arguably include customary international law.[19] Although there is considerable debate over the implications of customary international law for IOs, *jus cogens* norms such as the prohibition of torture and non-refoulement of individuals at risk of torture are 'utterly binding for all subjects of international law,' including IOs, a position that is well-established in international jurisprudence.[20]

In interpreting IOM's mandate and obligations, particularly from a political or operational perspective, its identity as a 'multi-mandate' organization is especially significant. 'Multi-mandate' is not a legal term of

[17] Schermers and Blokker (n 10) 756–757, 761. Under the principle of speciality of international organizations, the scope of internal rules is limited in that an IO 'may not extend its activities beyond the competences conferred upon it (explicitly or implicitly) by its founders.' See Pierre Klein, 'International Organizations or Institutions, Internal Law and Rules,' *Max Planck Encyclopedia of Public International Law* (2019) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e503?prd=MPIL> accessed 10 May 2022. However, as IOs take significant latitude in interpreting which competencies have been conferred upon them, in practice their internal rules often broach a wider range of issues than would be assumed based on a narrow reading of constituent instruments.

[18] 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.

[19] For varying perspectives on the applicability of customary international law to IOs generally and IOM particularly, see Jan Klabbers, 'The (Possible) Responsibility of IOM under International Law', Stian Øby Johansen, 'An Assessment of IOM's Human Rights Obligations and Accountability Mechanisms' and Geoff Gilbert, 'The International Organization for Migration Humanitarian Scenarios' 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).

[20] Vincent Chetail, 'The International Organization for Migration and the Duty to Protect Migrants: Revisiting the Law of International Organizations' in Jan Klabbers (ed), *The Cambridge Companion to International Organizations Law* (Cambridge University Press 2022) 261; Klein (n 17) 3.

art, yet it is a vital concept in terms of understanding the different roles assigned to IOs, and the tensions that can arise between them.[21] Different global governance fields are underpinned and legitimized by particular principles and practices, some of which can conflict with one another; this is most obvious when an IO's work straddles humanitarianism and other sectors such as development. Single-mandate humanitarian organizations such as the World Food Programme focus on providing life-saving aid, whereas multi-mandated agencies such as UNICEF are involved in humanitarian assistance as well as development efforts. Single-mandate humanitarian agencies are often sceptical of close cooperation with national authorities, whereas this is integral to the modus operandi of most development actors.[22] While humanitarian narratives often present multi-mandated organizations as deviant, such actors are hardly exceptional, with UNICEF again serving as a case in point.[23] Juggling different elements of organizational mandates is a common concern and a defining challenge for IOM, as its work on migration straddles the humanitarian and development sectors, as well as related fields such as security. It is, however, rarely concertedly analysed as a multi-mandate actor.

2.3 IOM's Establishment and Constitutional Developments

According to the 1996 ICJ Nuclear Weapons Advisory Opinion, IOs' constituent instruments are, generally speaking, 'treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals.'[24] IOM is often assumed to have little by way of autonomy or obligations,

[21] On IO's efforts to legitimize themselves as they navigate such tensions, see e.g. Sarah von Billerbeck, '"Mirror, Mirror on the Wall": Self-Legitimation by International Organizations' (2020) 64 International Studies Quarterly 207; Sarah von Billerbeck, 'No Action without Talk? UN Peacekeeping, Discourse, and Institutional Self-Legitimation' (2020) 46 Review of International Studies 477.

[22] On multi-mandated actors, see e.g. Dorethea Hilhorst and Eline Pereboom, 'Multi-Mandate Organisations in Humanitarian Aid' in Zeynep Sezgin and Dennis Dijkzeul (eds), *The New Humanitarianism in International Practice: Emerging Actors and Contested Principles* (Routledge 2017) 85–102; Hugo Slim and Miriam Bradley, 'Principled Humanitarian Action & Ethical Tensions in Multi-Mandate Organizations in Armed Conflict' (World Vision 2013) <https://interagencystandingcommittee.org/system/files/legacy_files/Slim,%20WV%20Multi-Mandate%20Ethics%20FinalDraft.pdf> accessed 10 May 2022. Although much of the scholarship on multi-mandated agencies focuses on NGOs, similar challenges face multi-mandated IOs.

[23] Hilhorst and Pereboom (n 22) 85–86.

[24] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226.

given its vague constitutional mandate, lack of a formal protection role, dependence on project-based funding, and tradition of pronounced deference to its member states. Yet, as an IO with legal personality under its Constitution, IOM, like other IOs, has the 'capacity to have rights and obligations of its own.'[25] And, again like other IOs, the formal parameters of its mandate have evolved since the organization was established in 1951 as the Provisional Intergovernmental Committee for the Movement of Migrants from Europe (PICMME). This evolution reflects, in part, the agency of the organization and its staff, who have, over the decades, pushed to make the institution permanent and expand its geographic remit and the range of activities it undertakes. Similar processes have unfolded at other IOs, including those working in the field of human mobility.[26] Recognizing this agency is essential to any serious, politically engaged and empirically grounded conversation about IOM's obligations and accountability as an IO. If the organization were nothing more than an automaton robotically serving states, then it would be fruitless to critique IOM's own interpretation of its mandate and obligations, including to migrants themselves. Instead, this conversation could only usefully be had with its member states.

After World War II, millions of people were uprooted across Europe, while scores more were impoverished and unemployed, with little prospect of making a living in their communities. Western governments – particularly the United States – were concerned that these populations would be hotbeds for Communist infiltration, and believed international cooperation was needed to support the resolution of Europe's displacement and perceived 'surplus population' problem, including through migration to states in need of labour. Created in 1946, the International Refugee Organization (IRO) facilitated the resettlement of more than a million refugees from post-war Europe, but by the early 1950s it had come to be seen by its main benefactor, the United States, as costly, inefficient and insufficiently attuned to US foreign policy priorities, and was slated to close.[27] Although the International Labour Organization (ILO)

[25] Schermers and Blokker (n 10) 950. For analysis of the significant structural limitations of international organizations law vis-à-vis attempts to identify and advance the responsibility of IOs, particularly in relation to human rights and humanitarian norms, see Klabbers, 'The (Possible) Responsibility of IOM under International Law' (n 19).

[26] On the evolution of UNHCR's mandate, see e.g. Gil Loescher, *The UNHCR in World Politics: A Perilous Path* (Oxford University Press 2001); On the evolution of UNRWA's mandate, see e.g. Lance Batholomeusz, 'The Mandate of UNRWA at Sixty' (2010) 28 Refugee Survey Quarterly 452.

[27] Loescher (n 26) 41–43.

attempted to take over from the IRO as the main IO working on migration and displacement, their efforts were torpedoed by the United States at the ILO's 1951 Naples Migration Conference.[28] (UNHCR had been created in 1950, but as a protection-focused agency without operational capacities.) Washington hastily convened the Brussels Conference of 1951, where PICMME was created with the express purpose of taking over the IRO's operational activities and assets, including its fleet of ships.

Drafted by the United States, the Brussels Resolution formally established PICMME, setting it outside the framework of the United Nations, and specifying that membership was limited to 'democratic governments' with 'a demonstrated interest in the principle of the free movement of persons.'[29] These provisions effectively excluded Communist states, and were essential to meeting the demand of the US Congress at the time that any IO working on migration and displacement issues and receiving American financing could not have Communist members – a position that initially impeded UNHCR taking on significant operational roles.[30] Signed by 16 states, the Brussels Resolution articulated PICMME's functions, indicating in Article 2 that the organization was

> [T]o make arrangements for the transport of migrants, for whom existing facilities are inadequate and who could not otherwise be moved, from certain European countries having surplus population to countries overseas which offer opportunities for orderly immigration, consistent with the policies of the countries concerned.[31]

Article 4 of the Resolution stresses, 'among the migrants with whom the Committee will be concerned are included … refugees for whom

[28] Rieko Karatani, 'How History Separated Refugee and Migrant Regimes: In Search of Their Institutional Origins' (2005) 17 International Journal of Refugee Law 517; Jerome Elie, 'The Historical Roots of Cooperation between the UN High Commissioner for Refugees and the International Organization for Migration' (2010) 16 Global Governance 345; Megan Bradley and others, 'Whither the Refugees? International Organizations and "Solutions" to Displacement, 1920–1961' (2022) Refugee Survey Quarterly <https://doi.org/10.1093/rsq/hdac003> accessed 10 May 2022.

[29] 'Resolution to Establish a Provisional Intergovernmental Committee for the Movement of Migrants from Europe' (n 6); Karatani (n 28) 537.

[30] Elie (n 28) 350; Susan Martin, *International Migration: Evolving Trends from the Early Twentieth Century to the Present* (Cambridge University Press 2014) 125. This US position initially impeded UNHCR taking on significant operational roles.

[31] 'Resolution to Establish a Provisional Intergovernmental Committee for the Movement of Migrants from Europe' (n 6) Article 2. The original signatories were Australia, Austria, Belgium, Bolivia, Brazil, Canada, Chile, France, the Federal Republic of Germany, Greece, Italy, Luxembourg, the Netherlands, Switzerland, Turkey and the United States.

migration arrangements may be made between the Committee and the governments of the countries affording asylum.'[32] The Committee's mandate was geographically focused on the movement of people from Europe, and was set to expire within one year. While the fundamental aim was to enable migration that otherwise would not happen by setting up transportation, the signatories did not rule out PICMME's provision of other, related services, such as language training and settlement support.[33] Strikingly, although the Brussels Resolution does not explicitly mention protection, its preamble stresses that the aim of intergovernmental cooperation through PICMME is to move migrants 'to overseas countries where their services can be utilized in conformity with generally accepted international standards of employment and living conditions, with full respect for human rights.'[34] This acknowledgement of employment and human rights standards did not appear in the Constitution adopted by the organization's members only a few years later.

The first meeting of the PICMME governing Council occurred immediately on the heels of the Brussels Conference. Efforts immediately began to alter the new organization's mandate, in particular by extending its operations beyond one year; however, the majority of member states concurred that PICMME needed to demonstrate its utility, efficiency and logistical capacity before any extension could be approved.[35] PICMME proved its ability to move large numbers of migrants in short order on a limited budget, and its timeline was extended. Meanwhile, the United States led the drafting of a Constitution for the new agency, which changed its name in 1952 to the Intergovernmental Committee for European Migration (ICEM).[36]

[32] Ibid, Article 4.

[33] Richard Perruchoud, 'From the Intergovernmental Committee for European Migration to the International Organization for Migration' (1989) 1 International Journal of Refugee Law 501, 504.

[34] 'Resolution to Establish a Provisional Intergovernmental Committee for the Movement of Migrants from Europe' (n 6) Preamble.

[35] US Department of State, 'Confidential Report on the Conference on Migration Held at Brussels, Belgium from November 26 through December 5, 1951 and the Sessions of the Provisional Intergovernmental Committee for the Movement of Migrants from Europe Held at Brussels from December 6 through December 8, 1951' (January 1952) <https://history.state.gov/historicaldocuments/frus1951v04p1/d83> accessed 10 May 2022.

[36] On the early history of ICEM, see Lina Venturas (ed), *International 'Migration Management' in the Early Cold War: The Intergovernmental Committee for European Migration* (University of the Peloponnese 2015). On IOM's involvement in colonial migration projects, see Megan Bradley, 'Colonial Continuities and Colonial Unknowing in International Migration Management: The International Organization for Migration Reconsidered' (2022) Journal of Ethnic and Migration Studies.

ICEM's first director, Hugh Gibson, consulted with UN Secretary General Dag Hammarskjöld on the draft Constitution, which posed concerns for the UN, given, in Hammarskjöld's words, 'the danger of duplication and overlapping arising out of the growth of activities of non-United Nations organizations,' particularly in relation to 'the refugee problem.'[37] Before the Constitution was adopted, and despite clear resistance from ICEM's own member states, senior ICEM officials met with UN leaders to explore 'the possibility of more formal relationships between ICEM and the UN,' and 'promot[ing] a movement within ICEM to request Specialized Agency status with the United Nations or some special form of relationship, giving ICEM United Nations recognition and standing.'[38] However, in the assessment of senior UN staff, this would be unlikely and undesirable in light of the 'difficulty of reconciling the [draft] ICEM constitution with the UN Charter, [and] the political objections that would no doubt arise from certain quarters.'[39] These 'political objections' were a veiled reference to the exclusive character of ICEM membership. Adopted on US insistence, ICEM's policy of excluding Communist countries reflected the deployment of US refugee and migration policy as a plank in its broader, anti-Communist foreign policy agenda. Whereas the USSR insisted that those who remained displaced in Europe should be repatriated (even involuntarily) and attempted to block emigration from Eastern Europe, western powers favoured resettlement and sidestepped Soviet interference in this process by establishing ICEM outside the UN.

ICEM's Constitution was adopted on 19 October 1953 and came into force on 30 November 1954, preserving the exclusion of Communist countries and entrenching the committee's position outside the UN. As articulated in the 1953 ICEM Constitution, the organization's central objective was

> [T]o promote the increase of the volume of migration from Europe by providing, at the request of and in agreement with the Governments concerned, services in the processing, reception and first placement of migrants which other international organizations are not in a position to supply, and such other assistance to this purpose as is in accord with the aims of the Committee.[40]

[37] Letter from UN Secretary General Dag Hammarskjöld to ICEM Director General Hugh Gibson, 3 August 1953, UN Headquarters Archives File #391 ICEM, S-0369-0030-06.

[38] Letter from Martin Hill to UN Secretary General Dag Hammarskjöld, 4 August 1953, UN Headquarters Archives File #391 ICEM, S-0369-0030-06; Megan Bradley, 'Joining the UN Family?: Explaining the Evolution of IOM-UN Relations' (2021) 27 Global Governance 251.

[39] Ibid.

[40] ICEM Constitution (adopted 19 October 1953, entered into force on 30 November 1954), Article 1.1 (b).

ICEM and its member states understood the Brussels Resolution to establish and underpin a multi-mandate organization straddling humanitarian and development aspects of migration. Reflecting on the organization's first twenty years, Director General John Thomas wrote in 1971 that ICEM's 'founding fathers had two motivations, the one humanitarian on behalf of refugees, the other economic on behalf of nations, but there was no strict dividing line between the two.'[41] This framing suggests that even at its founding, IOM was invested in the notion that the rights and interests of states and individuals can be advanced in tandem, glossing over the ways in which these often conflict. Like the Brussels Resolution, the Constitution indicated that the Committee was to work with migrants and refugees, but did not define either group. Over its first decades of work, the ICEM Council extended the organization's lifespan, the regions in which it worked and the range of activities undertaken, all without formal constitutional modifications.[42]

In the late 1970s, ICEM faced diminished budgets and institutional decline. Its traditional lines of work dried up as emigration from Europe dwindled, and those migrating did not require the assistance of an international organization. Stretching beyond its mandated focus on Europe, ICEM sustained itself through involvement in various humanitarian operations, but its role in these situations was sometimes questioned owing to its rather esoteric formal mandate and its position outside the UN. ICEM's leadership began to agitate for constitutional changes that could place the organization on stronger footing as it competed for resources and influence. ICEM brought together a group of legal experts to prepare a report entitled 'Suggestions for amendments to the Constitution of the Intergovernmental Committee for European Migration,' which was circulated to member states in advance of the 39th session of the ICEM Council in 1976.[43] This report argued that new needs had emerged which differed from those facing the international community when ICEM was

[41] John Thomas, 'ICEM, Yesterday, Today and Tomorrow' in ICEM (ed), *Twenty Years Dedicated to the Free Movement of People* (ICEM 1971) 166.

[42] See 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) for an account of how, in more recent decades, IOM has steadily expanded its range of operations, particularly in humanitarian response.

[43] ICEM, 'Suggestions for amendments to the Constitution of the Intergovernmental Committee for European Migration' (1976) MC/1135.

created; these 'new needs were essentially humanitarian and called for services that no other organization could provide, but meeting them often meant relying on the good will of Governments to accept a liberal interpretation of the ICEM Constitution, respecting the spirit rather than the letter of its provisions.'[44] In line with this report, the ICEM leadership brought to the Council 'suggestions relating to possible changes in the Constitution,' which would facilitate bringing new members into the organization; they urged constitutional revisions to describe 'in detail ICEM's purposes and functions so that there would no longer be any question about the legal aspects of its intervention when ICEM was called upon to help in emergencies; dropping the word "European" from its name, and generally strengthening the organization.'[45] Yet ICEM's member states kyboshed the prospect of renegotiating the Constitution, suggesting that it would be a cumbersome process detracting from more urgent practical matters and the organization's traditional logistical strengths. In public comments at ICEM Council sessions, they also slapped the Director General's wrists for initiating the experts' review without first consulting the member states.[46]

2.3.1 *Constitutional Amendments*

Having been forcefully rebuffed by the member states, the organization's leadership let the question of revamping the Constitution rest for several years before relaunching the conversation in the 1980s, in a process that led to the entry into force in 1989 of a new Constitution and a new name: the International Organization for Migration.[47] Within the organization, this process was seen as a matter of bringing the Constitution into alignment with the roles it had already assumed in practice[48] – a view that reflects

[44] Report of the 39th session of the Council of the Intergovernmental Committee for European Migration, MC/1154, 10 March 1976. The IOM Migration Crisis Operational Framework reflected a similar rationale. IOM Council, 'Migration Crisis Operational Framework' (15 November 2012) IOM Doc MC/2355.

[45] Report of the 39th session of the Council of the Intergovernmental Committee for European Migration (n 44).

[46] Ibid, pp. 18–20.

[47] Over the course of the 1980s, the agency sustained itself through involvement in activities such as refugee resettlement and, increasingly, repatriation operations; in 1981 it had 29 members, growing to 35 by December 1989. Marianne Ducasse-Rogier, *The International Organization for Migration, 1951–2001* (International Organization for Migration 2002) 70–74.

[48] Perruchoud (n 33) 508–509.

IOM's longstanding entrepreneurial, expansionist ethos and a perception of legal standards as malleable rather than fixed.[49]

Perruchoud argues that the 'ultimate goal' of the constitutional revisions was 'undoubtedly to put the Organization in a position to meet the challenges in the field of international migration, and to provide an adequate legal framework within which to respond to contemporary and future trends and needs.'[50] The adequacy of this framework has, however, been pointedly questioned as it omits direct reference to migrants' rights, protection, or humanitarian principles.[51] The revised Constitution retains the notion that members should have 'demonstrated interest in the principle' if not the practice 'of free movement of persons' and keeps states firmly at the centre of migration decision-making, indicating that the 'Organization shall recognize the *fact* that control of standards of admission and the number of immigrants to be admitted are matters within the domestic jurisdiction of States, and, in carrying out its functions, shall conform to the laws, regulations and policies of the States concerned.'[52]

Indeed, IOM's fundamental obligations under its Constitution are to its member states, with Article 1.1 laying out the organization's mandate. It provides that:

> The purposes and functions of the Organization shall be:
>
> (a) to make arrangements for the organized transfer of migrants, for whom existing facilities are inadequate or who would not otherwise be able to move without special assistance, to countries offering opportunities for orderly migration;
> (b) to concern itself with the organized transfer of refugees, displaced persons and other individuals in need of international migration services for whom arrangements may be made between the Organization and the States concerned, including those States undertaking to receive them;

[49] Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (n 5).

[50] Perruchoud (n 33) 508–509.

[51] Significant external critiques of IOM's legal framework emerged in the 1990s as it began to play larger roles in contested areas such as returns. Amongst IOM member states and senior officials, reflections on the inadequacies of the organization's legal framework have gained pace more recently, as it has started to take on increasingly prominent operational and coordination roles.

[52] 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) Article 1(3) (emphasis added).

(c) to provide, at the request of and in agreement with the States concerned, migration services such as recruitment, selection, processing, language training, orientation activities, medical examination, placement, activities facilitating reception and integration, advisory services on migration questions, and other assistance as is in accord with the aims of the Organization;
(d) to provide similar services as requested by States, or in cooperation with other interested international organizations, for voluntary return migration, including voluntary repatriation;
(e) to 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 in order to develop practical solutions.[53]

Thus articulated, IOM's mandate is in some ways highly specific yet also remarkably vague. IOM sees its Constitution as 'permissive': that is, it identifies some of the activities it may undertake and points to or implies some of the sectors in which the organization may work, but the list is not exhaustive. Similarly, the Constitution identifies (but does not define) some of the groups with whom IOM may work, such as refugees and displaced persons, but IOM is not limited to interacting only with these groups.[54] While the ICEM Constitution mandated the organization to actively *promote* migration, the 1989 Constitution removes migration promotion from IOM's formal remit.[55] IOM has taken significant latitude in interpreting its Constitution, suggesting, for example, that the provisions of Article 1 bestow on IOM a humanitarian mandate – an interpretation accepted by its member states in several IOM Council resolutions.[56] It has also suggested that the Constitution sows the seeds for IOM involvement in the protection of migrants. This is a more controversial interpretation but one that, Chetail argues, is in line with the doctrine of implied powers, which suggests that every IO 'possesses implied powers that are additional to those explicitly granted by its constituent instrument and essential to fulfilling the purposes and functions of the

[53] IOM Constitution (n 52) Article 1.1.
[54] Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (n 5) 8.
[55] Perruchoud (n 33) 512.
[56] IOM Council, 'Migration Governance Framework Resolution' (4 December 2015) Resolution No. 1310 (C/106/RES/1310); IOM Council, 'Migration Crisis Operational Framework' (n 44).

organization.'[57] On this view, IOM is mandated to assist migrants, and assistance worthy of the name must involve protection.[58] Yet even if this interpretation is accepted, in fundamental ways the IOM Constitution remains a throwback:

> The loosely defined terms of its mandate has created a hiatus, if not a gulf, between what IOM can do and what it must do … The deafening silence of the IOM Constitution about the protection of migrants and their human rights is, indeed, astonishing. It is a historical anomaly that is no longer compatible with the profound transformation of IOM, its new responsibilities as a UN-related organization and, more broadly, the renewed commitment towards the human rights of migrants as acknowledged in the Global Compact for Migration.[59]

The doctrine of implied powers establishes that IOM can appropriately involve itself in migrant-protection efforts. However, the doctrine of implied powers arguably cannot, on its own, undergird a binding obligation for IOM to undertake positive actions to protect migrants' rights, although it is obligated not to actively violate migrants' rights.[60] Furthermore, it does not speak to the challenge of managing the different elements of IOM's mandate.

As interpreted by the IOM bureaucracy and the organization's member states, the Constitution establishes an overarching 'migration mandate' straddling multiple normative and operational spheres. Reflecting on the revamping of the IOM Constitution in the 1980s, Perruchoud suggests that

> In the past, there was sometimes a tendency to label ICM as a humanitarian body, because of its involvement in the migration of refugees and displaced persons; or as a development agency, because of its programmes for the transfer of qualified human resources. This apparent contradiction was potentially detrimental, as it veiled the common denominator of all its activities, namely, the migration of people.[61]

[57] Chetail, 'The International Organization for Migration and the Duty to Protect Migrants' (n 20) 250.

[58] Ibid.

[59] Ibid., 247–248. For further commentary on the limitations of the IOM Constitution, particularly in relation to human rights principles see e.g. 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; François Crépeau and Idil Atak, 'Global Migration Governance: Avoiding Commitments on Human Rights, Yet Tracing a Course for Cooperation' (2016) 34 Netherlands Quarterly of Human Rights 113.

[60] Chetail, 'The International Organization for Migration and the Duty to Protect Migrants' (n 20) 250–251.

[61] Perruchoud (n 33) 515–516.

Perruchoud argues that '[u]pdating the Constitution has helped to eliminate this dichotomy.'[62] However, many inside and outside IOM continue to perceive it as two agencies in one, a divided house that struggles to reconcile the implications of its multiple mandates. Although the 1989 Constitution provides little explicit direction to navigate this challenge, IOM has in recent years significantly expanded its set of internal rules, many of which attempt, with varying degrees of success, to speak to this issue.

2.4 IOM's Internal Policies: Shifting Conceptions of the Organization's Purpose and Obligations

Recognizing that constitutive instruments do not tell the full story of how IOs' responsibilities evolve and are understood in practice, this section maps out some key shifts in conceptions of IOM's mandate and obligations that go beyond the formal ascriptions of its Constitution, focusing on the flurry of internal policies, frameworks, and guidelines that it has developed over the past 20 years (see Table 2.1). IOM's internal policymaking moves are somewhat surprising as the organization has a reputation for shirking normative standards.[63] IOM officials have historically been reluctant to, in their view, bog the agency down with standards and protocols that could compromise operational efficiency and responsiveness.[64] These developments are also surprising because some IOM officials have, in recent memory, publicly rejected the notion that the organization has obligations under international human rights law – standards that are recognized and incorporated into many of IOM's recent internal policies. For example, as Goodwin-Gill points out, IOM representatives argued this point before the UK House of Lords EU Committee in 2004.[65] After introducing IOM's internal policymaking efforts, this section considers their significance from the perspective of international law and IR theories on the legitimation of IOs.

[62] Ibid.

[63] Antoine Pécoud, 'What do we know about the International Organization for Migration?' (2018) 44 Journal of Ethnic and Migration Studies 1621; Guy Goodwin-Gill, '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 22 April 2022.

[64] Interviews, IOM officials 1, 2 and 6 (2015); IOM official 17 (2019).

[65] Goodwin-Gill (n 63). This view has been echoed in migration studies scholarship on IOM, but is increasingly questioned by international law scholars, see e.g. Vincent Chetail, *International Migration Law* (Oxford University Press 2019); Chetail, 'The International Organization for Migration and the Duty to Protect Migrants' (n 20) 244–264.

IOM's body of internal policies (including guidelines and frameworks) has ballooned in recent decades, and particularly over the last ten years. Since 1998, at the headquarters level, IOM has developed at least 40 significant, publicly available institutional policies, with 31 of these adopted since 2012 (see Table 2.1). Recent IOM policies, frameworks and guidelines address a wide range of issues including migration governance, humanitarian action, migration crises, AVR, data, monitoring and evaluations, protection, accountability, prevention of sexual exploitation and abuse, and particular populations such as trafficked migrants, evacuees, IDPs and migrant workers.[66] In addition, IOM has adopted policies focused on management and human resources issues such as staff conduct and competencies, gender equity, risk management, and reporting and investigation of misconduct. Beyond these internal policies, which are to be implemented on an ongoing basis, IOM has additionally developed time-bound strategic planning frameworks, such as the IOM Strategic Vision: 2019–2023: Setting a Course for IOM, building on the 2007 IOM Strategy.[67] Discussed and in some cases formally approved by the IOM Council, these strategic frameworks are also important elements of IOM's increasingly extensive internal policy apparatus.

Many of IOM's early internal policies acknowledge international human rights law and humanitarian principles, but do not necessarily clearly commit the organization to abide by them. For example, the 2002 IOM Policy on the Human Rights of Migrants indicates that 'In all aspects of its work, IOM is committed to working towards effective respect for the human dignity and well-being of migrants.'[68] While the scope of the notion of 'working towards effective respect' is unclear, later in the policy IOM more forthrightly 'recognizes its responsibility to ensure that when providing assistance to migrants, its activities must obtain full respect for the rights of the individual, its activities must be

[66] Several of the chapters in this volume analyse particular IOM policies in detail. For example, on the 2015 Humanitarian Policy, see Gilbert (n 19). On the 2017 IOM Framework for Addressing Internal Displacement, see Bríd Ní Ghráinne and Ben Hudson, 'IOM's Engagement with the UN Guiding Principles on Internal Displacement' 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). On IOM's policies on accountability and misconduct, see Johanson (n 19).

[67] IOM, 'Strategic Vision: Setting a Course for IOM' (15 November 2019) IOM Doc C/110/INF/1; IOM, 'IOM Strategy' (9 November 2007) IOM Doc MC/INF/287.

[68] IOM, 'IOM Policy on the Human Rights of Migrants' (13 November 2002) IOM Doc MC/INF/259 Section I para 3.

non-discriminatory and must not diminish the human rights of others.'[69] While the language used in some of IOM's more recent internal policies is still ambiguous, it is more direct in others. The most important of IOM's recent, member state-approved internal policies include the 2012 Migration Crisis Operational Framework (MCOF) and the 2015 Migration Government Framework (MiGOF). The MiGOF lays out 'the essential elements for facilitating orderly, safe, regular and responsible migration.'[70] 'Adherence to international standards and fulfilment of migrants' rights' is the first of the MiGOF's three foundational principles.[71] The MCOF's goal is to identify the links between IOM's different interventions in emergency settings, such as camp coordination and camp management, the provision of emergency aid and shelter, evacuations and border management.[72] Considerably more explicit than the MiGOF, the MCOF states that IOM is '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.'[73] Through IOM Council resolutions, IOM's member states unanimously welcomed both the MCOF and the MiGOF, and requested the Director General to apply these frameworks and report regularly to the Council on this process.[74] These documents have become cornerstones of IOM's subsequent internal policymaking activities, informing the creation of additional standards focused on more specific operational challenges and populations.

Alongside these policies, IOM has produced an extensive series of handbooks, guides, manuals and toolkits, many of which incorporate and address the implementation of these internal policies as well as relevant external standards.[75] In addition to these handbooks and manuals, briefs

[69] Ibid, Section II para 4.
[70] IOM Council, 'Migration Governance Framework' (4 November 2015) IOM Doc C/106/40.
[71] IOM Council, 'Migration Governance Framework' (n 70).
[72] IOM Council, 'Migration Crisis Operational Framework' (15 November 2012) IOM Doc MC/2355.
[73] Ibid, para 11.
[74] IOM Council, 'Migration Crisis Operational Framework Resolution' (27 November 2012) Resolution 1243 IOM Doc MC/2362; IOM Council, 'Migration Governance Framework Resolution' (n 56).
[75] See for example IOM, 'IOM Project Handbook' (2011) <https://publications.iom.int/system/files/pdf/iom_project_handbook_6feb2012.pdf> accessed 10 May 2022; IOM, 'IOM Emergency Manual' (2016) <https://ctic.iom.int/en/resources/iom-emergency-manual>

such as the IOM Protection Portfolio – Crisis Response map out IOM's internal policies as well as relevant standards developed by the UN, the International Committee of the Red Cross, and the Inter-Agency Standing Committee on topics such as protection mainstreaming; 'meeting institutional commitments on human rights'; prevention of sexual exploitation and abuse; counter-trafficking efforts in emergencies; humanitarian evacuations; relocations; resettlement; land, property and reparations; and mental health and psychosocial support.[76]

The breadth of IOM's internal policymaking efforts reflects IOM's identity as a multi-mandate agency. The fact that many of the policies address populations and operational challenges associated with IOM's work in emergency settings reflects the significance of involvement in the humanitarian sector to IOM's budget and field presence, and the general expectation that professionalized organizations active in humanitarian response should be guided by clear, shared principles and standards.[77] That said, these policies are certainly not all equally clear or robust, and they do not enjoy equal weight (or even awareness) across the organization. While some of IOM's internal policies, such as the 2015 Humanitarian Policy, were developed through multi-year processes involving internal and external consultations, others were drafted by consultants with seemingly little institutional engagement or investment in dissemination, implementation and review of the policy.[78]

In addition to these policies related to particular populations and fields of responsibility, it is important to note that significant changes were also recently made to IOM's internal financing rules. Under Director General Swing, the member states agreed to an increase in the rate of overhead charged on IOM projects. This is significant because, in the absence of robust core funding, IOM relies on funds raised through overheads to undertake otherwise unfunded activities such as internal policy development efforts and related training initiatives, as well as the hiring of protection officers involved in efforts to implement some of these internal standards.[79]

accessed 10 May 2022; IOM, 'Rights-Based Approach to Programming' (2016) <https://publications.iom.int/books/rights-based-approach-programming> accessed 10 May 2022.

[76] IOM, 'IOM Protection Portfolio: Crisis Response' (2018) <www.iom.int/sites/g/files/tmzbdl486/files/documents/IOM-Protection-Infosheet-19Jan2018.pdf> accessed 10 May 2022.

[77] Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (n 5).

[78] Interviews, independent experts 2 (2016) and 7 (2020).

[79] Interviews, IOM officials, 1, 17; Interview, member state official 1 (2015).

2.4.1 *Assessing the Significance of IOM's Internal Policies: Legal Perspectives*

What, legally, is the significance of these policies? Arguably, at least some of these policies represent internal rules, which may have binding effects on IOM alongside its Constitution and other key standards such as the 2016 Agreement concerning the Relationship between the United Nations and the International Organization for Migration. An IO's internal law is 'the body of rules governing the functioning of the organization, in the widest sense of the term.'[80] As discussed above, internal rules stem from an IO's constituent treaty, as well as from resolutions passed by an IO's organs and institutional practices, provided these are 'sufficiently clear and well-established.'[81] Internal rules can in theory bind an IO, although there is little agreement on the form that internal rules must take, with some suggesting that 'Any decision by a competent organ creates binding internal rules, provided that the intention to do so is sufficiently clear.'[82]

Per its Constitution, IOM has two organs, the Council and the Administration;[83] both have constitutionally established roles in the creation of internal rules for IOM. Under the Constitution, the Council's role is *inter alia* 'to determine, examine and review the policies, programmes and activities of the Organization.'[84] As the head of the IOM Administration, the Director General is to 'discharge the administrative and executive functions of the Organization in accordance with this Constitution and the policies and decisions of the Council and the rules and regulations established by it. The Director General shall formulate proposals for appropriate action by the Council.'[85] While the Director General can therefore bring proposals for internal rules forward to the Council for formal approval, he or she may arguably also create

[80] Klein (n 17).

[81] Ibid. On IOs' widely recognized power to create internal rules, see e.g. Schermers and Blokker (n 10) 755; Krzysztof Skubiszewski, 'A New Source of the Law of Nations: Resolutions of International Organizations' in Graduate Institute of International Studies (eds), *Recueil d'études de droit international en hommage à Paul Guggenheim* (Institut Universitaire de Hautes Etudes Internationales 1968) 510; Jorge Eugenio Castañeda, *Legal Effects of United Nations Resolutions* (Columbia University Press 1969); Rudolf Bernhardt, 'International Organizations, Internal Law and Rules' in Rudolf Berhardt (ed), *Encyclopedia of Public International Law: Volume II* (Max-Planck-Institut für Ausländisches Öffentliches Recht und Völkerrecht 1995) 1314–1318.

[82] Schermers and Blokker (n 10) 758.

[83] IOM Constitution (n 52) Chapter III, Article 5.

[84] IOM Constitution (n 52) Article 6(a)

[85] IOM Constitution (n 52) Article 13(2).

internal rules by clearly and explicitly shaping the practice of the organization. Many of the policies listed in Table 2.1 have been presented to and approved by the IOM Council itself or the Council's Standing Committee on Programmes and Finance; others have not gone through a formal process of member state approval but have been disseminated within the organization, with some requiring mandatory staff compliance.

While the debate in international law on what constitutes an 'internal rule' is unsettled, at least some of IOM's recently adopted policies, particularly those approved by the IOM Council, plausibly rise to the level of internal rules. As a formal legal agreement with another IO, the 2016 Agreement is not an internal rule for IOM, but it is a critical part of the organization's evolving legal order, and its internal policies should be considered and interpreted in light of this important agreement. The text identifies IOM as 'an essential contributor […] in the protection of migrants,' and states that IOM 'undertakes to conduct its activities in accordance with the Purposes

Table 2.1 *IOM Internal Policies, Frameworks and Guidelines (selected), 1998–2021*

Document name	Year
Evaluation Guidelines	1998
Human Resources Policy in IOM (MC/INF/242)	2000
IOM Migration Policy Framework for Sub-Saharan Africa (MC/INF/244)	2000
Internally Displaced Persons: IOM Policy and Activities (MC/INF/258)	2002
IOM Policy on the Human Rights of Migrants (MC/INF/259)	2002
IOM Evaluation Guidelines	2006
IOM Data Protection Principles	2009
The Human Rights of Migrants – IOM Policy and Activities (MC/INF/298)	2009
IOM Data Protection Guidelines	2010
Migration Crisis Operational Framework (MC/2355)	2012
Internal Guidance Note on Assisted Voluntary Return and Reintegration for Trafficked Migrants (IN/198)	2012
Internal Guidance Note on Assisted Voluntary Return and Reintegration for Migrants in Detention (IN/199)	2012
Internal Guidance Note on IOM-Assisted Voluntary Returns and Reintegration of Unaccompanied Migrant Children (IN/208)	2013
IOM Standards of Conduct (IN/15 Rev. 1)	2014
Assessing Risks when Assisting Victims of Trafficking (IN/219)	2014

(continued)

Table 2.1 (*cont.*)

Document name	Year
IOM Policy on Protection (IOM Policy on Protection)	2015
IOM's Humanitarian Policy: Principles for Humanitarian Action (C/106/CRP/20)	2015
Gender Equality Policy 2015–2019 (C/106/INF/8/Rev.1)	2015
Migration Governance Framework (C/106/40)	2015
IOM Internal Guidance Note on Immigration Detention and Alternatives to Detention (IN/228)	2015
Internal Guidance Note on Mixed Migration Flows (IN/227)	2015
Framework on the Progressive Resolution of Displacement Situations	2016
IOM General Procurement Principles and Processes	2016
Guidance Note on How to Mainstream Protection Across IOM Crisis Response (IN/232)	2016
Policy and Procedures for Preventing and Responding to Sexual Exploitation and Abuse (IN/234)	2016
Guidance Note on the Inclusion of Protection Considerations when Planning and Implementing International Humanitarian Evacuations for Migrants Caught in Armed Conflict Settings (IN/238)	2016
IOM Framework for Addressing Internal Displacement	2017
IOM Key Principles for Internal Humanitarian Evacuations/Relocations of Civilian Populations in Armed Conflict	2018
IOM Staff Regulations (C/108/INF/2) (updated)	2018
Institutional Framework for Addressing Gender-Based Violence in Crises	2018
Guidance for Addressing Gender in Evaluations	2018
IOM Evaluation Policy (IN/266)	2018
IOM Monitoring Policy (IN/31 Rev. 1)	2018
IOM Competency Framework	2018
IOM Internal Governance Framework	2018
Risk Management Framework (updated)	2019
Reporting and Investigation of Misconduct Framework (IN/275)	2019
Accountability to Affected Populations Framework	2020
IOM Policy on the Full Spectrum of Return, Readmission and Reintegration	2021
IOM Monitoring and Evaluation Guidelines	2021

[*] *Note:* This table focuses on policies, frameworks and guidelines produced at the headquarters level. It includes internal guidance notes produced for IOM staff (often containing mandatory compliance instructions), as well as policies, frameworks and guidelines produced internally and presented to the IOM Council and/or the IOM Standing Committee on Programmes and Finance. It does not include time-limited strategic planning frameworks.

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.'[86] On the face of it, these provisions complement the recognition in many of IOM's recent internal policies that the organization has obligations to respect migrants' rights and support their protection. However, the Agreement also identifies IOM as a 'non-normative' organization – a term that is not part of the standard lexicon of international law, but which has understandably generated concern that this may be a way for IOM to evade its obligations and prioritize states' interests over migrants' rights. Senior IOM staff and other officials involved in the negotiation of the 2016 Agreement suggest that in this context, 'non-normative' carries a particular meaning: that IOM would not serve as an arena to set, monitor and hold states legally accountable to binding international standards related to migration.[87] The term was deployed on the insistence of IOM member states, and assuaged states' concern that upon entering the UN system IOM might retreat from its longstanding, deferential posture, particularly in relation to respect for sovereign control over admissions and membership. However, IOM leaders also mused that the non-normative term reflected the idea that states 'don't want us to be shackled, I think, by norms or standards.'[88] The perception that adherence to international norms might hinder or even shackle the organization, rather than guide it towards appropriate action, is telling, and points to the need for caution in assuming that the obligations confirmed in the 2016 Agreement and in various internal policies are internalized and warmly welcomed across the organization.

Looking beyond debates on the precise contours of IOM's evolving legal order and which policies might represent internal rules, Klabbers stresses that the *structure* of international law on the responsibility of IOs is such

[86] For varying perspectives on what this 'due regard' may entail, see the chapters in this volume: Helmut Philipp Aust and Lena Riemer, 'A Human Rights Due Diligence Policy for IOM?' and Miriam Cullen, 'The Legal Relationship between the UN and IOM after the 2016 Cooperation Agreement: What has Changed?'. Relatedly, under the Global Compact on Migration, IOM is designated as the lead agency for the UN Network on Migration (UNNM). The Terms of Reference for the network indicate that it is to 'prioritize the rights and wellbeing of migrants and their communities of destination, origin, and transit.' For discussion of the implications of these provisions, see Janie Chuang, 'IOM and Ethical Labor Recruitment' 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).

[87] Bradley, 'Joining the UN Family?' (n 38).

[88] Interview, IOM official 16 (2019).

that it is difficult, if not impossible, to use these standards to leverage formal legal accountability, such as through courts or tribunals.[89] Others are more optimistic, suggesting that notwithstanding the hurdles to using these standards to uphold accountability, they have significant implications for the interpretation of IOM's mandate and obligations, particularly vis-à-vis protection. In an expansive reading of the IOM Constitution and the duties stemming from IOM Council resolutions, institutional policies and practices, Chetail draws on the International Law Commission (ILC) Articles on the Responsibility of International Organizations (ARIO) to argue that 'protecting migrants is both implicit and explicit to the mandate of IOM. It is inherent to the purposes and functions of this organization under its Constitution and, more importantly, it is an explicit duty deriving from the subsequent practice and interpretation of the IOM governing body.'[90] Chetail further contends:

> The common complaint among scholars about the limits of its Constitution is not only ineffective but also misleading, as it fails to capture the potential of international law in addressing the responsibility of IOM towards migrants … IOM is legally bound to protect migrants' rights under the current state of international law and, therefore, even without any change in its constituent instrument. The obligation of IOM stems from a threefold legal basis: the internal law of the organization, as informed by the practice of its governing body; the international agreement concluded in 2016 with the UN; and the general rules of international law, including *jus cogens* norms. This insight from the law of international organization may provide, in turn, a new critical step for both scholars and activists to move from a posture of IOM-bashing to a more incisive and efficient engagement with a view to ensuring its accountability on the basis of existing legal commitments.[91]

As I have discussed, many of IOM's internal policies, including some approved by the IOM Council, recognize and commit the organization to respect and advance human rights and humanitarian standards. However, they also often hedge these commitments, reflecting continued deference to states and 'pliability' in assisting them.[92] Chetail's approach is striking because rather than focusing on how this tendency

[89] See e.g. Klabbers 'The (Possible) Responsibility of IOM under International Law' (n 19).
[90] Chetail, 'The International Organization for Migration and the Duty to Protect Migrants' (n 20); Chetail, *International Migration Law* (n 65).
[91] Chetail, 'The International Organization for Migration and the Duty to Protect Migrants' (n 20) 261–262.
[92] Atak and Crépeau (n 59) 135.

limits the effectiveness of IOM's policies and their implications for its mandate, he takes seriously the commitments IOM and its member states have made. Instead of taking the protection-related shortcomings of IOM's legal order as evidence of a hopelessly compromised mandate, he uses IOM's commitments as the foundation for a capacious reading of its obligations. This reading reflects the aspirations of the architects of some of IOM's internal policies, who have sought to gradually shift how IOM's mandate and obligations are interpreted, and to strengthen the organization's position, performance and perceived legitimacy by tying it to international human rights and humanitarian standards – a strategy that underscores the ways in which 'mandates' are both legal and political concepts.

2.4.2 *Legitimation through Internal Policymaking: Perspectives from IR Theory*

IOM's internal policy development activities represent something of a puzzle: IOM has been presumed to thrive precisely *because* it lacks explicitly articulated obligations to human rights and humanitarian norms. Why then would it commit to these standards through numerous internal policies – at least some of which represent binding internal rules? These commitments are difficult if not impossible to enforce, and are expressed in weaker terms than some protection advocates would like. Taken alongside IOM's entry into the UN system, these policies may 'blue wash' some activities that are incongruous with respect for human rights.[93] Yet these limitations do not solve the puzzle. It is implausible to suggest that these developments are nothing more than an elaborate smokescreen for states' migration-control agendas – not least because many governments score political points by flaunting their anti-migrant positions, and need no help from IOM in this. Taken as a whole, these policies shift expectations inside and outside IOM regarding the organization's commitments, and increase prospects that IOM may be held to account – politically, if not in a formal legal sense – in relation to these commitments.[94] A more nuanced

[93] Asher Lazarus Hirsch and Cameron Doig, 'Outsourcing Control: The International Organization for Migration in Indonesia' (2018) 22 The International Journal of Human Rights 681; Julien Brachet, 'Policing the Desert: The IOM in Libya beyond War and Peace' (2016) 48 Antipode 272.

[94] On the potential role of human rights NGOs in holding IOM to account in relation to these standards, see Angela Sherwood and Megan Bradley, 'Holding IOM to Account: The Role of International Human Rights Advocacy NGOs' in Megan Bradley, Cathryn Costello

explanation is therefore needed, one that does not assume that these policymaking efforts are simply altruistic but that considers the incentives and pressures facing IOM as an IO. In this section, I sketch the contours of such an explanation, drawing on insights from IR scholarship on IOs' legitimation efforts.[95]

Although rarely applied to IOM,[96] an extensive body of IR research theorizes the sociological legitimacy of IOs – that is, their 'perceived compliance with norms and values' that underpin their claimed authority and exercise of power.[97] Otherwise put, legitimacy entails a 'generalized perception or assumption that the actions of an entity are desirable, proper or appropriate within some socially constructed system of norms, values, beliefs, and definitions.'[98] This literature conceives of legitimacy as a dynamic and contested but essential 'operational resource' for all IOs as they attempt to achieve their governance aims.[99] If 'legitimacy is the goal' for an IO, 'legitimation is the way to get there.'[100] IOs deploy legitimation strategies to demonstrate their compliance with legitimizing norms to important target audiences such as states and other IOs. In addition to trying to foster a sense of legitimacy in the eyes of external actors, an IO may also engage in self-legitimation efforts 'as a way of developing,

and Angela Sherwood (eds), *IOM Unbound? Obligations and Accountability of the International Organization for Migration in an Era of Expansion* (Cambridge University Press 2023).

[95] For an extended discussion of this argument, see Megan Bradley and Merve Erdilmen, 'Is the International Organization for Migration Legitimate? Rights-talk, Protection Commitments and the Legitimation of IOM' (2022) Journal of Ethnic and Migration Studies.

[96] For exceptions, see Nina Hall, *Displacement, Development and Climate Change: International Organizations Moving beyond Their Mandates* (Routledge 2016); Oleg Korneev, 'Self-Legitimation through Knowledge Production Partnerships: International Organization of Migration in Central Asia' (2018) 44 Journal of Ethnic and Migration Studies 1673.

[97] von Billerbeck, 'No Action without Talk?' (n 21); Dominik Zaum, 'Legitimacy' in Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds), *Oxford Handbook on International Organizations* (Oxford University Press 2016); Jonas Tallberg, Karin Bäckstrand and Jan Art Scholte (eds), *Legitimacy in Global Governance* (Oxford University Press 2018). Notably, this literature focuses on IOs' legitimacy as an *empirical* matter – that is, whether their legitimacy claims are accepted by other key actors – rather than on whether they are morally or legally legitimate.

[98] Mark Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20 Academy of Management Review 571, 574.

[99] Suchman (n 98) 576; Jennifer Gronau and Henning Schmidtke, 'The Quest for Legitimacy in World Politics: International Institutions' Legitimation Strategies' (2016) 42 Review of International Studies 535, 539.

[100] von Billerbeck, 'No Action without Talk?' (n 21) 479.

defining and (re)confirming its identity,' recognizing that internal legitimacy is often vital to effective external claims to legitimacy.[101] Legitimation strategies may be multi-pronged, responding to the priorities and interests of different stakeholders inside and outside the organization. They often involve the strategic use of discourses and narratives that support an IO's claimed role, and institutional reforms including internal policymaking efforts – in other words, a playbook closely followed by IOM in recent years.[102] Legitimation strategies are especially important for multi-mandate IOs such as IOM whose work may result in contradictions, with one 'side' of the organization behaving in ways that corrode the perceived legitimacy of its other sides. In the case of IOM, these contradictions play out in, for example, conflicts between the Department of Operations and Emergencies (DOE), responsible for IOM's humanitarian response work, and the Department of Migration Management (DMM), which runs IOM's more normatively fraught AVR and border management projects.[103] In such cases, legitimation strategies attempt to rationalize an organization's behaviour, enabling IO staff to feel that their work is appropriate and withstands scrutiny.[104] Through their ongoing legitimation efforts, IOs strive to advance their governance objectives, build up their own power, defend against competition, secure increased material resources, and adapt to changing normative expectations.[105]

Viewed as institutional legitimation efforts, the institutional logic motivating IOM's internal policy development efforts (and its attempts to reinterpret its mandate to include humanitarian work and human rights protection) becomes clearer. The IOM Constitution does not explicitly reference legitimizing values such as humanitarian principles or human rights, but it girds the organization's work in a norm that

[101] von Billerbeck, '"Mirror, Mirror on the Wall"' (n 21) 207.

[102] Gronau and Schmidtke (n 99); Zaum (n 97); Tallberg, Bäckstrand and Scholte (n 97); Jens Steffek, 'The Legitimation of International Governance: A Discourse Approach' (2003) 9 European Journal of International Relations 249; Dominik Zaum (ed), *Legitimating International Organizations* (Oxford University Press 2013).

[103] Although many IOM staff members underscore the significance of intra-institutional conflict, including between DOE and DMM, there is also considerable cooperation between these departments, particularly in the field. In Libya, for example, the framing and operationalization of "assisted voluntary humanitarian returns" of migrants from detention centres characterized by widespread human rights violations subverts DOE-DMM divisions. Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (n 5) 54–55, 88.

[104] von Billerbeck, '"Mirror, Mirror on the Wall"' (n 21) 207–219; von Billerbeck, 'No Action without Talk?' (n 21) 477–494.

[105] Zaum (n 97); von Billerbeck, '"Mirror, Mirror on the Wall"' (n 21) 212.

is, according to states and orthodox (although increasingly challenged) readings of international law, integral to legitimate migration governance efforts: sovereign control of entry and membership. While adherence to this principle remains essential to IOM's legitimacy in the eyes of its members, the organization has had to adjust to the rise of human rights as the predominant legitimizing framework in global governance, especially in relation to fields such as humanitarian response, where IOM is highly active.[106] This has fuelled the need for new legitimation strategies – including internal policy development efforts – that try to fuse protection commitments, human rights and humanitarian principles with deference to member states. This attempt to meld deferential service to states with commitments to human rights and humanitarian principles prompts some sceptics to question IOM's 'protection DNA' – yet this deferential position, and IOM's continued, full-throated recognition of states' rights to control entry and membership, is a source of perceived legitimacy from the perspective of many of its member states. That IOM is perceived as legitimate by some actors and illegitimate by others does not undermine the suggestion that these policies are part of IOM's efforts to legitimate itself, and that IOM may in fact be gaining legitimacy through such efforts. As Zaum emphasizes, 'legitimacy judgements are not universal.'[107] Particularly for multi-mandate organizations, there may be divergent views on how particular norms should be interpreted, what is required for an IO to be legitimate in relation to these norms, and how tensions between different normative frameworks should be managed. IR scholarship on IOs' legitimation efforts stresses that these initiatives are most likely to be effective when they balance different constituencies' concerns[108] – an approach that has been the hallmark of IOM's attempts to shore up its legitimacy.

Beyond needing to respond to the emergence of human rights as the overarching, legitimizing framework for global governance, IOM's deployment of legitimation strategies, such as its internal policymaking efforts, has been motivated by changes in the composition of the IOM membership, and the need to achieve a greater degree of organizational coherence. As one senior IOM official expressed it, 'If you're a collection of 3,000 projects, of course it's difficult to bring a sense of coherence to

[106] Vincent Pouliot and Jean-Philippe Thérien. 'Global Governance: A Struggle over Universal Values' (2018) 20 International Studies Review 55.
[107] Zaum (n 97) 1109.
[108] Gronau and Schmidtke (n 99).

what the organization does and represents, particularly as perceptions are … widely differing, let's say, amongst our partners.'[109] The expansion of IOM's membership base to include more large, Southern migrant-sending states has fuelled the agency's need to recalibrate to portray its commitments as encompassing the protection of migrants' rights, as this is a clear expectation of many of these newer members.[110] Notably, senior staff involved in the agency's internal policymaking processes distinguish between IOM recognizing that it is a protection actor with protection obligations, and any attempt to recast itself as having a formal, legal protection mandate. Some suggest that 'We're very clear about the fact that we're talking about operational, effective protection' rather than legal protection efforts; 'The fact that IOM is not legally mandated does not mean that IOM does not consider itself bound by international norms and international law.'[111] Possessing such policies is also, increasingly, an expectation of the donor agencies of IOM's wealthier Western member states; for the agency to secure larger amounts of funding from these donors, a less ad hoc, more systematized approach was seen to be necessary.[112] While the desire to bring in more money is thus part of the explanation for the creation of these policies, this is part and parcel of IOM's broader legitimation strategies. Donors are one of the key audiences for IOM's legitimation efforts. IOM's major humanitarian funders, in particular, expect recipients to have relatively clear institutional commitments to the legitimizing principles of the sector – an expectation that is addressed at least in part through IOM's internal policymaking.

While the instigation of these policy development efforts preceded the focused negotiations around IOM's entry into the UN system as a related organization (which began in earnest in 2015), other IOs, particularly in the UN system, were also an important audience for IOM's legitimation

[109] Interview, IOM official 19 (2020).

[110] Interview, IOM official 2.

[111] Interview, IOM official 19. This reflects a certain strategic ambiguity surrounding the concept of 'protection' in relation to IOs. Whereas IOM has attempted to overcome the lack of reference to protection in its Constitution to nonetheless assert a protection role in its operational engagements, in its early years UNHCR worked to expand beyond the legally-focused conception of protection set out in its Statute to also pursue protection goals through field operations. On early notions of protection in the UNHCR Statute, see Antonio Fortin, 'The Meaning of "Protection" in the Refugee Definition' (2000) 12 International Journal of Refugee Law 548.

[112] Anders Olin, Lars Florin and Björn Bengtsson, 'Study of the International Organization for Migration and its Humanitarian Assistance' (SIDA Evaluations 2008); Interviews, IOM officials 3, 13 (2015), 15 (2016); interviews, member state officials 1 and 7 (2016).

efforts. Although IOM's internal policymaking processes were not *primarily* attempts to pave IOM's way into the UN system, they did enable IOM to cast itself as a more reliable counterpart to its UN partners. Protection advocates within IOM suggest that the agency's entry into the UN system may, in turn, help create pressure for accountability vis-à-vis IOM's protection obligations: 'Not externally, but maybe internally … there's this sense that it's an argument we can use, right? So for the people within the organization that think that we should be doing better, we have an ability now to say, look, we're part of the system now, you know, and we have these obligations.'[113] In this sense, IOM's entry into the UN system may strengthen the hand of protection proponents within IOM – a constituency that has not traditionally had a strong base of power with the organization.

Internal proponents of IOM's policy development efforts, particularly those related to protection and humanitarianism, argue that these steps were necessary to better serve migrants, and also to achieve greater coherence across the organization, which is in turn essential to bolstering its perceived credibility and continued expansion. These considerations are especially important for IOM as it has become increasingly visible since becoming a related organization in the UN system. Reflecting on IOM's efforts to manage different elements of its mandate, one senior IOM staff member suggested,

> the multiplicity of counterparts and accountability lines that we have naturally leads to tensions, well at least challenges, in how you reconcile those different programming areas to ensure that they remain consistent and coherent. But I think over the past decade, the organization has also equipped itself with fairly robust sets of principles and policy frameworks that, even though they may refer to one particular area of work, they're applied to the entire organization.[114]

As another senior IOM official put it, 'Learning how to play those hats' – that is, how to manage the different elements of IOM's mandate – is a reflection of 'the political maturity of an organization. We are growing up but we are not there yet.'[115] IOM's internal policies help to manage and navigate tensions between the 'different sides' of IOM, which some staff still describe as a 'schizophrenic' organization in light of conflicts between departments concerned with humanitarian response and those focused on other aspects of migration management, such as AVR.[116] A growing

[113] Interview, IOM official 17.
[114] Interview, IOM official 19.
[115] Interview, IOM official 2.
[116] Interviews, IOM officials 1, 3, 4 (2015), 5 (2015), 13, 17, 19, 21 (2020), 22 (2021).

number of the agency's staff have worked with protection-oriented NGOs or UN agencies before joining IOM, and question IOM's traditional, 'cowboy' approach.[117] For these staff, commitments to human rights and humanitarian principles in IOM's internal policies assure them that they share common values with their organization, allowing them to 'look in the mirror and like what they see' – a key consequence of self-legitimation efforts.[118]

Legitimation is an ongoing process of contestation, not a 'one and done' box-ticking effort. It is thus unsurprising that IOM continues to refine and roll out new policies, and revise its practices in light of evolving demands. IOM still has vocal critics, including partners within the UN system who charge that IOM is still fundamentally motivated by a 'sell, sell, sell' mentality.[119] However, many UN officials, human rights advocates, and member state officials concerned with IOM's adherence to human rights standards applaud the changes underway within the organization, emphasizing that IOM has come a long way since the 'bad old days'[120] of the agency presenting itself as a maximally flexible, unscrupulous contractor willing to 'do anything for money.'[121] Concerningly, however, IOM's legitimation efforts, particularly its adoption of human rights discourses and commitments, may have the effect of making some normatively contentious 'migration management' activities seem more acceptable and in line with human rights standards. This possibility requires careful monitoring, to ensure that IOM is held to account in practice for the commitments it has made.[122] The preceding discussion and the broader IR literature on IO legitimation focus on sociological legitimacy as an empirical issue – that is, on whether and how IOs come to be accepted as legitimate by key actors. However, this concern points to the need for future analyses of IOs' sociological legitimacy to link to investigations of their legal and moral legitimacy.

[117] Interviews, IOM officials 10 (2015), 13, 15, 17, 20 (2020), 22; interview, human rights advocate 5 (2015).
[118] von Billerbeck, '"Mirror, Mirror on the Wall"' (n 21) 207.
[119] Interview, humanitarian official 7 (NGO, 2015).
[120] Interview, human rights advocate 10 (2016).
[121] Interview, member state official 4 (2016); interviews, humanitarian officials 8 (NGO, 2016), 10 (UN, 2019), 12 (UN, 2019); interviews, human rights advocates 7 (2016), 10; interviews, independent experts 2, 3 (2016), 6 (former UN, 2019), 8 (former UN, 2020).
[122] Bradley and Erdilmen (n 95). On this risk in relation to IOM's entry into the UN system, see Hirsch and Doig (n 93).

2.5 Conclusion: Who and What Is IOM For? Updating Assumptions and Expectations

Conceptions of IOM's mandate and obligations have evolved considerably inside and outside the organization since its creation in 1951. Motivated significantly by a thirst for increased legitimacy, and in turn, influence in global governance, IOM's internal policymaking efforts – alongside broader debates on its mandate – have played an important but to-date under-examined role in shifting ideas of what IOM is for, and whom it should serve. IOM remains a service provider shaped by its projectized funding structure, a set-up that was reinforced in the terms of the 2016 Agreement. However, the internal policies described above provide more direction on what kinds of services the organization should and should not provide, and the principles that are to inform this work. Viewed from a migrants' rights protection standpoint, these policies are far from perfect. Yet they are a critical part of IOM's effort to recast and legitimate itself as having a clear humanitarian mandate as well as broader institutional protection obligations. This reinterpretation brings to the fore tensions between the traditional idea that IOM is first and foremost 'for' its member states, and the notion that it should also be 'for' migrants themselves. The organization has long claimed to serve states and individuals alike, with the introduction to the 1971 volume commemorating the organization's 20th anniversary asserting that its 'sole aim' is to 'serve men and nations.'[123] Yet such claims are now a much more routine part of IOM's self-presentation, an interpretation increasingly accepted by its member states despite the conflicts and tensions it entails. In light of these developments, some IOM staff suggest that the organization now uses these internal policies to say 'no,' more often than it has in the past, to requests from states to take on normatively troubling work, while recognizing that it still has a way to go in this respect.[124]

There are ample opportunities to build on these developments to strengthen the extent to which IOM lives up to its claims to serve not only states but also migrants. First, the IOM leadership and the organization's member states should further clarify the content and scope of the agency's protection obligations, including through reforms to the IOM Constitution. Member states concerned with respect for human

[123] ICEM (ed), *Twenty Years Dedicated to the Free Movement of People* (ICEM 1971) p ii.
[124] Interviews, IOM officials 3, 12 (2015), 13, 15 (2018), 17, 19, 22.

rights and humanitarian values should spearhead a move through the IOM Council to more formally recognize IOM's humanitarian mandate and specify its human rights protection obligations. This should include amendments to the IOM Constitution to clearly bind the organization to respect and promote the rights of people on the move internally and across borders. These developments should strengthen IOM's capacity to say 'no' to projects inconsistent with human rights and humanitarian standards. IOM works in many morally, legally and politically vexing contexts characterized by serious, sometimes intractable dilemmas. Such reforms would not do away with these dilemmas, but should provide IOM with stronger scaffolding to reflect on and determine when it should decline involvement in or withdraw from particular, normatively compromised operations. Such high-level, constitutional reforms are admittedly unlikely. Even if they were undertaken, and existing organizational policies committing IOM to respect human rights and humanitarian principles were confirmed to be binding internal rules, in the absence of effective legal mechanisms to ensure compliance, respect for these obligations remains largely a matter of organizational culture, institutional incentives and political will. Legal strategies alone are insufficient to secure institutional change. This points to the need for a second, related set of reforms, focused on institutional, cultural, and the internal operationalization of commitments related to protection, human rights norms, and humanitarian principles. To ensure that these internal policies are used to maximum effect to strengthen IOM's support for migrants and not only member states, they should be widely disseminated inside and outside the organization, with staff training and regular review processes in place to support their effective implementation and revision as necessary. Staff evaluation and promotion exercises should also be tied to systematic and successful implementation of IOM's commitments in terms of human rights protection and respect for humanitarian principles.

Progress also depends on updating assumptions about IOM's obligations and raising expectations of the organization, including among scholars and advocates. Repeating the trope that IOM has no obligations to people on the move simply because it does not have a formal protection mandate in its Constitution is incorrect as a matter of law and policy. But even more concerningly, it impedes efforts to hold this increasingly influential organization to account for its commitments towards those it claims to serve. For IOM's critics, such calls for accountability may seem quixotic, given its history and structural constraints. However,

like other IOs, IOM has changed over time, including in terms of how its mandate and obligations are understood. If these changes are to benefit migrants and not only state interests, they must be taken seriously. That is, they must be carefully analysed, shored up where appropriate, and used to challenge instances in which IOM may undermine the rights of those individuals it now claims to serve.

3

The (Possible) Responsibility of IOM under International Law

JAN KLABBERS

3.1 Introduction

On board of a Finnair flight, in October 2021, the seat pocket contained Finnair's flight menu, advertising products available for on-board purchase. The products on offer were standard enough: coffee and tea, sodas, snacks, and beer and wine. The (exorbitant) price level too was not very surprising. But what was surprising was a small-print disclaimer: having first stated that prices and selection may be subject to change, it continued: 'Finnair is not responsible for misprints.'[1] On some level, this is understandable: the printing has probably been outsourced to a sub-contractor, or perhaps even to a sub-contractor of the sub-contractor, or a further sub-contractor thereof. At some point it becomes difficult to keep track, even for the original assignor. On the other hand: the flight is a Finnair flight; the menu is offered by Finnair, and the goods are purchased from Finnair flight attendants – why shouldn't the proverbial buck stop with Finnair? And if not with Finnair, then with whom? If there were a misprint, to whom should the passenger complain?

What applies to many business settings these days, characterized by the involvement of multiple actors in global supply and value chains and joint ventures, also applies to politics generally, and therewith to international organizations and their activities – including an organization such as the International Organization for Migration (IOM). Often enough, international organizations are involved in projects together with a multitude of other actors, some closely related to them (their member states, for instance), others more distant, from other international organizations[2]

[1] Finnair, 'For Your Delight: Refreshing Drinks and Tasty Snacks'.

[2] See, e.g., Megan Bradley, *The International Organization for Migration: Challenges, Commitments and Complexities* (Routledge 2020).

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and funders to co-financiers to service-providers.[3] And this cannot but affect the topic of the accountability of international organizations, all the more so as shifting responsibility onto others is a useful strategic device. In what follows, I will first set out why international organizations law has difficulties handling accountability, delving a little into the history (Section 3.2) and epistemology of international organizations law (Section 3.3). Sections 3.4 and 3.5 take a more in-depth look at the most authoritative accountability regime, the ARIO, developed by the International Law Commission; succeeded by a closer look at the mechanisms available at IOM (Section 3.6). Section 3.7 concludes.

The argument I will make is a general argument, equally applicable (*mutatis mutandis*) to IOM as to the World Bank, or the World Health Organization or even the European University Institute. While it is arguable that IOM has no strong human rights protection or humanitarian mandate, this circumstance alone is unlikely to affect its legal accountability – the problems with accountability of international organizations under international law go much, much deeper. And by legal accountability (not quite a term of art perhaps), I mean something like utilizing a (more or less) legal mechanism to test the acts of an international organization against (more or less) legal standards. This may be done before a court, but may also involve internal accountability mechanisms. Those standards, in turn, do not simply comprise the entire corpus of international law, but are limited, it is generally agreed, to the treaties that international organizations are parties to, to international legal rules that have become internalized, and to the 'general rules of international law'.[4] There is consensus that this is an authoritative enumeration, but precious little agreement on what this entails (it will be further discussed below).

3.2 The Vacuum Assumption

The accountability of international organizations under international law has proved a difficult topic, albeit of relatively recent provenance. For more than a century, from the 1860s to the 1980s, the topic did not exist. International organizations were supposed merely to interact with

[3] IOM derives much of its income from providing services: see 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.

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

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their member states: legally as well as theoretically, a vacuum was drawn around the relationship between international organizations and their member states, and the idea of holding international organizations to account simply never came up, at least not with respect to third parties. After all, since international organizations were not supposed to deal with third parties, issues of accountability towards third parties could not logically arise – *quod erat demonstrandum*. While some organizations were created to take care of individuals, those individuals were conceptualized as merely the objects of organizational activity – not as interlocutors or partners in any meaningful way.

There was only one exception, and it was not immediately related to third parties: member states could control their organization, if only they could muster the unity to suggest that the organization had overstepped its powers, acted *ultra vires*, or maybe violated some internal rule or other. This way of thinking was behind the 1962 *Certain Expenses* opinion of the International Court of Justice, with France and the USSR contesting the legality of peacekeeping 'recommended' by the General Assembly (GA) of the UN. This, they claimed, effectively meant the GA had been acting *ultra vires*, and how could states be expected to help finance *ultra vires* activities? The ICJ disagreed, but without taking a firm principled stand: activities *ultra vires* the GA could still be *intra vires* the UN at large, and thus could be viewed as legitimate expenses, to be provided for under the regular UN budget. Whether peacekeeping was *ultra vires* the UN itself was a question not further addressed,[5] and the idea that the GA could sponsor peacekeeping was in line, the Court suggested, with the idea that the UN Charter merely assigned 'primary responsibility' for peace and security to the Security Council. And this made it possible to suggest that the GA exercised a secondary responsibility.[6]

So, the member states can hypothetically control the acts of their international organizations: if the members together disapprove of an action or a policy, then the organization can be compelled to mend its ways.

[5] Peacekeeping can no doubt be justified on the broad reading of the implied powers doctrine developed earlier by the ICJ in *Reparation for Injuries Suffered in the Service of the United Nations* [1949] ICJ Reports 174 – but it is a little awkward to base so fundamental an activity on a power not expressly conferred, but implied. For more on the implied powers doctrine, see Jan Klabbers, *An Introduction to International Organizations Law* (4th edn, Cambridge University Press 2022).

[6] *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)* [1962] ICJ Reports 151.

There are two obvious drawbacks though. The first is that for this to work, the members must all sing from the same hymn sheet: if only one or two think the organization does wrong, then control will be out of reach. What then typically happens is that individual member states take the law in their own hands and try to exercise political pressure. This may take place by withholding their contributions (a weapon all the more potent when the organization is hugely dependent on a single member state, as with IOM vis-à-vis the United States[7]); by threatening to withdraw from the organization[8] or even by ousting the director-general.[9] And then there are other pesky ways to make life difficult: delaying visa applications for organization staff, not allowing aircraft to land or not allowing staff or management into the country, that sort of thing.

The second drawback is that this form of control still assumes the vacuum drawn around the organization and its member states: it is of little use to third parties in terms of their ability to demonstrate or advance their own accountability claims. An international organization breaching a treaty commitment towards a third party, or a commercial agreement with a service provider, will not, given the assumed vacuum, incur accountability. And even more seriously, when the organization commits a wrong to an individual, it has historically proven difficult to address the matter, let alone to find redress. This is partly a matter of immunities law (international organizations can typically invoke immunity for their official acts, and are not afraid to do so), but it goes deeper: in a setting where there exist no third parties, with a legal system which cannot think about third parties, accountability towards third parties will remain elusive.[10]

[7] In 2019, IOM received almost 600 million USD from the US as voluntary contribution, most of it earmarked. The second biggest donor was the UK, at a little under 100 million USD. See IOM, '2019 Annual Report of the Use of Unearmarked Funding' (2020) <www.iom.int/sites/g/files/tmzbdl486/files/our_work/ICP/DRD/2019-report-use-of-unearmarked-funding-final.pdf> accessed 17 May 2022.

[8] Sweden was noted to have withdrawn from IOM's predecessor Intergovernmental Committee for European Migration in 1961, though without any reason being given: see 'Intergovernmental Committee for European Migration' (1962) 16 International Organization 663, 664.

[9] This was the fate of Mr José Bustani, erstwhile director-general of the Organization for the Prohibition of Chemical Weapons. See further Jan Klabbers, 'The Bustani Case before the ILOAT: Constitutionalism in Disguise?' (2004) 53 International and Comparative Law Quarterly 455.

[10] Whether the dream itself is a dream worth having is a different matter: see Jan Klabbers, 'The Love of Crisis' in Jean d'Aspremont and Makane Mbengue (eds), *Crisis Narratives in International Law* (Martinus Nijhoff 2021).

Against this background, it is no coincidence that the first academic attempts to come to terms with the accountability of international organizations remained unsuccessful. Attempts in the 1950s by Eagleton[11] and by Ginther[12] in the 1960s came to naught (although Ginther coined the glorious term *Durchgriffshaftung* – literally, something like 'see through responsibility' – to discuss the responsibility of member states for acts of the organization[13]), and quickly moved to the possible responsibility of *member states* for acts of their organizations. For while practically speaking, international organizations can and do affect third parties, the law had no way of handling this, so the idea that international organizations could be accountable in their own right, in their own name, as independent actors with their own international legal personality, just did not arise. And it could not even arise: in a rather literal sense, the thought had not yet been thought.[14]

That this situation was problematic became clear with the International Tin Council (ITC) litigation in the mid-1980s. The ITC, an international organization based in London, became insolvent; banks and others claimed their money back; the ITC was unable to make good on its loans, and as a result several creditors started proceedings against the ITC's member states. This however, was unsuccessful before the UK courts (where the litigation played out): if international organizations are separate persons, it follows that their accountability is separate from that of their member states. Accordingly, member states cannot be held liable for the acts of their international organizations. The ITC litigation made waves: the legal discipline started to realize that international organizations could actually do wrong in their own name – in this case, defaulting on debts – and perhaps it is no coincidence that the wake-up call related to large sums of money rather than the suffering of ordinary people. And there was nothing the law could do about it – or was there?

[11] Clyde Eagleton, 'International Organization and the Law of Responsibility' in *Recueil des Cours: Collected Courses of the Hague Academy of International Law* (1959/ I).

[12] Konrad Ginther, *Die völkerrechtliche Haftung internationaler Organisation gegenüber Drittstaaten* (Springer 1969).

[13] A more recent approach aims to hold member states responsible for their voting behaviour within international organizations. Exemplary is Ana Sofia Freitas de Barros, *Governance as Responsibility: Member State Participation in International Fincancial Institutions and the Quest for Effective Human Rights Protection* (Cambridge University Press 2019).

[14] The example of the EU does not falsify this claim: the EU was always set up as an exceptional entity, typified as 'supranational' precisely because it could affect the rights of third parties, including steel industries and coal mine operators as early as the 1950s. This is precisely why the EU is unrepresentative of the genus 'international organization.'

Various pens were moved, first of all to confirm the position that member states are and should be shielded.[15] Others went a bit further and started to explore arguments of principle[16] and, more inductively, the relevant case law of international and domestic tribunals.[17]

Others started to search for administrative precepts which could possibly be applied to instances of global governance, including the acts of international organizations. Most prominent among these is the Global Administrative Law approach (GAL), tapping into administrative law thinking in the hope of finding ideas that could be used in the 'global administrative space': this would include such ideas as participation in decision-making, providing reasons in judicial judgments, and using proportionality.[18] Still, this did not solve all issues, partly because in order to hold international organizations to account, there must be standards according to which they can be held to account. Borrowing administrative principles from European and US traditions was considered a bit too Western-centric, and even within Europe there are fundamental differences about the role and function of public law: some view public law largely as a check on overzealous governance while others view it rather as *enabling* governance.[19] Moreover, the GAL approach remained unable to resolve one of the fundamental issues: why, unlike states, are international organizations bound to respect rules they have not consented to?

Even the ILC, never the most agile body, stepped in, and between 2001 and 2010 developed a regime on the international legal responsibility of international organizations, the Articles on the Responsibility of International Organizations (ARIO). And the ILC put its finger on the sore spot. It suggested, sensibly enough, that organizations should be held responsible for their internationally wrongful acts, and these are thought to consist of two elements: a violation of an international legal obligation incumbent on the

[15] See generally Klabbers, *An Introduction to International Organizations Law* (n 5) Chapter 14.

[16] Moshe Hirsch (ed), *The Responsibility of International Organizations toward Third Parties* (Martinus Nijhoff 1995).

[17] Pierre Klein, *La responsabilité des organisations internationales dans les orders juridiques internes et en droit des gens* (Bruylant 1998).

[18] A manifesto is Benedict Kingsbury, Nico Krisch and Richard Stewart, 'The Emergence of Global Administrative Law' (2005) 68 (3/4) Law and Contemporary Problems 15; see also Armin von Bogdandy and others (eds.) *The Exercise of Public Authority by International Institutions* (Springer 2010). GAL is applied to UNHCR in Mark Pallis, 'The Operation of UNHCR's Accountability Mechanisms' (2005) 37 New York University Journal of International Law and Politics 869.

[19] Carol Harlow 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 European Journal of International Law 187.

organization that is attributable to the organization. Both elements prove to be extremely difficult. This raises a further question, to be discussed in Section 3.3: why is international organizations' accountability so difficult?

The very term 'accountability' (and related terms like 'responsibility' or 'liability') already carries a strong suggestion that the entity concerned has done something questionable. At issue is the control of the acts of the organization, but whereas 'control' is a relatively neutral, unloaded term that at most suggests that the organization needs someone in charge, accountability and related terms are considerably more politicized. Put differently, the very term 'accountability' presupposes what often needs to be proven: that international organizations do wrong – 'control', by contrast, raises the possibility of wrongdoing, but without having reached that conclusion just yet.

Furthermore, accountability (and related terms) is usually backwards-looking: it makes sense to speak of *controlling* what an international organization plans to do tomorrow, but it makes less sense to speak of *holding it accountable* for what it plans to do tomorrow. Linguistically, it would seem odd to incur accountability for something that has not yet taken place, although in pledging to respect particular principles, such as human rights and humanitarian standards, international organizations create expectations regarding their future behaviour, and may be called to account for deviations from these commitments. The point for present purposes is not that the term accountability is out of place – it is merely to suggest that the term itself is based on certain assumptions which may or may not withstand further scrutiny.

Relatedly, the question arises of what and whose standards are considered of relevance. The ILC focuses on international legal obligation, and that is fine as far as things go. But different constituencies might rely on different and possibly contradictory standards of accountability, reflecting their own policy preferences. Put concretely, donors to specific IOM projects may rely on different standards than migrants do, whose priorities may also differ from those of the member states collectively and from those of (often foreign-based) civil society organizations.[20] This is likely to

[20] Ruth Grant and Robert Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99 American Political Science Review 29. On the relationship between IOM and international human rights advocacy NGOs, 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).

result in confusion and a leaking away of accountability – how to decide whose preferences weigh heavier?

Relatedly, it makes sense to think that organizations should be held responsible for misconduct, but often the problem lies elsewhere: it is often claimed that the organization should be held accountable for acts done in the course of doing its job. This comes in broadly two variations. First, in the exercise of a task, the organization can stumble on other, external, standards, to which it may or may not be bound as a matter of law. The classic example is the lengthy discussion about the World Bank and human rights, with the Bank caught between its own constituent instrument and a number of other possible standards supported by different stakeholders. This applies also to international organizations which have publicly stated to respect human rights, as IOM has done, unless one could claim that the human rights at issue are peremptory norms of international law (*jus cogens*). This may apply to some human rights norms (the torture prohibition, e.g. or the *non-refoulement* rule), but is unlikely to apply to most human rights norms. The net result then is a conflict of norms, and those often defy easy solutions, even if formerly external standards are transformed into 'internal rules'. They will, often enough, need to be balanced against other international rules.

The second scenario is where the organization causes damage (or contributes to it), without violating any particular international legal obligation. Here a standard scenario is that of the UN inadvertently bringing cholera to Haiti. The UN may have made some debatable decisions, such as contracting a local waste management company, likely for cost reasons. And most assuredly the UN should have issued an apology for a catastrophe happening on its watch. Still, it seems to have followed its own procedures for preventing the spread of communicable disease which had been working quite well for half a century, with a three-month window between testing and deployment. At worst (and not very plausibly, given the existence of these procedures), the UN can be accused of negligence, but how to give this hands and feet in international law? To some extent, this gets done by invoking an obligation to exercise due diligence, but due diligence itself remains rather elusive contents-wise, and it often remains unspecified why, as a matter of positive law, international organizations would be under an obligation to exercise due diligence.[21]

[21] Recent international law scholarship has started to investigate due diligence. Examples include Neil McDonald, 'The Role of Due Diligence in International Law' (2019) 68 International and Comparative Law Quarterly 1041; Samantha Besson, 'La *due diligence* en droit international', in *Recueil des Cours: Collected Courses of the Hague Academy of International Law* (2020).

3.3 Tropes Underlying the Law

As noted, international organizations were imagined as entities without external relations, let alone legal interactions with third parties. Whether this was ever tenable is beside the point (and really, it never was tenable), but what is relevant is that this became a very strong assumption – where actors were not expected to interact with the outside world, the legal system need not make arrangements for this; and by the time external engagement became topical, the vacuum assumption was firmly in place.

Behind the accountability discussion lie deeper tropes. If there is a tension between external standards and the mandate of an international organization, why not simply settle this in favour of external standards? After all, that is what happens with states: states cannot use their internal set-up as an excuse for violating international law. So why are things different with respect to international organizations?

Here the *topoi* underlying international organizations law make an appearance.[22] When international organizations are discussed, the adjective gets emphasized: international organizations are viewed as manifestations of the 'international', rather than as a particular kind of 'organization'. Doing so taps into a number of related tropes. First, for many (and especially international lawyers), the 'international' has a specific attraction. The 'international' is somehow regarded as superior to 'parochial', internationalism is considered better than nationalism. International lawyers are not alone in this: the thought can be traced back centuries, to Kant[23] and many writing before him. Few might opt for world government, but somehow internationalism is synonymous to peace, to harmony, to universal understanding.

This in turn borrows from a deeper idea: cooperation is considered superior to the absence of cooperation. Whether the proposition is generally tenable, is debatable (torture too depends on many people working together[24]), but for that no less forceful. Without cooperation, life would be 'nasty, brutish and short'. The *topos* is a strong one, deeply engrained and embedded in political thought. And that entails that for international

[22] My thinking here has been strongly influenced by Kratochwil. See Friedrich V Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press 1989); Friedrich V Kratochwil, *Praxis: On Acting and Knowing* (Cambridge University Press 2018).

[23] Immanuel Kant, *Zum ewigen Frieden* (Reclam 1984 [1795]).

[24] Rebecca Gordon, *Mainstreaming Torture: Ethical Approaches in the Post 9/11 United States* (Oxford University Press 2014).

lawyers, a soft agreement is always preferable to no agreement at all: voilà the most obvious explanation for the popularity of 'soft law'.[25] And international organizations, as manifestations of international cooperation, can accordingly do little wrong – almost literally.

With respect to international organizations, there is a further *topos* to consider: the idea that 'the end justifies the means'. This applies with particular force to international organizations; these, after all, are almost by definition set up to reach a certain end. The very core of international organizations law is that they exercise a function, a task, set to them by their member states. This even applies to organizations whose goal is very abstract and somewhat contested: think of the European Union's goal of becoming 'an ever closer union'. This is impossible to demarcate with any precision, but important it is nonetheless considered to be.

It is no coincidence that Jellinek, writing in 1882, used the term *Verwaltungszweck* to discuss international organizations, with the word *Zweck* translating as goal, or end. International organizations have an end (as organizations generally cannot work without a goal or *telos*[26]), and whatever contributes to that end should be given pride of place, while whatever might obstruct the achievement of the end should be brushed aside. Previous generations have intuitively recognized this, and have used biblical imagery to underscore the point. Claude gave his highly popular post-war textbook on international organizations the title *Swords into Plowshares*, in one linguistic stroke summing up the idea that peaceful order can be born out of the anarchical international society if only we let international organizations do their job.[27] And Singh, a future President of the International Court of Justice, even went one better, attributing to international organizations generally a crucial role in the 'salvation of mankind'.[28] The message is clear: let international organizations do what they were set up to do, and the world will be a better place.[29] The idea holds a strong place in the collective minds of specialist lawyers:

[25] See C M Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 International and Comparative Law Quarterly 850.

[26] Seumas Miller, *The Moral Foundations of Social Institutions* (Cambridge University Press 2010).

[27] Inis Claude, *Swords into Plowshares: The Problems and Progress of International Organization* (2nd edn, Random House 1959).

[28] Nagendra Singh, *Termination of Membership of International Organisations* (Stevens 1958) vii.

[29] Jens Steffek, *International Organization as Technocratic Utopia* (Oxford University Press 2021).

international organizations should act without impediments because they will bring us the salvation of mankind – and who would possibly want to stand in the way? This is irrespective of the precise international organization concerned: the oil cartel that is OPEC or the military alliance of NATO benefit from the positive image of international organizations founded on the above-mentioned tropes, as does IOM. The law has been unable to differentiate between organizations under reference to their perceived public ethos, and the precise constitutional mandates do not alter the picture. The *topoi* operate at a far deeper level, and even a hypothetical nasty international organization would be considered to manifest cooperation and represent 'the international', although in the case of an obviously nasty organization one might pause at thinking that the end would justify the means.

If the above is accurate, then it is no wonder that the law has problems thinking of international organizations as being accountable to third parties: the end, after all, justifies the means, and the end is considered so important that a little collateral damage is considered perfectly acceptable. On this line of thought, if UNHCR runs a refugee camp and decides to withhold food from those who seem a bit obstinate, that is considered quite acceptable: the obstinate interfere with the functioning of UNHCR.[30] And if the World Bank ends up displacing thousands of people in the name of a development project, again, the end justifies the means. Most of these *topoi* have a natural counterpart (local over global; sometimes cooperation is bad; some means are intrinsically bad), but the point for present purposes is precisely that these *topoi* strongly influenced – and still influence – the way international lawyers think about international organizations.

3.4 Internationally Wrongful Acts: Some Problems

But even without considering the above *topoi*, it will be difficult to hold international organizations to account. There are few institutional external arrangements available to enforce such obligations as international organizations may have. Typically, international organizations enjoy a large measure of immunity from legal proceedings before domestic courts. This applies also to IOM, which under Article 23 of its Constitution can claim a functional level of privileges and immunities. The text is somewhat ambivalent, with paragraph 3 of the same Article suggesting that the

[30] I borrow the example from Guglielmo Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (Cambridge University Press 2011).

privileges and immunities 'shall be defined' in agreements between IOM and states. This can be seen as meaning that there are no privileges and immunities in the absence of further agreements, but this is difficult to reconcile with the wording of paragraph 1, stating that IOM 'shall enjoy' privileges and immunities to the extent necessary for its functioning – and this would seem not to require further action. That said, calling for further action is functionally expedient, in that positing the absence of privileges and immunities suggests IOM may sometimes be impeded in its work, and detailed agreements will contribute to legal certainty.[31]

Moreover, international organizations cannot be made to appear before the International Court of Justice (ICJ), as only states can be parties to proceedings before the Court. And much the same applies to other international tribunals. There have been some arbitrations before the Permanent Court of Arbitration (PCA) involving international organizations, but the awards have invariably been kept confidential. Hence, it is difficult to get a sense of which rules were applied, how responsibility (if any) was conceptualized, et cetera.[32] This does little to boost confidence in closing the widely perceived remedies deficit.[33] And sometimes, quasi-judicial panels are set up to address specific instances or episodes of governance, or limited aspects thereof: think of the Kosovo Human Rights Advisory Panel, set up in the aftermath of the UN exercising governmental tasks in Kosovo, or the EU's Human Rights Review Panel, accompanying the EU's exercise of governmental tasks in Kosovo.[34] Still, these remain exceptions.

[31] The IOM Director General has called for further agreements; see e.g. IOM, 'Third Annual Report of the Director General on Improvements in the Privileges and Immunities Granted to the Organization by States' (29 September 2016) IOM Doc. S/19/1. On the other hand, Italian case-law granting immunity to IOM seems to have relied either on Article 23, paragraph 1 or on a customary grant of functional immunity: see Ricardo Pavoni, 'Italy', in August Reinisch (ed), *The Privileges and Immunities of International Organizations in Domestic Courts* (Oxford University Press 2013) 162.

[32] See, e.g. *International Management Group v. European Union, represented by the European Commission* (2017-04) PCA <https://pca-cpa.org/en/cases/158/> accessed 17 May 2022.

[33] See generally on the remedies deficit, Carla Ferstman, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (Oxford University Press 2017).

[34] For brief discussion, see Agostina Latino, 'Chronicle of a Death Foretold: The Long-term Health Impacts on Victims of Widespread Lead Poisoning at UN-run Camps in Kosovo', in Stefania Negri (ed), *Environmental Health in International and EU Law* (Routledge 2019). The EU of course has its own judicial mechanisms to review acts of the EU administration, but even here it is not always clear how and when the standards of review are based on international obligations. See further Jan Klabbers, 'Straddling the Fence: The EU and International Law', in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015).

For the better part, the options available tend to be internal to international organizations: compliance mechanisms, ethics offices, departments of institutional integrity. Useful as these may be,[35] they remain internal mechanisms, typically testing the activities of the organization concerned against internal standards. These standards may, but often do not, reflect international legal standards.[36] But even if it were possible to identify available remedies, two problems of a more principled nature remain. The first of these pertains to the basis of obligation in international law when it comes to international organizations; the second concerns attribution.

The various attempts to formulate accountability standards for international organizations invariably have problems in coming to terms with the basis of obligation. The ILC's ARIO specify that international organizations can only be held responsible in international law for their internationally wrongful acts, consisting of two elements: a violation of an international legal obligation incumbent on the organization, and attributable to the organization. And this raises two obvious questions: how do organizations incur international legal obligations, and when exactly are acts attributable to them? ARIO deal extensively with the latter question (more on this below), but not so much with the former; hence, guidance must be found elsewhere. In the *WHO-Egypt* advisory opinion, the ICJ held in 1980, somewhat in passing, that international organizations incur international legal obligations in three distinct ways:[37] they are bound by the treaties they are parties to; by their internal rules (and these may reflect international law) and by what the Court termed, purposefully one may assume, the 'general rules of international law'.[38]

International organizations conclude a variety of treaties. Nigh-on all international organizations will have concluded a headquarters agreement with their host state, and many will conclude operational agreements in their spheres of activity: troop-contributing agreements,

[35] For an empirical study, suggesting that internal mechanisms applying internalized standards can be useful, in particular if plaintiffs are backed by strong civil society organizations, see Kelebogilo Zvogba and Benjamin Graham, 'The World Bank as an Enforcer of Human Rights' (2020) 19 Journal of Human Rights 425.

[36] For an overview, see Jan Klabbers, 'Self-control: International Organisations and the Quest for Accountability', in Malcolm Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union* (Hart 2013).

[37] Sometimes these may join forces. For an illustration, see Vincent Chetail, 'The International Organization for Migration and the Duty to Protect Migrants: Revisiting the Law of International Organizations', in Jan Klabbers (ed), *The Cambridge Companion to International Organizations Law* (Cambridge University Press 2022).

[38] *WHO/Egypt* (n 4).

mission agreements and status-of-forces agreements in the case of the UN; loan agreements in the case of the World Bank, et cetera. But participation of international organizations in multilateral treaties of a quasi-legislative nature is almost non-existent, and even more so if the EU (the only organization with a proper foreign policy, if it can still be considered an international organization to begin with) is excluded. International organizations are neither parties to human rights treaties, nor to humanitarian treaties or to environmental protection treaties.[39] And what applies to international organizations generally, applies to IOM as well – it is not a party to any multilateral convention of the sort mentioned above.

It is not uncommon for international organizations to have internal instruments reflect international law. The World Bank will generally be mindful of human rights (as will other international organizations: very few of them commit torture, practice slave labour, or stifle freedom of religion), while the UN Secretary General in the 1990s issued a Bulletin declaring that the UN will apply the 'fundamental principles and rules' of international humanitarian law.[40] Laudable as the latter may be, it nonetheless provides the UN with considerable wriggle room in concrete cases: it is not bound by the letter of the Geneva Conventions. Potentially important for present purposes, moreover, is that in 2013 the UN adopted a Human Rights Due Diligence Policy (amended in 2015) which, so it is argued, ought to be respected by entities related to the UN, including IOM.[41]

The most controversial source listed in the *WHO-Egypt* opinion, however, is the reference to the 'general rules of international law'. Many observers have taken this as a reference to 'customary international law',[42]

[39] The one exception to date with respect to human rights treaties is that the EU has joined the Convention on the Rights of People with Disabilities. In addition, it has joined a fair number of environmental treaties.

[40] UN Secretariat, 'Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law' (6 August 1999) UN Doc ST/SGB/1999/13.

[41] See 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).

[42] For one example among many, see Stian Øby Johansen, 'An Assessment of IOM's Human Rights Obligations and Accountability Mechanisms' 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). See also Andrew Clapham, *Human Rights Obligations of Non-State Actors*

but doing so is unpersuasive: had the Court wanted to refer to the entire corpus of custom, it could have done so explicitly. The better view is that the Court's words refer to the 'secondary rules' of the legal system: those addressing the creation and application of primary rules.[43] It would be difficult to imagine that international organizations could escape from general notions of treaty-making, or the general rules on jurisdiction; but it is also unlikely that, e.g. the International Civil Aviation Organization would be bound by the entire corpus of customary international law, regardless of whether it has in some way consented.[44] The one possible exception is *jus cogens* (peremptory norms from which no derogation is permitted, such as the prohibition of genocide), but this follows from the very nature of *jus cogens*: it has to be binding on all actors, including international organizations; otherwise it cannot be considered *jus cogens*.

If the basis of obligation is difficult to capture, no less problematic is the idea of attribution. To put it bluntly: international organizations rarely have their own police officers, customs officers, and the like: they often depend for implementation of action on cooperation by their member states. Plus, in turn, their decisions are often traceable to some or all member states, and could (generally) not be taken without some member state involvement. At the very minimum then, international organizations can rarely act in full independence from member states. But there is more to it still: often enough, international organizations participate in projects in which others also participate. Well-known is the collaboration in the field between IOM and UNHCR, often also involving governments and other actors. In a development project, participants may include private banks, construction companies, local governments, and multilateral development banks. In other cases, such as peacekeeping, it may involve not just national troop contingents but also transportation companies, waste management providers, and yet other participants, including regional organizations. Hence, it is often difficult, perhaps impossible, meaningfully to distinguish between the various participants in attributing behaviour.

(Oxford University Press 2006). A different line of argument is pursued by Kristina Daugirdas, 'How and Why International Law Binds International Organizations' (2016) 57 Harvard International Law Journal 325.

[43] The terminology derives from H L A Hart, *The Concept of Law* (Clarendon 1961).

[44] Consent to customary rules is largely a theoretical matter ('tacit consent'), but for that no less indispensable. See Jan Klabbers, 'The Sources of International Organizations' Law: Reflections on Accountability', in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (Oxford University Press 2017).

3.5 A Bird's Eye View on ARIO: Answering a Different Issue

The ARIO are based on several assumptions about their practical effect. Above, it was already noted that they require a violation of an international legal obligation incumbent on the organization (rather than its member states), and this violation must be attributable to the organization concerned. Both elements, it was argued above, will rarely materialize, and they will even more rarely materialize at the same time.

Some scenarios seem obviously to engage the responsibility of the organization concerned. One can easily imagine, for instance, that pushbacks operations engaged in by Frontex, the EU's border agency, will possibly engage the EU's responsibility under international law. Pushbacks may in certain circumstances violate the prohibition of non-refoulement (often seen as an example of *jus cogens*,[45] and therefore binding on the EU[46]), and Frontex is an agency of the EU – hence, responsibility is prima facie likely.[47] Likewise, mistreatment of refugees by UNHCR staff or IOM staff running a refugee camp or similar settlements will prima facie engage the organization's responsibility, as will sexual abuse by UN peacekeepers.

And yet, things are not entirely clear. One of the curiosities behind ARIO is that their application is premised on classical international legal thinking: Articles 43 to 49, regulating the possibilities for invoking ARIO, are limited to sketching the circumstances under which responsibility can be invoked by a state or an international organization. Systemically, this makes eminent sense: international organizations, by and large, only hold international legal obligations towards either states or other international organizations, so it stands to reason that these two categories of entities are the ones upon which the ARIO are premised. Put differently, under classic international law as it applies to international organizations, IOM has the capacity to conclude an agreement with, say, Uzbekistan and subsequently breach it; and IOM has the capacity to conclude an agreement with, for example UNHCR. And should customary international law apply to international organizations to begin with, it will be in the

[45] See Cathryn Costello and Michelle Foster, 'Non-Refoulement as Custom and *Jus Cogens*? Putting the Prohibition to the Test' (2015) 46 Netherlands Yearbook of International Law 273.

[46] If non-refoulement is not part of *jus cogens*, the picture may change. The provision is laid down in the 1951 Refugee Convention, to which the EU is not a party, and for reasons set out above it is not immediately self-evident that the EU is bound by customary international law. That said, the Court of Justice of the EU has repeatedly held that the EU is so bound.

[47] On attribution, see Roberta Mungianu, *Frontex and Non-Refoulement: The International Responsibility of the EU* (Cambridge University Press 2016).

form of obligations owed towards other states and other international organizations.[48] As a result, it is no surprise that ARIO discuss the circumstances in which responsibility can be invoked by directly injured states and international organizations; that it prescribes that states and organizations give notice when they invoke responsibility; that ARIO refer to the general admissibility criteria known to inter-state international law (nationality of claims, and exhaustion of local remedies); that states and organizations can lose their right to invoke responsibility; that it provides for invoked responsibility by a plurality of states or organizations; and that it eventually provides for responsibility to be invoked by states and organizations that are not directly injured. The underlying model is that of classical international, inter-state, law, which is limited to addressing claims between states, and to those cases where private complaints come to be owned by the state of nationality of the complainant. The only concession concerns the circumstance that under ARIO, international organizations too can be part of the system, and the only (minor) departure from the classic model consists of the possibility to invoke responsibility on behalf of the community interest.

But what has gone missing here is the circumstance that in the twenty-first century, the most problematic situations are not those where IOM violates a treaty obligation towards Uzbekistan or UNHCR, but where organizations exercise public power: where Frontex engages in push-backs; where IOM runs a migration processing centre; where UNHCR staff decides on refugee status applications, where the UN exercises governance and policing powers.[49] It is here that ARIO are found wanting, resting content with the savings clause of Article 50, suggesting that ARIO is 'without prejudice' to entitlements private or legal persons may have to invoke ARIO. Again, in systemic terms this makes sense, and yet, it also suggests that when most needed, ARIO retreat. Private persons with a grievance against an organization need to find another legal basis for invoking responsibility – the individual having been badly served by IOM needs to identify a different legal basis. This, in turn, is harmonious with Article 33 of ARIO, suggesting that rights 'may accrue directly' to individuals or legal persons. By way of example, the official ARIO Commentary

[48] It is philosophically unclear whether customary law obligations are owed to individuals, to another state, to states (and/or individuals) *erga omnes*, or all of the above.

[49] See also Armin von Bogdandy and Mateja Steinbrück Platise, 'ARIO and Human Rights Protection: Leaving the Individual in the Cold' (2012) 9 International Organizations Law Review 67.

mentions obligations of organizations arising out of employment, and the effects of peacekeepers' breaches on individuals.[50] But this ignores that while for the former there might be judicial mechanisms available in the form of administrative tribunals, this does not apply to the latter: confronted with allegations concerning the activities of peacekeepers, international organizations will be quick to invoke their immunity from suit.

If the first relevant assumption underlying ARIO is the classical interstate model of international law, oblivious to the exercise of public authority by international organizations, the second is equally problematic, and harks back to the problem of attribution. The basic idea, understandable enough in a liberal society where actors are supposed to be autonomous and thus to be held responsible for their own actions, is that responsibility can always be carved up between those participating in a wrongful act. And in theory, or *ex hypothesi* perhaps, it can: one can make fine distinctions and yet finer distinctions about how actors collaborate and how this affects 'their' contribution to a wrongful act, and this is precisely what ARIO aim to do. It contains over a dozen Articles on attribution in one way or another or, put differently, around 20% of the ARIO is devoted to attribution. The least problematic of those are Articles 6 through 9, largely addressing the acts of international organizations themselves and suggesting that acts of an organization's organs and agents are attributable to the organization.

Articles 14–19 see to divided responsibility: an international organization can incur responsibility for aiding and assisting another entity in committing a wrongful act – hence, it is not excluded that IOM would incur responsibility for training the Libyan Coast Guard and providing it with equipment and infrastructure.[51] Organizations may also incur responsibility for directing and controlling such an act; for coercing another entity in such an act; for using member states to circumvent obligations; and as members of another international organization. And Article 19 underlines that this is 'without prejudice' to the separate responsibility of other international organizations or states. The model, therewith, is one of 'carved-up responsibility': each and every act can presumably be broken down into smaller pieces; for some of these the organization will incur responsibility, for some others a collaborator will incur responsibility.

[50] 'ILC Articles on the Responsibility of International Organizations' annexed to UNGA Res 66/100 (27 February 2012) UN Doc A/RES/66/100 (ARIO) plus commentary at 79, commentary to Article 33 para 5.

[51] As noted in Bradley, *The International Organization for Migration: Challenges, Commitments and Complexities* (n 2).

The same presumption underpins a final set of articles, Articles 58–63, addressing the partial responsibility of states for the acts of international organizations and largely mirroring Articles 14–19: aiding and assisting by states; direction and control by states; coercion by states; circumvention of obligations resting upon states, and express or implied acceptance of responsibility by states, and again 'without prejudice' to the possible responsibility of the organization concerned or any other state or organization. The message then is clear: each and every single wrongful act can be broken down, divided, parcelled out. In a literal sense, there is no 'sharing' of responsibility envisaged, as each participant can potentially be held responsible for its own contribution. In other words: a scenario in which IOM helps to run a detention centre in Libya and is financed, in part, by the EU, would cause serious intellectual difficulties, for how to break this down into manageable bits of activities that might incur the responsibility of the various participants?[52]

Hence, the question arises: how realistic is it to think of parcelled responsibility? Its provenance is understandable: the philosophical basis of acceptable politics (and therewith law) is individualist and liberal, and has been for centuries.[53] It is considered unfair (with minor exceptions) to punish A for acts of B or C, and thus there is a strong philosophical imperative to divide wrongful acts into a multitude of component parts for which a multitude of different actors can be held responsible. But in the real world, such clear-cut divisions are not always possible or plausible and, what is more, many have discovered that this liberalism invites them to artificially assign tasks to different entities, each with their own sphere of responsibility – this is how Finnair can claim, selling products on a Finnair flight and with prices listed on a Finnair menu, that responsibility rests elsewhere, for responsibility can always be made to rest elsewhere, either upwards (with the assignor) or downwards (with the sub-contractor).

3.6 An Excursion into IOM Mechanisms

Even though IOM is not legally bound to any human rights convention, the understanding is that at the very least, by concluding the 2016 IOM-UN Agreement, it bound itself to respect human rights, broadly

[52] An attempt to close the gap is André Nollkaemper and others, 'Guiding Principles on Shared Responsibility in International Law'(2020) 31 European Journal of International Law 15.

[53] Louis Dumont, *Essais sur l'individualisme* (PUF 1983); Mark Bovens, *The Quest for Responsibility* (Cambridge University Press 1998).

speaking.[54] The Agreement provides, after all, in Article 2, paragraph 5 that IOM 'undertakes to conduct its activities' in accordance with the purposes and principles of the UN and with 'due regard to the policies of the UN furthering' these purposes and principles, as well as 'other relevant instruments in the international migration, refugee and human rights fields.' What exactly this means in ordinary language is not entirely clear (and that is probably no coincidence), but at least it would seem to suggest that IOM has committed itself to act with a human rights sensibility.

In the virtual absence of external accountability mechanisms such as courts, IOM has developed some internal mechanisms to hold it to account, but it should be noted here that the term accountability in itself is versatile, and covers many forms of control.[55] Thus, IOM has an Office of the Inspector-General, which can evaluate the acts of individual IOM officials[56] and is otherwise engaged in auditing IOM's country offices or particular policies, but mostly in terms of effectiveness, understood in terms of whether the policies are effective in achieving their stated aims, or whether the country offices are run effectively from a bureaucratic perspective. And this has fairly little to do with how accountability is usually conceptualized in discourses surrounding international organizations. Similarly, like so many other international organizations, IOM as an employer has accepted the jurisdiction of the International Labour Organization Administrative Tribunal (ILOAT), which serves as the tribunal deciding staff disputes for some sixty international organizations. It has done so since 1999, and has thus far (late 2021) been involved in around fifty ILOAT cases which, given the circumstance that IOM employs some 15,000 people, is very decent.[57] That said, a report ranking the internal justice systems of a number of international organizations is not very impressed: it ranks IOM 29th out of the 35 organizations scrutinized, which is all the more problematic, perhaps, as IOM is the fourth largest employer of the organizations covered.[58] Either way, its activities as employer are not directly related to the more usual conception of

[54] 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.

[55] What follows is culled from IOM's website, <www.iom.int> accessed 17 May 2022.

[56] For an assessment of its evaluative work, see Johansen (n 42).

[57] IOM, 'IOM Snapshot 2021' (2021) <www.iom.int/sites/g/files/tmzbdl486/files/about-iom/iom_snapshot_a4_en.pdf> accessed 17 May 2022.

[58] International Administrative Law Centre of Excellence, *Internal Justice Systems of International Organisations Legitimacy Index 2018* (on file with the author).

accountability (focusing on the substantive activities of the organization rather than its role as employer), and neither is the work of IOM's Office of the Ombudsperson.

The closest to accommodating regular accountability concerns at IOM is the Ethics and Conduct Office, providing counsel, promoting ethical awareness, reviewing allegations of retaliation and recommending protective measures. This too is not exactly a promise to act in conformity with generally accepted human rights standards, but comes somewhat closer. In order to give effect to this, the IOM website even offers a Confidential Reporting Form, offering individuals the chance to complain about fraud and corruption and misuse of resources (again, perhaps more useful to the organization than to the complainant) but also about harassment, retaliation and sexual exploitation and abuse.[59]

In 2020, IOM summarized and streamlined its accountability policies by means of a newly established Accountability to Affected Populations framework,[60] realizing that its activities may have broader effects than merely on those who benefit from IOM's work. While the document stipulates to be based on principles such as 'do no harm', non-discrimination, and zero tolerance for sexual abuse and exploitation, at no point does it claim that IOM will respect particular international legal instruments. The document comes closest in pledging that IOM's crisis-related operations will adhere to 'the humanitarian principles of humanity, impartiality, neutrality and independence in the delivery of its humanitarian response'.[61] When it comes to data protection, moreover, it adheres to its own data protection principles and those of the UN, rather than those promulgated for more general use, such as the EU's General Data Protection Regulation.[62]

3.7 Conclusion

If and when IOM does wrong, it will be difficult to hold it to account under international law. This is partly because few external accountability mechanisms are available, but the problem (if that is what it is) runs much, much

[59] See IOM, 'Confidential Reporting Form' <https://weareallin.iom.int/> accessed 17 May 2022.

[60] IOM, 'Accountability to Affected Populations Framework' (2020) <https://publications.iom.int/system/files/pdf/iom-aap-framework.pdf> accessed 17 May 2022.

[61] Ibid, 10.

[62] IOM, 'Data Protection' <www.iom.int/data-protection> accessed 17 May 2022. For useful general discussion of the possible applicability of the GDPR to international organizations generally, see Christopher Kuner, 'International Organizations and the EU General Data Protection Regulation' (2019) 16 International Organizations Law Review 158.

deeper than merely the absence of suitable mechanisms. It is written into the DNA of international organizations law that accountability will be difficult to achieve, regardless of the availability of mechanisms, the existence of privileges and immunities, and related matters. The heart of the matter is that the underlying framework does not allow for accountability, from a legal perspective at least: the 'software' of putative accountability schemes is structurally incompatible with the 'hardware' of functionalist legal theory and functionalist international organizations law. Whether other, perhaps less 'legal', mechanisms would fare better remains unclear. Recognized approaches propagated in the public administration literature (thinking of IOM as having 'clients' that it would be accountable to in accordance with a market model, for example, or enhancing possibilities for participation by stakeholders in decision-making and implementation[63]) do not appear to be very practical when it comes to international organizations generally, and much less so in times of urgency and crisis.

The only possible way out is not to have more rules; is not to have more tribunals; is not the lifting of immunity; the only way out, instead, is to rethink international organizations law from the ground up. Neither changing the IOM Constitution nor creating more internal mechanisms will do the trick as long as the 'operating system' is not capable of accommodating accountability towards third parties. As long as the law is dominated by the vacuum assumption, established over a century ago, discussing accountability will come to naught. It is only once international organizations are treated, in law, as the autonomous political actors they are, that discussing their accountability towards third parties has a chance of success.

In addition, at the risk of sounding *Weltfremd*, much also depends on organizational culture: an organization that internalizes a virtuous mindset among leadership and staff might be more inclined to behave responsibly than an organization where a 'Just Do It' mentality prevails or, worse perhaps, an organizational culture steeped in harshness and rough competition. The point is familiar from studies on business leadership[64], and may be extended to global governance, including international organizations such as IOM.[65]

[63] Seminal is Judith Gruber, *Controlling Bureaucracies: Dilemmas in Democratic Governance* (University of California Press 1987).

[64] Classic is Robert Jackall, *Moral Mazes: The World of Corporate Managers* (2nd edn, Oxford University Press 2010).

[65] See Jan Klabbers, *Virtue in Global Governance: Judgment and Discretion* (Cambridge University Press 2022).

4

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

STIAN ØBY JOHANSEN

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.

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.

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.

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.

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.

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.

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.

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.

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).

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.

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.

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).

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.

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.

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).

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.

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.

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*

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.

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.

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.

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.

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.

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).

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.

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.

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.

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.

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.

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

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.

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.

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.

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.

5

A Human Rights Due Diligence Policy for IOM?

HELMUT PHILIPP AUST AND LENA RIEMER

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'.

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.

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 I, 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.

6

The Legal Relationship between the UN and IOM

What Has Changed since the 2016 Cooperation Agreement?

MIRIAM CULLEN

6.1 Introduction

On 8 July 2016, the UN General Assembly (UN GA) adopted by consensus an Agreement Concerning the Relationship between the UN and the International Organization for Migration (IOM) (the 2016 Agreement). IOM renamed itself 'UN Migration' on the grounds that the Agreement had transitioned it into 'UN-related' status,[1] through which it became 'part of the UN family'.[2] Yet the phrase 'UN-related' is neither mentioned in the agreement nor an expression of legal art.[3] Such an interpretation fails to reflect the pre-existing legal relationship between the two organizations which was set out in a similar agreement concluded twenty years earlier. This chapter finds that in legal terms, the differences between the 1996 and 2016 UN-IOM Agreements are modest. That finding is important because the later Agreement has been used to justify a significant shift

[1] 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) 30; Antoine Pécoud, 'Introduction: The International Organization for Migration and the New "UN Migration Agency"' in Martin Geiger and Antoine Pécoud (eds), *The International Organization for Migration: The New 'UN Migration Agency' in Critical Perspective* (Palgrave Macmillan 2020) 2; Megan Bradley, 'Joining the UN Family? Explaining the Evolution of IOM-UN Relations' (2021) 27 Global Governance: A Review of Multilateralism and International Organizations 251; Megan Bradley, 'The International Organization for Migration (IOM): Gaining Power in the Forced Migration Regime' (2017) 33 Refuge (1) 97.

[2] IOM, 'IOM Becomes 'Related Organization' of the United Nations' (Press Release, 26 July 2016) <www.iom.int/news/iom-becomes-related-organization-united-nations> accessed 30 June 2022.

[3] Vincent Chetail, *International Migration Law* (Oxford University Press 2019) 366; Miriam Cullen, 'The IOM as a "UN-Related" Organization, and the Potential Consequences for People Displaced by Climate Change' in Simon Behrman and Avidan Kent, *Climate Refugees: Global and Critical Approaches* (Cambridge University Press 2023) 338.

in IOM identity. IOM has taken on a new leadership role in legal standard setting and development, including through the negotiation of the Global Compact for Safe, Orderly and Regular Migration, and its follow-up and review.[4] There is a disconnect between the actual legal effect of the agreement and the impression of it which is important because what IOM can be held accountable for, as a matter of law, is defined by its formal legal obligations. Therefore, clarity over what the 2016 Agreement achieves is essential. This is true whether one views accountability in international law in a narrow sense, manifested in tribunals of legal enforcement, or perceives it more broadly as fostered through procedural mechanisms which facilitate transparency and access to information.[5] As has often been remarked, legal obligations provide a common language for compliance and accountability mechanisms, whether meted out through legal or political processes,[6] and notwithstanding fairly pervasive deficiencies in those mechanisms as they apply to international organizations generally.[7]

This chapter begins by examining what 'UN-related' means, the term being not one of law but description, used to refer to a certain grouping of international organizations that possess similar cooperation agreements with the UN. That is followed by an account of why this arrangement was pursued instead of specialized agency status. Thereafter the 1996 and 2016 UN-IOM Cooperation Agreements are compared to find that while the 2016 Agreement has clearly triggered internal policy changes within IOM, those changes are not necessarily demanded by its terms. In fact, already modest accountability mechanisms in the 1996 Agreement were actually watered down in the 2016 version.

[4] UNGA Res 71/1, 'New York Declaration for Refugees and Migrants' (19 September 2016) UN Doc. A/RES/71/1 (hereafter New York Declaration) Annex II, para 12; UNGA Res 73/195, 'Global Compact for Safe, Orderly, and Regular Migration' (19 December 2018) UN Doc A/RES73/195 (hereafter Global Compact) para 45(a).

[5] Anne Peters, 'International Organizations and International Law' in Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (Oxford University Press 2016) 33.

[6] Rosalyn Higgins, 'The Place of International Law in the Settlement of Disputes by the Security Council' (1970) 64 American Journal of International Law 1.

[7] Jean d'Aspremont, 'The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility' (2012) 9 International Organizations Law Review 15; See also Stian Øby Johansen, 'An Assessment of IOM's Human Rights Obligations and Accountability Mechanisms' 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).

6.2 What Is 'UN-Related' Status and When Did IOM Achieve It?

IOM has interpreted its most recent cooperation agreement as having transitioned it to become 'a part of the UN family', its press release at the time was entitled 'the IOM Becomes [a] "Related Organization" of the United Nations'.[8] It changed its twitter handle to @UNmigration and added the words 'UN Migration' after its acronym on its branding. Although the 2016 Agreement appears to have inspired the adoption of a new UN-related *identity* for IOM, there is nothing express in the 2016 Agreement to justify it. Guy S. Goodwin-Gill has written that 'Although banners and leaflets may suggest otherwise, the International Organization for Migration (IOM) is not a United Nations agency, and neither has it "entered" or "joined" the UN'.[9]

The phrase 'UN-related' is not a recognized or defined legal category. UN-related organizations are not contemplated within the UN Charter or other international instruments. Rather, the expression is used adjectivally to describe a small suite of international organizations that have cooperation agreements with the UN of certain similar character and yet are not UN-specialized agencies.[10] At least some of the other international organizations described as 'UN-related' seem to have understood their cooperation agreements as keeping them at arm's length from the formal UN regime. The International Criminal Court (ICC), for example, provides on its website that 'while not a United Nations organization, the Court has

[8] IOM, Press Release (n 2).

[9] Guy S. Goodwin-Gill, 'A Brief and Somewhat Sceptical Perspective on the IOM', paper presented to the Oxford University Refugee Studies Centre Workshop, 'IOM: The UN Migration Agency?, Oxford, (2 February 2019). UNSW Sydney, Kaldor Centre Publication on 7 April, 2019 <www.kaldorcentre.unsw.edu.au/publication/brief-and-somewhat-sceptical-perspective-international-organization-migration> accessed 30 June 2022.

[10] The Secretariat to the UN Framework Convention on Climate Change (UNFCCC) and the International Trade Centre are excluded from consideration here because this chapter focuses on the relationship between *international organizations* and the UN. International secretariats of environmental agreements, including the UNFCCC, are generally 'not regarded as international organizations' within the meaning ascribed by the International Law Commission, ILC Articles on the Responsibility of International Organizations' annexed to UNGA Res 66/100 (27 February 2012) UN Doc A/RES/66/100 (ARIO), Art 2, notwithstanding that secretariats enjoy some legal capacity: Bharat H. Desai, *Multilateral Environmental Agreements: Legal Status of the Secretariats* (Cambridge University Press 2013) 172. The ITC is a subsidiary organ of the UN and the WTO rather than an independent international organization in its own right: International Trade Centre, 'Our Role in the UN and WTO' <www.wto.org/english/thewto_e/coher_e/wto_itc_e.htm> accessed 30 June 2022. There might be lessons to be drawn from these arrangements too, but they are beyond the scope of this chapter.

a cooperation agreement with the United Nations'.[11] For most of these organizations, some institutional distance makes intuitive sense. Of the eight UN-related organizations listed in the UN organization chart,[12] three are judicial bodies (the International Seabed Authority, the International Tribunal for the Law of the Sea, and the ICC). A further three deal with the control of particularly hazardous weapons and materials (the International Atomic Energy Agency, the Comprehensive Nuclear Test Ban Treaty Organization, and the Office for the Prohibition of Chemical Weapons) which, being sensitive both materially and politically, arguably warrant standalone institutional arrangements. The final two are the World Trade Organization (WTO) and IOM. For reasons that are not material to the argument here, the UN-WTO Agreement was, as IOM has acknowledged, 'based on exceptional circumstances' associated with the character of its predecessor organization, the General Agreement on Trade and Tariffs (GATT), being both temporary and an 'agreement' rather than an organization as such. The WTO, on its establishment, simply continued the pre-existing arrangements between the UN and the GATT, through an exchange of letters with the UN Secretary-General.[13] Thereafter the UN indicated that the arrangement 'cannot represent a realistic model for future relations with any other organization'.[14]

Overall, the cooperation agreements between the UN and its related organizations are sufficiently similar that while not pro forma, they together form part of an obvious set, distinguishable from those the UN has concluded with, for example, non-governmental organizations, other international organizations, or regional arrangements.[15] While not identical, the cooperation

[11] International Criminal Court, 'How the Court Works' <www.icc-cpi.int/about/how-the-court-works> accessed 30 June 2022.

[12] UN, 'The United Nations System' <www.un.org/en/pdfs/un_system_chart.pdf> accessed 30 June 2022.

[13] IOM, 'IOM-UN Relationship' (14 November 2006) IOM Doc MC/INF/285 5 footnote 3; IOM, 'Options for the IOM-UN Relationship: Additional Analysis of Costs and Benefits' (9 November 2007) IOM Doc MC/INF/290 3 para 10. See further: World Trade Organization General Council, 'Arrangements for Effective Cooperation with other Intergovernmental Organizations: Relations between the WTO and the United Nations: Communication from the Director-General', (3 November 1995) WTO Doc WT/GC/W/10 para 1.

[14] IOM, 'IOM-UN Relationship' (n 13).

[15] Which are typically sui generis in both substance and form, for instance UN cooperation with the Council of Europe is the subject of a biennial UNGA resolution: Res 75/264, 'Cooperation between the United Nations and the Council of Europe' (6 March 2021) UN Doc A/RES/75/264. The Association of South East Asian Nations (ASEAN) holds a memorandum of understanding with the UN: 'Memorandum of Understanding between the Association of Southeast Asian Nations (ASEAN) and the United Nations

agreements follow the same general structure and are markedly similar in both substance and form. Each agreement – including both the 1996 and 2016 IOM iterations – contains comparable clauses on general cooperation and coordination between the organizations,[16] information sharing and exchange,[17] representation and participation in meetings,[18] avoiding the unnecessary duplication of work,[19] reporting to the UN,[20] and personnel

(UN) on ASEAN-UN Cooperation' (27 September 2007) <https://asean.org/wp-content/uploads/2017/12/2007-Memorandum-of-Understanding-between-ASEAN-and-the-UN-on-ASEAN-UN-Cooperation.pdf> accessed 30 June 2022. The Organization for Economic Cooperation and Development, holds a number of separate memoranda of understanding and cooperative arrangements with UN General Assembly bodies and UN specialized agencies including, for example, the UN Development Program, the UN Educational, Scientific and Cultural Organization and the Food and Agriculture Organization: OECD, 'Partnerships with International Organizations' <www.oecd.org/global-relations/oecdpartnershipswithinternationalorganisations/> accessed 30 June 2022.

[16] Cooperation and coordination: UNGA Res 1145/XII, 'Agreement Governing the Relations between the United Nations and the International Atomic Energy Agency' (14 November 1957) UN Doc RES/1145/XII (UN-IAEA) Art. 11 and 12; UNGA Res 52/251, 'Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea' (15 September 1998) UN Doc RES/52/251 (UN-ITLOS) Art. 2; UNGA Res 52/27, 'Agreement Concerning the Relationship between the United Nations and the International Seabed Authority' (14 March 1997, adopted 26 November 1997) UN Doc 52/27 (UN-ISA) Art. 3 and 6; UNGA Res 54/884, 'Agreement to Regulate the Relations between the United Nations and the Preparatory Commission for the United Nations Comprehensive Nuclear-Test-Ban Treaty Organization' (26 May 2000) UN Doc RES/54/884 (UN-CTBTO) Art 2; UNGA Res 55/283, 'Agreement concerning the Relationship between the United Nations and the Organization for the Prohibition of Chemical Weapons (7 September 2001, adopted 24 September 2001) UN Doc RES/55/283 (UN-OPCW) Art. II and III; UNGA Res 58/874, 'Relationship Agreement between the United Nations and the International Criminal Court' (7 June 2004, adopted 20 August 2004) UN Doc RES/58/874 (UN-ICC) Art. 3; UN ECOSOC, 'Cooperation Agreement between the United Nations and the International Organization for Migration' (25 June 1996) UN Doc E/DEC/1996/296 (hereafter 1996 UN-IOM Agreement) Art. V and VII; 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 (hereafter 2016 Agreement) Art 3.

[17] Information sharing and exchange: UN-IAEA Art. VI; UN-ITLOS Art. 4; UN-ISA Art. 8(1); UN-OPCW Art. II; UN-CTBTO Art. VII; UN-ICC Art. 5; 1996 UN-IOM Agreement Art. III; 2016 Agreement Art. 7.

[18] Representation and participation in meetings: UN-IAEA Art. VII; UN-ITLOS Art. 3; UN-ISA Arts. 4(2), 6; UN-CTBTO Art. III; UN-OPCW Art. V; UN-ICC Art. 4; 1996 UN-IOM Agreement Art. II; 2016 Agreement Art. 5.

[19] Duplication: UN-IAEA Art. XI; UN-ITLOS Art. 4(3); UN-ISA Art. 3(1) and 9; UN-CTBTO Art. II(4), VII(5); UN-ICC Art. 5(2); 2016 Agreement Art. 7(4).

[20] Reporting to the UN: UN-IAEA Art. III and IV; UN-ITLOS Art. 5; UN-ISA Art. 8; UN-CTBTO Art. IV; UN-OPCW Art. IV; UN-ICC Art. 6; 1996 UN-IOM Agreement Art. V(3); 2016 Agreement Art. 4.

arrangements.[21] Most stipulate that the autonomy and/or institutional independence of the non-UN organization remains unchanged as a result of the agreement, although, notably, the 1996 UN-IOM Agreement did not.[22] The order in which the clauses appear, specific phrasing, and provisions that deal with the *sui generis* character of the relevant non-UN organization, distinguish one UN cooperation agreement from another. None of the cooperation agreements between the UN and other international organizations incorporate the phrase 'UN-related', nor do any recognize that becoming UN-related, or something like it, is a legal status the relevant agreement affords.

According to a 2007 report of IOM, an 'UN-related agency' is one 'whose cooperation agreement with the UN has many points in common with that of specialized agencies, but does not refer to Art. 57 or 63 of the Charter'.[23] Article 57 of the UN Charter defines a specialized agency as one with 'wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields'. IOM is different from other UN-related organizations because it is the only one for which its main activities fall directly *within* the categories which would qualify it for UN specialized agency status.[24] Unlike the others, IOM performs services, albeit on behalf of states, for the care, migration, transfer of individuals on a one-on-one basis through the broadly migration-related processes and activities it facilitates. With the exception of the WTO, UN-related organizations tend to be those the mandates of which deal with matters outside the economic, social, cultural, educational or health realms.[25] Why, then, did the IOM not pursue specialized agency status?

6.3 Why a New Agreement?

In 2014 a draft resolution was tabled in the Second Committee of the UN GA that proposed, among other things, the creation of a centralized UN agency for migration. In response, the Director-General of IOM, William Swing, wrote to the IOM-Council warning that 'the UN General Assembly's Second Committee discussions have given substantial momentum to

[21] Personnel: UN-IAEA Art. XVIII; UN-ITLOS Art. 6; UN-ISA Art. 11; UN-CTBTO Art. X; UN-OPCW Art. X; UN-ICC Art. 8; 2016 Agreement Art. 10.

[22] Independence from the UN: UN-ITLOS Art. 1; UN-ISA Art. 2(2); UN-CTBTO Art. I(1); UN-OPCW Art. 1(2); UN-ICC Art. 2(1); autonomy of the non-UN organization: UN-IAEA Art. I(2); UN-ISA Art. 2(2); 2016 Agreement Art. 2(3).

[23] IOM, 'Options for the IOM-UN Relationship: Additional Analysis of Costs and Benefits' (n 13) 2–3 para 9.

[24] With the exception of the WTO in terms of 'trade' which, as explained earlier in this section, is subject to an anomalous institutional arrangement with the UN.

[25] Chetail, International Migration Law (n 3) 365.

the idea that migration should be institutionalized in the UN system'.[26] He suggested that 'as a matter of self-defence' the Council ought to 'consider the possibility of a more formal association with the UN system' or 'other agencies would duplicate aspects of our mandate to the point where we risked losing our global migration agency status'.[27] Yet, the process of becoming a specialized agency is relatively cumbersome by comparison with what is necessary to conclude a new cooperation agreement.

Specialized agencies are brought into relationship with the UN in accordance with Article 63 of the UN Charter, which permits ECOSOC to enter into, and define the terms of those agreements, subject to the final approval of UNGA. Thus, to become a specialized agency, IOM would need to finalize an agreement with ECOSOC and later the UNGA, in accordance with a decision by the IOM Council.[28] It would not necessarily require any amendment to the IOM Constitution and could take a year or two to implement, depending on the complexity of the arrangement.[29] On the other hand, a cooperation agreement need only be negotiated, signed by those with the appropriate authority, and adopted by the UNGA. That a cooperation agreement would be more expeditious could have been important. Ban-Ki Moon was months away from ending his term as Secretary-General of the United Nations at the time the 2016 UN-IOM Agreement was signed. Had IOM waited, new diplomatic relationships would need to be fostered and there was a risk that the new Secretary-General may not share Moon's enthusiasm for the new terms.

The notion that IOM might reconsider its relationship with the UN in order to defend its interests was not new. The previous IOM Director General, Brunson McKinley, held similar concerns about the possibility of a broader UN migration agency and reported to the IOM Council in 2002 that 'the UN is conscious of a gap in coverage and is looking for ways to fill the

[26] IOM, 'Director-General's response to the Chairperson's report on the Working Group on IOM-UN Relations and the IOM Strategy' (26 November 2014) IOM Doc C/105/CRP/48 (IOM Director General's Response 2014) 2 para 5(b); see also UNGA Draft Res, 'International Migration and Development' (30 October 2014) UN Doc A/C.2/69/l.32 para 26.

[27] IOM, 'Director General's Response 2014' (n 27).

[28] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) (UN Charter) 1 UNTS XVI Art. 63; 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) Arts. 1(2) and (6)(e).

[29] Cullen (n 3).

gap'.[30] When, in January 2004, the IOM Council endorsed a course of action to advance the UN-IOM relationship in which 'improvements to the existing cooperation agreement with the United Nations should be sought', the UN Secretariat took the view that 'the sole viable option' for a more formal institutional link between IOM and the UN 'would be specialized agency status'.[31] On the face of it, IOM's expanded program of work, into a far broader spectrum of migration-related activities than logistics alone, arguably rendered it of a character suited to specialized agency status given the alignment of that work with the definition of specialized agency in Article 57 of the UN Charter. Yet IOM is not a UN-specialized agency, nor has it become one as a result of the 2016 Agreement. In fact, it intentionally avoided that form of relationship, the possibility of which had long been the subject of internal deliberation.[32]

Between 2003 and 2013, the IOM Administration produced a series of reports which gave thorough consideration to the options for future UN-IOM relations and detailed the pros and cons of becoming a UN-specialized agency. In 2003, the IOM Council established the IOM Working Group on Institutional Arrangements and asked the IOM Administration to prepare a report for further deliberation. The *Preliminary Report on the IOM-UN Relationship* was delivered to IOM member states on 7 April 2003, an Addendum provided on 22 September 2003, and a summary report on 10 November of the same year.[33] Deliberations on the topic were then paused to allow for the findings of the Global Commission on International Migration to be concluded.[34] Thereafter, in 2007 another report was produced: *Options for the IOM-UN Relationship: Additional Analysis of Costs and Benefits.*[35] A further Working Group on IOM-UN Relations was established in 2013.[36]

[30] IOM, 'Statement by IOM Director General, Brunson McKinley, at the Eighty-Fourth Session of the IOM Council' (2–4 December 2002) IOM Doc MICEM/7/2002 (IOM Director-General's Statement 2002) 4 para 27.

[31] IOM, 'IOM-UN Relationship' (n 13) 2 para 9.

[32] IOM, 'Director General's Statement 2002' (n 31); International Organization for Migration Working Group on Institutional Arrangements, 'IOM-UN Relationship: Addendum to Preliminary Report' (22 September 2003) 3 [7] available as Annex III to the IOM Working Group on Institutional Arrangements, 'IOM-UN Relationship Preliminary Report' (7 April 2003); IOM Council, 'Summary Report of the Working Group on Institutional Arrangements' (10 November 2003) IOM Doc MC/INF/263 (Summary Report on Institutional Arrangements); IOM, 'Options for the IOM-UN Relationship: Additional Analysis of Costs and Benefits' (n 13).

[33] IOM Working Group, 'IOM-UN Relationship Preliminary Report' (n 33); IOM, 'Summary Report on Institutional Arrangements' (n 33).

[34] IOM, 'IOM-UN Relationship' (n 13) 1 para 2.

[35] IOM, 'Options for the IOM-UN Relationship: Additional Analysis of Costs and Benefits' (n 13).

[36] IOM Working Group on IOM-UN Relations and the IOM Strategy, 'IOM Strategy Discussions: Timeline' (4 February 2014) IOM Doc WG/REL/2014/2 2.

The 'regularly prepared background documents' produced by the IOM Administration over the 17 meetings of this Working Group are not publicly available.[37] IOM Council Resolution 1309 was adopted in December 2015 and contained the terms for negotiating the 2016 Agreement. It appears to have been informed by the 2013 Working Group's findings insofar as resolution 1309 thanks the (2013) Working Group for its efforts, acknowledges its report, and thereafter requests the Director-General to formally approach the UN to convey its views on how the relationship between IOM and the UN could be improved.[38] It was these negotiations which led to the conclusion of the 2016 UN-IOM Agreement.[39]

In its reporting to the IOM Council, the Working Group assessed that as a specialized agency IOM would be advantaged in several respects. It would be 'accorded additional and enhanced rights, privileges, opportunities, visibility and standing at United Nations Headquarters, in the Field, and in capitals around the world'.[40] These privileges included membership of the Chief Executives Board of the UN, Executive Committees on Humanitarian Affairs, 'full membership in UN country teams', UN privileges and immunities for its staff including the use of the UN passport (*laissez passer*), and a 'higher profile' for IOM in general.[41] It also identified the possibility of 'additional funding sources' and 'clarity' because 'IOM's formal organizational status would be easier for interlocutors – including governmental officials – to understand'.[42] That is, the adoption of the UN brand would grant it easier recognition and acceptance as well as the potential for additional funding.[43] Existence outside the UN had meant 'IOM has to work harder to gain acceptance and recognition, to raise funds, to join inter-agency planning processes and assessment

[37] The IOM web page entitled 'IOM-UN Relations and Related Issues' was 'restricted to member states' at the time of writing <https://governingbodies.iom.int/iom-un-relations-and-related-issues> accessed 1 July 2022; the number of meetings and background documents are referred to in IOM Council, 'Improved Legal Arrangements between IOM and the United Nations' (24 June 2016) IOM Doc C/SP/1/9 para 1.

[38] IOM Council Resolution 1309, 'IOM-UN Relations' (4 December 2015) IOM Doc C/106/RES/1309 paras 1 and 2 (IOM Council Resolution 1309).

[39] IOM Council (n 41).

[40] IOM Working Group, 'IOM-UN Relationship Preliminary Report' (n 33) 23 para 63; IOM, 'Options for the IOM-UN Relationship: Additional Analysis of Costs and Benefits' (n 13) 14–15.

[41] IOM Working Group, 'IOM-UN Relationship Preliminary Report' (n 33) 23 para 63; IOM, 'Options for the IOM-UN Relationship: Additional Analysis of Costs and Benefits' (n 13) 7 para 28.

[42] IOM Working Group, 'IOM-UN Relationship Preliminary Report' (n 33) 4 para 3 and 23 para 63(vii)-(viii).

[43] Ibid 20 para 56.

missions, and to acquire the international legal status that comes automatically to UN agencies'.[44] IOM reporting noted that without specialized agency status, participation in UN Headquarters working groups and UN country team meetings was at the discretion of the UN Secretariat or the relevant UN Resident Coordinator and 'never automatic nor as of right'.[45] The potential use of the *laissez passer* and its associated privileges by IOM staff were also perceived as a benefit that specialized agency status would afford.[46]

IOM internal reporting recognized that among the disadvantages of becoming a UN-specialized agency were the inefficiencies to which it might lead and potential reporting requirements. IOM recognized that it would have to make an annual report to the Economic, Social and Cultural Committee and through h it, the UN GA, submit its budget to the Advisory Committee on Administrative and Budgetary Questions (ACABQ) and 'expect a visit from the 15 ACABQ members once every few years'.[47] Indeed, ECOSOC can coordinate the activities of specialized agencies, obtain reports from them, make recommendations to them, and communicate its observations on those reports to the UN GA.[48] The UN GA can also make recommendations to specialized agencies in respect of both substantive and financial matters[49] and ECOSOC can demand reports on the steps specialized agencies have taken to implement UNGA and ECOSOC recommendations.[50] While hardly accountability mechanisms of the strongest order, the additional lines of reporting and the need to adapt to the UN's 'more bureaucratic and less results-oriented work-style' were among the perceived disadvantages of specialized agency status.[51]

Assessing the terms of the 2016 Agreement against these documents is insightful. It becomes clear that what the 2016 Agreement achieved for IOM is many of the benefits that specialized agency status would afford,

[44] Ibid 3 para 3.
[45] Ibid 10 para 22; IOM, 'Options for the IOM-UN Relationship: Additional Analysis of Costs and Benefits' (n 13) 14 para 66.
[46] IOM, 'Options for the IOM-UN Relationship: Additional Analysis of Costs and Benefits' (n 13) 7 para 28.
[47] IOM Working Group, 'IOM-UN Relationship Preliminary Report' (n 33) 22 para 61.
[48] UN Charter Art 64; Gert Rosenthal, 'Economic and Social Council' in Thomas G Weiss and Sam Daws (eds), *The Oxford Handbook on the United Nations* (Oxford University Press 2008) 136–137.
[49] UN Charter Art 58.
[50] UN Charter Art 64.
[51] IOM Working Group, 'Addendum to IOM-UN Relationship Preliminary Report' (n 33) 9 para 30.

while avoiding the perceived pitfalls such as centralized reporting and UN oversight. Specifically, the 2016 Agreement granted IOM additional and enhanced access to UN systems and meetings, privileges associated with the use of the laissez passer, participation in the UN Chief Executives Board for Coordination, its subsidiary bodies, and country teams,[52] and, although this was not expressly provided for under the terms of the 2016 Agreement, a launching point for the adoption of the UN brand.[53]

6.4 What Does the 2016 Agreement Change? The 1996 and 2016 Agreements Compared

The 2016 UN-IOM Agreement largely mirrors the 1996 iteration, in both structure and form. The 2016 Agreement is longer than its 1996 counterpart: it contains 25 paragraphs (nine in the preamble), whereas the 1996 version contains 14 (four in the preamble). At no point does the 2016 Agreement state in express terms that its effect is to alter the 'status' of IOM, nor that the Agreement transforms the character of the organization vis-à-vis the UN. This is perhaps not remarkable insofar as none of the other agreements held between the UN and other international organizations recognized as 'UN-related' do so either. The reason one searches for express terms in this instance is because IOM has claimed that the effect of the 2016 Agreement was to grant IOM a *new* UN-related status and is the justification for its reconstituted identity.[54] Others too have suggested the 2016 Agreement constitutes a 'change in its legal status'.[55] Accordingly, one expects a sufficient distinction between the 2016 Agreement and the pre-existing 1996 UN-IOM Agreement to warrant this interpretation.

It is true enough that Article 1 of the 2016 Agreement does expressly provide, in a way that the 1996 Agreement did not, that 'the present Agreement defines the terms on which the United Nations and the International Organization for Migration shall be brought into relationship with each other'.[56] The words 'shall be brought into relationship with each other'

[52] 2016 Agreement (n 16) Art 3(2)(a).
[53] IOM Working Group, 'IOM-UN Relationship Preliminary Report' (n 33) 23 para 63; IOM, 'Options for the IOM-UN Relationship: Additional Analysis of Costs and Benefits' (n 13)14–15.
[54] IOM, Press Release (n 2).
[55] Vincent Chetail, 'The International Organization for Migration and the Duty to Protect Migrants: Revisiting the Law of International Organizations' in Jan Klabbers (ed) *The Cambridge Companion to International Organizations Law* (Cambridge University Press 2022).
[56] 2016 Agreement (n 52) Art 1.

could imply that the two organizations were not already in a relationship and that this agreement is doing something new. But equivalent express terms about being 'brought into relationship' do not appear universally in the other UN relationship agreements either, and yet these agreements have done just that. Moreover, the 1996 Cooperation Agreement is evidence of the pre-existing legal relationship between the two.

When viewing the two instruments side by side, the overarching impression is that the 1996 and 2016 Agreements are largely similar, if anything the later agreement insulates IOM from UN-administered accountability and direction as compared with the earlier version. For example, in subparagraph (6) of Article 2 of the 2016 Agreement, each organization commits to cooperating with the other 'without prejudice to the rights and responsibilities of one another under their respective constituent instruments'. Similar wording appears at several points, where the relevant legal obligation is confined to matters which fall within the 'respective mandates' or 'respective constituent instruments' of the two organizations.[57] This is not particularly significant on its own because without express words to the contrary, that the two would act within their respective mandates is implicit in any case. Comparable language appeared in the 1996 Agreement too, but there was less of it.[58] The difference is the greater degree of importance the institutional distinctions appear to carry in the 2016 Agreement as compared with the earlier version. In particular, as a 'principle' on which the 2016 Agreement rests, it places emphasis on the institutional distinctions between the two organizations rather than their ties.[59]

The 2016 Agreement also extinguished already modest accountability mechanisms insofar as accountability includes procedural mechanisms such as transparency, participation and access to information. For example, Article V of the 1996 Agreement provides that IOM 'shall take into consideration any formal recommendations that the United Nations may make to it' and that IOM shall 'upon request, report to the United Nations on the actions taken by it, within its mandate, in order to respond to or otherwise give effect to such recommendations'.[60] In contrast, the 2016 Agreement does not provide for recommendations to flow from the UN to IOM in any formal sense, nor for mandatory reporting in response to such recommendations should they arise. Rather, Article 4 of

[57] 2016 Agreement (n 16) Arts 2(6), 3(1) and (5), 13.
[58] 1996 UN-IOM Agreement (n 16) Art V (2).
[59] 2016 Agreement (n 16) Art 2(6).
[60] 1996 UN-IOM Agreement (n 16) Art V (3).

the 2016 Agreement reads in its entirety: 'The International Organization for Migration may, *if it decides it to be appropriate*, submit reports on its activities to the General Assembly through the Secretary-General'.[61] This phrasing renders reporting essentially a matter of discretion and in this way, the already meagre accountability mechanisms are effectively extinguished. That said, neither the 1996 Agreement nor its 2016 counterpart specifies any process or penalty for non-compliance with its terms. Nor has the author identified any recommendations from the UN to IOM under Article V in the 1996 Agreement, nor reporting from IOM to the UN as a result. Still, it is notable that the possibility has disappeared as a result of the very agreement purported to bring IOM into the UN.

The 1996 Agreement stipulates that the UN and IOM 'agree to exchange information and documentation in the public domain to the fullest extent possible on matters of common interest'.[62] In contrast, the 2016 Agreement stipulates that each party shall, upon the request of the other party, furnish the other with 'special studies or information relating to matters within the other organization's competence *to the extent practicable*'.[63] There could be arguments about whether the limitation in the 1996 Agreement to 'material within the public domain' is more or less open than the 2016 version, but the language has notably shifted: from 'fullest extent possible' to simply 'the extent practicable'. Similar attenuations of the 1996 version are evident elsewhere. The 2016 Agreement states that the UN and IOM 'agree to cooperate closely within their respective mandates and to consult on matters of mutual interest and concern'. Whereas the 1996 Agreement provides that the UN and IOM '*shall* act in close collaboration and hold consultation on *all* matters of common interest', without any reference to respective mandates.[64] Even if the 2016 Agreement is more or less equivalent to its predecessor, it cannot reasonably be described as strengthening cooperation on these points.

Entitled 'principles', Article 2 of the 2016 Agreement contains no statements of principle in terms of moral code but establishes the design principles from which the agreement proceeds, including the institutional independence of each organization from the other. Subparagraphs (1) to (3) list the various ways in which the UN 'recognizes' certain features of IOM, including that it shall function as 'independent, autonomous and non-normative'. In subparagraph (4) of Article 2, IOM recognizes 'the

[61] Emphasis added.
[62] 1996 UN-IOM Agreement (n 16) Art III (1).
[63] 2016 Agreement (n 16) Art 7(2) and (3) emphasis added.
[64] 1996 UN-IOM Agreement (n 16) Art I (1) emphasis added.

responsibilities of the United Nations under its Charter' as well as those of its subsidiary organs and agencies. UN recognition of IOM independence and autonomy must be interpreted based on the ordinary meaning of those words, and in light of the object and purpose of the Agreement itself,[65] which in this case is to strengthen cooperation between the two organizations. Thus the IOM independence and autonomy being emphasized is its independence *from* the UN. Whereas in other contexts IOM is constrained from acting independently because its own Constitution requires that in carrying out its activities IOM 'shall conform to the laws, regulations and policies of the states concerned'.[66]

The adoption of the expression 'non-normative' in this clause has been more controversial. To focus on an organization's non-normative character in a legal arrangement with the UN is curious, insofar as human rights standard setting is widely accepted to be the UN's principle normative role.[67] Yet it is unlikely that IOM is using the phrase 'non-normative' to describe itself as not having to comply with human rights norms.[68] What is meant by 'non-normative' is not explained in the text of the 2016 Agreement, nor IOM Council resolution 1309 — which sought to insert the term into the Agreement — and it is not a term of art in international law. IOM officials have expressed the view that 'non-normative' means that 'the IOM is not a venue for setting binding standards'.[69] Yet, that interpretation stands in contrast to the organizational pursuit of leadership in normative processes such as its involvement in the negotiation of the *Global Compact for Safe, Orderly and Regular Migration*, and responsibility for its follow-up and review.[70] At least in this respect, the

[65] Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (hereafter Vienna Convention) Art 31(1).

[66] Guild, Grant and Groenendijk (n 1) 32.

[67] Ibid 33.

[68] Ibid 33–34.

[69] Megan Bradley, *The International Organization for Migration: Challenges, Commitments, Complexities* (Routledge 2020) 23.

[70] UNGA Res 71/1, 'New York Declaration for Refugees and Migrants' (19 September 2016) UN Doc A/RES/71/1 (New York Declaration) Annex II, para 12; UNGA Res 73/195, 'Global Compact for Safe, Orderly, and Regular Migration' (19 December 2018) UN Doc A/RES73/195 (hereafter GCM) para 45(a). While the GCM is not strictly binding, it contains political commitments through which legal norms can develop. It is implausible that had negotiations inspired a binding treaty, IOM would have recused itself, which would also be at odds with the institutional drive to be recognized as 'the' global leader in the field of migration. Martin Geiger, 'Ideal Partnership or Marriage of Convenience? Canada's Ambivalent Relationship with the International Organization for Migration' (2018) 44 Journal of Ethnic and Migration Studies 1639, 1649 referring to Citizenship

interpretation of the 2016 Agreement by IOM officials and the activities of the organization itself appear misaligned.[71]

Article 3 of the 2016 Agreement gave IOM membership in the UN System Chief Executives Board for Coordination and its subsidiary bodies, as well as the Inter-Agency Standing Committee, the Executive Committee on Humanitarian Affairs, the Global Migration Group, and country-level security management teams.[72] Article 7 permits IOM staff to use the laissez-passer as a travel document, which grants certain privileges and immunities pursuant to the 1946 Convention on Privileges and Immunities of the UN. Crucially, the 2016 Agreement preserved the organization's 'independent, autonomous and non-normative' character as directed by the IOM Council, all of which were previously identified by IOM as being afforded by specialised agency status.[73]

6.4.1 What Does Article 2(5) Achieve?

In Article 2(5), IOM 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'.

The purposes of the UN are set out in Article 1 of the UN Charter. They are, essentially, to maintain international peace and security, to promote friendly relations between states and to advance international cooperation in solving problems of economic, social, cultural, or humanitarian character. The UN purpose most directly relevant to IOM is to achieve international cooperation 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 distinction as to race, sex, language, or religion'.

To 'achieve international cooperation' in these fields, rather than to advance them, will probably not upset the IOM apple cart. Indeed, this obligation aligns rather well with Article 1(e) of the IOM Constitution.

and Immigration Canada, Annual Report to Parliament on Immigration (Ottawa 2016) <www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/annual-report-parliament-immigration-2016.html> accessed 1 July 2022.

[71] Nina Hall, *Displacement, Development, and Climate Change: International Organizations Moving beyond Their Mandates* (Routledge 2016) 100; Geiger (n 72) 1649–1650.

[72] 2016 Agreement (n 16) Art 3(2)(a).

[73] IOM Council Resolution 1309 (n 38).

That provision stipulates that among the purposes and functions of IOM is 'to 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 in order to develop practical solutions'.[74] The UN obligation to achieve international cooperation in solving problems and encouraging respect for human rights goes a step further, but, as others in this volume have acknowledged, there is a difference between encouraging cooperation on a topic and advancing it.[75]

The *principles* of the UN are set out in Article 2 of the Charter and have little relevance to IOM. For instance, the principle that international disputes should be settled by peaceful means and that the use or threat of force are to be avoided, are hardly matters that IOM can influence directly, albeit that a state's compliance with these principles can impact its work. It is also in Article 2 that the Charter requires that UN member states fulfil their Charter obligations in good faith. While IOM is not a UN member state, the principle of good faith would apply to its conduct in any case under general principles of international law.

The duty to have 'due regard' to relevant policies of the UN and 'instruments in the international migration, refugee and human rights fields' is ambiguous, insofar as what constitutes 'due' is relatively open, and as other authors in this volume have noted, it could arguably be met by simply considering a given norm.[76] 'Due regard' obligations have been the subject of fairly extensive consideration in other areas of international law, in particular the international law of the sea.[77] In that regime, it has at various points in time been treated as synonymous with standards of 'reasonable regard',[78] 'keep under review',[79] and 'take into account',[80] and

[74] Emphasis added.
[75] Johansen, (n 7).
[76] 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).
[77] International Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 Arts 27(4), 39(3)(a); 56(2); 58(3); 79(5); 87(2); 142; 148.
[78] *Fisheries Jurisdiction (United Kingdom v. Iceland)* [1974] ICJ Rep 3, 29 [68].
[79] Ibid [72].
[80] Vienna Convention Art 31(3): Stefan Raffeiner, 'Organ Practice in the Whaling Case: Consensus and Dissent between Subsequent Practice, Other Practice and a Duty to Give Due Regard' (2017) 27 European Journal of International Law 1043, 1053.

operates as a mechanism through which to reconcile the competing interests of states and to interpret duties of cooperation.[81] Overall, 'due regard' is best understood as a 'procedural restraint'[82] which requires the legal actor to consider and weigh the competing interests in a given situation.[83] It is not a pledge to comply, but a commitment to proffer some active deliberation as part of a suite of other considerations.

Article 2(5) must be interpreted in light of the surrounding provisions. Article 2(3) provides, *inter alia,* that the UN '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 UN established by this Agreement, noting its essential elements and attributes defined by the Council of the International Organization for Migration as per its Council Resolution No. 1309'.[84]

It is notable that the 1996 Agreement did not mention the institutional independence of IOM, yet the 2016 Agreement does so expressly in the same provision said to bring it under the UN umbrella. IOM Council resolution 1309 provided the instructions for IOM negotiators. It directs that any new agreement should be made under the 'explicit condition' that certain 'essential elements' of the organization be preserved. These include that the 'IOM is the global lead agency on migration and is an intergovernmental, non-normative organization with its own constitution and governance system, featuring a predominantly projectized budgetary model and decentralized organizational structure'[85] and that IOM 'must' retain its 'responsiveness, efficiency, cost-effectiveness and independence'.[86] According to some scholars, IOM member states were concerned about potential 'mandate creep', towards a more

[81] Caroline Foster, 'Inertia or Innovation? Reshaping International Law for a Complex Future' (28th Australian New Zealand Society for International Law Conference, 6 July 2021) 3 (on file with author). See further: Caroline E Foster, *Global Regulatory Standards in Environmental and Health Disputes: Due Regard, Due Diligence and Regulatory Coherence* (Oxford University Press 2021).

[82] *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom),* (Award, Arbitral Tribunal Constituted under Annex VII of the United Nations Convention on the Law of the Sea, 18 March 2015) 129 [322].

[83] Foster, 'Inertia or Innovation?' (n 83).

[84] Emphasis added.

[85] IOM Council Resolution 1309 (n 39) para 2(a).

[86] Other 'essential elements' include that IOM is 'an essential contributor in the field of migration and human mobility' and 'IOM must be in a position to continue to play this essential and experience-based role': Ibid para 2.

protection-oriented agenda,[87] the avoidance of which could explain, at least in part, why the IOM Council insisted that in any new Agreement with the UN, the independence, mandate and efficiencies of IOM were expressly retained.

The commitment to conduct its activities in line with the purposes and principles of the UN could signify that IOM commits to a wider set of human rights standards than it already possesses[88] insofar as to 'promote and encourage respect for human rights' is among the purposes of the UN. Yet, as others in this volume have also observed, it is unlikely that this clause adds much to pre-existing obligations.[89] When identifying what those pre-existing obligations are, however, it is notable that over the course of the past decade, IOM has advanced its human rights engagement through institutional policies such as the 2012 Migration Crisis Operational Framework, the 2015 Migration Governance Framework, and since 2016 it has participated in programmes such as the UN Human Rights Up Front Initiative and the Human Rights Due Diligence Policy.[90] Policy while is not always irrelevant as a matter of law. The internal rules of an organization, such as 'decisions, resolutions, and other acts of the organization adopted in accordance with those instruments, and established practice of the organization'[91] possess the potential to give rise to responsibility under international law.[92]

6.5 How the Organizations Continue to Differ: The IOM Constitution and the UN Charter

The Constitution of an international organization sets out the organization's fundamental purpose and the scope of its power, including its basic structure, key organs, finances, and how decisions are made.[93] As the International Court of Justice has observed, an international organization's Constitution establishes 'the very nature of the organization

[87] Hall (n 73) 100; Geiger (n 72) 1649–1650; IOM Council Resolution 1309 (n 38) para 2(a).
[88] Johansen (n 7) 3.1.2.
[89] Ibid.
[90] Bradley, 'Joining the UN Family' (n 1) 30; Bradley, *The International Organization for Migration* (n 71) 21–23; see also Aust and Riemer (n 76).
[91] 'ILC Articles on the Responsibility of International Organizations' annexed to UNGA Res 66/100 (27 February 2012) UN Doc A/RES/66/100 (ARIO) Art 2(b).
[92] Ibid Art 10(2).
[93] Niels Blokker, 'Constituent Instruments', *The Oxford Handbook of International Organizations* (Oxford University Press 2016) 946–947.

being created, the objectives which have been assigned to it by its founders, [and] the imperatives associated with the effective performance of its functions'.[94] It can be distinguished from the suite of other documents that might come to inform aspects of the organization's legal obligations and relationships – such as the agreements the subject of this chapter – in that the objective of the Constitution is the creation of a new subject of law, to which the parties 'entrust the task of realizing common goals'.[95] Thus, although there is scope for the interpretation of a Constitution to shift over time alongside the practice of the organization and its internal documents, the central purpose of the organization and its governing structure, as set out in its constituent instrument, set some boundaries for that evolution.[96] For that reason, this section compares the Constitution of the International Organization for Migration and the UN Charter. The differences between these documents are recognized in the 2016 Agreement itself insofar as it is 'by virtue of its Constitution' that the UN recognizes the IOM 'shall function as an independent, autonomous and non-normative organization' in the working relationship between the two.[97]

The UN, and in particular the Office of the UN High Commissioner for Refugees (UNHCR), and IOM were designed to work side-by-side and have long done just that.[98] The UN was established by states to maintain international peace and security, to promote friendly relations between states, and to promote international cooperation including in promoting respect for human rights and fundamental freedoms.[99] Human rights standard setting is widely accepted to be the principal normative role of the UN,[100] enlivened by specific obligations embedded throughout its Charter.[101] The preamble to the UN Charter expresses states' determination 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person'[102] Article 13 of the Charter provides that the

[94] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 at 75.
[95] Ibid.
[96] Chetail, 'The International Organization for Migration and the Duty to Protect Migrants' (n 56).
[97] 2016 Agreement (n 16) Art 2(3).
[98] Cullen (n 3).
[99] UN Charter Art 1.
[100] Guild, Grant and Groenendijk (n 1) 33.
[101] UN Charter Arts 13, 55, 62(2), 68, 76(c).
[102] UN Charter Preamble [2].

UNGA must make recommendations towards, *inter alia,* 'assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'.[103] UN member states make an express commitment in Article 55 of the Charter to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all'.[104] That is not to say that the UN or its member states have always lived up to these commitments, but it remains notable that they are an express element of the organization's purpose, repeatedly referred to throughout the UN Charter, and human rights promotion and protection comprise specific obligations for UN member states by virtue of their membership of the UN.

There are notable differences in the way that UNHCR and IOM are funded and how they operationalize their budgets. As a matter of principle, UNHCR seeks to direct funds where the need is greatest, with the first priority being to ensure the protection of people.[105] However, there is usually a significant gap between the assessed needs and the funds it has available, and it routinely undertakes funding appeals to address the shortfall.[106] That shortfall leaves obvious, if potential, scope for state influence. Nonetheless, empirical studies suggest that 'even if donors attempt to influence UNHCR based on their diverse geopolitical and economic interests, this does not undermine the mandate of the organization to provide aid to displaced populations'.[107] IOM initiates projects at the request of states and is financed predominantly by earmarked contributions for those projects, which is perfectly in line with its constitutional mandate to provide migration services to states.[108]

What is now IOM was established in 1951 as the Provisional Intergovernmental Committee for the Movement of Migrants from Europe (PICMME). It was created as a counterpart to the Office of the UN High Commissioner for Refugees, to provide logistical support for

[103] UN Charter Art 13.
[104] UN Charter Art 55.
[105] UNHCR, 'Global Appeal 2020–2021' (2020) 32 <https://reporting.unhcr.org/sites/default/files/ga2020/pdf/Global_Appeal_2020_full_lowres.pdf> accessed 1 July 2022.
[106] Executive Committee of the High Commissioner's Programme, 'Updates on Budget and Funding for 2018 and 2019' (4 March 2019) UN Doc EC/70/SC/CRP.7/Rev.2 23; see also Cullen (n 3).
[107] Svanhildur Thorvaldsdottir, Ronny Patz and Klaus H Goetz, 'Mandate or Donors? Explaining the UNHCR's Country-Level Expenditures from 1967 to 2016' (2022) 70 Political Studies 443, 455.
[108] IOM, 'Financial Report for the Year Ended 31 December 2020' (31 May 2021) IOM Doc C/112/3 19.

migration out of Europe in the wake of the Second World War.[109] Its purpose, according to its Constitution, is 'to make arrangements for the organized transfer of migrants' and to provide various migration services 'at the request of and in agreement with the States concerned'.[110] The scope of IOM operations has shifted markedly since. It now routinely supports states with internally displaced persons, border management, counter-trafficking, evacuations, emergency shelters, policy development, and the implementation of detention programs, assisted voluntary returns and reintegration.[111] In fact, IOM provides services to millions of people each year through its crisis-related activities.[112] Indeed, it is this very feature that makes it *prima facie* more akin to a UN Specialised agency than any of the other UN-related organizations: it is the only one which directly engages with individuals in situations of precarity. The absence of human rights priorities within its central purposes enshrined in its Constitution, combined with its constitutional onus to respect the policies of states, has led to criticism that it has prioritized state interests over migrant interests in its work.[113]

6.6 Addressing the Disconnect: The Path Forward

The cooperation agreements between the UN and other international organizations, including those with IOM, incorporate no express terms to indicate that becoming 'UN-related' is a status the relevant agreement affords. If 'UN-related' is an attribute that an organization derives from having concluded a cooperation agreement with the UN, then IOM became 'UN-related' when the 1996 Agreement entered into force. Indeed, express wording recognizing the independence of IOM from the UN was

[109] Hall (n 71) 88; Cullen (n 3).
[110] IOM Constitution (n 29) Art 1 (1).
[111] IOM, 'Financial Report for the Year Ended 31 December 2020' (n 113) 19 para 40.
[112] IOM, *Annual Report 2020* (2021) 5.
[113] See further: Guild, Grant and Groenendijk (n 1) 43; Asher Lazarus Hirsch and Cameron Doig, 'Outsourcing Control: The International Organization for Migration in Indonesia' (2018) 22 International Journal of Human Rights 681; Ine Lietaert, Eric Broekaert and Ilse Derluyn, 'From Social Instrument to Migration Management Tool: Assisted Voluntary Return Programmes – The Case of Belgium' (2017) 51 Social Policy & Administration 961, 962; Michael Collyer, 'Deportation and the Micropolitics of Exclusion: The Rise of Removals from the UK to Sri Lanka' (2012) 17 Geopolitics 276; 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 1 July 2022.

an addition to the 2016 Agreement,[114] not present in the version from two decades earlier. It is therefore perplexing that the later legal instrument has been heralded as the source of the shift.

Internal advice within IOM dating back to the early 2000s illustrates an understanding within IOM that to achieve what the 2016 UN-IOM Agreement does would maintain the 'status quo' of the 1996 Agreement while obtaining the benefits of being a UN-specialized agency, without actually becoming one.[115] Overall the *legal* effect of the 2016 Agreement is to maintain its pre-existing legal status, reduce potential reporting, while granting IOM greater access to UN systems, high-level meetings, and the use of the *laissez passer*. It is notable too that IOM's own internal reporting on UN-IOM relations anticipated that improved international recognition and funding would flow from the use of the UN brand. While the 2016 Agreement does not include any language about it being within the UN or acquiring a new status, the rebranding of the organization at the same time as the new agreement provides that impression.

Notwithstanding the absence of a meaningful legal change in status, IOM could certainly embrace the 2016 Agreement as a launching point for its own more UN-like initiatives. In some respects, it appears to have done just this. It is indeed possible that IOM's more active advancement of human rights policies constitutes a 'sincere shift in priorities since the beginning of this decade'.[116] Whether or not this is so, it remains the case that this shift in priorities lacks the 'solid foundation' that IOM itself recognized would come with legally effective commitments.[117] There is a meaningful difference between the internal policy approaches an organization might adopt, and the legal obligations that apply. While the internal rules of an organization can be a source of legal obligation, a persistent lack of clarity over their nature inhibits the strength of such claims.[118] As others have observed, the adoption of human rights policies and the UN logo, without

[114] Art 2(3) was a later addition to initial drafts of the 2016 UN-IOM Agreement. It reads '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 established by this Agreement, Agreement, noting its essential elements and attributes defined by the' Council of the International Organization for Migration as per its Council Resolution No. 1309' (emphasis added).

[115] IOM, 'Summary Report on Institutional Arrangements' (n 33) 10.

[116] Philippe M Frowd, 'Developmental Borderwork and the International Organization for Migration' (2018) 44 Journal of Ethnic & Migration Studies 1656, 1662.

[117] IOM Working Group, 'IOM-UN Relationship Preliminary Report' (n 32) 13 para 63.

[118] Christiane Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility" (2011) 8 International Organizations Law Review 397, 479.

a concomitant binding and express legal commitment to advance human rights as an institutional imperative, could serve to cloak the organization's activities that inhibit access to protection.[119] None of this is to suggest that the UN ought to be perceived as the flagbearer for accountability. It certainly has its own failings which have been widely documented elsewhere. It is rather to observe that whatever the failings of accountability within the UN, those of IOM *vis-à-vis* the UN are weakened by the 2016 Agreement.

One way to address the challenges this chapter has raised would be to amend the Constitution of the IOM to include an unequivocal commitment to both promote human rights standards and to prioritize their protection in its operational activities.[120] At the very least, this would clarify the scope of its obligations. Guild, Grant and Groenendijk have argued that as the UN GA considers the institutional architecture for the GCM, the UN member states that are also members of IOM should move to revise the IOM Constitution to include a protection mandate.[121] IOM member states could also clarify which of its internal policies constitute internal and binding law of the organization, alongside its formal Constitution. There are, of course, obstacles to the accomplishment of such suggestions. Even if such commitments were made, it is unclear how they would be monitored and enforced. Further legal scholarship alongside relevant adjudication could also advance legal clarity.

Stian Øby Johansen, in this volume, has contemplated the establishment of a new internal accountability mechanism. While technically within the IOM machinery, it would stand as independent, similar to the European Ombudsman or the World Bank Inspection Panel. The idea is one of some merit, particularly for its potential to advance transparency, depending on the particular form that it might take. Before it gets to that, in more practical terms, an amendment of the IOM Constitution would require a minimum a two-thirds majority of the IOM Council to vote in favour of such a proposal.[122] That would be difficult to achieve in the

[119] Fabian Georgi, 'For the Benefit of Some: The International Organization for Migration and Its Global Migration Management' in Martin Geiger and Antoine Pécoud (eds), *The Politics of International Migration Management* (Palgrave Macmillan 2010) referring to a 2002 report of Amnesty International and a 2003 report of Human Rights Watch; Hirsch and Doig (n 115) 684; Cullen (n 3) 352.

[120] Guild, Grant and Groenendijk (n 1) 48–49.

[121] Ibid 48.

[122] Depending on whether the IOM Council determines the change to be 'fundamental': IOM Constitution (n 29) Art 25(2).

context of an evident tendency among IOM member states to favour efficiency over accountability. The political climate is not encouraging. The trend towards the mass securitization of borders has only been heightened by the Covid-19 pandemic, and it is difficult to see how a majority of states would approve any measures that could inhibit the scope, efficiency or conduct of the services that IOM currently provides. In the meantime, not only should IOM's operational compliance with human rights standards continue to be closely monitored, including by third parties and NGOs,[123] but any trend to assign leadership to IOM – an expressly non-normative institution – in processes that lead to the development of norms must be monitored and restrained.

[123] 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); Gisela Hirschmann, *Accountability in Global Governance: Pluralist Accountability in Global Governance* (Oxford University Press 2020) 206.

PART II

IOM in Action

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7

Crisis and Change at IOM

Critical Juncture, Precedents, and Task Expansion

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7.1 Introduction[1]

The Constitution of the International Organization for Migration (IOM) lists the purposes and functions of the Organization in Article 1. In particular, they encompass the organized transfer of migrants, refugees, and displaced persons in agreement with the states concerned as well as the provision of broader 'migration services' ranging from language training to advisory functions. IOM and its predecessor organizations have often deployed these functions in the context of a humanitarian crisis, particularly in post-conflict settings – starting with refugees in post-War Europe. For a long period, however, the organization's activities were restricted to migration management, that is, the logistical support for migration at the request of member states,[2] leading to its depiction as nothing but a better travel agency.[3] By contrast, IOM's functions today comprise frontline emergency relief and a staggering variety of humanitarian activities that often only remotely link to migration issues.[4] In fact, its institutional development in the post-Cold War era seems to be one of the most

[1] For valuable comments on earlier versions of this chapter, we would like to thank the editors, Megan Bradley, Cathryn Costello, and Angela Sherwood, as well as the participants in an online authors' workshop on 2 November 2020, in particular Ronny Patz. We are furthermore grateful to Nora-Corinna Meurer for excellent research assistance.

[2] Marianne Ducasse-Rogier, *The International Organization for Migration, 1951–2001* (International Organization for Migration 2002); Antoine Pécoud, 'What Do We Know about the International Organization for Migration?' (2018) 44 Journal of Ethnic and Migration Studies 1621, 1623–1625.

[3] Jérôme Elie, 'The Historical Roots of Cooperation between the UN High Commissioner for Refugees and the International Organization for Migration' (2010) 16 Global Governance 345, 346.

[4] 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.

intriguing features in the history of IOM. It is characterized by rapid organizational growth and task expansion, a shift in the allocation of resources from migration facilitation to the provision of humanitarian aid in emergencies, and an engagement with an ever-wider range of policy fields, now encompassing issues as diverse as climate change and border control.[5] How can these dramatic developments be explained?

Literature on IOM has identified important facilitating conditions for its task expansion: First, its 'non-normative mandate'[6] and functional organization type certainly represent a driver. Unlike many other international organizations (IOs) (incl. esp. UNHCR), IOM is not tasked to oversee and help with the implementation of international legal rules in its field. This makes it more flexible to go for new and rather unrelated tasks.[7] Second, its projectized funding structure plays a role. Since IOM only has a very small core budget and receives funding almost exclusively for concrete projects, it has a financial incentive to broaden the scope of its activities – and convince member states and other donors of the necessity to operate in new fields.[8] These important insights notwithstanding, we are still lacking a clear understanding of *how* IOM took hold in a growing number of areas and what *institutional mechanisms* underpinned this development.

In this contribution, we develop a historical institutionalist argument that combines the concepts of critical juncture and path dependency with agency-driven accounts of institutional change in IOs.[9] Historical institutionalism assumes that institutional trajectories are path-dependent, that is, their development is conditioned by original decisions that introduce either self-reinforcing or self-undermining reactive sequences.[10] While

[5] Nina Hall, 'Money or Mandate? Why International Organizations Engage with the Climate Change Regime' (2015) 15(2) Global Environmental Politics 79; Julien Brachet, 'Policing the Desert: The IOM in Libya beyond War and Peace' (2016) 48 Antipode 272.

[6] See Chapter 1 for a critical discussion of the concept.

[7] Hall (n 5).

[8] Ronny Patz, 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); Megan Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (Routledge 2020) 39–41.

[9] see also Tine Hanrieder, 'Gradual Change in International Organisations: Agency Theory and Historical Institutionalism' (2014) 34 Politics 324.; Vincent Pouliot, 'Historical Institutionalism Meets Practice Theory: Renewing the Selection Process of the United Nations Secretary-General' (2020) 74 International Organization, 742.

[10] James Mahoney, 'Path Dependence in Historical Sociology' (2000) 29 Theory and Society' 507; Tine Hanrieder and Michael Zürn, 'Reactive Sequences in Global Health Governance' in Orfeo Fioretos (ed), *International Politics and Institutions in Time* (Oxford University Press 2017).

a strong focus thus lies on the relative stability of institutions and their gradual change, historical institutionalism also theorizes the original moments that create path dependencies in the first place. These critical junctures are conceived as situations in which the structural constraints on political action are significantly reduced and 'the range of plausible choices open to powerful political actors expands substantially'.[11] Which political actors at the IO level can be expected to benefit from such conditions is subject to theoretical controversy in international relations. On the one hand, as expected by much rationalist theorizing on IOs, the most powerful member states might seize the opportunity to shift the institution in their desired direction.[12] On the other hand, as anticipated particularly by constructivists, it might also be the bureaucratic IO organs that attain institutional change through organizational entrepreneurship.[13] Drawing on recent accounts of crisis-induced authority expansions by IOs, we assume that both may be possible, but hold that the strongest institutional ruptures can be expected where organizational entrepreneurship is met with tacit or explicit support by the most powerful member state(s).[14]

We submit that the metamorphosis of IOM in the past 30 years can be understood as a path-dependent development rooted in a critical juncture at the beginning of the 1990s. At the level of the international system, this period was marked by the end of the Cold War that infused international politics with a large degree of fluidity in general. At a situational level, the 1991 Gulf War represented a contingent window of opportunity for IOM to change its role from post-conflict migration manager to active humanitarian emergency responder. The shift was premised on the coincidence of the organization's willingness to assume responsibility in this area and the United States' active enlistment of IOM to fulfil crisis management tasks on the ground. This decision proved momentous as it set the organization on a path that has shaped its development to the present day. Not only did the Gulf intervention leave a lasting imprint on

[11] Giovanni Capoccia and R Daniel Kelemen, 'The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism' (2007) 59 World Politics 341, 343.

[12] Randall W Stone, *Controlling Institutions: International Organizations and the Global Economy* (Cambridge University Press 2011).

[13] Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Cornell University Press 2004).

[14] Christan Kreuder-Sonnen, *Emergency Powers of International Organizations: Between Normalization and Containment* (Oxford University Press 2019).

IOM's institutional structure, but it also provided a blueprint for institutional expansion that would be reactivated time and again over the next decades: Humanitarian crises expose governance gaps that IOM is ready to fill on an ad hoc basis which member states accept ex-post or even invite ex-ante. This repeated match of demand and supply creates social precedents for IOM that widen its practical and operational experience and hence increase the range of tasks that 'naturally' fall within its remit over time.

The analytical narrative we provide in this chapter on IOM's institutional evolution since the entry into force of its Constitution contributes to a better understanding of the organization's changing character, transitioning from a foremost migration manager to a provider of humanitarian assistance in active crises. By focusing on the institutional mechanisms underlying this process, we shed light on IOM's internal dynamics that so far have remained 'almost completely unexamined'.[15] The remainder of this chapter is structured as follows: First, we provide the theoretical background to our argument by providing theoretical building blocks from historical institutionalism and developing expectations about IOM's institutional development in times of crisis. In the main part of the chapter, we first analyse the critical juncture at which IOM's institutional path initially deviated (the 1990–1991 Gulf War) and show how it set in motion mechanisms of reproduction which reinforced the expansionary logic of IOM's crisis interventions. Second, we illustrate how this logic of mandate extension through precedent setting has taken hold in the organization in two important crisis interventions by IOM in the more recent past: the Libyan civil war (2011), and the 2014–2016 Ebola crisis. In the concluding section, we discuss our findings with a view to their implications for the organization's ethos, obligation and accountability.

7.2 Historical Institutionalism and International Organizations

In this section, we first introduce concepts from historical institutionalism, especially critical junctures and path-dependent processes of self-reinforcement, that provide analytical tools to understand long-term institutional developments. Second, we build on theories of international organizations to derive concrete expectations about the actors and conditions driving change at IOM.

[15] Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (n 8) 3.

7.2.1 *Critical Junctures and Path Dependence*

Historical institutionalism is rooted in comparative politics. More recently, its use has been extended to international institutions and IR more generally.[16] The core insight of historical institutionalist thought is that institutional outcomes at a given point in time are regularly not the product of exogenous factors and independent actor choices at that moment, but follow from path-dependent processes of reproduction and change endogenous to the institution itself. While not oblivious to mechanisms of gradual transformation,[17] historical institutionalists usually take a 'punctuated equilibrium' view on institutional change. That is, long periods of relative stability are only interrupted by rare moments of contingency in which new institutional paths are chosen. These moments are called critical junctures. Here, actor decisions evoke reactive sequences which set in motion self-reinforcing (or self-undermining) mechanisms of path-dependent institutional development.[18]

Historical institutionalist explanations thus gravitate towards the concepts of critical junctures and path dependence. Generically, critical junctures can be defined as '*relatively* short periods of time during which there is a *substantially* heightened probability that agents' choices will affect the outcome of interest'.[19] The distinctive feature of such historical junctures in which actor choices matter more than usual 'is the loosening of the constraints of structure to allow for agency or contingency to shape divergence from the past'.[20] Often, critical junctures are equated with crises or turning points. They are not necessarily instantaneous events, but can represent 'short phases that may actually last for a number of years'.[21] The main challenge in the analysis of critical junctures is to identify cases in

[16] Orfeo Fioretos, 'Historical Institutionalism in International Relations' (2011) 65 International Organization 367; Tine Hanrieder, *International Organization in Time. Fragmentation and Reform* (Oxford University Press 2015); Thomas Rixen and Lora Anne Viola, 'Historical Institutionalism and International Relations: Towards Explaining Change and Stability in International Institutions' in Thomas Rixen, Lora Anne Viola and Michael Zürn (eds), *Historical Institutionalism and International Relations: Explaining Institutional Development in World Politics* (Oxford University Press 2016).

[17] James Mahoney and Kathleen Ann Thelen, 'A Theory of Gradual Institutional Change' in James Mahoney and Kathleen Ann Thelen (eds) *Explaining Institutional Change: Ambiguity, Agency, and Power* (Cambridge University Press 2010).

[18] Mahoney (n 10); Hanrieder and Zürn (n 10).

[19] Capoccia and Kelemen (n 11) 348.

[20] Hillel David Soifer, 'The Causal Logic of Critical Junctures' (2012) 45 Comparative Political Studies 1573.

[21] Capoccia and Kelemen (n 11) 350.

history and to explain why these moments in time are characterized by weaker constraints on agency than others.

According to Soifer (2012), critical juncture accounts need to identify and distinguish permissive and productive conditions. 'Permissive conditions can be defined as those factors or conditions that *change the underlying context to increase the causal power of agency or contingency and thus the prospects for divergence*'.[22] The focus thus lies on structural shifts, unintended consequences, exogenous shocks, etc., that interrupt the previously established processes of institutional reproduction. Productive conditions, on the other hand, are those factors that – in the possibility space created by the permissive conditions – cause divergent institutional outcomes that then represent the starting point for new institutional equilibria.[23] Often, productive conditions will combine with so-called 'critical antecedents', that is, factors preceding the historical juncture that unfold different causal effects under the changed conditions.[24] For instance, if an institutional equilibrium is unsettled by permissive conditions, agents that are at the right place at the right time (the productive condition) may effectuate change by redeploying long-established institutional capacities (the critical antecedent) for new purposes.

Once a critical juncture ends, historical institutionalists expect the deviant outcome to trigger mechanisms of reproduction that create new path dependencies. Most often, these are mechanism of institutional self-reinforcement. Here, positive feedback effects change actors' attitudes in favour of an existing institutional practice. As Rixen and Viola explain:

> The process is reinforcing because it is subject to increasing returns, that is, a situation in which the returns to engaging in a certain behavior or from adopting a certain rule increase over time and make the adoption of alternatives less attractive. The process is self-reinforcing, because it is reinforced through variables endogenous to the institution.[25]

From a utilitarian perspective, institutional reproduction is the result of a cost-benefit imbalance of transformation. Given the investments sunk into setting up the institution as well as the learning and coordination effects produced by the institution once in place, opportunity costs for drastically altering the existing or creating an alternative institution are

[22] Soifer (n 20) 1574.
[23] Soifer (n 20) 1575.
[24] Dan Slater and Erica Simmons, 'Informative Regress: Critical Antecedents in Comparative Politics' (2010) 43 Comparative Political Studies 886.
[25] Rixen and Viola (n 16) 12.

high and increasing over time.[26] Moreover, as highlighted by Zürn with a specific view to IOs, there are also increasing returns through cognitive effects. Both institutional actors and IO members engage in increasingly close interaction, producing convergent understandings (learning) and adaptive expectations, that is their belief in the success of the institution leads to adaptive behaviour which reinforces the institution's ability to develop in the desired direction.[27]

7.2.2 Assumptions about International Organizations and IOM

From the perspective of historical institutionalism, then, a long-term institutional development such as IOM's rapid expansion in the area of humanitarian emergencies is likely to be rooted in a contingent starting point, a critical juncture, that sets in motion a process of institutional reproduction. As a general model of institutional change, however, it naturally lacks action and actor-theoretic specifications that would allow deducing concrete expectations for either the outcome of critical junctures or the drive behind its reproduction.[28] In the specific context of IOs, the question is who are the 'powerful political actors' for whom the range of available options increases during a critical juncture, who benefits and consequently whose repeated interactions increase the returns of institutional practice over time.

Most theories about IOs differentiate between IOs' member states on the one hand and IOs' supranational bodies such as secretariats and judicial entities on the other, and hold specific views on their respective role and influence on the design and direction of IOs. At one end of the spectrum are rational institutionalists who contend that all power lies with member states: IO bureaucracies are conceived as agents fulfilling tasks on behalf of their principals without much independent power of their own.[29]

[26] Mahoney (n 10) 517–523.

[27] Michael Zürn, 'Historical Institutionalism and International Relations – Strange Bedfellows?' in Thomas Rixen, Lora Anne Viola and Michael Zürn (eds), *Historical Institutionalism and International Relations: Explaining Institutional Development in World Politics* (Oxford University Press 2016) 205–213.

[28] cf Zürn, 'Historical Institutionalism and International Relations – Strange Bedfellows?' (n 27) 201.

[29] Robert O Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton University Press 1984); Darren G Hawkins and others, 'Delegation under Anarchy: States, International Organizations, and Principal-Agent Theory' in Darren G Hawkins, David A Lake, Daniel L Nielson, Michael J Tierney (eds), *Delegation and Agency in International Organizations* (Cambridge University Press 2006).

While often understood as one collective principal, a distributive variant of the theory highlights that member states differ in their capacity to wield control over policy which is why institutional choices will typically reflect the interests of the most powerful among them.[30] Moments of crisis and contingency, then, should represent opportunities for powerful states to steer IOs in their preferred direction.[31] At the other end of the spectrum are sociological institutionalists who emphasize the ability of IOs to wield independent power: IOs are conceived as partially autonomous bureaucracies influencing member state behaviour through their delegated, moral, and epistemic authority.[32] Importantly, this literature argues that 'IOs tend to define both problems and solutions in ways that favour or even require expanded action for IOs'.[33] Mission creep is a distinct possibility. Seen from this perspective, crises could represent an opportunity for entrepreneurial IO staff to push their organization in an expansionary direction.[34]

We adopt a middle-ground position between these two poles.[35] There is no compelling theoretical reason to treat the influence of powerful states and that of entrepreneurial IO staff as mutually exclusive or either as individually exhaustive in accounting for all patterns of institutional choice and change at IOs. It is much more plausible to entertain the possibility that both play a role to varying degrees depending on empirical conditions. At IOM, these conditions generally seem to favour a strong role for powerful states.[36] Compared to the specialized agencies of the UN, for instance, IOM has very small headquarters (both in terms of staff and funding), it lacks an appreciable amount of delegated authority, and its formal role in policy coordination among member states is minuscule. Moreover, states' power to choose the projects they want to fund puts them in a prime position to control the organization. On the other hand, the general shortage of funds also fosters organizational entrepreneurialism,[37] and the lack of clearly mandated tasks opens the way for IOM

[30] Stephen D Krasner, 'Global Communications and National Power: Life on the Pareto Frontier' (1991) 43 World Politics 336; Stone (n 12).
[31] see Kreuder-Sonnen (n 14) 39–40.
[32] Barnett and Finnemore (n 13); see also Bob Reinalda and Bertjan Verbeek (eds), *Autonomous Policy Making by International Organisations* (Routledge 1998).
[33] Barnett and Finnemore (n 13) 43.
[34] Kreuder-Sonnen (n 14) 41.
[35] see also Michael Zürn and Jeffrey Checkel, 'Getting Socialized to Build Bridges: Constructivism and Rationalism, Europe and the Nation-State' (2005) 59 International Organization 1045.
[36] Pécoud (n 2).
[37] Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (n 8) 49–52.

to venture into various areas.[38] Additionally, IOM has a high number of relatively autonomous country offices with skilled and experienced staff whose expertise can be decisive for the decision to launch a new project.[39] Hence, even though it ultimately always depends on member state approval, the organization has both motive and opportunity to push its institutional path towards expansion.

In sum, our theoretical conjecture thus holds that IOM's task expansion will be marked by both push factors on the part of the organization and pull factors on the part of powerful member states. We suppose that a critical juncture proves especially momentous if it creates conditions under which these factors align and show the actors that they may both profit from the expansionary path taken. For the case at hand, we refer in particular to IOM's ability and eagerness to provide operative crisis management capacities in new areas that are largely ungoverned by any other actor, and powerful member states' desire to leverage this capacity in situations that they care about. Any such situation, we argue, creates a social precedent through which IOM gains experience, knowledge and reputation as a flexible crisis manager. After the fact, we expect the organization to entrepreneurially foster an institutionalization of the precedent by creating corresponding programs, divisions, or operational frameworks which normalize the new-found tasks. Such formal and informal institutional devices can be used to signal to member states that IOM is ready to take on similar jobs in the future and that a wider than previously considered range of situations falls within its remit. The process is thus foremost a cognitive one by which mutual expectations among state and organizational actors converge and create increasing returns from expansion.

7.3 The Critical Juncture: IOM in the Gulf War

Operations in the context of crises have always been part of IOM's activities, especially when large numbers of refugees were involved. In fact, the organization portrays its own history as one tracking man-made and natural disasters in which it provided help to migrants.[40] However, until 'the late 1980s, IOM's emergency responses were traditionally focused on movements and medical checks related to the resettlement of refugees and

[38] Pécoud (n 2) 1626.

[39] Interview with a senior IOM official at Geneva headquarters, member of the emergency team in Libya (via Zoom, 27 November 2020), hereafter: Interview 2.

[40] IOM, 'IOM History' <www.iom.int/iom-history> accessed 11 April 2022.

displaced persons. In the 1990s that situation changed'.[41] It expanded the array of its crisis-related activities to encompass an ever-wider range of services such as humanitarian evacuation, camp management, and border control. During the 1990–1991 Gulf War, IOM for the first time adopted the role of first emergency responder evacuating displaced persons in an active crisis context. In this section, building on the concept of critical juncture, we analyse how this decisive precedent came about and what short and long-term institutional effects it produced.

7.3.1 Permissive and Productive Conditions: Understanding IOM's Gulf War Operations

Arguably, a number of exogenous factors eased the constraints on political agency at IOM in the early 1990s, creating the possibility space for its expansion in the realm of humanitarian emergency assistance. One such *permissive condition* certainly was the end of the Cold War which created a moment of malleability in international politics more generally. Most importantly for our purposes, the fall of the Soviet Union and the temporary cessation of great power rivalry allowed for a surge in Western-led, liberal forms of institutionalized cooperation around the globe.[42] New and more capable organizations were created (e.g. WTO, OPCW, etc.), existing ones started tapping the potential of their original mandates (e.g. UN Security Council), or received additional authority.[43] Similarly, for IOM the end of the Cold War created a window of opportunity to transition from a Western or US-led service organization to an IO with global ambition. It soon expanded its membership base to the East and it suddenly seemed possible to more fully live up to the global aspiration included in the 1989 Constitution.[44]

The IOM Constitution itself represents an additional factor that opened the range of available options and increased the possibility for agency. It is an important historical coincidence that the amendment to the 1953 ICEM Constitution, debated since 1975 and adopted in 1987, entered into force on 14 November 1989, five days after the fall of the Berlin Wall.[45] The

[41] Ducasse-Rogier (n 2) 132.
[42] G John Ikenberry, *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order after Major Wars* (Princeton University Press 2001).
[43] Michael Zürn, *A Theory of Global Governance: Authority, Legitimacy and Contestation* (Oxford University Press 2018).
[44] Ducasse-Rogier (n 2) 90.
[45] Ducasse-Rogier (n 2) 88.

new Constitution was supposed to reflect a broadened field of activities that the organization had come to occupy and the changed geographical focus since its creation as an ad hoc Committee to deal with post-war refugees in Europe in the 1950s. In combination with the (in-)famous lack of a formal protection mandate given to IOM by its member states, that is, the fact that there is no set of norms and rules that the organization is supposed to observe and help implement,[46] the result was a constitutional text that merely states very broad objectives for the organization without clearly defining either the scope of these goals or the way that they should be realized. Article 1 says that IOM shall 'make arrangements' and 'concern itself' with the 'organized transfer' of migrants in need of assistance as well as refugees and displaced persons. This can mean virtually anything. While there is no indication that the Constitution drafters intended to carve out space for the organization to expand into new areas, this imprecision and rule ambiguity factually provided IOM with the legal flexibility to engender policy innovations.[47]

Finally, the turn of the decade also saw a steep rise in regional inter- and intra-state armed conflicts that strongly influenced population movements by generating huge numbers of refugees and displaced people. The 1990–1991 Gulf War was the first such conflict. After the Iraqi invasion of Kuwait, the United States launched the first UN-sanctioned military campaign to liberate Kuwait and protect Saudi Arabia. Moreover, amidst the hostilities, Iraqi Kurds attempted a secession from Iraq that was quashed by air and ground attacks of the Iraqi military. At both fronts, thousands of refugees and displaced people were left in dire conditions. Kuwait, in particular, had hosted a large number of migrant workers from South-East Asia that were displaced within Kuwait or fled to neighbouring Saudi Arabia. In a strict legal sense, these were not refugees according to the Geneva Convention that pertains to individuals being forced out of their country of citizenship (Art. 1). The movements of people during and after the Gulf War thus did not fall squarely and exclusively within the mandate of UNHCR[48] – a condition that opened the door to IOM.

There was nothing necessary about IOM's subsequent involvement in the humanitarian emergency response, however. For one, UNHCR

[46] See Hall (n 5).

[47] Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (n 8) 21, 48.

[48] Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford University Press 2001) 267.

actually offered its services to the UN Secretary General and thus signalled its readiness to take the lead in the humanitarian emergency response.[49] That the offer was refused and IOM given the lead[50] instead is a puzzle to be explored. Moreover, nothing in IOM's mandate and previous practice would have made it seem necessary or logical for the organization to stage a big emergency relief effort. Similar crises in the previous decades had not triggered that kind of response and the new Constitution did not specifically ask for it either. The question is thus what *productive conditions* caused IOM's surprisingly intensive engagement in the context of the Gulf War. After all, IOM became active in the region at an extremely fast pace and immediately started to evacuate displaced persons and stranded migrant workers by air, land, and sea routes. IOM set up offices in Kuwait and Southern Iraq and moved as close to areas where hostilities were ongoing to identify and assist people willing but so far unable to leave the countries. As early as 3 September 1990, a month after hostilities had started, IOM had organized the first 'humanitarian repatriation flight'[51] and evacuated about 155,000 people by the end of the year. Later, it also cooperated with UN Blue Helmets to facilitate the safe repatriation of more than 600,000 displaced Kurds that were transported in a fleet of locally rented trucks and buses.[52]

What drove IOM to take on this new role? The official account tells a rather formalistic story of streams of forced migrants causing the affected governments to call on the UN for help which then asked IOM to take the lead in providing transportation and return-related services.[53] However, the account given to us in an interview by Bill Hyde,[54] the head of IOM's emergency response team in the Gulf War, has a strikingly different tone to it. In his recollection, it was especially the coincidence of IOM's willingness and ability to act and the double leadership role of the US in the

[49] Ibid.

[50] Georgi states that IOM was made 'the lead agency by the United Nations to support nearly one million migrant workers who had fled after the Iraqi invasion of Kuwait.' While IOM certainly was the main IO actor on the ground, its 'lead' was restricted to its area of operations (evacuations and shelter) and did not involve coordinating authority over other actors. Fabian Georgi, 'For the Benefit of Some: The International Organization for Migration (IOM) and Its Global Migration Management' in Martin Geiger and Antoine Pécoud (eds), *The Politics of International Migration Management* (Palgrave Macmillan 2010) 53–54.

[51] Ducasse-Rogier (n 2) 137.

[52] Ducasse-Rogier (n 2) 137–138.

[53] Ducasse-Rogier (n 2) 137.

[54] Interview with Bill Hyde, former Head of IOM's Emergency Response Unit, Ebola Response Coordinator (via Zoom, 20 October 2020), hereafter: Interview 1.

coalition forces as well as in IOM that facilitated its entry to the scene. The US happened to have the authority both within IOM to sanction a certain course of action and on the ground in the conflict region to allow actors of their choice to become active. The particularly dominant position of the US in IOM, which the US valued for its managerial and outcome-oriented style of operation, contrasted with its rather complicated relationship with UNHCR which it deemed too liberal and politically entangled at the time, may explain how IOM got into the central position.[55] Hence, before any other agency apart from the Red Cross had reached the region, the first IOM team was already on its way. On board the US ambassador's aeroplane it landed in Kuwait City[56] and was introduced to the Kuwaiti government to whom the IOM officials explained what they had to offer and were authorized to carry it out.[57]

What made IOM an attractive cooperation partner for all concerned governments and gave it a competitive advantage over other IOs was basically two *critical antecedents*. On the one hand, IOM was not constrained by a mandate bound to legal definitions of who could be assisted under what conditions. According to Hyde,[58] 'IOM has always been doing things on a timely basis for the greater good' – a notion that was 'a bit nebulous without being illegal'. In this sense, IOM showed an amount of flexibility much required in the complex Gulf War crisis that was 'not very much in the DNA of established UN organizations'. On the other hand, IOM possessed the technical expertise needed for the task at hand. While it had never operated under these precise circumstances and had never used its tools for the exact same purposes, it was still very used to organizing the logistics of people's movement. Accordingly, the main operative task in Kuwait and Iraq 'fit right into our ballpark'.[59] In the end, IOM was already operating an ad hoc but functional system of emergency evacuations when other actors entered the scene and inter-agency coordination started. Due to the organization's first-mover advantage, its leadership position in the area of emergency evacuations and the provision of shelter was never questioned. 'Needs were so immediate that there was never the

[55] Georgi (n 50) 54.
[56] While an apparently small detail, the operative twist to share airplanes shows how important the close and direct cooperation between IOM and the US government was at the time, since Kuwait City was completely sealed off and the airport closed at the time, inhibiting more regular forms of entry.
[57] Interview 1 (n 54).
[58] Ibid.
[59] Ibid.

question if we should have the lead … it was 'you have a plan, you have the resources, it's within your broad mandate, you can do this, you can do it now, so please do it'.[60]

7.3.2 *The Short- and Long-Term Institutional Consequences of IOM's Gulf War Operations*

Many things had to come together for IOM to adopt this outstanding role on the humanitarian assistance front in the Gulf War. Important permissive conditions such as the end of the Cold War and the outbreak of the Gulf War created a possibility space in which productive conditions such as the US's dissatisfaction with UNHCR and IOM's flexible problem-solving approach allowed for an unprecedented institutional outcome. But how did the Gulf War episode affect the organization's institutional development on the long run? According to Georgi, 'the First Gulf War in 1990/1991 was the single most important event at that time for IOM's subsequent expansion'.[61] As we argue, it set in motion a path-dependent process of institutional growth in the area of humanitarian assistance by ex-post formalizing competence in the area and creating organizational capacity which would be redeployed to different contexts, thus facilitating a cognitive normalization over time.

While IOM's Gulf operations were initially conceived as a unique and one-off engagement, Director-General Purcell recognized the potential for a recurrence of comparable scenarios and tasked the head of IOM's Gulf operations with the establishment of the Emergency Response Unit (ERU) which became operative in 1992.[62] This was a completely independent process without member state interference as the ERU at first did not require any new resources. Its working method was to connect, train, and equip standing staff for future emergency interventions by IOM.[63] Over the next few years, the Unit developed IOM's emergency preparedness and put it to tests in a number of refugee- and displacement-generating conflicts such as in Yugoslavia (1992), Rwanda/Zaire (1994), and Chechnya (1994). Building on this increasingly frequent involvement in humanitarian assistance, the IOM Secretariat in 1995 proposed a 'strategic plan' supposed to formally include for the first time a task to provide

[60] Ibid.
[61] Georgi (n 50) 53.
[62] Ducasse-Rogier (n 2) 135.
[63] Interview 1 (n 54).

migration assistance to persons affected by emergencies. Reportedly, this step was not unequivocally supported by member states who feared overlaps and duplications with other IOs in this area.[64] However, while IOM needed to officially recall that it did not view itself primarily as an emergency response organization, none of the member states were seriously opposed to its substantive work in the realm of humanitarian assistance.[65] Accordingly, IOM continued to step up its crisis response activities. The increasingly extensive involvement of IOM in conflict regions such as East Timor and Kosovo towards the end of the 1990s, for instance, led to an institutional solidification of these efforts in the larger Emergency and Post-Conflict Division in 2000, a precursor of today's Department of Operations and Emergencies (DOE) that firmly enshrined humanitarian assistance in emergencies in IOM's institutional structure.[66]

Beyond the immediate impact that the Gulf War intervention had on IOM's organizational structure, it also influenced the organizational culture and its perception by its environment. As an exemplary precedent, IOM's Gulf operations changed how IOM's role was perceived internally and externally. The precedent suggested a pattern that was transferrable: A crisis exposes governance gaps in terms of timing and functions; IOM has some capacity in its portfolio that can be used to fill such gaps; IOM immediately and actively offers and advertises its services to member states who value the organization's flexibility and low expected normative costs; IOM moves in before anyone else and sets another precedent for a new kind of activity; if carried out effectively, there is recognition at both IOM and its member states that this type of activity may be useful in other contexts, too, which leads to its ex-post institutionalization. At the level of organizational culture, this produced and over time reinforced an 'esprit de corps' among IOM's civil servants that help would be provided wherever help was needed, irrespective of formal responsibilities and conventional views of the boundaries of migration management.[67] At the level of organizational environment, member states and relevant non-state actors grew increasingly accustomed to IOM's flexibility and started to use its fungible capacities for crisis-related activities that were ever more remote from the organization's previous focus on migration

[64] Ducasse-Rogier (n 2) 134.
[65] Interview 1 (n 54).
[66] Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (n 8) 50.
[67] Interview 1 (n 54).

management and, sometimes, even from the issue of migration altogether. For instance, the Organization for Security and Cooperation in Europe (OSCE) enlisted IOM to facilitate out-of-country-voting for citizens of Bosnia and Herzegovina in 1996–1999,[68] and, starting with Mozambique in 1992, several member states made use of IOM's field presence to assist post-conflict disarmament, demobilization, and reintegration (DDR) campaigns in by now over 120 projects.[69]

With both sides learning how to profit from each other in a growing array of activities and building on a consolidating base of experiences, we may conclude that a mutually reinforcing cognitive process of convergence underlies a mechanism of increasing returns that reproduces the institution's path towards horizontal task expansion. In the following, we use two important cases in the more recent history of IOM to underscore the claim that this logic of institutional expansion through precedents has taken hold in the organization's development: the 2011 civil war in Libya and the 2014–2016 Ebola crisis.

7.3.3 Path-Dependent Reproduction of IOM's Expansionary Logic in Libya and West Africa

Both the civil war and foreign intervention in Libya and the Ebola crisis in West Africa gave rise to further emergency operations by IOM that covered partly new terrain and led to ex post institutional accommodations of its practice. While the Libyan case was marked by the creation of new best practices by IOM as a now focal manager of migration crises, the case of Ebola saw IOM redeploy its emergency toolkit to a new type of crisis context, namely one caused by the spread of a contagious disease.

7.3.3.1 Setting New Best Practices in Libya

In February 2011, civil unrest erupted in Libya in the context of the so-called *Arab Spring*. The situation quickly escalated into a civil war between the Libyan army of the Gaddafi government and rebels supported by NATO air forces. In terms of the number of people displaced, the civil war caused one of the worst migration crises in the region since the first Gulf War. Before the war, the Libyan economy had heavily relied on migrant

[68] IOM 2007.

[69] IOM, 'Disarmament, Demobilization and Reintegration. Compendium of Projects 2010–2017' (2019) <https://publications.iom.int/books/disarmament-demobilization-and-reintegration-compendium-projects-2010-2017> accessed 11 April 2022.

workers with foreigners making up about 21–35% of the Libyan population.[70] When the war broke out, both Libyan citizens and migrant workers tried to escape the violence and flee the country. Many of the foreigners who wanted to leave Libya were (mostly undocumented) manual labourers from sub-Saharan Africa.[71] Soon, a severe governance gap was exposed: While the migrant workers' countries of origin lacked the capacity to bring home their citizens, UN agencies were, at first, prevented from providing assistance due to the strict security protocols and the escalating violence on the ground.[72] Moreover, the UN was in a weak position to negotiate access to the country as the Security Council had authorized military action against the Gaddafi regime. The situation called for an actor to coordinate with both, the Libyan government and NATO, which was trusted by the migrant workers' countries of origin,[73] and able to enter the dynamic and dangerous environment in Libya. IOM fulfilled these criteria.

IOM was the first responder on site.[74] Its field office in Tunisia, which conducted most of the emergency response, consisted of two to three employees on the day the war broke out. Within a week, IOM had deployed about 1000 staff to the Tunisian country mission who were working on the ground at the Libyan border.[75] Soon after the onset of the crisis, IOM coordinated with UNHCR to set up the 'Humanitarian Evacuation Cell' (HEC), a liaison body of the two organizations at headquarters' level.[76] It

[70] Brachet (n 5) 273.

[71] Christine Aghazarm and others, 'Migrants Caught in Crisis: The IOM Experience in Libya' (2012) 5, <https://publications.iom.int/system/files/pdf/migrationcaughtincrisis_forweb.pdf> accessed 11 April 2022; Khalid Koser, 'Responding to Migration from Complex Humanitarian Emergencies: Lessons Learned from Libya' (Chatham House 2011) 2f. <www.chathamhouse.org/sites/default/files/1111bp_koser.pdf> accessed 11 April 2022; Khalid Koser, 'Migration, Displacement and the Arab Spring: Lessons to Learn' (The Brookings Institution 2012) <www.brookings.edu/opinions/migration-displacement-and-the-arab-spring-lessons-to-learn/> accessed 11 April 2022.

[72] Aghazarm and others (n 71) 22.

[73] Within the first month after the unrest had erupted, IOM received official diplomatic correspondence from 46 governments asking the organization for help in evacuating their citizens. Aghazarm and others (n 71)20.

[74] IOM Department of Operations and Emergencies (DOE), 'Humanitarian Emergency Response to the Libyan Crisis: February – December 2011 Report' (2011), <https://publications.iom.int/books/humanitarian-response-libyan-crisis> accessed 11 April 2022 5.

[75] Interview 2 (n 39).

[76] Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (n 8) 84; IOM Department of Operations and Emergencies (DOE), 'HumanitarianEmergencyResponsetotheLibyanCrisis:28February2011–27September2011' (2011) 3 <https://publications.iom.int/books/humanitarian-emergency-response-libyan-crisis> accessed 11 April 2022.

coordinated with the Libyan government to obtain the needed clearances and access to regions affected by ongoing fighting and with NATO to fly out migrants through the no-fly zone.[77] Moreover, IOM coordinated with humanitarian organizations, set up temporary camps, performed necessary health checks, and transported large numbers of migrants out of Libya.[78]

Most of IOM's operational activities in the early phase of the 2011 Libyan migration crisis can be considered part of what had become the organization's core crisis portfolio. At that point, IOM was used to negotiate with warring parties to gain access to conflict zones and its abilities as a facilitator of mass transport were well known. Two aspects of IOM's crisis response in Libya were unprecedented, however. One was that beyond evacuation, IOM also started building capacities to support migrants once they disembarked their means of transportation outside the conflict zone.[79] By creating transition camps, integration programs, and community projects, IOM assumed tasks typical for a development agency. The second was IOM's *focal* position as a coordination hub between all parties involved. In the past, IOM had operationally assisted UN-coordinated efforts on the ground, especially in tandem with UNCHR.[80] Over the course of the Libyan crisis, however, it became a key coordinator, eventually co-leading the Refugee and Migrant Platform and preparing a Joint Operational Framework for Humanitarian Response in Libya.[81]

IOM's initial response to the Libyan migration crisis 'was unanimously welcomed abroad',[82] as the migrant workers' countries of origin praised the organization's swift action on the ground. Additionally, and in contrast to what had previously been understood as a rather tense relationship,[83] UNHCR acknowledged the improved partnership between the two organizations that proceeded to co-publish joint statements at a

[77] Aghazarm and others (n 71) 24.
[78] Aghazarm and others (n 71); Interview 2 (n 39); IOM DOE, 'Humanitarian Emergeny Response to the Libyan Crisis: 28 February – 27 September 2011' (n 76) 3.
[79] Interview 2 (n 39).
[80] Elie (n 3) 352–355.
[81] Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (n 8) 85–90. As the conflict in Libya evolved, IOM took on an even wider range of roles, especially in terms of providing services in detention centers, training the Libyan coast guard, returning migrants to countries of origin ('voluntary assisted humanitarian repatriation') etc.
[82] Brachet (n 5) 273.
[83] Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (n 8) 85.

distinctly accelerated rate.[84] This positive feedback notwithstanding, a few months after the start of its operations IOM actually encountered an unprecedented funding lag.[85] At the peak of the crisis, the organization ran out of funds to charter all the planes necessary to transport migrants to diverse locations on different continents.[86] Even though most of IOM's typical donor states were willing to finance the efforts, the US preferred to fund efforts in Iraq rather than in Libya,[87] causing a crunch in the operations. IOM and its member states thus had to learn the hard way that the organization's short-term project-based budget proved insufficient to fund emergency evacuations of such a scale.[88]

After the acute phase of the 2011 Libyan migration crisis had subsided, IOM translated such lessons into prescriptions for the handling of future crises. First, it used the Libyan example to sell the idea of a new funding mechanism to its member states.[89] With success: The IOM Council created the 'Migration Emergency Funding Mechanism' in December 2011, a permanent fund to finance IOM's widened set of humanitarian evacuation efforts in future similar situations.[90] Second, the complex and multi-layered crisis in Libya arguably served as an eye-opener demonstrating the need for a structured and concerted approach to the governance of migration crises.[91] The Libyan experience thus provided the spark for the development of the 'Migration Crisis Operational Framework' (MCOF), which was approved by the IOM Council in 2012.[92] MCOF has since become a centrepiece of IOM's emergency responses. The document describes a variety of activities to be undertaken in crisis situations by IOM staff on the ground. While the document rationalizes a task expansion beyond mere migration matters, it was justified as enabling the organization to even better respond

[84] cf UNHCR and IOM, 'International approach to refugees and migrants in Libya must change' (2019), <www.unhcr.org/news/press/2019/7/5d2765d04/unhcr-iom-joint-statement-international-approach-refugees-migrants-libya.html> accessed 11 April 2022.

[85] Interview with Bruce Reed, former Head of IOM's Department of Resources Management (via Zoom, December 2020), hereafter: Interview 3.

[86] Aghazarm and others (n 71) 24.

[87] Interview 2 (n 39).

[88] Interview 3 (n 85).

[89] Interview 2 (n 39); Interview 3 (n 85).

[90] Aghazarm and others (n 71) 24; Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (n 8) 85.

[91] Interview 2 (n 39); Interview 3 (n 85).

[92] IOM Council, 'Migration Crisis Operational Framework' (2012), <www.iom.int/sites/g/files/tmzbdl486/files/migrated_files/What-We-Do/docs/MC2355_-_IOM_Migration_Crisis_Operational_Framework.pdf> accessed 11 April 2022.

to such situations in the future.[93] Third, IOM's improved relationship with UNHCR and generally the functioning inter-agency coordination during the Libya crisis also spurred lasting institutional change. In particular, the HEC, which was originally 'thought to be time-limited' became a permanent mechanism ensuring sustained cooperation with UNHCR.[94] Moreover, in 2016, IOM became a *related organization* to the UN, formalizing the ever-closer embeddedness of IOM within the UN framework[95] and thus allowing IOM to assume the role of the central coordinator in future crises.

7.3.3.2 IOM's Venture into Global Health Crisis Management: The 2014–2016 Ebola Outbreak

Another illustrative example of IOM's expansion into a new area that few would have associated with the portfolio of the organization is its involvement in the 2014–2016 Ebola epidemic in West Africa. In March 2014, an outbreak of the Ebola Virus Disease (EVD) was detected in Guinea. At that time, the virus had already spread to neighbouring Liberia, Sierra Leone, and Mali.[96] While certainly propelled by the fact that various cultural communities in the region span borders, the resulting health crisis had little to do with migration.

Similar to the Gulf War and the civil war in Libya, the situation in West Africa was perceived as very dangerous and unclear. Given the magnitude of the problem and the limited governance capacities of the states involved, some of IOM's most influential donor states, the United Kingdom, France, and especially the United States, asked the organization for assistance.[97] At first, IOM hesitated to get involved due to safety concerns for its staff[98] in light of what was perceived as a 'completely new threat'.[99] However, the

[93] Alexander Betts, 'The Global Governance of Crisis Migration' in: Susan Martin, Sanjula Weerasinghe, Abbie Taylor (eds) *Humanitarian Crises and Migration: Causes, Consequences and Responses* (Routledge 2014) 354.

[94] IOM Migrants in Countries in Crisis Initiative (MICIC), 'Humanitarian Evacuation Cell (HEC)' <https://micicinitiative.iom.int/micicinitiative/humanitarian-evacuation-cell-hec> accessed 11 April 2022.

[95] Bradley, 'The International Organization for Migration (IOM): Gaining Power in the Forced Migration Regime' (n 4) 97.

[96] Adam Kamradt-Scott, 'WHO's to Blame? The World Health Organization and the 2014 Ebola Outbreak in West Africa' (2016) 37 Third World Quarterly 401, 404.

[97] Interview 3 (n 85); Interview with a senior IOM field officer, member of the Ebola response team (via Zoom, 16 December 2020), hereafter: Interview 4.

[98] Interview 3 (n 85).

[99] Interview 1 (n 54).

US government under the Obama administration insisted,[100] referring to IOM's proven ability to move into extremely difficult situations with speed and quick adaptability.[101] Since the organization lacked a health-related framework for operation at the time, IOM started projects under its recently established 'Humanitarian Border Management' (HBM) framework, which intends to prepare governments and border authorities for crisis-induced mass movements and displacement.[102] IOM joined a cluster of IOs responding to the EVD crisis, which included the World Health Organization (WHO) and was coordinated at headquarters' level by the UN Mission for Ebola Emergency Response (UNMEER).[103]

Contrary to IOM's previous crisis responses, it is worth noting that the organization did not jump on the opportunity to enter uncharted territory in the case of the Ebola epidemic. Of course, the organization's hesitation was not based on concerns about potential mandate violations or organizational over-stretch, but about its staff security. The fact that IOM's most influential donor states still enlisted the organization for sake of its flexible crisis management capabilities illustrates the advancement of the cognitive mechanism of self-reinforcement. After repeated demonstrations of its usefulness for varied crisis governance tasks, IOM's member states seem to have internalized an impression of the organization as a quasi-universal tool deployable in any kind of crisis context. IOM does not necessarily have to push for its involvement anymore – it is being pulled in.

Once the decision was taken, the organization repeated the same pattern in had established in previous crises. It quickly deployed its staff and started out with its core activities – the documentation and transportation of people – in order to ensure that virus testing results got to the correct individuals and that patients could reach health facilities.[104] Soon, IOM identified governance gaps on the ground which were not filled comprehensively by any other responder and could be addressed by IOM. Thus, IOM started to conduct health screenings,[105] sanitized

[100] Interview 3 (n 85); Interview 4 (n 97).
[101] Interview 1 (n 54).
[102] Tilmann Scherf, 'The IOM's Humanitarian Border Management in the West African Ebola Crisis' in Martin Geiger and Antoine Pécoud (eds), *The International Organization for Migration: The New 'UN Migration Agency' in Critical Perspective* (Palgrave MacMillan 2020).
[103] Interview 1 (n 54); Scherf (n 102) 227.
[104] Interview 1 (n 54).
[105] IOM; 'IOM Regional Response to Ebola Crisis. External Situation Report' (2015) 3, <https://reliefweb.int/sites/reliefweb.int/files/resources/IOM%20Ebola%20Crisis%20Response%20Programme%20External%20SitRep%202015-03-26_0.pdf> accessed 11 April 2022.

migrants,[106] and provided psychosocial counselling sessions at schools in areas affected by EVD.[107] It set up clinics and emergency treatment centres based on a US model[108] and managed its own Ebola treatment units (ETU).[109] IOM was the first to conduct trainings of border officials[110] on health screening[111] and later formally took over the full management of the Ebola training academies from the United Kingdom's Ministry of Defense in Liberia[112] and Sierra Leone.[113] Moreover, IOM built structural improvements to border checkpoints, creating so-called flow monitoring points (FMPs)[114] to collect data on people's movements based on the HBM framework.[115] These border surveillance measures led to the creation of an unprecedented collection of data mapping population flows in the region.[116] Finally, IOM carried out a comprehensive public health information campaign, including radio spots,[117] town hall meetings, billboards, posters, and comics,[118] to inform the public on matters like EVD prevention measures, immunization campaigns, the ETUs, and the fight against the stigmatization of EVD survivors.[119] The information campaign also involved consultations with local authorities and community leaders[120] who were trained on community preparedness for EVD.[121]

[106] Interview 4 (n 97).
[107] IOM, 'IOM Liberia: Situation Report 27 April 2015–17 May 2015' (2015) 3 <www.iom.int/sites/default/files/situation_reports/file/IOM-Liberia-Situation-Report-27Apr-17May2015.pdf> accessed 11 April 2022.
[108] Interview 1 (n 54); Interview 3 (n 85); Interview 4 (n 97).
[109] IOM, 'IOM Liberia: Situation Report 27 April 2015–17 May 2015' (n 107) 1.
[110] Interview 1 (n 54).
[111] IOM 'Ebola Crisis Response Cote d'Ivoire: External Situation Report August 2015' (2015) 1 <www.iom.int/sites/default/files/situation_reports/file/IOM-Cote-d-Ivoire-Ebola-Crisis-Response-Situation-Report-August-2015.pdf> accessed 11 April 2022.
[112] IOM, 'Migration Health: Annual Review 2014' (2015) 14 <https://publications.iom.int/books/migration-health-annual-review-2014> accessed 11 April 2022.
[113] IOM, 'Migration Health: Annual Review 2014' (n 112) 58.
[114] Scherf (n 102) 228.
[115] Interview 4 (n 97).
[116] IOM, 'IOM Regional Response to Ebola Crisis. External Situation Report' (n 105) 3; IOM, 'Migration Health: Annual Review 2014' (n 112) 15.
[117] IOM, 'IOM Liberia: Situation Report 27 April 2015–17 May 2015' (n 107) 3.
[118] IOM, 'Migration Health: Annual Review 2014' (n 112) 58.
[119] IOM, 'Guinea Ebola Response International Organization for Migration: Situation Report 21 January–4 February 2016' (2016) 5, <www.iom.int/sites/default/files/situation_reports/file/IOM-Guinea-Ebola-Response-Sitrep-04-February-2016.pdf> accessed 11 April 2022.
[120] Interview 4 (n 97).
[121] IOM, 'IOM Liberia: Situation Report 27 April 2015–17 May 2015' (n 107) 3.

While the documentation, logistics, and transportation parts of the operation were IOM's core business, many of IOM activities during the Ebola crisis appear to be new endeavours for the organization, at least at such a scale and with such intent.[122] It was the first time that IOM engaged in border surveillance with FMPs according to the HBM framework and it had neither conducted a major public health campaign nor taken over the management of entire emergency treatment centres before.[123] To be sure, IOM was also used to health-related activities inasmuch as ground staff often performed routine health checks for migrants before boarding transportation and the organization had been involved in the cholera outbreak in Haiti a few years prior. In the Ebola crisis context, however, IOM conducted health checks and treatments at a new scale.[124]

While the World Health Organization (WHO) was criticized for its (mis)management of the Ebola epidemic,[125] IOM received mainly positive reactions for its involvement in West Africa, even though it was not expressly mandated to respond to health emergencies. For example, UNMEER repeatedly expressed its appreciation of IOM's activities[126] and the WHO Director-General praised the Ebola-related cooperation with IOM in a speech at the IOM Council.[127] Moreover, at the IOM Council, an African Union spokesperson thanked IOM for the swift response to the crisis.[128] However, some member states, especially the Netherlands, also voiced concerns about the apparent mandate violations in the Ebola crisis.[129] IOM's leadership retorted that 'migration is a cross-cutting issue' and that it was able to 'tie all its activities to migration'.[130] In the debates, it received backing by the US as one of IOM's most influential member states and major donors. That the Americans praised the organization's

[122] Interview 1 (n 54); Interview 3 (n 85); Interview 4 (n 97).
[123] Interview 4 (n 97).
[124] Interview 1 (n 54).
[125] Kamradt-Scott (n 96).
[126] Interview 4 (n 97).
[127] WHO, 'WHO Director-General addresses panel on migration and health' (2015), <www.who.int/director-general/speeches/detail/who-director-general-addresses-panel-on-migration-and-health> accessed 11 April 2022.
[128] IOM, 'Statement by HE Ambassador Jean Marie Ehouzou, Permanent Oberserver of the African Union in Geneva 105th Session of the IOM Council, 25–28 November 2014' (2014), <http://governingbodies.iom.int/files/live/sites/iom/files/About-IOM/governing-bodies/en/council/105/African-Union.pdf> accessed 11 April 2022.
[129] Interview 3 (n 85).
[130] Interview 4 (n 97).

operation in the context of the Ebola crisis successfully muted concerns regarding legal issues and mission.[131]

Again, IOM followed the pattern it had established with its involvement in the Gulf War and used the positive feedback from its major donor state to create a new framework called 'Health, Border and Mobility Management' (HBMM)[132] in order to formalize its expanded portfolio.[133] Based on the understanding that diseases do not stop at borders,[134] HBMM was considered a reiteration of the HBM framework.[135] It includes a diverse set of tasks ranging from 'operational research, evidence, data gathering and sharing', which normalizes the surveillance aspects of the Ebola response and underlines IOM's continued effort to expose governance gaps during crisis, to 'enhanced capacity of health systems and border management services'.[136] Sources inside IOM maintain that the main lesson learned from the Ebola response was the realization of a 'continued need for capacities' to respond to health crises[137] and that the HBMM framework was a direct result of IOM's Ebola crisis response.[138] Since then, IOM has continued to perform health-related activities in crisis response operations around the world based on the HBMM framework.[139] In the context of the contemporary COVID-19 pandemic, IOM is promoting its 'Global Strategic Preparedness and Response Plan', which is anchored in the HBMM framework.[140] Starting with the Ebola crisis response, IOM has thus successfully established itself as a player in yet another policy field not originally covered by its mandate.

[131] Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (n 8) 51; Interview 3 (n 85); Interview 4 (n 97).

[132] IOM, 'Health, Border & Mobility Management: IOM's framework for empowering governments and communities to prevent, detect and respond to health threats along the mobility continuum' (2016) <www.iom.int/sites/default/files/our_work/DMM/IBM/updated/Health_and_Humanitarian_Border_ManaManage.pdf> accessed 11 April 2022.

[133] Scherf (n 102) 227.

[134] Interview 1 (n 54).

[135] Interview 4 (n 97).

[136] IOM, 'Health, Border & Mobility Management: IOM's framework for empowering governments and communities to prevent, detect and respond to health threats along the mobility continuum' (n 132) 5.

[137] Interview 4 (n 97).

[138] Interview 3 (n 85); Interview 4 (n 97).

[139] IOM, 'Health Response to Crisis Situation' <www.iom.int/health-response-crisis-situation> accessed 11 April 2022.

[140] IOM, 'Global Strategic Preparedness and Response Plan Coronavirus Disease 2019: February–August 2020' (2020) <www.iom.int/sites/default/files/country_appeal/file/iom_covid-19_appeal_2020_final.pdf> accessed 11 April.

7.4 Conclusion

Today's institutional design and policy of IOM is heavily influenced by the historical legacies of its earlier crisis interventions. As we argued in this chapter, IOM's contingent emergency response in the Gulf War marked a critical turning point in the organization's evolution. Ever since, it has embarked on an institutional trajectory branching out further and further into the realm of humanitarian assistance in an ever-wider range of crisis contexts and in an ever more central role. The case study attests to the power of precedents in IOM's development. As predicted by historical institutionalism, once institutional choices provide increasing returns over time, they are not easily undone. In the remainder of this conclusion, we shall reflect on the implications of our findings for IOM's ethos, obligations, and accountability.

It seems most relevant for IOM's task expansion in the field of humanitarian emergency assistance that the organization is underpinned by an 'esprit de corps' in its staff that seems to prioritize hands-on assistance to people in need over broader normative or legal concerns. While arguably part of the organization's DNA from the beginning,[141] this practical helper ethos not only facilitates flexible crisis interventions in uncertain circumstances, but it is itself also reinforced in tune with the number of social precedents set by IOM in this area of activity. As suggested by the accounts of our interview partners, every new crisis intervention following the pattern provides arguments to rationalize (any other case of) humanitarian emergency assistance in terms of the organizational ethos: 'because this is what we do'.

The small regard for mandate violations or legal ramifications at IOM hints at a conflict that its ethos may create with obligations and accountability. What our account of IOM's near-exponential growth in the area of humanitarian emergency assistance has revealed in this regard, is that its expansions generally predate the adoption of any clear policies to reflect the pertinent normative principles. The Gulf intervention predated the adoption of any humanitarian policy principles, the Libya intervention predated the formalization of MCOF and MICIC[142] policies, and the Ebola response predated the adoption of the HBMM framework. Indeed, on the long run, these steps lead to a normative regulation of IOM activities. In the moment of expansion, however, IOM acts in a normative void ruled

[141] Interview 1 (n 54).
[142] Migrants in Countries in Crisis.

by facticity only. In this void, it is hard to discern forms of accountability that go beyond answering to donor states. In fact, as our model suggested, IOM often works at the behest of particularly powerful donor states on the territory of weaker states, without any clear foundation in a multilaterally endorsed set of principles. While the organization is thus strongly accountable to a few states, the countries and societies most affected by IOM's interventions lack the means to hold the organization to account. From a constitutionalist perspective, this is hard to reconcile with normative legitimacy requirements. However, legitimacy assessments need to consider both the input and output dimensions. To what extent IOM's achievements in living up to its ethos balances these normative problems, is a question we can only allude to here.

8

How IOM Reshaped Its Obligations on Climate-Related Migration

NINA HALL

In 1990 the first Intergovernmental Panel on Climate Change (IPCC) report predicted that climate change could lead to 'millions of people displaced by shoreline erosion, coastal flooding, and severe drought'.[1] Since then, non-governmental organizations, scientists, international organizations, and some states have echoed these concerns that climate change may drive millions from their homes. Since 2007 the International Organization for Migration (IOM) has played an important role in international policy discussions on the relationship between climate change and migration. They have pointed out that the links between climate change and migration are complex and not directly causal (i.e. not everyone affected by climate change will be forced to move). IOM has also noted that natural disasters will lead most people to be displaced internally, rather than across international borders.[2] IOM has emphasized that climate-related migration should not be seen as a 'threat' to states. Rather migration can be a positive adaptation strategy to climate change, and hence states should provide more pathways for international migration. IOM has also developed operational projects to assist people affected by climate change and outlined their positions through research, policy reports, and conferences.

Interestingly, IOM took on the issue of climate change and migration with no formal mandate for these activities. Initially there was a lack of support from member states at the Council. Here I examine how IOM expanded its obligations to include a broad category of climate and environmental migrants (both displaced and voluntary; internal and

[1] IPCC, *Climate Change the IPCC Impacts Assessment Report* (Australian Government Publishing Service 1990).

[2] Frank Laczko and Christine Aghazarm (eds), *Migration, Environment and Climate Change: Assessing the Evidence* (IOM 2009) 18.

international movement). I ask: what drove IOM's expansion, if not states? And what does this case tell us about who generates IOM's obligations and how?

The chapter argues that IOM staff, especially the climate change focal point, lobbied member-states to make climate-related migration a policy priority.[3] Most member states were initially reluctant, yet IOM found ways to work on climate-related migration, by seeking financing from the private sector, other international organizations, and a few supportive states. In other words, IOM staff 'colluded' with supportive stakeholders to expand its obligations to include environmental and climate change-related migration. IOM was able to do this as many member states do not closely monitor its operations at the Executive Council, but rather influence it through their bilateral funding. In addition, states accept, and even take advantage of the fact, that IOM is 'projectized' and hence has multiple obligations to its funders, that may not parallel the obligations set by the Executive Council. In short, this chapter outlines how IOM's financing structure coupled with weak patrolling of IOM's mandate by the Executive Council enabled it to expand into a new area.

The first section examines international relations theories of obligation in international organizations, focusing on how states control institutions through the executive body and funding decisions. It also notes that individual states and the secretariat of an international organization can work together to 'collude' and advance common interests. The second section examines IOM's mandate and funding patterns. The third section traces how IOM worked on climate change and migration and convinced member states of its role in this area.[4] The chapter draws on primary interviews conducted between 2009 and 2013 with IOM staff, donors, and other international organizations in Geneva, New York, and Kenya. I also examined speeches, reports, policy papers, and executive committee proceedings relating to the issue of climate change in IOM.

[3] Scholars have pointed out that climate change in and of itself very rarely causes migration, as there are a mix of social, economic and political factors that shape when and whether people move at all. This chapter hence refers to climate related migration, rather than 'climate refugees' or 'climate migration', to capture this complexity. For more on these terms and definitions, see Laczko and Aghazarm (n 2) 18–19.

[4] This chapter draws directly on: Nina Hall, *Displacement, Development and Climate Change: International Organizations Moving beyond Their Mandates* (Routledge 2016) ch 3; Nina Hall, 'The Money or the Mandate: International Organizations Engagement with the Climate Change Regime' (2015) 15 (2) Global Environmental Politics, 79–90.

8.1 Obligation in International Organizations

Most International Relations (IR) scholars perceive international organizations as primarily holding political obligations to the member states that create, finance, and govern.[5] Under this account of the 'ideal type' IO, states control international organizations by establishing a clear mandate, delegating specific tasks to the IO, and by controlling its funding.[6] Scholars have typically focused on deliberations at an international institution's executive board or council to identify the tasks and obligations states delegate to an international organization. An IO's mandate tends to evolve over time as the executive body identifies and delegates new tasks or issues, and older ones may be deprioritized or subtracted. Most IR scholars conceive of a mandate as the tasks and obligations which are *formally* delegated to an IOs: not those which are *informally* decided or which are *unilaterally* decided upon by an individual state. Multilateralism is based on state parties collectively agreeing to common principles and priorities.

In addition, IR scholars examine how states control IOs through their funding.[7] States choose how much funding to give an institution to fulfil its tasks, and if they do not give it enough the institution cannot deliver on its mandate. States, and other funders, can also choose whether to give states earmarked or non-earmarked funding.[8] Earmarked funding is often a contractual agreement between one state and the IO to deliver a particular activity or focus on a particular region or topic. When international organizations have a high proportion of earmarked funding, their autonomy is often circumscribed. They are contracted to deliver certain tasks, which may or may not align with their mandate delegated by their

[5] Kenneth W Abbott and Duncan Snidal, 'Why States Act through Formal International Organizations' (1998) 42 Journal of Conflict Resolution 3.

[6] Alexandru Grigorescu, *The Ebb and Flow of Global Governance: Intergovernmentalism versus Nongovernmentalism in World Politics* (Cambridge University Press 2020). See also Stian Øby Johansen, 'An Assessment of IOM's Human Rights Obligations and Accountability Mechanisms' 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).

[7] Ibid; Erin R Graham, 'Money and Multilateralism: How Funding Rules Constitute IO Governance' (2015) 7 International Theory 162; Erin R Graham 'Follow the Money: How Trends in Financing Are changing Governance at International Organizations' (2017) 8 (5) Global Policy 15.

[8] Nina Hall, Lisa Schmid and Alex Reitzenstein, 'Blessing or a Curse? The Effects of Earmarked Funding in UNICEF and UNDP' (2021) 27 Global Governance 433.

executive body.[9] Hence, scholars have pointed out that earmarked funding may be undermining multilateralism and strengthening individual donor interests.[10] Earmarked funding weakens the position of developing country states where IOs operate as donor states have a greater ability to shape IO tasks, than most developing states, given they fund IOs.[11]

Scholars have also noted that international organizations have autonomy and can influence states' decisions on what issues they should tackle (i.e. their mandate), and how to fund them.[12] Moreover, individual member states may share preferences with IO staff and 'collude' to advance their goals, at the expense of other member states.[13] Collusion can work both ways: IO Secretariats can search for, and work with, member states who share their interests.

In sum, to understand the political obligations of IOs most IR scholars would look to (1) the *formal mandate*, as set out in its constitution and other foundational documents whereby states collectively delegate certain tasks to the IO; (2) the various tasks it is *financed* to do (through earmarked and non-earmarked funding); and (3) whether IO staff shape member states' preferences and/or 'colludes' with stakeholders supportive of its agenda.

Notably, the formally delegated mandate and funding are only two types of obligations an IO may have. Others include obligations to beneficiaries, particularly those in their care (e.g. migrants in IOM's case); obligations to private funders (e.g. foundations or private companies); obligations to staff; obligations to other IOs (e.g. through the

[9] IOs may charge an overhead fee when taking earmarked funds, which can be used for other activities or administrative costs. Thanks to Miriam Bradley for pointing this out.

[10] Graham 'Money and Multilateralism: How Funding Rules Constitute IO Governance' (n 7); Grigorescu (n 6); Hall, Schmid and Reitzenstein, (n 8). Ronny Patz, 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).

[11] Thanks to Cathryn Costello for this point.

[12] Nina Hall and Ngaire Woods, 'Theorizing the Role of Executive Heads in International Organizations' (2018) 24 European Journal of International Relations 865; Hall, *Displacement, Development and Climate Change: International Organizations Moving beyond Their Mandates* (n 4).

[13] Hylke Dijkstra, 'Collusion in International Organizations: How States Benefit from the Authority of Secretariats' (2017) 23 Global Governance 601. To complicate matters even more, individual member states do not have unitary interests and different government agencies (e.g. interior, humanitarian/aid and labour) may advocate different approaches in global migration governance. Thanks to Miriam Bradley for raising this point.

humanitarian cluster system); and obligations to the general public. In the next section, I examine IOM's formal mandate and funding.

8.2 Obligations in IOM

8.2.1 Mandate

IOM's mandate has evolved considerably over the past seventy years, as others in this edited volume describe. It was originally established in 1951 as an operational travel agency and was tasked with relocating displaced persons and migrants from post-War Europe to the Americas, Australia, and New Zealand.[14] Its most significant mandate change occurred in 1989 when it took on a new Constitution, and a new name, to reflect its global ambit and broader scope. The new Constitution changes included a deletion of its focus on European migration; a new emphasis on a broader range of people requiring assistance; and the addition of new functions to its purpose. These functions included the provision of 'migration services' such as recruitment, language training, medical examination and reception, integration activities, and research on international migration.[15]

In fact, the 1989 Constitution mandated IOM to work with an exceptionally broad category of people, including refugees, displaced persons, and 'other individuals in need of international migration services'.[16] The ambiguity of the term 'individuals in need of international migration services' meant IOM had significant leeway to perform a wide range of tasks with different groups of people. Moreover, IOM was given no constitutionally articulated obligations for any specific people of concern, unlike UNHCR which has an obligation to protect refugees.[17] One member state

[14] It was originally called the *Provisional Intergovernmental Committee for the Movement of Migrants from Europe* (PICMME). Marianne Ducasse-Rogier, *The International Organization for Migration, 1951–2001* (International Organization for Migration 2002)15.

[15] 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) Article 1 (c, d and e). For more on the Constitution see Richard Perruchoud, 'From the Intergovernmental Committee for European Migration to the International Organization for Migration' (1989) 1 International Journal of Refugee Law 501.

[16] IOM Constitution (n 15) Article 1(b).

[17] Kreuder-Sonnen and Tantow also make a similar point that IOM was 'not constrained by a mandate bound to legal definitions of who could be assisted under what conditions'. Christian Kreuder-Sonnen and Philip M Tantow, 'Crisis and Change at IOM: Critical

representative explained that IOM is 'much more like a service provider. It has a Constitution but not a convention [such as the Refugee Convention] but the Constitution is just a founding document'.[18] The agency requires a request from a member state or from the UN to carry out its activities in a particular country.[19]

8.2.2 *Financing*

Although IOM has a broad and ambiguous mandate, it is circumscribed by its funding model. IOM receives the majority of its funding (over ninety percent) through earmarked projects. In 2019 only one per cent of IOM's revenue was unearmarked voluntary contributions beyond member states' regular dues.[20] In addition, in 2019 only eleven donors made unearmarked contributions, and 68 per cent of all unearmarked funding came from just three donors (Sweden, the UK, and Denmark). IOM is concerned by this trend and has encouraged states to sign multi-year agreements and commit to voluntary unearmarked funding.[21] In 2019 they released a report on unearmarked funding trends, for transparency and to encourage other donors to shift away from earmarking.[22]

IOM is highly 'projectized' as many scholars have noted.[23] Funders contract IOM for specific tasks, and one scholar has even compared it to a company that produces only those goods that have been ordered in advance.[24] Ninety-seven per cent of IOM's staff are in the field implementing projects

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).

[18] Interview with member state representative to IOM (Geneva, 10 May 2012).

[19] IOM Constitution (n 15) Article 1(b).

[20] IOM received US $2.1 billion in total voluntary contributions (the first time the organization surpassed US $2 billion), and $28.5 million of this was unearmarked. IOM, '2019 Annual Report on the Use of Unearmarked Funding', (2020) 3 <www.iom.int/sites/default/files/our_work/ICP/DRD/2019-report-use-of-unearmarked-funding-final.pdf> accessed 4 April 2022.

[21] Ibid 5.

[22] IOM, '2018 Annual Report on the Use of Unearmarked Funding' (2019) <www.iom.int/sites/default/files/our_work/ICP/DRD/iom-2018-annual-report-use-of-unearmarked-funding.pdf accessed 4 April 2022. To my knowledge this was the first such report.

[23] Megan Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (Routledge 2020) 39–41; Patz and Thorvaldsdottir (n 10) 75–98; Kreuder-Sonnen and Tantow (n 17).

[24] Fabian Georgi, 'For the Benefit of Some: The International Organization for Migration (IOM) and Its Global Migration Management' in Martin Geiger and Antoine Pécoud (eds), *The Politics of International Migration Management* (Palgrave Macmillan 2010).

which leaves a small staff of three per cent at headquarters working in strategic, administrative, and oversight roles.[25] This makes IOM distinct from many other UN agencies which have a larger proportion of non-earmarked funds, and more staff dedicated to policy-making at headquarters.

IOM is constrained by its projectized nature and earmarked funds. Donor interests play a 'greater role' in determining how funds are spent in IOM than in UNHCR.[26] The United Kingdom's Department for International Development (DFID) noted that: 'IOM has a market-oriented approach as a reactive project-based organization offering migration services in 12 broad areas of activities but is limited in its ability to direct resources strategically'.[27] IOM has a stronger tendency towards 'bilateralization' than UNHCR and many other UN-related organizations.[28]

Many states influence IOM's policies through bilateral financing, rather than decisions taken by the Executive Board or Council. Some IOM donors are more likely to target their influence through their funding decisions at the project level rather than by lobbying for changes at headquarters in policy.[29] Most states spend less time monitoring IOM at headquarters than they do for UNHCR, and some states manage their relationship with IOM from their capital, rather than from Geneva.[30] Furthermore, some states still perceive IOM as predominantly a 'travel agency' responsible for migration services and thus the lead Ministry working with IOM is the Ministry of Interior, Immigration or Justice, rather than Foreign Affairs.[31] States are also less concerned with policy or mandate expansion at IOM council meetings than they are with UNHCR's mandate.[32] In fact, several states claimed that 'member states don't talk about mandate' and that IOM is 'more interested in filling a gap if they can find funding for it'.[33] Thus IOM has a high degree of operational autonomy: states may choose not to fund IOM's expansion into a new area, but they are also unlikely to strongly oppose expansion if IOM finds funding elsewhere.

[25] IOM, 'Review of the IOM Strategy' (12 October 2010) IOM Doc MC/INF/302 2.
[26] Patz and Thorvaldsdottir (n 10) 91.
[27] DFID, 'Multilateral Review: Assessment of International Organization for Migration' (February 2011) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/67600/IOM.pdf> accessed 4 April 2022.
[28] Patz and Thorvaldsdottir (n 10) 91; Hall, Schmid and Reitzenstein, (n 8).
[29] DFID (n 27).
[30] Interview with IOM and UNHCR member state representatives (Geneva, 10 May 2012).
[31] Ibid.
[32] One state described IOM Council meetings as 'very easy-going' and said they mostly focus on financial issues. Interview with IOM and UNHCR member state representative d (Geneva, 9 May 2012).
[33] Interview with IOM and UNHCR member state representative b (Geneva, 7 May 2012).

In sum, IOM's 1989 Constitution gave it an exceptionally broad and ambiguous mandate for international migration services, which gives it significant autonomy. However, it is also circumscribed by its highly projectized funding model and reliance specifically on earmarked funds. The next sections explore how IOM has navigated these opportunities and constraints.

8.3 IOM and Climate Change (2000–2014)

By the late 1990s, IOM had expanded its activities to encompass a wide range of migrants, IDPs, refugees, and other displaced peoples. IOM had also framed a new policy problem of 'ecological migration', which they defined as 'migration caused by processes of environmental degradation including worsening quality and accessibility of natural resources'.[34] In the 2000s IOM then engaged with climate change–related migration in three areas: (1) humanitarian response to natural disasters; (2) operational activities; and (3) policy and research expertise. IOM's work on climate-related migration collectively covered the full range of people on the move: internally or internationally; voluntary or forced.

8.3.1 Natural Disasters and Humanitarian Operations

In the early 2000s, IOM became more engaged in natural disasters and humanitarian operations.[35] This work was not explicitly conceived as responding to climate-related displacement or migration, but rather assisting people affected by extreme weather, floods, droughts, and other natural disasters. There was an increasing need for humanitarian assistance following natural disasters. IOM for example sent teams to Gujarat post-earthquake (2001); Sri Lanka post-tsunami (2004); Haiti post-earthquake (2010); and Pakistan after the devastating floods of 2010 (IOM 2011: 101). In all of these cases, IOM was providing humanitarian assistance to IDPs.

IOM's role in natural disasters was strengthened in the humanitarian reform process. The Inter-Agency Standing Committee (IASC), the main

[34] IOM, UNHCR and Refugee Policy Group, 'Symposium on Environmentally Induced Population Displacement and Environmental Impacts Resulting from Mass Migration' (International Symposium, Geneva, 21–24 April 1996) <https://publications.iom.int/system/files/pdf/environmentally_induced.pdf> accessed 4 April 2022.

[35] See Kreuder-Sonnen and Tantow (n 17).

coordinating mechanism for humanitarian agencies, appointed IOM as cluster lead for camp coordination and camp management in natural disasters under the new coordination system. Dealing with natural disasters was a significant share of these humanitarian activities.

Importantly, it was other UN humanitarian agencies that gave IOM this new role, not member states. In 2006, the director general Brunson McKinlay explained IOM's new cluster lead role to states at Council, as they had not given it a mandate to take on this work. He stated that:

> IOM was now a major disaster relief agency, and the Inter-Agency Standing Committee (IASC) had recognized its role in the new cluster process and given it special standing with regard to natural disasters, i.e. emergencies that were not caused by war, oppression or human rights violations. Such disasters seemed to be increasing in number and duration, prompting IOM to focus more attention on them.[36]

The official record of this Council meeting does not mention any reaction from member states to the DG's claim. This is an interesting example of how international organizations can generate new obligations for other IOs.

States likely supported this work tacitly, even if they did not financially. One member state representative, for instance, explained that 'IOM does a lot of important work that you don't find in their mandate'.[37] Another member state explained that 'in Geneva we see them as a migration agency' but argued that IOM 'don't have to prove it [humanitarian operations] is part of their formal mandate' as long as 'they prove operationally sound'.[38] IOM sought to be active players in the humanitarian field, given the funding opportunities and need.

8.3.2 Attempted Mandate Change

In 2006 the organization appealed to states to fund a small meeting of academics, policy-makers, and experts on environmental migration. However, states did not fund the conference. One IOM official explained that developed countries claimed climate migration was, 'not part of the mandate'. Member state representatives also confirmed that 'there is a view amongst member states that climate change is not an issue

[36] IOM, 'IOM Report on the Hundred and third Session of the Executive Committee' (26 June 2006) IOM Doc MC/2201.
[37] Interview with IOM official (Geneva, 11 May 2012).
[38] Interview with IOM member state representative (Geneva, 7 May 2012).

that … IOM should be working on'.[39] Some states may have been reluctant for the organization to expand significantly into new areas. Although some member state representatives were unaware that IOM even worked in this area.[40]

Instead, IOM turned to the United Nations Population Fund (UNFPA) for funding and co-organized a seminar in February 2007 in Bangkok on environment and migration.[41] The meeting was held in the same month as the release of the fourth IPCC report which explicitly mentioned that climate change was likely to cause migration, making the issue 'very hard to deny' in the words of one IOM staffer.[42] This staff member maintained that the IPCC report gave IOM the legitimacy and inspired its 'willingness' to work on the issue.[43]

At the 2007 conference, IOM outlined a working definition of environmental migrants as: 'persons or groups of persons who, for compelling reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move either within their country or abroad'.[44] This intentionally broad definition, which covered some refugees, IDPs, and international migrants, became IOM's official definition and gave the organization much room to maneuver.[45]

Subsequently, IOM brought the issue of environmental migration to the attention of its governing Council. Yet again, states were reluctant to support this, and when given the choice they did not prioritize it as a topic for discussion.[46] The main reason, according to one IOM staff member, was that states had neither awareness nor interest in the issue.[47] Another IOM staff member explained that states asked 'what does IOM have to do with it? Is this [environmental migration] a real issue?'[48] IOM needed to do more research and awareness-raising to make it a priority for states.[49]

[39] Interview with IOM member state (Geneva, 23 March 2010).
[40] Interview with IOM member states (Geneva, 7, 10 and 11 May 2012).
[41] Interview with IOM officials (Geneva, 17 March 2010).
[42] Ibid.
[43] Ibid.
[44] IOM, *International Dialogue on Migration No 10. Expert Seminar: Migration and Development* (IOM 2008).
[45] Laczko and Aghazarm (n 2) 18.
[46] Interview with IOM senior official (Copenhagen, 15 December 2009).
[47] Ibid.
[48] Interview with IOM official (Geneva, 17 March 2010).
[49] Ibid.

IOM staff were aware of these constraints, as an IOM staff member working on the issue explained: states would be 'ready when they're ready'.[50]

In 2007 IOM convinced states to hold a three-hour discussion on migration, the environment and climate change at Council. Secretariat staff prepared a discussion note for this meeting, where they explained that environmental migration was a problem for those who moved, and the recipient country. IOM also maintained that: 'Increased migration can contribute to further environmental degradation, but it can also be a coping mechanism and survival strategy for those who move'.[51] In the paper, IOM recommended that countries of origin encourage 'host states to admit environmental migrants, whether as part of labour migration schemes, resettlement programmes, or humanitarian assistance initiatives'.[52] This paper set out IOM's position: cross-border environmental migration should be facilitated within the available legal migration channels. It also outlined a role for IOM in enabling 'more informed action and multi-stakeholder cooperation'.[53]

The subsequent discussion during the 2007 Council meeting focused predominantly on the issue of environmental migration, rather than IOM's role in addressing it. A panel of speakers, including representatives from China, Bangladesh, Greece, Cameroon, and Colombia, spoke about if and how environmental migration was a problem in their countries. Greece pledged it would create 'special funds in cooperation with regional organizations to finance adaptation projects in Africa and small island developing states and cooperate with IOM on various projects'.[54] Greece was then also chairing the international *Human Security Network* and the *Organization for the Security and Co-operation in Europe* (OSCE), and prioritized the human security impacts of climate change.[55] No other member state pledged funding for IOM on climate and migration.[56]

[50] Ibid.
[51] IOM, 'Discussion Note: Migration and the Environment' (1 November 2007) IOM Doc MC/INF/288 1.
[52] Ibid 7.
[53] Ibid 7.
[54] IOM, 'Report on the Ninety-forth Session of the Council' (5 December 2008) IOM Doc MC/2239/Rev 1.
[55] The Human Security Network is an informal group of 13 states that meet regularly at the Foreign Ministerial level to promote the concept of human security. Interview with IOM senior official (Copenhagen, 15 December 2009).
[56] IOM, 'Report on the Ninety-forth Session of the Council' (n 54); On collusion see Dijkstra (n 13).

At this Council meeting, IOM did not outline a new role for itself in environmental migration but outlined principles for states to follow to address environment and migration. These included: effective environmental migration management; proactive policy and early action; and bilateral, regional, and multi-stakeholder cooperation.[57] There is no official record of states disagreeing or agreeing with these principles and IOM did not explicitly establish its role in these principles.[58] This suggests there was an acknowledgement of the issue but not explicit support for IOM's engagement with environmental migration.[59]

Subsequently, in 2008 IOM received the first explicit financial support to work on climate change and migration from a member state. Greece financed and co-hosted a half-day long conference on *Climate Change, Environmental Degradation, and Migration: Addressing Vulnerabilities and Harnessing Opportunities.* However Greek support was limited to 2008 and was largely due to the leadership of its representative Theodor Skylakakis.[60] The conference's primary objective was to raise awareness of the human security challenge of climate change for the most vulnerable people.[61] The Director General of IOM, Brunson McKinley, spoke at the conference and emphasized IOM's expertise on climate and migration. IOM focused the conference on the human security dimensions of climate change mobility to counter the growing perception of migration as a threat.[62] By bringing together over 180 people from 67 countries and 33 inter-governmental organizations, IOM became a known expert and broker in debates on climate change and migration. IOM 'colluded' with Greece to advance their climate agenda.

In sum, IOM lobbied member states to recognize the organization had a role in responding to environment and climate migration. They did this by initiating conferences, setting the agenda of council meetings, and working with sympathetic states. However, they did not initially gain a formalized mandate change as states did not agree that it was a priority. IOM understands its Constitution to be very permissive, as many activities can be classified as a 'migration service'. This gives the organization

[57] IOM, 'Report on the Ninety-forth Session of the Council' (n 54).
[58] Ibid 30.
[59] Notably throughout this period IOM framed the issue as 'environmental migration' and not as 'climate migration'.
[60] Interview with IOM senior official (New York, 12 October 2010).
[61] IOM and Greece, 'Climate Change, Environmental Degradation and Migration: Addressing Vulnerabilities and Harnessing Opportunities' (2009).
[62] Interview with IOM official (Geneva, 11 May 2012).

a significant degree of autonomy to define its tasks and add new ones. However, IOM due to its heavy reliance on earmarked funding and projectized nature is also constrained by what member states will fund and is thus more responsive than most IOs to states' preferences. What's interesting in this case is IOM still sought collective agreement from its Executive Council on its priorities.

8.3.3 *Secretariat Staff Led Expansion*

In 2007–2008 IOM continued to work on climate-related migration, despite member states' reluctance to fund or support it. IOM established a focal point for environmental migration within the Migration Policy, Research, and Communications Division to be assisted by two Migration Policy Officers. There were ten other staff across IOM working on climate change, environment, and natural disasters. The focal point, Philippe Boncour, 'pushed' the issue internally, highlighting to others that 'this [issue] matters'.[63] The climate focal point remained, even during a period of major organizational reform in 2009.

Staff sought to establish the organization as an expert on climate change–induced migration, even without members' explicit support. IOM's DG Brunson McKinley stated for instance that 'The International Organization for Migration has an obvious role in addressing the linkages between environmental degradation, climate change, and migration'.[64] They frequently published research reports and participated in events with governments and universities on the topic.[65]

In 2008 IOM instigated a working group on climate change, displacement, and migration in the IASC.[66] The IASC was an important catalyst

[63] Interview with IOM senior official (New York, 12 October 2010).

[64] Brunson McKinley, 'IOM statement' (Institute for Public Policy Research Conference Climate Change and Forced Migration, London, 29 April 2008).

[65] IOM, 'Report of the Director General on the Work of the Organization for the Year 2008' (10 June 2009) IOM Doc MC/2278. In 2008 IOM published the following: IOM, 'Migration Research Series No 31: Migration and Climate Change' (2008); IOM, 'Migration Research Series No 32: Irregular Migration from West Africa to the Maghreb and the European Union: An Overview of Recent Trends' (2008); IOM, 'Migration Research Series No 33: Climate Change and Migration: Improving Methodologies to Estimate Flows' (2008); IOM, 'Survey on Remittances 2008 and Environment (IOM 2008); IOM, Migration Research Series No 35: Migration, Environment and Development' (2008). IOM staff wrote some of these reports and commissioned academics to write others, such as the report on *Climate Change and Migration: Improving Methodologies to Estimate Flows.*

[66] Nina Hall, 'A Catalyst for Cooperation: The Inter-Agency Standing Committee and the Humanitarian Response to Climate Change' (2016) 22 Global Governance 369.

for new policy responses to climate-related migration, as states were not party to IASC discussions (nor did they actively monitor them). In October 2008 the working group submitted its first working paper which outlined IASC's commitment to: 'Take account of, and manage, the humanitarian consequences of climate change, including protecting those who may move as a result' and to 'launch a dialogue among Member States on how to fill existing and foreseeable legal, operational and capacity gaps associated with climate change and human mobility'.[67] This work subsequently became the basis for the Nansen Initiative, led by UNHCR and the Norwegian government.[68] Through the IASC IOM also pushed for migration to be accepted as an adaptation strategy under the UNFCCC text.[69] IOM did not want migration to be seen simply as a 'failure of adaptation'.[70]

IOM also established a new *Climate Change, Environment and Migration Alliance* (CCEMA) with UNEP, the United Nations University, Munich Re Foundation, and civil society partners. This alliance's primary purpose was to develop policy approaches and research to investigate the links between climate change, environmental degradation, and migration. They wanted to support the most vulnerable countries with capacity-building and work with national governments on the degradation of natural resources. It was a broad and ambitious agenda ambit for a small alliance.[71] It illustrates how IOs can also 'collude' with the private sector, academia, and civil society to advance their agenda.

[67] IASC, 2008, 'Climate Change, Migration and Displacement: Who Will Be Affected?' (31 October 2008) <http://unfccc.int/resource/docs/2008/smsn/igo/022.pdf> accessed 4 April 2022.

[68] Nansen Initiative, <https://environmentalmigration.iom.int/nansen-initiative> accessed 4 April 2022.

[69] IOM, 'Environment, Forced Migration and Social Vulnerability: Identifying Problems and Challenges' (UNFCCC Preparatory Meeting, Bonn, 9 October 2008) <www.iom.int/jahia/webdav/shared/shared/mainsite/activities/env_degradation/env_keynote_speech.pdf> accessed 4 April 2022.

[70] IOM, 'Migration and Climate Change: From Emergency to Adaptation' (14th Conference of the Parties of the UNFCCC, Poznan, 8 December 2008) <www.iom.int/jahia/webdav/shared/shared/mainsite/activities/env_degradation/webcast.pdf> accessed 4 April 2022.

[71] In April 2008 they also held an expert meeting in Munich to which many CCEMA members attended including: UNU, UNEP, Munich Re Foundation and with financial support from the Rockefeller Foundation. See Koko Warner, Workshop Report for 'Research Workshop on Migration and the Environment: Developing a Global Research Agenda'16–18 April 2008 Munich, Germany (IOM 2008) <www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/events/docs/programme_positionpapers.pdf> accessed 4 April 2022.

In May 2009, IOM published its first policy paper explicitly on climate change and migration. The nine-page brief 'Migration, Climate Change and the Environment' outlined the 'complex' relationship between climate change and migration.[72] It stated the 'irrefutable evidence regarding climate change' and expectation that global migration flows would 'rise significantly over the next decades as a result of climate change'.[73] The paper emphasized that the agency had a 'long established' interest and expertise in the area through its publications and research and operational responses to natural disasters.[74] It outlined ambitious future goals to mainstream climate change and environment into migration policies; and to minimize forced displacement by 'developing temporary and circular labour migration schemes with 'environmentally-vulnerable countries'.[75] IOM positioned itself as the organization with the necessary expertise, and experience to address climate-related migration. IOM's investment in developing climate and migration policy was significant given it has a small headquarters with little policy-making capacity.

8.3.4 *Operational Expansion*

Alongside this policy development, IOM sought to publicize its operational expertise on climate change and environmental migration. The Geneva headquarters invited 40 missions to send in descriptions of projects which related in some way to climate change and environment.[76] The resulting *Compendium of IOM's activities in Migration, Climate Change, and the Environment* covered a broad range of activities in thirty countries.[77] The Compendium was a major enterprise due to the decentralized nature of the organization.[78] In the process of compiling the report, IOM staff in headquarters and the field became aware that a lot of work 'has already been done on climate change and environment'.[79] The 300-page

[72] IOM, 'Migration, Climate Change and the Environment: Policy Brief May 2009' (2009) <www.iom.int/sites/default/files/our_work/ICP/IDM/iom_policybrief_may09_en.pdf> accessed 4 April 2022 1, 5.
[73] Ibid.
[74] Ibid.
[75] Ibid 7.
[76] Interview with IOM official (Geneva, 11 May 2012).
[77] IOM, *Compendium of IOM's Activities on Migration, Climate Change and the Environment* (IOM, 2009) <https://publications.iom.int/books/compendium-ioms-activities-migration-climate-change-and-environment> accessed 4 April 2022.
[78] Interview with IOM official (Geneva, 17 March 2010).
[79] Interview with IOM official (Geneva, 25 March 2010).

compendium illustrated IOM's existing expertise on environment, climate change, and migration. In fact, it was so popular with participants at the Copenhagen summit that IOM ran out of copies to distribute.[80]

However, the Compendium raised important questions on IOM's role in environmental or climate change projects. It included activities where IOM had no core competency and only a very tenuous link to its migration services mandate, such as soil conservation and reforestation in Haiti or promoting youth employment in the environmental sector in Senegal.[81] Moreover, the Compendium inadvertently highlighted the disconnect between the global policy debate and operations on the ground. IOM's activities dealt with a range of migrants and non-migrants who did not always fit within the clear typologies of environmental migrants that IOM had developed. The Compendium highlighted a conceptual ambiguity and tension between IOM's climate and migration operations and their policy statements.

Importantly, the existence of each project depended on what donors were prepared to fund. One member state for example visited IOM's Haiti operations and visited IOM's reforestation activities. They claimed these activities were not in IOM's 'core mandate' and not a 'core capacity of IOM'.[82] They acknowledged that 'mission creep' was occurring but did not see this as a 'dangerous development' as they argued 'someone needs to do it [reforestation]'.[83] Nevertheless, this state would not fund IOM's reforestation or other natural disaster activities as they only financed 'core' mandated operations, in particular IOM's assisted voluntary returns programme.[84] States often tolerate IOM's 'gap-filler' or 'catch-all' interpretation of its mandate and role, hence it can take on any task that they can find funding for.

In addition to the Compendium, the Director General, William Lacy Swing, also frequently highlighted IOM's operational and research expertise on climate change and migration. He highlighted IOM's contribution in carrying out 'relevant operations' in over 40 countries,

[80] Interview with IOM officials (Geneva, 17 March 2010).

[81] Note that adaptation is a broad category so some of these projects could fit within a broad definition of adaptation, however IOM gave neither a definition of adaptation nor made any explicit connections between these activities and climate change adaptation. I visited IOM's operations in Northern Kenya and saw a similar pattern.

[82] Interview with IOM member state representative (Geneva, 10 May 2012).

[83] Ibid.

[84] Interview with IOM member state representative (Geneva, 10 May 2012). Notably states' views vary on what constitutes IOM's 'core' mandated operations.

developing a research base, setting out the policy issues, and working in partnership with other agencies. In December Swing published an Op-Ed in the French newspaper, *Le Monde,* where he called on the international community to accept the 'principle of mobility of people who must migrate, temporarily or permanently, in order to adapt or to survive climate change'.[85] The core message was that climate change–induced migration was a problem that the international community, needed to address.

In December 2009 Swing spoke at the UNFCCC alongside the UN High Commissioner for Refugees and other humanitarian leaders. He again emphasized IOM's expertise in working with environmentally displaced persons:

> Certainly since Hurricane Mitch in Central America in 1998, IOM, together with its humanitarian partners, has been there every time a major disaster struck and forced populations to flee for sheer survival. We know how to put up the tents in displacement camps, we know of the protection and assistance needs of displaced persons, we know how important it is to build back better.[86]

He argued that migration should not be a strategy of 'last resort' but that the international community needed to respond sooner and see migration as an adaption strategy. Swing's speeches sought to establish IOM as a legitimate actor in what they saw as a new field of climate change–related migration (both internal and external; voluntary and forced).

Throughout 2010 IOM continued to showcase its expertise on climate change and migration at a range of international events and through reports. For instance, two climate and migration experts recognized IOM as 'Perhaps the most important international organization in this area [of environmental and climate migration]' in a background paper written for the *Global Forum on Migration and Development* in Mexico.[87] Swing

[85] Author's translation from the French: William Swing, 'Aidons les pays en développement à faire face aux changements climatiques' (*Le Monde*, 12 December 2009) <www.lemonde.fr/idees/article/2009/12/16/aidons-les-pays-en-developpement-a-faire-face-aux-changements-climatiques-par-william-lacy-swing_1281291_3232.html> accessed 4 April 2022.

[86] William Swing (15th Conference of the Parties UNFCCC Copenhagen Side Event: Climate Adaptation Continuum, Migration and Displacement: Copenhagen and beyond, Copenhagen, 16 December 2009) <www.iom.int/jahia/webdav/shared/shared/mainsite/activities/env_degradation/speakingpts_swing.pdf> accessed 4 April 2022.

[87] Koko Warner and Susan Martin, 'Impact of Climate Change on Migration and Development' (Background Paper for Civil Society Days, Global Forum on Migration and Development, Mexico 2010).

attended the 2010 UNFCCC summit and emphasized that: 'Today's reality is that climate change and environmental degradation are already triggering migration and displacement. In the past decade alone, for example, IOM undertook some 500 projects for a total of $280 million to assist victims of environmental degradation'.[88] He reiterated that migration was not a 'worst case scenario' but that it 'should be part of our response to climate change'.[89] IOM continued to walk a fine line between advocating for migration as a useful adaptation to climate change; and providing operational solutions to what most states saw as the core problem: mass displacement caused by climate change.

8.3.5 *Mandate Change*

Alongside IOM's expanded policy, research, and operational activities on climate and migration, they returned to Council for support. In November 2008, McKinley announced to states at the annual IOM Council meeting that climate change was an area of strategic priority. There is no officially recorded response from states on this. However, member states at this meeting expressed a general concern about mandate creep:

> [Y]ears of expansion in terms of both membership and scope of programming may have resulted in a form of 'mandate creep' and the Organization was urged to consolidate its work in line with the 12 strategic activities…. Particular disquiet was expressed about the possibility that IOM would stray from helping member states formulate migration policy and take on a normative role.[90]

The Director General's responded that there 'should be no mandate creep' and pledged that IOM would always provide compelling evidence of linkages between its work and the 12 strategic activities established in 2007.[91] In addition, he stated that one of IOM's five 'broad strategic directions' was to 'engage cooperatively and thoughtfully in emerging fields such as…climate change'.[92] IOM could claim it had tacit consent, given there was no vocal disagreement, for continuing research,

[88] William Swing, 'IOM Statement' (16th Conference of the Parties UNFCCC Side Event, Cancun, 10 December 2010).
[89] Ibid.
[90] IOM, 'Report on the Ninety-sixth Session of the Council' (26 November 2009) IOM Doc MC/2266/Rev.1 6.
[91] Ibid.
[92] Ibid.

conferences, and submissions on climate migration.[93] However, it is highly likely that the agency would have faced strong opposition from states if it had sought a protection role for climate-related displacement as UNHCR did.[94]

Then at the next Council meeting in 2009, some states agreed that an area of 'special importance' to IOM was 'climate change and the consequent displacement of migrants'.[95] At the 2010 Council states again discussed IOM's work on climate change and migration. IOM noted in its 2010 strategic review that 'emerging issues with implications for migration, such as climate change, continue to rise on the global agenda, it may also be in Member States' strategic interest to ensure that IOM is tasked to specifically address such new challenges in the future'.[96] States then agreed that the *International Dialogue on Migration* (IDM) in 2011 should focus on climate change and migration. This was significant as the IDM is IOM's top-level policy forum and engagement with states and is a sign of state support for IOM's work on climate and migration.[97]

In March 2011 IOM convened the IDM on *Climate Change, Environmental Degradation and Migration* and 221 people attended, including 151 member states representatives. The deputy director of IOM, Laura Thompson highlighted that in the past 10 years, IOM had received funding for more than 500 projects to respond to environmental migration. IOM's aim was to bring the 'topic to the table' and then let states decide if and how they would pursue it according to one IOM representative.[98] In the official record of the meeting, IOM did not advocate for a particular outcome from the conference and did not stipulate what its role was in

[93] There was also a discussion over whether IOM had a protection mandate for migrants or refugees. One delegation stated that 'IOM did indeed have a protection mandate stemming from the IOM strategy and constitution'. They added that it was 'becoming increasingly difficult to distinguish between refugees and migration in the field. A factor that could hinder the effective management of mixed migration flows because institutional mandates did not appear to be in sync with reality in the field'. IOM, 'Report on the Ninety-sixth Session of the Council' (n 90) 30.

[94] Hall, *Displacement, Development and Climate Change: International Organizations Moving beyond Their Mandates* (n 4) ch 2.

[95] A member of the Executive Committee explicitly 'recognised the Administration's role in raising the profile of migration-related issues in the agreement expected to be produced' at the Copenhagen UNFCCC Summit. IOM, 'Report on the Ninety-sixth Session of the Council' (n 90) 3.

[96] IOM, 'Review of the IOM Strategy' (n 25) 2.

[97] Interview with IOM official (Geneva, 11 May 2012).

[98] Interview with IOM official (Geneva, 7 May 2012).

implementing the conference recommendations.[99] IOM sought to carve out a new role by directing states to this new issue.

In addition, IOM sought out financing for its climate-related migration work from sources other than member states. IOM had successfully lobbied for the inclusion of migration as an adaptation strategy in the final UNFCCC Agreement at Cancun.[100] This was applauded as a significant victory on the basis that IOM would have access to the adaptation fund. Subsequently, IOM did a 'mapping' of potential 'use of the adaptation fund, the Least Developed Countries Fund, EU funds as well other bilateral, multilateral and private sources'.[101] IOM could not directly access the adaptation fund and so established a partnership with the Asian Development Bank (ADB) to access the fund.[102] The Director General held bilateral meetings with the ADB to develop this partnership and also explored funding for adaptation projects with the Swedish International Development Agency. IOM was proactive in sourcing financing. IOM worked around member-states to develop support and funding for its climate-related migration work.

By 2013 IOM's policy agenda relating to natural disasters, climate change, and environmental migration was spread in several key policy debates.[103] Firstly, they sought to ensure that migration was recognized as a driver of risk in the Hyogo Framework for Action discussions on disaster risk reduction (DRR) and resilience and contribute to the UN system-wide action plan on DRR. Secondly, in the UNFCCC IOM lobbied for states to deliver on their promise to consider rehabilitation and compensation for migration under the 'loss and damage' domain. They also advocated for states to integrate migration as a positive adaptation strategy in National Adaptation Programmes of Action. Thirdly, in the humanitarian sphere, IOM collaborated with other agencies and pushed its 'Migration Crisis Operational Framework' to look at vulnerable mobile groups and

[99] IOM, 'International Dialogue on Migration 2011: Intersessional Workshop on Climate Change, Environmental Degradation and Migration: Chair's Summary' <www.iom.int/jahia/webdav/shared/shared/mainsite/microsites/IDM/workshops/climate-change-2011/Chair%27s-Summary.pdf> accessed 4 April 2022.

[100] UNFCCC 'Framework Convention on Climate Change' (Cancun Agreements) (2010) UN Doc FCCC/CP/2010/7/Add.1, Paragraph 14 (f). See also Koko Warner, *Legal and Protection Policy Research Series No 18: Climate Change Induced Displacement: Adaptation Policy in the Context of the UNFCCC Climate Negotiations* (UNHCR 2011).

[101] Interview with IOM official (Geneva, 7 May 2012).

[102] Interview with IOM staff member (Geneva, 11 May 2012).

[103] IOM, 'Compendium of IOM Activities in Disaster Risk Reduction and Resilience' (2013) 11–12.

participated in the Nansen Initiative's steering committee (which focused on those displaced across international borders by natural disasters).

IOM developed research and policy expertise on climate-related migration, despite the small size and capacity of its headquarters, and projectized funding structure. They did this by looking for supportive partners and funders, such as humanitarian organizations, the UN University, Munich Re, and supportive states. Over time IOM staff convinced the Executive Council that climate-related migration issues fitted within their competencies, and states ultimately did not block this shift as they did in UNHCR's case.

8.4 Conclusion

IOM staff developed a role for IOM on climate and migration and sought states' collective support for this. They organized conferences, wrote policy papers, conducted research, and spoke at important international summits, including the UNFCCC. IOM lobbied for migration to be considered a form of adaptation, worked with other IASC members to develop a humanitarian response, and completed hundreds of projects related to the environment, climate, and migration worldwide. Over time, by showcasing their work and the importance of the issue, IOM convinced states at Council to tacitly support this work and hence acquired a formal mandate for climate-related migration (as opposed to ad-hoc projects for work on this issue).

IOM was able to pursue its climate change and migration work without explicit endorsement from Council in the 2000–2008 period because states' generally accepted that IOM could be contracted for specific projects and purposes which did not neatly fit in the organization's core delegated competencies. This gave IOM a degree of flexibility to find and work with sympathetic member states, and forge alliances with other international organizations, the private sector, and civil society. States were largely not concerned that IOM 'colluded' with others to pursue a new issue, even if the IOM Council did not actively delegate or prioritize climate-related migration.

More research is needed on the relationship between IOM's obligations to its Council (i.e. its formalized mandate) and to its funders (who may not be IOM member states). In particular, scholars could look at how IOM acts when there is a direct conflict between private funders and IOM member states. In turn, member states could also clarify their expectations of IOM: should it be a 'gap filler', or stick to a set of core activities

where it has expertise? If they see utility in IOM's role as an organization with a 'catch-all' mandate that provides services wherever and whenever states want, then earmarking is not a major issue. If states want a more focused UN migration agency then they should reduce earmarked funding, or at least ensure that earmarked funding relates directly to the organization's core competencies, and does not undermine the mandate set multilaterally by the Council.

What does this mean for people affected by climate change? IOM will continue to offer humanitarian assistance to IDPs affected by natural disasters and develop policies and research on the relationship between climate change and migration. IOM is not the appropriate place to elaborate new protection frameworks for those displaced across international borders by natural disasters, an issue that the new Biden administration explored.[104] However, IOM could play a stronger role in advocating for more legal pathways for migration, and emphasizing the positive role that safe and legal migration can play in adapting to climate change.

[104] White House: Presidential Action, 'Executive Order on Rebuilding and Enhancing Programs to Resettle Refugees and Planning for the Impact of Climate Change on Migration' (4 February 2021) <www.whitehouse.gov/briefing-room/presidential-actions/2021/02/04/executive-order-on-rebuilding-and-enhancing-programs-to-resettle-refugees-and-planning-for-the-impact-of-climate-change-on-migration/> accessed 4 April 2022.

9

The International Organization for Migration as a Data Entrepreneur

The Displacement Tracking Matrix and Data Responsibility Deficits

ANNE KOCH

9.1 Introduction

Migration and displacement data are a growth sector. Apart from governments hoping to better understand, forecast and control human mobility, a number of global processes, including the Global Compact on Migration and the UN High Level Panel on Internal Displacement, have called for more and better data on human mobility. Throughout its history, the work of the International Organization for Migration (IOM) has entailed collecting and processing large volumes of both personal and non-personal data on migrants and displaced populations. In line with growing demand by donors, this engagement in data collection and analysis has over the course of the past two decades shifted from a by-product of the organization's operational work to a key service offered to governments and humanitarian actors, and has been complemented by an increasingly active role in data dissemination, communication and visualization. While this at times includes the collection and processing of biometric data – alongside the stated objective to strengthen its use in programming[1] – the vast majority of data currently collected by IOM is statistical information about the number and key characteristics of people moving, and the routes used.

The processing of data on migrants and displaced persons is often presented as a purely technical exercise aimed at improving the evidence base for subsequent projects and policy decisions. This chapter questions this largely apolitical view of (migration and displacement) data and instead considers the collection, analysis, application and communication of

[1] IOM, 'Biometrics' <www.iom.int/biometrics> accessed 11 July 2022.

https://doi.org/10.1017/9781009184175 Published online by Cambridge University Press

data an inherently normative process with far-reaching political implications. Through an in-depth analysis of the Displacement Tracking Matrix (DTM), IOM's primary data collection mechanism, it recounts how the organization came to be the most widely used and authoritative source of data on internal displacement. Drawing on the concept of data responsibility, defined by OCHA as 'the safe, ethical and effective management of personal and non-personal data for operational response',[2] the chapter sets out the obligations arising from this role, and questions whether in its current set-up, the organization is fit to meet them.[3]

Data responsibility subsumes, but goes beyond the protection of, personal data. For example, data responsibility in humanitarian contexts may be understood to require (1) data protection, (2) legality and legitimacy (data processing in accordance with applicable laws, as well as with core values of the respective organization), (3) doing no harm, (4) respect for the rights of data subjects (including access to, rectification and erasure of data), (5) purpose specification, (6) data minimization (collection on the basis of necessity and proportionality) and (7) data quality (accuracy, validity, reliability and being up to date).[4] The adequate protection of personal data constitutes a continuous challenge for any organization engaged in humanitarian work. IOM acknowledges the existing international obligations in this field and is engaged in ongoing efforts to meet them.[5] Arguably more pressing, therefore, are the not fully acknowledged ethical obligations arising from the potentially sensitive nature of the vast amounts of non-personal but demographically identifiable data collected

[2] Inter-Agency Standing Committee, 'Operational Guidance: Data Responsibility in Humanitarian Action' (February 2021) 5 <https://interagencystandingcommittee.org/system/files/2021-02/IASC%20Operational%20Guidance%20on%20Data%20Responsibility%20in%20Humanitarian%20Action-%20February%202021.pdf> accessed 11 July 2022.

[3] For a related analysis of IOM's involvement with internally displaced persons from the vantage point of the 1998 Guiding Principles on Internal Displacement, see Bríd Ní Ghráinne and Ben Hudson, 'IOM's Engagement with the UN Guiding Principles on Internal Displacement' 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).

[4] These principles are to be respected throughout all stages of the 'data life-cycle', i.e. from the conception of a data-related project to the eventual destruction of the data collected. Source: The Netherlands Red Cross, 'Data Responsibility Policy – 510' (version 2.2 – public use, 12 November 2018) 2 <www.510.global/wp-content/uploads/2018/12/510-Data-Responsibility-policy-V2.2-20181211-PUBLIC-USE.pdf> accessed 11 July 2022.

[5] IOM, *IOM Migration Data Strategy: Informing Policy and Action on Migration, Mobility and Displacement 2020–2025* (Revision 1, October 2020) 11.

through the DTM, that is, data on issues such as displacement rates, returns and the number of people resident in particular camps that cannot be traced back to any individuals but are characterized by group-specific markers, for example, ethnic identity.[6] Beyond this, there are concerns about the quality of DTM data, about potential negative implications of the DTM's expansion beyond the field of humanitarian needs assessments and about its responsiveness to donor demands for data that serve as a post hoc legitimization of policy interventions.

Adopting a political economy lens that foregrounds IOM's role as a participant in a dynamic and highly competitive market of data providers – that can be described as the humanitarian data economy – helps to make sense of these developments. While the DTM serves an important function in humanitarian needs assessments, it has also been shaped by the entrepreneurial spirit of IOM as a whole.[7] That is, IOM 'sells' the DTM to its donors, adapting it where necessary, and uses the data generated through the DTM to justify other projects that IOM then pitches to donors for funding. The demand-driven and service-oriented nature of the DTM may create tensions with data responsibility principles, including purpose specification, data minimization and 'do no harm'. Any benefits offered by the DTM in terms of providing rapid overviews of IDP situations and providing the basis for advocacy therefore need to be viewed in conjunction with the tool's limitations.

Based on these observations, the chapter argues that in order to ensure that IOM's data activities are in line with the notion of data responsibility and produce the kind of data required for both evidence-based and rights-oriented decision making, a clarification and strengthening of related standards does not suffice. What is needed instead is a fundamental change in institutional set-up and funding structure that allows IOM to only engage in responsible data collection, free from a profit-driven market logic.

The chapter is structured as follows: It starts out with a brief review of the literature that speaks to IOM's engagement in migration and displacement data, and the obligations arising from it. Next, it sets out the idea of a market

[6] For a definition of personal and non-personal data, see OCHA Centre for Humanitarian Data, 'Data Responsibility Guidelines' (October 2021) 9 <https://reliefweb.int/sites/reliefweb.int/files/resources/ocha-data-responsibility-guidelines_2021.pdf> accessed 11 July 2022

[7] Megan Bradley, 'The International Organization for Migration (IOM): Gaining Power in the Forced Migration Regime' (2017) 33 (1) Refuge 97, 100; Antoine Pécoud, 'What Do We Know about the International Organization for Migration?' (2018) 44 Journal of Ethnic and Migration Studies 1621, 1626.

for migration and displacement data within which IOM competes with other data providers for financial resources and reputational gains. It then offers a thick description of the DTM's history, institutional set-up and output, including a discussion of the quality of data produced, before zooming in on two DTM country operations (Haiti and Niger) in order to illustrate the value of certain types of mobility data have for political actors. In conclusion, it juxtaposes the risks associated with IOM's near-monopolization of internal displacement data, as well as with the expansion of DTM operations into the field of cross-border mobility with IOM's data protection standards, to highlight the organization's shortcomings with regard to the responsible conduct of its data work. The focus on the DTM and the data produced through it means that the chapter's analysis is necessarily selective, and does not cover all of IOM's data-related activities. This focus is justified by the fact that questions of political and ethical accountability that the contributions to this edited volume speak to are particularly pertinent in situations of forced displacement that the DTM focuses on.

The argument developed in this chapter draws on publicly available information on IOM's data-related activities, as well as on a series of interviews conducted between September 2020 and March 2021 with 20 current and former IOM officials, representatives of other international organizations and non-governmental organizations and investigative journalists who regularly engage with DTM data in their work. These interviews were structured around three core themes: The history, structure and working mechanisms of the DTM, the function and value of the DTM within IOM overall and the relationships and interactions of different actors engaged in the collection and analysis of data on internal displacement and irregular cross-border movements. In order to allow for a frank discussion of sensitive institutional concerns, all interviews were conducted anonymously.

9.2 From the 'Datafication of Migration' to the Need for Data Responsibility in Migration and Displacement

The increased importance of quantitative data and related evaluation systems like benchmarks and indicators has given rise to much debate across all sectors.[8] Migration and displacement are no exceptions. In the context

[8] Kevin E Davis and others, 'Introduction: Global Governance by Indicators' in Kevin E Davis and others (eds), *Governance by Indicators. Global Power through Classification and Rankings* (Oxford University Press 2012); Hans K Hansen, 'Numerical Operations,

of this chapter, three different (albeit interlinked) strands of literature are of particular relevance. The first discusses the 'marketization of migration statistics'[9] and its consequences; the second delves into the risks associated with the increasingly data-driven nature of humanitarian work; and the third concerns developments regarding data protection by international organizations broadly, and humanitarian actors more narrowly. This scholarship does not engage with IOM in any detail, yet the concerns raised are relevant to the organization's work, in particular in light of the expanding nature of DTM data collection.

First, a growing literature starts from the assumption that 'the accumulation of data is a core component of political economy in the twenty-first century', and that this frequently takes the form of data extraction, 'with little regard for consent and compensation'.[10] This speaks directly to the notion of a 'migration knowledge hype',[11] and to Taylor and Meissner's observation of an increasing marketization of migration statistics. One of their central insights is the co-constitutive relationship between the perception of migration as a threat, and the demand for more data on human mobility: 'an existing policy vision creates a market for technologies which then shape the world to fit that policy vision and make its enforcement possible. This dynamic is particular to the involvement of commercial actors: where policy interacts with the data analytics market, a field is created for firms to compete for contracts based on how closely they can adapt and develop analytical techniques to policy objectives.'[12] The market dynamics described here arguably do not only apply to corporations, but also to international organizations like IOM that due to its projectized structure is constantly competing for funding. While the specific incentives to engage in this competition differ between IOs and

Transparency Illusions and the Datafication of Governance' (2015) 18 European Journal of Social Theory 203; Hans K Hansen and Tony Porter, 'What Do Numbers Do in Transnational Governance?' (2012) 6 International Political Sociology 409; Sally E Merry, *The Seductions of Quantification: Measuring Human Rights, Gender Violence, and Sex Trafficking* (University of Chicago Press 2016).

[9] Linnet Taylor and Fran Meissner, 'A Crisis of Opportunity: Market-Making, Big Data, and the Consolidation of Migration as Risk' (2020) 52 Antipode 270, 271.

[10] Jathan Sadowski, 'When Data Is Capital: Datafication, Accumulation, and Extraction' (2019) 6 (1) Big Data & Society 1.

[11] Katharine Braun and others, 'Umkämpfte Wissensproduktionen der Migration. Editorial' (2018) 4(1) Movements: Journal for Critical Migration and Border Regime Studies 9.

[12] Taylor and Meissner (n 9) 285. Along similar lines, cf. Tuba Bircan and Emre Eren Korkmaz 'Big Data for Whose Sake? Governing Migration through Artificial Intelligence' (2021) Humanities and Social Sciences Communications 1, 3 <https://doi.org/10.1057/s41599-021-00910-x> accessed 11 July 2022.

commercial enterprises (e.g. IO staff are not paid bonuses based on performance), professional advancement is typically linked to being able to 'sell' projects to donors, which is facilitated through readily available data.

Second, the increasing pervasiveness of quantitative data in humanitarian work has given rise to a body of literature that – in response to an 'avalanche of 'tech-optimistic' scholarly work, premised on the belief that adding technology will change things [in the humanitarian sector] for the better'[13] – focuses on the limitations and the risks associated with this development.[14] More specifically, contributors call into question the hoped-for benefits of the 'data revolution' for the humanitarian field, given the mismatch between the vast amount of data collected and the limited capacities for analysing it;[15] point out the risk of big data and artificial intelligence (AI)-driven humanitarian work reproducing existing power asymmetries and relationships of dependency;[16] and highlight privacy and data protection concerns related to the collection of sensitive data.[17] Again, IOM – not neatly fitting into the humanitarian category – is not specifically discussed, yet due to the primary humanitarian purpose of much of the data produced by the DTM, these insights are of direct relevance to the organization's work.

[13] Kristin B Sandvik and others, 'Humanitarian Technology: A Critical Research Agenda' (2014) 96 International Review of the Red Cross 219, 221.

[14] Larissa Fast, 'Diverging Data: Exploring the Epistemologies of Data Collection and Use among Those Working on and in Conflict' (2017) 24 International Peacekeeping 706, 712.

[15] Róisín Read, Bertrand Taithe and Roger Mac Ginty, 'Data Hubris? Humanitarian Information Systems and the Mirage of Technology' (2016) 37(8) Third World Quarterly 1314; Martina Tazzioli, 'Extract, Datafy and Disrupt: Refugees' Subjectivities between Data Abundance and Data Disregard' 27 (2022) Geopolitics 70.

[16] Mirca Madianou, 'Non-Human Humanitarianism: When AI for Good Turns Out to be Bad' (2020) AoIR Selected Papers of Internet Research <https://doi.org/10.5210/spir.v2020i0.11267> accessed 11 July 2022; Mirca Madianou, 'Technocolonialism: Digital Innovation and Data Practices in the Humanitarian Response to Refugee Crises' (2019) 5 (3) Social Media + Society 1; Marie McAuliffe, Jenna Blower and Ana Bedushi, 'Digitalization and Artificial Intelligence in Migration and Mobility: Transnational Implications of the COVID-19 Pandemic' (2021) 11 Societies 135 <http://dx.doi.org/10.3390/soc11040135> accessed 11 July 2022.

[17] Katja L Jacobsen, 'Experimentation in Humanitarian Locations: UNHCR and Biometric Registration of Afghan Refugees' (2015) 46 Security Dialogue 144; Katja L Jacobsen and Larissa Fast, 'Rethinking Access: How Humanitarian Technology Governance Blurs Control and Care' (2019) 43 Disasters 151; Lydia H V Franklinos and others, 'Key Opportunities and Challenges for the Use of Big Data in Migration Research and Policy' (2021) UCL Open Environment 1 <https://dx.doi.org/10.14324/111.444/ucloe.000027> accessed 11 July 2022.

Third, and most directly linked to the themes of this volume, there is a nascent literature on the legal and ethical obligations linked to the data-related activities of international organizations. Kuner discusses to what extent the EU's 2018 General Data Protection Regulation (GDPR), which sets new standards of data privacy and security, applies to international organizations engaged in the processing of personal data.[18] While Kuner comes to the conclusion that the legal situation is 'murky', and that 'there is considerable uncertainty about the extent to which IOs should implement the GDPR', he argues that European donors could prod IOs into compliance by making it a funding prerequisite. Against this background, he recommends that IOs use the GDPR as a 'source of inspiration' to put into place adequate internal data protection principles.[19] It is worth noting, however, that the GDPR only covers personal data. Over the past five years, there has been an important conceptual shift in discussions about humanitarian actors' data protection responsibilities, broadening it beyond the 'personally identifiable information' that has traditionally been of central concern to include 'demographically identifiable information'.[20] The notion that data protection obligations are not limited to individuals but also refer to vulnerable groups leads to the conclusion that humanitarian data collection and utilization 'needs to follow the principle of proportionality and consider benefits and harms beyond individual interests'.[21] These developments are of direct relevance to IOM – indeed, some of the related warnings regarding the risks entailed by 'organizations tracking time and place-specific movement/status data of large

[18] Christopher Kuner, 'The GDPR and International Organizations' (2020) 114 AJIL Unbound 15; Christopher Kuner 'International Organizations and the EU General Data Protection Regulation: Exploring the Interaction between EU Law and International Law' (February 2018) University of Cambridge Faculty of Law Research Paper No. 20/2018 <https://ssrn.com/abstract=3050675> accessed 11 July 2022.

[19] Kuner, 'The GDPR and International Organizations' (n 18) 17.

[20] Raymond, who first coined the term, defines demographically identifiable information as 'either individual and/or aggregated data points that allow inferences to be drawn that enable the classification, identification, and/or tracking of both named and/or unnamed individuals, groups of individuals, and/or multiple groups of individuals according to ethnicity, economic class, religion, gender, age, health condition, location, occupation, and/or other demographically defining factors.' Nathaniel Raymond, 'Beyond "Do No Harm" and Individual Consent: Reckoning with the Emerging Ethical Challenges of Civil Society's Use of Data' in Linnet Taylor, Luciano Floridi and bart van der Sloot (eds), *Group Privacy* (Springer 2017).

[21] Andrej Zwitter and Oskar J Gstrein, 'Big Data, Privacy and COVID-19: Learning from Humanitarian Expertise in Data Protection' (2020) 5 Journal of International Humanitarian Action <https://doi.org/10.1186/s41018-020-00072-6> accessed 11 July 2022.

demographically delineated groups'[22] sound as though they were formulated with the DTM in mind.

These concerns have prompted some limited reforms in the humanitarian sector, with the development of various guidance on data responsibility. One key document that has become a common point of reference is the 510 Data Responsibility Policy initiated by the Netherlands Red Cross Society. It sets out the key argument that data responsibility encompasses ethical principles that go beyond compliance with GDPR data protection requirements, especially in terms of 'doing no harm and respecting each individual's fundamental right to privacy and to control the use and processing of his or her own personal data, bearing in mind the consequences that the use of data could have on vulnerable people around the world and taking measures to avoid putting individuals or communities at risk'.[23] The debate about data responsibility in humanitarian settings is ongoing in various fora, some of which IOM is actively involved in. However, these conversations do not generally cover data-related work carried out outside the context of humanitarian emergencies.

9.3 IOM and the Market for Migration and Displacement Data

As noted above, there is immense international demand for data on migration and displacement that is linked to broader developments in the development and humanitarian sectors. The call in the 2013 UN High Level Panel on the Post-2015 Development Agenda for a 'data revolution', and a subsequent report dedicated to mobilizing this data revolution for sustainable development are indicative of the increasing prioritization of data in development programming.[24] The equivalent for the humanitarian

[22] Jos Berens and others, 'The Humanitarian Data Ecosystem: the Case for Collective Responsibility' (2017) <https://pacscenter.stanford.edu/wp-content/uploads/2017/11/humanitarian_data_ecosystem.pdf> accessed 11 July 2022.

[23] The Netherlands Red Cross (n 4) 2. Other relevant reference points include OCHA (n 6); Office of the United Nations High Commissioner for Human Rights, 'A Human Rights Based Approach to Data: Leaving No One Behind in the 2030 Agenda for Sustainable Development' (2018) <www.ohchr.org/Documents/Issues/HRIndicators/GuidanceNoteonApproachtoData.pdf> accessed 11 July 2022.

[24] UN High Level Panel of Eminent Persons on the Post-2015 Development Agenda, 'A New Global Partnership: Eradicate Poverty and Transform Economies through Sustainable Development' (2013) 23<www.un.org/sg/sites/www.un.org.sg/files/files/HLP_P2015_Report.pdf> accessed 11 July 2022; UN Secretary-General's Independent Expert Advisory Group on the Data Revolution for Sustainable Development, (2014) 'A World That Counts: Mobilising the Data Revolution for Sustainable Development' <www.undatarevolution.org/wp-content/uploads/2014/12/A-World-That-Counts2.pdf> accessed 11 July 2022.

sector came with the international community's commitment to improve the evidence base of humanitarian response operations under the 2016 Grand Bargain.[25]

These developments, and the hopes for greater efficiency and cost effectiveness motivating them, are reflected in a number of recent global processes that have increased the demand for data on human mobility more specifically. The global indicator framework developed to measure progress towards the Sustainable Development Goals (SDGs) is preceded by a passage calling for the disaggregation of SDG indicators, where relevant, by migratory status.[26] Remarkably, the first of the 23 core objectives of the Global Compact for Safe, Orderly and Regular Migration (GCM) contains the commitment to 'strengthen the global evidence base on international migration by improving and investing in the collection, analysis and dissemination of accurate, reliable, comparable data'.[27] In the Global Compact for Refugees (GCR), data and evidence feature as one of three 'key tools for effecting burden- and responsibility-sharing'.[28] Most recently, the UN High Level Panel on Internal Displacement highlighted the relevance of more and better data on internal displacement, recommending inter alia that international donors should increase their funding efforts in this field.[29]

Given that the majority of large donor countries have supported the development of these frameworks and are committed to implementing them, the last few years have seen a significant increase in the volume of funds available for the collection and analysis of migration and displacement-related data. This has had significant effects on the institutional landscape, visible both in the expansion of existing data initiatives by international actors and in the emergence of new ones.

[25] Australian Aid and others, 'The Grand Bargain: A Shared Commitment to Better Serve People in Need' (23 May 2016) 8 <https://reliefweb.int/sites/reliefweb.int/files/resources/Grand_Bargain_final_22_May_FINAL-2.pdf> accessed 11 July 2022.

[26] UN Statistical Commission, 'Global Indicator Framework for the Sustainable Development Goals and Targets of the 2030 Agenda for Sustainable Development' (2020) 1 <https://unstats.un.org/sdgs/indicators/Global%20Indicator%20Framework%20after%202020%20review_Eng.pdf> accessed 11 July 2022.

[27] UN GA, 'Global Compact for Safe, Regular and Orderly Migration' (19 December 2018) UN Doc A/RES/73/1957.

[28] UN GA, 'Report of the United Nations High Commissioner for Refugees: Global Compact on Refugees' (13 September 2018) UN Doc A/73/12 (Part II).

[29] UN Secretary-General's High-Level Panel on Internal Displacement, 'Shining a Light on Internal Displacement: A Vision for the Future' (September 2021) 39 <www.internaldisplacement-panel.org/wp-content/uploads/2021/09/HLP-report-WEB.pdf> accessed 11 July 2022.

IOM is a case in point. In line with the breadth of its overall portfolio, the organization collects various types of migration-related data, for example, related to pre-departure health assessments, interlinkages between environmental change and human mobility, and migrant deaths and disappearances. The organization aims to be 'a primary reference point for migration information, research, best practices, data collection, compatibility and sharing'.[30] Its Global Migration Data Analysis Centre (GMDAC) in Berlin was founded in 2015, replacing the organization's former Geneva-based Migration Research Division.[31] It has the threefold aim to '(1) Strengthen the role of data in global migration governance […], (2) Support IOM Member States' capacities to collect, analyse and use migration data, [and] (3) Promote evidence-based policies by compiling, sharing and analysing IOM and other sources of data'.[32] The centre's ongoing expansion – from a modest start with less than four staff members in 2015 to 45 in May 2022 – is evidence of its success. While GMDAC – with its ambition to serve as a one-stop-shop for all available migration data through its Migration Data Portal – serves as an institutional focal point for IOM's engagement in data analysis and communication, IOM's primary dedicated data-collection mechanism, the Displacement Tracking Matrix (DTM), has so far been institutionally separate. While both GMDAC and the DTM are crucial to IOM's efforts to secure a leadership role in the field of migration data,[33] it is arguably the DTM that creates considerable revenue, both in and of itself, and in terms of providing the evidence base for further interventions that IOM may propose to donors.[34]

The overall increase of interest in migration and displacement data, however, goes hand in hand with increased competition, especially in the humanitarian field, and where the humanitarian and development sectors meet. Dedicated data collection initiatives whose work overlaps with that of the DTM include REACH, the Mixed Migration Centre (MMC) and the Joint IDP Profiling Service (JIPS). REACH, a humanitarian data

[30] IOM, 'Mission' <www.iom.int/mission> accessed 11 July 2022.

[31] Yussef Al Tamimi, Paolo Cuttitta and Tamara Last, 'The IOM's Missing Migrants Project: The Global Authority on Border Deaths' in Martin Geiger and Antoine Pécoud (eds), *The International Organization for Migration: The New 'UN Migration Agency' in Critical Perspective* (Palgrave Macmillan 2020) 199.

[32] IOM Global Migration Data Analysis Centre, 'About the Centre' <https://gmdac.iom.int/about-centre> accessed 11 July 2022

[33] Megan Bradley, *The International Organization for Migration. Challenges, Commitments, Complexities* (Routledge 2020) 57.

[34] Ibid 58.

collection initiative, collects data on crisis-affected populations (many of whom are internally displaced persons (IDPs), creating a significant overlap with the DTM) and plays a crucial role in informing UNHCR's crisis response. Established in 2010, it has seen a massive expansion over the course of the last five to seven years. The Mixed Migration Centre (MMC), established by the Danish Refugee Council in 2018, is a data collection initiative aimed at improving the evidence base on cross-border movements by a diverse set of people including refugees, victims of trafficking and individuals primarily searching for opportunities not available to them in their places of origin. The MMC conducts thousands of in-depth interviews with people on the move along key migration routes in seven distinct regions, responding to increased donor interest in understanding migrants' routes and aspirations, especially on their way towards Europe. The MMC has grown considerably over the course of the last three years, its data feeding into the work of various UN agencies like UNHCR, UNODC and UNFPA. Another relevant actor engaged in data collection on internal displacement, JIPS, is an inter-agency body founded in 2009 that is administered jointly by UNHCR and the Danish Refugee Council. It conducts targeted profiling exercises with IDPs and host communities in individual localities to inform the development of durable solutions. While the data collection activities undertaken by these three actors do not compare to the DTM in size and coverage, all three offer valued and distinct services to actors engaged in displacement scenarios.

Beyond these individual organizations, new collaborative initiatives have sprung up in response to donor demand for improved data interoperability and joint assessments. The World Bank-UNHCR Joint Data Center on Forced Displacement (JDC) and OCHA's Centre for Humanitarian Data are the most prominent examples. The work of all of these actors overlaps, intersects and feeds into each other. The fierce sense of competition that runs through these interactions is conveyed by remarks by IOM staff members that some of their smaller NGO competitors are 'claiming more and more space', and that management at JDC 'are loading their guns, hiring all the right people'.[35] In 2020, IOM published a migration data strategy and in 2021 an internal displacement data strategy. Both of these documents acknowledge the broad array of actors involved, while at the same time claiming a leadership role for IOM.[36]

[35] Interview with IOM staff member, February 2021 (hereafter: IOM5).

[36] IOM, *IOM Migration Data Strategy* (n 5) 14; IOM, *Internal Displacement Data Strategy 2021–2025. Strengthening Capacity and Leadership in Internal Displacement Data* (2021) 13.

9.4 The Displacement Tracking Matrix

The DTM – variously described by IOM itself as a data-collection mechanism,[37] a monitoring tool,[38] an information management tool[39] and a system enabling the development and maintenance of baseline information on displaced populations[40] – is a highly decentralized system for tracking and monitoring internal displacement and (frequently irregular) cross-border mobility. The DTM toolbox consists of four key components – mobility tracking, flow monitoring, surveys and registration – that can be flexibly combined to fit a given country context. The respective role of these four components can be broadly characterized as follows: Mobility tracking operations follow a distinct group of persons, capturing basic demographic characteristics as well as vulnerabilities and priority needs, tracking their movements. Flow monitoring, in contrast, focuses on fixed geographical locations and aims to capture data on the various mobile populations crossing that point. Using direct observation by DTM staff and key informant interviews, both initially only collect non-personal data, but can be further substantiated through surveys that may contain personal data. Registration – which entails the collection of personal data – is a service largely distinct from the other three components and is only undertaken at the explicit request of governments.

In its public presentation of the DTM, IOM emphasizes the tool's modular set-up, and the fact that it can be adapted to widely varying circumstances, including 'conflict, natural disaster, and complex emergency settings, from small to large cases of displacement'.[41] Its target population is broad, encompassing conflict- and disaster-induced IDPs, returnees and migrants. The DTM expansion over the past decade has been rapid: While in 2010 it was deployed in ten countries, this had grown to over 40 in 2016[42] and to 88 in

[37] IOM, *IOM Migration Data Strategy* (n 5) 12.

[38] Displacement Tracking Matrix, 'Haiti – Earthquake Displacement Report 1' (December 2010) 1 <https://dtm.iom.int/reports/haiti-%E2%80%94-earthquake-displacement-report-1-december-2010> accessed 11 July 2022.

[39] Displacement Tracking Matrix, 'Iraq – Displacement Report 10' (December 2014) 1 <https://dtm.iom.int/reports/iraq-%E2%80%94-displacement-report-10-december-2014> accessed 11 July 2022.

[40] Displacement Tracking Matrix, 'Libya – IDP & Returnee Report 3' (March 2016) 19 <https://dtm.iom.int/reports/libya-%E2%80%94-idp-returnee-report-3-march-2016> accessed 11 July 2022.

[41] IOM, 'Displacement Tracking Matrix / DTM. Tracking and Monitoring System for Displaced Populations' 2 <www.iom.int/sites/default/files/our_work/DOE/humanitarian_emergencies/IOM-DTM-Infosheet.pdf> accessed 11 July 2022.

[42] Displacement Tracking Matrix, 'Timeline of DTM Activation' <https://displacement.iom.int/content/timeline-dtm-activation> accessed 11 July 2022.

2020.[43] By 2020, these operations enlisted the help of approximately 6,600 staff around the globe, most of these local data collectors.[44] The DTM written output increased at pace, with a steady year-by-year increase – from one report in 2010 to 2209 in 2020. The DTM website today is a vast repository of data from past operations, currently storing more than 9100 individual documents in various formats – among these, dashboards, situation reports and maps.[45]

9.4.1 *Origins and Evolution*

How did this vast data collection exercise come about? Despite IOM's long-standing interest in IDP profiling, its Iraq operation in the early 2000s is widely considered the starting point of a methodology for rapid assessments of the movements and needs of IDPs carried out by field-monitoring teams – the initial core business of the DTM that now features under the label 'mobility tracking'.[46] With the establishment of the humanitarian cluster approach in 2005 that accorded IOM the co-lead of the Global Camp Coordination and Camp Management (CCCM) cluster, IOM became increasingly engaged in IDP registrations in camp settings – a second core module of the contemporary DTM.[47] Data collection on IDPs in camp settings constituted a key element of IOM's activities in Haiti following the 2010 earthquake, and it was in this context that the umbrella term 'Displacement Tracking Matrix' for displacement-related data collection exercises in various country contexts was coined.[48]

'Flow monitoring' was initially developed to capture distinct displacement situations, such as the movements triggered by the military coup d'état in Mali in 2012,[49] the 2014–2016 Ebola epidemic in West

[43] IOM, '2020 Annual Report on the Use of Unearmarked Funding' (2021) 27.

[44] Displacement Tracking Matrix, 'DTM Data Sharing Intern' <https://displacement.iom.int/vacancies/dtm-data-sharing-intern> accessed 11 July 2022.

[45] Displacement Tracking Matrix, 'Reports' <https://dtm.iom.int/reports> accessed 11 July 2022.

[46] IOM, 'Iraq Displacement 2006 Year in Review' <www.iom.int/sites/g/files/tmzbdl486/files/jahia/webdav/site/myjahiasite/shared/shared/mainsite/media/docs/news/2006_iraq_idp.pdf> accessed 111 July 2022.

[47] Interview with IOM staff members, November 2020 (hereafter: IOM2).

[48] Moetsi Duchatellier, 'Durable Solutions for the Internally Displaced Persons in Haiti Following the 2010 Earthquake: Out of Sight, Out of Mind. Where Are the Internally Displaced Five Years After?' The Graduate Institute Geneva Global Migration Research Paper 2015 No 13 7 <https://repository.graduateinstitute.ch/record/293223/keywords> accessed 11 July 2022.

[49] IOM, 'Matrice de suivi des déplacements – Mali' (July 2013) <https://displacement.iom.int/system/tdf/reports/OIM_Mali_Rapport_DTM_Juillet_2013_0.pdf?file=1&type=node&id=1777> accessed 11 July 2022.

Africa,[50] and those from the Dominican Republic into Haiti following legislative changes that threatened Haitian immigrants and Dominicans of Haitian descent with deportation.[51] However, its usage significantly changed in the context of the so-called European refugee crisis, which led to a sudden and urgent demand for data on population movements towards the European Union (EU): The number of DTM reports featuring a flow monitoring component jumped from 25 in 2015 (19 of which were dedicated to the situation in Haiti) to 182 in 2016, the vast majority of which reported on movements towards EU territory.[52] In this sense, flow monitoring has over time become almost synonymous with the expansion of DTM operations from internal to cross-border movements, and from displacement scenarios to broader migratory dynamics – reflecting, in the words of an IOM staff member, an 'immense thirst for flow data on the part of donors'.[53] Surveys were added as a fourth component in 2013, initially to gain a better understanding of return intentions among displaced communities in Mali and the Central African Republic.

Over time, various sub-categories were added to the four key components, with more recent additions including biometric registration, community perception surveys and village assessments as a type of mobility tracking. In general, surveys are aimed at complementing baseline assessments through data on the socio-economic profiles of migrants, their means of travel and their intentions and expectations. Despite its displacement-focused name, the DTM is now deployed in a vast variety of mobility settings, and in individual countries records all types of movements, including in the context of tourism, family visits and seasonal nomadic mobility.[54] The operation launched in The Gambia in 2021 is an example of the DTM being deployed with the broadly stated aim to improve migration governance.[55]

[50] IOM, 'Data Bulletin – Informing a Global Compact for Migration' (Issue 6, June 2018) 2 <https://publications.iom.int/system/files/pdf/data_bulletin_6.pdf> accessed 11 July 2022.

[51] IOM Haiti, 'Newsletter / SITREP' (20 July 2015) <https://displacement.iom.int/system/tdf/reports/IOM%20Haiti%20-%20Border%20Monitoring%20Sitrep_July%2020_FINAL.pdf?file=1&type=node&id=2804> accessed 11 July 2022.

[52] Displacement Tracking Matrix, 'Reports' <https://dtm.iom.int/reports?title=&body=&field_report_regional_report=All&f%5B0%5D=report_component_facet%3A11> accessed 11 July 2022.

[53] Interview IOM5 (n 35).

[54] Eg, Displacement Tracking Matrix, 'DTM Afghanistan' <https://displacement.iom.int/afghanistan> accessed 11 July 2022.

[55] IOM, 'Launch of Displacement Tracking Matrix (DTM) Strengthens Migration Data in The Gambia' (15 July 2021) <www.iom.int/news/launch-displacement-tracking-matrix-dtm-strengthens-migration-data-gambia> accessed 11 July 2022.

This brief reconstruction of the DTM's evolution over time indicates piecemeal and demand-driven growth. Current and former IOM staff members complain about constant ad hoc expansions ('running after money and fashions') at the expense of a consolidation and standardization of data collection methods, and about sudden shifts in priorities. A recent example of this is the mapping of Covid-19-related travel restrictions around the world that the DTM management initiated in March 2020.[56] The resource-intensive daily updates this required reportedly led to a postponement of a planned revision of the flow monitoring methodology.[57] Meanwhile, the steady stream of funding from donors attests to the business-savvy character of the DTM management.

9.4.2 *Institutional Set-Up and Funding*

Despite its primary identity as a 'tool', the DTM can also be considered an institutional entity in its own right. Its organizational home is IOM's Department of Operations and Emergencies, where a core 'global DTM support team' comprised of – at the time of writing – 45 technical experts across eight locations (Geneva, London, Bangkok, Nairobi, Dakar, Cairo, Vienna and The Hague) is engaged in data management and operations support.[58] Its overall staff structure in 2019 included 438 technical staff and 6,170 data collectors.[59] However, much of the DTM's institutional set-up remains opaque: There is no publicly available organizational chart, despite the fact that DTM vacancy notices regularly refer to up to twelve organizational subunits.[60] The large share of internships among the DTM

[56] Displacement Tracking Matrix, 'DTM-Covid19 Travel Restrictions Output' (11 March 2020) <https://displacement.iom.int/reports/dtm-covid19-travel-restrictions-output-11032020?_ga=2.22601467.1935150021.1625676554-897427949.1553784781> accessed 11 July 2022.

[57] Interview IOM5 (n 35).

[58] IOM Flow Monitoring, 'Displacement Tracking Matrix (DTM) Analytics, Knowledge and Output Quality (AKO) Chad – Intern' <Displacement Tracking Matrix (DTM) Analytics, Knowledge and Output Quality (AKO) Chad – Intern | Flow monitoring (iom.int)> accessed 11 July 2022.

[59] International Organization for Migration, 'Perspectives from IOM-DTM on IDP Data. Recommendations for the Consideration of the High-Level Panel on Internal Displacement' 1 <www.un.org/internal-displacement-panel/sites/www.un.org.internal-displacement-panel/files/iom_dtm_submission.docx> accessed 11 July 2022.

[60] According to a 2020 vacancy notice, the Global DTM support is organized within the following units: Global System Management (GSM); Project and Operations Support (POS); Operations and Methodological Framework (OMF); Data Systems and Centralization (DSC); Data Management, Verification and Procedures (MVP); Digital Content

positions advertised online support the account that the DTM core team is thinly staffed and relies heavily on support from interns for substantive input.[61] Against this background – and in line with the overall decentralized structure of IOM – DTM country coordinators enjoy a large degree of autonomy. At the same time, DTM field positions are hard to fill with qualified statisticians and data experts. As a result, the quality of data differs vastly between DTM country operations.[62] Emphasizing this point, former IOM staff noted that 'DTM is unrecognizable from one country context to the next' and can be considered 'more of a brand than a cohesive methodology'.[63]

While the DTM is considered a 'money-making machine'[64] within IOM, it is difficult to gain an understanding of the volume of funding the DTM attracts. IOM's annual financial reports typically contain a number of DTM-specific entries, yet due to variations in the terminology used to report on these activities, no clear picture emerges of the amounts and sources of money involved.[65] The vast majority of DTM country operations seem to be subsumed under more overarching categories like 'strengthening service coordination' or 'supporting a coordinated response'. Looking into individual country appeals affords slightly more insights: The 2018 and 2019 IOM's crisis funding appeals for Iraq, for instance, calculated a need of three million USD per year for the implementation of the DTM across the entire country. This amounted to a share of 11.2% of the entire appeal for the year 2018, and 7.2% for the year

Management (DCM); Analytics, Knowledge and Output Quality (AKO); Data Models and Learning (DML); DTM and Data Partnerships (DDP); Geospatial Analytics (GSA); Data Initiated Operations (DIO); and Humanitarian and Development Solutions (HDS). IOM, 'Perspectives from IOM-DTM on IDP Data. Recommendations for the consideration of the High-Level Panel on Internal Displacement' (n 59).

[61] Interview IOM5 (n 35).

[62] Interview with former IOM staff member, December 2020 (hereafter: IOM3).

[63] Interviews IOM3 (n 62) and with former IOM staff member, February 2021 (hereafter: IOM4)

[64] Interview IOM5 (n 35).

[65] IOM's Financial Report for 2020, for instance, contains entries pertaining to the displacement tracking matrix; displacement tracking services; displacement tracking assistance; mobility tracking; emergency tracking tool; tracking and monitoring populations; monitoring displacement dynamics; migrant presence monitoring programme; flow monitoring response; monitoring population mobility data; and monitoring the movements of people in severe shock. This inconsistent terminology in accounting for resources spent on the DTM may in itself be regarded as evidence of the highly fragmented nature of the DTM enterprise, and of the different data collection exercises undertaken under the same label. See IOM, 'Financial Report for the Year Ended 31 December 2020' (31 May 2021) IOM Doc C/112/3.

2019.[66] The IOM flash appeal following the August 2021 earthquake in Haiti calculated that one million USD was required for the DTM operation, amounting to 6.7% of the entire funding needed. Even though these appeals are not always fully met, it is clear that the DTM is a major source of revenue for IOM, particularly as DTM data are used to propose and justify further IOM projects.

DTM funding sources differ depending on the type of operation. DTM operations that are part of larger humanitarian interventions like those in Sudan, South Sudan and Libya, tend to be financed through a broad range of mechanisms, including UN funding mechanisms like Central Emergency Response Fund (CERF) or the UN Peacebuildig Fund, as well as by large bilateral and multilateral donors, for example, through USAID, German Humanitarian Assistance or the EU's humanitarian office ECHO.[67] DTM operations that are primarily aimed at collecting data on migratory movements, often towards the European Union, tend to attract funds from actors fearing the arrival of migrants on their own territory: DTM Libya is financed through the EU Trust Fund for Africa (EUTF),[68] DTM Niger has since its inception in early 2016 been funded by the foreign ministries of the UK, Germany and Denmark as well as through the EUTF,[69] and the donors of the DTM operation launched in March 2021 aimed at collecting data on 'migrant presence outside temporary reception centres in Bosnia and Herzegovina' are the EU, Italy and the Czech Republic.[70]

9.4.3 Data Collection and Data Quality

The on-the-ground data collection undertaken in the context of mobility tracking and flow monitoring – which together make up the vast majority

[66] To put this into perspective: In its 2018 Iraq appeal, IOM calculated 1.8 million USD for the provision of emergency and essential health care services to IDPs, returnees and host communities, and strengthening national health care systems in Iraq and KRI, and three million USD for the provision of emergency livelihoods assistance for IDPs and returnees. See IOM Iraq, 'Crisis Funding Appeal 2018' (2018).

[67] Cf. DTM, 'Sudan' <https://dtm.iom.int/sudan> accessed 11 July 2022; DTM, 'South Sudan' <https://dtm.iom.int/south-sudan> accessed 11 July 2022; IOM, 'Ethiopia National Displacement Report 8 – March 2021–April 2021' (30 June 2021) <DTM Ethiopia National Displacement Report 8.pdf (iom.int)> all accessed 11 July 2022.

[68] See DTM, 'Libya' <https://dtm.iom.int/libya> accessed 11 July 2022.

[69] Cf. DTM 'Niger Reports' <https://dtm.iom.int/reports?f%5B0%5D=report_country_facet%3A158&title=&body=&field_report_regional_report=All&page=0> accessed 11 July 2022.

[70] Cf. DTM, 'Migrant Presence Outside Temporary Reception Centres in Bosnia and Herzegovina' <https://us18.campaign-archive.com/?e=__test_email__&u=7fa4ed97b90df810fd0bdaa1d&id=ffc9a263ed> accessed 11 July 2022.

of DTM operations and produce large amounts of non-personal yet demographically identifiable data – has at its core one key method: key informant interviews.[71] While IOM is increasingly making forays into the use of advanced data collection technologies like high-resolution satellite imagery,[72] the 'coca cola recipe' of DTM operations is the rapid roll-out of a large network of key informants even in remote locations in the DRC and Northern Nigeria, and in acute crisis settings like Libya and Syria.[73] Key informants – 166,379 of whom were involved in DTM operations in 2019 alone[74] – are typically community leaders, religious leaders, local government officials, humanitarian aid workers or others who have a good insight into mobility patterns or displacement situations in a particular local setting. Local data collectors, so-called 'enumerators', are recruited and trained in data collection methodologies relevant to the specific context. Enumerators then conduct regular rounds of structured interviews – on location or via telephone – with key informants, electronically recording information, for example on the number, location, demographic make-up, humanitarian situation and needs of displaced persons in humanitarian settings.[75] The DTM methodology then foresees a stage of validation, for example through assessing the consistency between the information provided by different key informants.[76]

[71] Displacement Tracking Matrix, 'Methodological Framework Used in Displacement Tracking Matrix Operations for Quantifying Displacement and Mobility' <https://displacement.iom.int/system/tdf/Methodological%20Framework%20used%20in%20DTM%20Operations%20for%20Quantifying%20Displacement%20and%20Mobility.pdf?file=1&type=node&id=2389> accessed 11 July 2022.

[72] Cf. DTM South Sudan, '2020 | Quarter 2 Report' <https://reliefweb.int/report/south-sudan/dtm-iom-displacement-tracking-matrix-2020-quarter-2-report> accessed 11 July 2022.

[73] Interviews with IO staff member, December 2020 (hereafter: IO1), and NGO staff members, February 2021, (hereafter: NGO3)

[74] IOM, 'Perspectives from IOM-DTM on IDP Data. Recommendations for the consideration of the High-Level Panel on Internal Displacement' (n 59).

[75] This questionnaire informing the data collection in DTM Integrated Location Assessments in Iraq provides an overview of the range of issues potentially covered: DTM, 'DTM Integrated Location Assessment – IV IOM Iraq' (May 2019 Questionnaire) <https://iraqdtm.iom.int/archive/Downloads/DTM%20Special%20Reports/DTM%20Integrated%20Location%20Assessment%20IV/Integrated%20Location%20Assessment%20IV%20Questionnaire.pdf> accessed 11 July 2022.

[76] See, for example, IOM, 'DTM Location Assessment Credibility Score' <https://iraqdtm.iom.int/archive/Downloads/DTM%20Methodology%20Documents/DTM_LA_Credibility_Scoring_Methodology.pdf> accessed 11 July 2022.

While the use of local enumerators conducting interviews with key informants is popular among many international aid organizations,[77] IOM has a competitive advantage in terms of rolling out large data collection exercises within a short period of time due to its continuous field presence, existing networks and physical equipment (e.g. adequate vehicles necessary to reach remote locations) in most regions of the world. However, the key informant methodology comes with clear limitations: data collected in this manner is by definition proximate, and there are many concerns about data accuracy. Typical problems include ill-defined units of observation that may lead to double-counting, such as when key informants are assigned to adjacent neighbourhoods and may record several times the people moving between them.[78] In addition, interview respondents reported a lack of verification mechanisms, especially in settings where information is gathered remotely and cannot be validated through direct observation by trained enumerators (e.g. during times when the security situation in Libya prohibited access),[79] and instances of long-standing migrant communities being counted as recent displacements due to a lack of historical awareness within data teams working in certain country contexts (e.g. Palestinians and Syrians in Lebanon and Rohingyas in Bangladesh).[80]

Once the data is collected, it can be compromised by political imperatives – in many countries, DTM data has to be cleared at various levels of the respective host government's hierarchy before it is publicly released, increasing the risk for distortion.[81] Such an incident allegedly occurred in Nigeria, where the DTM team allegedly bowed to pressure from the Nigerian government that wanted to show progress in returns, and changed its methodology so as to record temporary returns between multiple displacements as returns 'proper'.[82] In other country contexts, DTM data largely amounts to a compilation of government figures with little or no verification.[83]

[77] Mahad Wasuge, Ahmed M Musa and Tobias Hagmann, 'Who Owns Data in Somalia? Ending the Country's Privatized Knowledge Economy' (June 2021) Somali Public Agenda, Governance Brief 12 2<https://somalipublicagenda.org/wp-content/uploads/2021/06/SPA_Governance_Briefs_12_2021_ENGLISH-1.pdf> accessed 11 July 2022.

[78] Interview NGO3 (n 73).

[79] Interview with NGO staff member, February 2021 (hereafter: NGO2) and independent journalist, January 2021 (hereafter: journalist2).

[80] Interview IOM5 (n 35).

[81] Interviews NGO3 (n 73) and IO staff member, February 2021 (herafter: IO3).

[82] Interview with NGO staff members, October 2020 (hereafter: NGO1).

[83] The 'Migrant Presence Monitoring' situation reports providing an overview of the migrant situation in Turkey that the DTM has published regularly since June 2016

Over and above any shortcomings in individual DTM country operations, there is widespread concern – both within and outside IOM – over a lack of technical expertise within the DTM management, and the persistent prioritization of quick results over investments in standardization that would be necessary for improved data quality.[84] This manifests in inconsistent methodologies for data collection, analysis and validation between countries.[85]

Regardless of these various limitations, the data presented in DTM reports has a level of specificity that belies the fact that it is based on estimates: a figure like the 662,248 migrants recorded by a flow monitoring exercise in Libya in March 2018 gives the impression of being based on an exact head-count of individuals in particular contexts, despite the fact that the underlying data collection relies on key informant interviews.[86] This speaks to insights from the literature on the politics of expertise that organizations like IOM are first and foremost concerned with increasing their legitimacy through a performance of epistemic authority,[87] in order to increase their 'claim to resources or jurisdiction over particular policy areas'.[88]

9.4.4 *The DTM's Core Humanitarian Function*

The various shortcomings of data produced through the DTM (some of which are acknowledged in the DTM methodological framework)[89] do not render the instrument useless or irrelevant. All migration and

are almost exclusively based on data provided by the Turkish Directorate General for Migration Management – see, for example, IOM, 'Turkey – Overview of the Situation with Migrants, Quarterly Report' (September 2016) <https://displacement.iom.int/system/tdf/reports/Turkey_Quarterly_Situation_Report_July_September_2016.pdf?file=1&type=node&id=2575> accessed 11 July 2022, and interview NGO3 (n 73).

[84] Interviews IO1 (n 73), IOM5 (n 35), NGO4 (n 91) and with IO staff member, February 2021 (hereafter: IO4).

[85] David Arnold and others, 'Beginning to Resolve Displacement' (*The Cairo Review of Global Affairs*, Spring 2020) <www.thecairoreview.com/essays/beginning-to-resolve-displacement/> accessed 11 July 2022; Interview IOM3 (n 62).

[86] DTM Libya, 'Migrant Report Key Findings 18' (30 April 2018) <https://dtm.iom.int/reports/migrant-report-key-findings-18-march-2018> accessed 11 July 2022.

[87] Stephan Scheel and Funda Ustek-Spilda, 'The Politics of Expertise and Ignorance in the Field of Migration Management' (2019) 37 Environment and Planning D: Society and Space 663, 666.

[88] Christina Boswell, *The Political Uses of Expert Knowledge: Immigration Policy and Social Research* (Cambridge University Press 2009) 7.

[89] DTM, 'Methodological Framework Used in Displacement Tracking Matrix Operations' (n 71) 9.

displacement data collection efforts face limitations, and the majority of interview respondents acknowledged the DTM's value in terms of producing baseline data on displacements for humanitarian planning and programming.[90] By making visible the existence and needs of IDPs and other populations, the DTM fulfills crucial fundraising and advocacy functions, serving both IOM specifically and a broader range of actors involved in responding to human mobility. This plays out on two different levels.

On the one hand, when it is used in humanitarian settings, the DTM typically plays a crucial role during the early stages of a humanitarian response by providing a rapid operational overview as well as a displacement 'planning figure' that serves as the basis for subsequent funding appeals by other members of the humanitarian system.[91] In 2020, DTM data on internal displacement was used in 80% of all humanitarian needs overviews and humanitarian response plans.[92] However, despite its widespread use, the DTM's relation to the wider humanitarian sector remains ill-defined. DTM operations in humanitarian settings are typically carried out under the umbrella of the IASC cluster system, yet there is no formal basis for this, especially in conflict settings. And while IOM has developed protection risk indicators (e.g. related to gender-based risks and unaccompanied minors) that can be integrated into DTM assessments,[93] other humanitarian actors remain concerned about IOM's lack of a protection mandate. More specifically, interview respondents acknowledged attempts to improve DTM integration into wider coordination structures, but noted that this has so far been limited to 'gentlemen's agreements', with insufficient impact on the protection response.[94] A related concern is that project-based DTM operations may create parallel structures on the ground that come to an end when the respective projectized funding ends rather than when the humanitarian community deems appropriate.

On the other hand, the DTM is one of the main sources of the global IDP statistics compiled by the Internal Displacement Monitoring Centre

[90] Interviews IO1 (n 73), NGO3 (n 73) and IO3 (n 81).
[91] Interviews NGO3 (n 73) with NGO staff members, February and March 2021 (hereafter: NGO4).
[92] IOM, '2020 Annual Report on the Use of Unearmarked Funding' (n 41) 27.
[93] IOM, 'IOM Framework for Addressing Internal Displacement' (2017) 13 <www.iom.int/sites/g/files/tmzbdl486/files/press_release/file/170829_IDP_Framework_LowRes.pdf> accessed 11 July 2022.
[94] Interview IO4 (n 84).

(IDMC)[95] that in turn feed into the UNHCR's annual Global Trends Report. Both can be considered cornerstones for advocacy efforts on behalf of IDPs. Beyond these institutionalized distribution channels (that entail external checks on the quality of DTM data, e.g., in the form of triangulation with other sources used by IDMC),[96] both individual DTM country data sets and aggregate figures are widely used and reproduced by governments, human rights NGOs, think tanks and academics alike, and are in these contexts typically presented as authoritative, without further data quality checks. In sum, the DTM creates visibility for IDPs both in distinct humanitarian crises and international discourse on displacement.

Part of the DTM branding is the claim that by making IDPs visible and highlighting gaps in assistance, it contributes to accountability in humanitarian response.[97] The extent to which this accountability function is actively pursued in DTM field operations is difficult to assess. Either way, the significance of the DTM for IOM's standing is immense: By positioning itself as the go-to authority for data on internal displacement, IOM has secured a place in the humanitarian system that is largely uncontested.

9.5 Showing Success through Numbers: The Political Functions of DTM Data

Beyond the core functions of humanitarian needs assessments and advocacy noted above, there are a number of additional functions that make DTM data politically valuable to donors. First, due to the prominent place that the recent global processes outlined above have accorded to data on migration and displacement, funding DTM operations can at times have a performative dimension: Through this, donors can showcase their efforts to meet the commitments agreed upon at the 2016 WHS, and to work towards more evidence-based policy-making – at a far lower political cost than, for example, increasing the number of resettlement places or opening up pathways for legal migration. Beyond this overall incentive

[95] DTM, 'Infosheet: DTM Understanding Displacement for Better and Accountable Humanitarian Response' (November 2018) 2 <www.iom.int/sites/g/files/tmzbdl486/files/country/AP/dtm_infosheet_-_27_november_2018.pdf> accessed 11 July 2022; Internal Displacement Monitoring Centre, 'Global Report on Internal Displacement 2020 – Methodological Annex' 14 <www.internal-displacement.org/global-report/grid2020/downloads/2020-IDMC-GRID-methodology.pdf> accessed 11 July 2022.

[96] Interview NGO1 (n 82) and IO3 (n 81).

[97] DTM, 'About' <https://dtm.iom.int/about> accessed 11 July 2022; DTM, 'Infosheet' (n 95) 2.

to provide funding for data-related activities, a closer look at individual DTM operations reveals another purpose – a post hoc legitimization of policy interventions that, in the words of a former IOM staff member, can be characterized as 'showing success through numbers'.[98]

9.5.1 DTM 'Mobility Tracking' in Haiti, 2010–2014

The Haiti earthquake of January 2010 forced around 1.5 million individuals to leave their homes, leading to a massive internal displacement crisis in the country.[99] In the wake of this disaster, thousands of official and informal IDP camps sprung up around the country's capital Port-au-Prince. The roll-out of the DTM across these various settlements followed swiftly, the operation being largely limited to the collection of data on the number and the location of the displaced, as well as a basic assessment of the availability of water, toilets and waste management.[100] At the same time, the overall humanitarian response to the Haiti earthquake was widely criticized for its inefficiency. Two years on, less than half of the funds pledged for reconstruction had been disbursed.[101]

In light of this apparent dysfunctionality, both the Haitian government and key donors like the US were eager to showcase positive developments. Bradley and Sherwood discuss how in this context, 'the concept of internal displacement became synonymous with residency in camps, and the resolution of the displacement crisis with camp closures, rather than with the more complex challenge of supporting durable solutions.'[102] Against this backdrop, the purportedly apolitical data collection efforts of the DTM soon became hugely politicized.

[98] Interview IOM4 (n 63).

[99] Juliette Benet, 'Expert Opinion – Behind the Numbers: The Shadow of 2010's Earthquake Still Looms Large in Haiti' (January *IDMC*, January 2020) <www.internal-displacement.org/expert-opinion/behind-the-numbers-the-shadow-of-2010s-earthquake-still-looms-large-in-haiti> accessed 11 July 2022.

[100] DTM Haiti, 'Site Assessment Round 1' (November 2011) <https://displacement.iom.int/datasets/haiti-site-assessment-round-1-0> accessed 10 January 2022.

[101] Marc J Cohen, 'Haiti: The Slow Road to Reconstruction. Two Years after the Earthquake' (10 January 2012) Oxfam Briefing Note 6 <www.oxfam.org/en/research/haiti-slow-road-reconstruction> accessed 11 July 2022.

[102] Megan Bradley and Angela Sherwood, 'Addressing and Resolving Internal Displacement: Reflections on a Soft Law "Success Story"' in Stéphanie Lagoutte Thomas Gammeltoft-Hansen and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (Oxford University Press 2016) 155, 176; Ní Ghráinne and Hudson (n 3) examine the normative problem associated with this approach from the perspective of the Guiding Principles on Internal Displacement.

DTM Haiti reports, setting out the results of different rounds of mobility tracking from 2010–2014 – that ultimately amounted to monitoring changes in IDP camp populations – share one common feature: they feature graphs visualizing the decreasing number of camp residents on the front page.[103] Former IOM staff involved in the Haiti response recount a fixation on numbers, on the part of both the Haitian and the US government, with IOM's country office receiving daily visits from the US embassy to have the latest numbers of returns and camp closures reported.[104] Irrespective of the subsequent contextualization of DTM data (in these same reports, but also by external actors)[105] pointing to the reasons people chose to leave the camps (among these the fear of contracting cholera in crowded camp settings, forced evictions and other safety concerns), and to the lack of safe housing in the areas people returned to, the primary message conveyed visually was one of progress towards ending displacement.

In one instance, three large settlements – Canaan, Jerusalem and Onaville – were taken off the list of IDP sites at the request of the Haitian government, leading to a sudden drop in IDP numbers from 279,000 in June 2013 to 172,000 in September 2013. This decision was justified with the assessment that these settlements showed key characteristics of permanent settlements.[106] Amnesty International noted that 'While this was true, the exclusion of these areas from the DTM had the consequence of leaving thousands of IDPs outside the scope of intervention by humanitarian organizations.'[107] In addition, there was evidence of forced evictions being carried out by state authorities in December 2013, indicating that contrary to the recommendations of the Special Rapporteur on the Human Rights of IDPs, conflicts over land tenure had not been resolved before the recategorization of these camps as regular neighbourhoods.[108] The Haitian example illustrates the DTM's central role in constructing a narrative of progress that is disconnected from a meaningful

[103] See, for example, DTM, 'Haiti – Earthquake Displacement Report 2' (7 January 2011) <https://dtm.iom.int/reports/haiti-%E2%80%94-earthquake-displacement-report-2-january-2011> accessed 11 July 2022.

[104] Interview IOM4 (n 63).

[105] Amnesty International, '15 Minutes to Leave – Denial of the Right to Adequate Housing in Post-Quake Haiti' (2015) 2.

[106] IASC, 'Displacement Tracking Matrix (DTM) V2.0 Update' (30 September 2013) 2 <https://displacement.iom.int/system/tdf/reports/01_IOM%20DTM_Round%2016_EN_20130930.pdf?file=1&type=node&id=220> accessed 11 July 2022.

[107] Amnesty International, (n 105) 46.

[108] Ibid 48.

understanding of durable solutions to internal displacement,[109] yet has real consequences for those affected in terms of access to support.

9.5.2 *DTM 'Flow Monitoring' in West and Central Africa Since 2016*

The so-called European refugee crisis of 2015 and 2016 not only led to the introduction of DTM flow monitoring along the so-called 'Balkan route' and at the EU's external borders,[110] but also to a significant expansion of DTM operations in West and Central Africa. In 2016, flow monitoring points were set up in Mali and Niger 'to better understand migration movements to Algeria and Libya on the Central Mediterranean Route', and by 2018 these data collection exercises had expanded to Burkina Faso, Chad, Guinea, Nigeria and Senegal.[111] This example shows how IOM has succeeded in transforming a tool developed largely for use in IDP situations to make it applicable to a wider range of contexts. While at the outset, DTM data collection exercises in West and Central Africa were limited to recording the mere number of border crossings (the main source of information often being local officials), this was later complemented by surveys aimed at gaining additional information about the routes and means of transportation used. Interview respondents noted that the explicit focus on movements towards Europe ('the system was pretty much designed to show that people move North'),[112] and the 'gold rush' mentality that came with the readily available funding from the EU Emergency Trust Fund for Africa (EUTF), at times led to an indiscriminate counting of movements as crisis-driven, irrespective of centuries-old mobility patterns in the region.[113]

Similar to the Haitian example, DTM data in this context was highly politicized. IOM staff recount a 'massive thirst for flow data' that was not subsequently used in any meaningful way[114] – echoing Read et al.'s observation that 'the enthusiasm for […] data is vastly outstripped by the

[109] Sherwood et al provide an insightful overview on the multidimensional nature of the durable solutions process: Angela Sherwood and others, 'Supporting Durable Solutions to Urban, Post-Disaster Displacement: Challenges and Opportunities in Haiti' (Brookings Institution and IOM 2014).

[110] European Commission, 'Flow Monitoring in the Mediterranean and Western Balkans' (22 February 2022) <https://knowledge4policy.ec.europa.eu/dataset/ds00048_en> accessed 11 July 2022.

[111] IOM, 'Data Bulletin – Informing a Global Compact for Migration' (n 50) 2.

[112] Interview with IOM staff member, February 2021.

[113] Interview with independent journalist, January 2021.

[114] Interview with IOM staff member, February 2021.

capacity to meaningfully analyse it'.[115] In addition, IOM publications suggest that one of the primary purposes of these data collection exercises was to better target IOM information campaigns about the risks of migration, with the aim of informing protection and assistance interventions taking second place.[116] At the same time, European governments regarded DTM data as a possible source of evidence of the effectiveness of EU deterrence strategies.[117]

The latter aspect was thrown into sharp relief during a minor data-related scandal in late 2016, when the non-profit news organization IRIN (renamed The New Humanitarian in 2019) uncovered how faulty DTM data on drastically reduced numbers of migrants transiting through Northern Niger was touted by the European Commission and various EU governments as evidence that their efforts to curb irregular movements on African territory were producing results.[118] Apart from being a poignant reminder of the fact that data produced by international organizations is rarely questioned and generally accepted as authoritative, the fact that the faulty number was included in various EU documents even after the mistake had been pointed out illustrates the EU's eagerness to showcase success through numbers.[119] An EU spokesperson highlighted the fact that regardless of the one-off miscalculation that was quickly acknowledged and remedied by IOM, the overall trend of decreasing numbers through DTM flow monitoring points in Niger remained the same.[120] While this was true, it disregarded the fact that both external observers and DTM reports pointed to evidence of a divergence of travel routes rather than an actual decrease in transit mobility through Niger.[121] This disregard of the DTM's own caveats echoes dynamics from the Haiti operation, in that the

[115] Read, Taithe and Mac Ginty (n 15) 1314.
[116] IOM, 'Data Bulletin – Informing a Global Compact for Migration' (n 50).
[117] Interview with independent journalist, January 2021 (hereafter: journalist1).
[118] Kristy Siegfried, 'Exclusive: EU Migrant Policy in Africa Built on Incorrect Niger Data' (*The New Humanitarian*, 31 January 2017) <www.thenewhumanitarian.org/news/2017/01/31/exclusive-eu-migrant-policy-africa-built-incorrect-niger-data> accessed 11 July 2022.
[119] European Commission Joint Communication, 'Migration on the Central Mediterranean Route – Managing Flows, Saving Lives' (25 January 2017) JOIN(2017) 4 final.
[120] Siegfried (n 118).
[121] IOM, 'Statistical Report – Overview NIGER Flow Monitoring Points (FMP)' (November 2016) <NIGER_IOM_FMP_Novembre_2016_EN&FR.pdf> accessed 11 July 2022; Leonie Jegen, 'The Political Economy of Migration Governance in Niger' (Arnold-Bergstraesser Institute 2020) 23 <www.medam-migration.eu/fileadmin/Dateiverwaltung/MEDAM-Webseite/Publications/Research_Papers/WAMiG_country_reports/WAMiG_Niger_country_report/WAMiG_Niger_country_report.pdf> accessed 11 July 2022.

visual elements of DTM reports – curves pointing downwards – are selectively picked up to legitimize certain policy choices, despite the fact that the written analysis accompanying them is more nuanced.

These examples illustrate the political value that DTM data can have for donors, as well as for the governments of states experiencing a displacement crisis. They also show that this is largely independent from the quality of the data: In line with the notion of the 'value of good enough numbers',[122] the performative function of DTM data may be more important than its accuracy. However, this may have negative repercussions for those from whom the information was extracted, as well as broader problematic political implications. The following sections attempt to systemize the potential negative side of the DTM for its 'data subjects', which go hand in hand with the epistemic power the organization holds with regard to both internal displacement and irregular cross-border migratory movements.

9.6 Risks and Pathologies: Mapping Out Key Concerns

The DTM is premised on the idea that data on displaced populations is essential for protection and effective interventions. This focus on the positive potential of data, and on the advocacy and fundraising roles of the DTM, tends to obscure the risks associated with data collection concerning often highly vulnerable populations. Four areas of concern stand out.

9.6.1 Insufficient Protection of Data in Field Settings

The DTM methodology entails a number of risks with regard to the protection of personal data collected in the context of registration exercises or through individual or household surveys. These are mainly related to its reliance on vast networks of local enumerators. Their rapid mobilization in humanitarian crises suggests that there is limited little time for adequate training on data protection procedures. This certainly is not specific to the DTM (interview respondents from other organizations readily conceded the challenges of collecting data in crisis settings),[123] yet potentially exacerbated by the sheer size of the operation and its overall lack of standardization. Beyond this, IDPs, especially in conflict settings, are often

[122] Isabel Rocha de Siqueira, 'Development by Trial and Error: The Authority of Good Enough Numbers' (2017) 11 International Political Sociology 166.

[123] Interviews IO1 (n 73), IO3 (n 81) and NGO3 (n 73).

at risk of continued persecution by state or non-state actors. Contrary to the wide-spread assumption in humanitarian work that being counted is automatically beneficial since it affords access to support, this risk may be heightened through the visibility that comes with data collection.[124] Risks emerge not only as regards personal data, but also non-personal yet demographically identifiable data. Notably, much DTM data falls into this category, such as when the ethnic or religious characteristics of a group are recorded alongside their movements.

9.6.2 *'Erasure' of Populations with Enduring Needs*

The advocacy and fundraising function that the DTM fulfills with regard to IDP populations in particular comes with immense responsibilities: It often means that once a data collection operation is discontinued, humanitarian support also comes to an end, plunging the respective groups back into a state of invisibility as far as global humanitarian efforts are concerned. The problem here is not so much the fact that support structures are eventually dismantled, but that this is not done on the basis of a comprehensive needs assessment. While it is generally difficult to ensure sustained funding for data collection, this challenge is exacerbated by IOM's projectized funding model: once individual funding streams have dried up, enduring needs are no longer captured in data. In addition, some of the examples set out above show pressure exerted by governments can lead to changes in DTM categorization (from temporary to permanent returns in the case of Nigeria, or from camps to permanent settlements in the case of Haiti) that may erase populations with enduring needs from the view of the international community. This raises the question of whether or to what extent DTM staff is trained to do advocacy in the sense of actively bringing forward needs and concerns emerging from the data collected.

9.6.3 *Crowding Out Development-Oriented Data Collectors*

As a first and foremost field-based operational agency, IOM has a competitive advantage over other data collectors to quickly 'put boots on the ground'[125] and respond to new developments. Beyond this, part of the DTM's appeal to donors lies in the fact that it is presented as a

[124] Gabriel Cardona-Fox, 'The Politics of IDP Data' (2020) 39 Refugee Survey Quarterly 620, 631.
[125] Interview IOM4 (n 63).

comprehensive package or one-stop-shop that can in theory cover all data needs, particularly in the context of internal displacement.[126] The 2017 IOM Framework on Addressing Internal Displacement, for instance, notes that the DTM increasingly provides the international community with information on IDP's access to durable solutions.[127] In line with this, the DTM is moving beyond its traditional remit of baseline assessments of the needs and characteristics of internally displaced persons in crisis settings, and into the field of collecting data on the socio-economic profiles and aspirations of displaced populations through survey methods. However, just as interview respondents shared an appreciation of the contribution the DTM makes during the early stages of humanitarian crises, there are widespread concerns as to whether the DTM – whose management has a humanitarian background, and whose 'quick and dirty' mindset persists in non-crisis field settings even when prodded by other actors to strive for improvements in data quality[128] – is capable of producing the high quality disaggregated data on displaced populations that are essential for moving towards durable solutions.[129] One interview respondent described DTM data as a helpful 'conversation starter' on the needs of displaced persons, yet highlighted the fact that at a certain stage of a displacement situation when the need for more fine-grained data arises, the balance tips and the disadvantages of DTM data start to outweigh its benefits.[130] Yet a further monopolization of internal displacement data by DTM is likely: While donors are reportedly aware both of the limitations of DTM data, and are open to funding alternative data collectors, the bulk of the resources available tend to go towards the DTM.[131] The further expansion of the DTM therefore comes with a real risk of crowding out actors and initiatives specializing in the collection of data required for development programming.

9.6.4 *Feeding into Perceptions of Migration as a Threat*

Fourth, the DTM's continuous quest for growth has led to an expansion of its data collection activities far beyond its initial field of internal

[126] Beyond its well-established role in humanitarian needs assessments, IOM notes that 'DTM has also proven highly effective as a preparedness tool, as well as in support of the recovery and transition phase of the response', see DTM, 'About' (n 97).
[127] IOM, 'IOM Framework for Addressing Internal Displacement' (n 93) 13.
[128] Interviews NGO2 (n 79) and NGO4 (n 91).
[129] Interview IO1 (n 73).
[130] Interview NGO4 (n 91).
[131] Interviews NGO3 (n 73) and NGO2 (n 79).

displacement. Instead, especially since the so-called 'European refugee crisis' and the related rise in demand for 'flow data', various DTM operations now cover irregular migration movements across borders. The funding sources of these operations indicate that they are primarily motivated by individual donors' interest in containing migratory movements towards Europe on the African continent, rather than by overarching humanitarian or development rationales. As the account of 'flow monitoring' in West and Central Africa since 2016 demonstrates, IOM has responded to this demand by a sometimes indiscriminate collection of data on human mobility in the region. While subsequent DTM publications differentiate between different types of movements, clarifying that much migration on the African continent is intraregional,[132] the aggregate numbers and corresponding visualizations may feed into a European discourse focusing on the threat of an impending African exodus towards Europe.[133]

These different areas of concerns indicate that an understanding of data protection that focuses on individually identifiable data is too narrow a lens for grasping the responsibilities that arise in the context of DTM operations. The risks and pathologies outlined above are exacerbated by the fact that due to IOM's decentralized and projectized structure, the DTM's rapid growth continuously outstrips the organization's capacity for oversight and control. The concluding section of this chapter provides an overview of IOM's data protection standards, and asks whether these live up to the organization's broader ethical obligations in terms of adequately addressing the risks and pathologies outlined above.

9.6.5 IOM's Data Protection Standards: Fit for Purpose?

IOM prides itself in having been among the first international organization to develop its own internal guidance concerning data protection. The IOM Data Protection Principles were developed in 2009, and set standards concerning inter alia the specified and legitimate purpose of data collection, data quality, consent and data security as well as oversight, compliance and internal remedies. A corresponding Data Protection

[132] See, for example, IOM, *Migration in West and North Africa and across the Mediterranean: Trends, Risks, Development and Governance* (2020) 41.

[133] See, for example, Koen Leurs and Kevin Smets, 'Five Questions for Digital Migration Studies: Learning from Digital Connectivity and Forced Migration In(to) Europe' (2018) Social Media + Society <https://doi.org/10.1177/2056305118764425> accessed 11 July 2022; Virginie Mamadouh, 'The Scaling of the "Invasion": A Geopolitics of Immigration Narratives in France and The Netherlands' (2012) 17 Geopolitics 377.

Manual was published in 2010.[134] Both documents focus on the protection of personal data, and are aimed at preventing 'unnecessary and disproportionate interference into privacy'.[135] The introduction to the Data Protection Manual acknowledges the particular sensitivity of data related to vulnerable groups, and notes the increased challenges linked to data protection and human rights related to the use of 'advanced technology in migration management'.[136] In terms of oversight, IOM's Institutional Law and Programme Support Division of the Office of Legal Affairs serves as the organization's 'focal point […] for data protection issues and provides advice to ensure that personal data are processed in accordance with the IOM Data Protection Principles and Manual.'[137]

Since this initial standard-setting exercise, IOM has been engaged in relevant inter-agency efforts to strengthen the protection of personal data at the international level, including through its membership in the UN Privacy Group that in 2018 issued the UN Principles on Personal Data Protection and Privacy with the threefold aim to '(i) harmonize standards for the protection of personal data across the United Nations System Organizations; (ii) facilitate the accountable processing of personal data for the purposes of implementing the mandates of the United Nations System Organizations; and (iii) ensure respect for the human rights and fundamental freedoms of individuals, in particular the right to privacy.'[138] Further related efforts include IOM co-hosting the 6th Workshop on Data Protection within International Organizations with the European Data Protection Supervisor (EDPS) in 2017, and participating in the advisory board of the 2020 ICRC Handbook on Data Protection in Humanitarian Action that contains an extensive section on standards for processing and sharing personal data in the context of new technologies.[139]

Beyond these activities focused on the protection of personal data, IOM has recently started to engage in a number of processes concerned with the more encompassing notion of ethical and responsible data management. Most notably, these include its co-lead of the IASC's Data

[134] IOM, 'IOM Data Protection Manual' (2010) <www.iom.int/resources/iom-data-protection-manual-2010> accessed 11 July 2022.
[135] IOM, 'Data Protection' <www.iom.int/data-protection> accessed 11 July 2022.
[136] IOM, 'IOM Data Protection Manual' (n 134) 3.
[137] IOM, 'Data Protection' (n 135).
[138] UN High-Level Committee on Management, 'Personal Data Protection and Privacy Principles' (11 October 2018) <UN Principles on Personal Data Protection & Privacy. FINAL (1) (1) (unsceb.org)> accessed 11 July 2022.
[139] Christopher Kuner and Massimo Marelli (eds), 'Handbook on Data Protection in Humanitarian Action' (2nd edn, ICRC May 2020).

Responsibility Working Group that developed 'Operational Guidance on Data Responsibility in Humanitarian Action,[140] and its coordination role of the Humanitarian Data Science and Ethics Group (DSEG) that recently published its 'Framework for the Ethical Use of Advanced Data Science Methods in the Humanitarian Sector'.[141] Both documents highlight the need for standard-setting in the field of non-personal data, reflect the state of the art with regard to ethical and responsible data collection and processing (e.g. featuring significant overlaps with the 510 Data Responsibility Policy)[142] and are in that sense of direct relevance to the bulk of DTM data collection in the form of non-personal data. In addition, IOM's 2020 Migration Data Strategy and its 2021 Internal Displacement Data Strategy both contain explicit commitments to adhere to principles of data responsibility.[143] While this indicates a significant positive development, a number of question marks remain with regard to the practical applicability of these stated commitments to the current modus operandi of the DTM.

First, unlike general data protection obligations (which are comprehensive in scope), the relevant UN standards and guidelines on data responsibility only apply to humanitarian contexts. Considering that the increasingly prominent DTM 'flow monitoring' component is typically used outside acute humanitarian emergencies and instead covers instances of cross-border migration (however mixed the motives may be), there remains an apparent regulatory gap in IOM's data standards. Second, any mention of ethical obligations or responsibilities in the realm of non-personal data is conspicuously absent from IOM's website on data protection that instead puts front and centre the idea that 'Data protection is about the protection of personal data of individuals', and features links to IOM's 2010 data protection manual as well as to the 2020 ICRC Handbook (both of which focus on the protection of personal data), but none to the IASC data responsibility guidance or the DSEG framework.[144] Further, the DSEG framework itself contains an 'Action Point' on data responsibility that encourages organizations to comply with one of three

[140] Inter-Agency Standing Committee, 'Operational Guidance: Data Responsibility in Humanitarian Action' (February 2021).

[141] Humanitarian Data Science and Ethics Group (DSEG), 'Framework for the Ethical Use of Advanced Data Science Methods in the Humanitarian Sector' <www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/dseg_ethical_framework_april_2020.pdf> accessed 11 July 2022.

[142] The Netherlands Red Cross (n 4).

[143] IOM, *IOM Migration Data Strategy* (n 5); IOM, *Internal Displacement Data Strategy* (n 36) 5.

[144] IOM, 'Data Protection' (n 135).

'sector-leading' documents on humanitarian data responsibility, these three being the 2020 ICRC Handbook, the 2010 IOM Data protection manual and the OCHA Data Responsibility Guidelines.[145] The fact that compliance with *any one* of these documents (two of which only refer to the protection of personal data) is deemed sufficient is likely to fall short of inducing real progress on the ethical and responsible processing of non-personal data.

Taken together, this indicates a piecemeal and inconsistent engagement in data-related standards beyond established principles on the protection of personal data. The rationale for this may be twofold. On the one hand, given the increase in so-called 'data incidents' that amount to instances of data theft or unauthorized use and disclosure of personal data in humanitarian settings,[146] putting in place technical safeguards to avoid such instances in the future could be considered a reasonable priority for an organization like IOM. At the same time, the curious absence of references to more encompassing data responsibility standards despite IOM being actively engaged in all the relevant fora and processes indicates a desire to showcase commitment to progress on ethics and accountability for reputational gains, while at the same time sidestepping the actual consequences of related frameworks. More specifically, taking seriously the principle of data minimization that requires the limitation of data collection to what is directly necessary for a clearly specified purpose would be in tension with the current modus operandi of the DTM, a modus characterized by expansionism. An explicit commitment to apply the principles of data minimization and defined purpose in the collection of non-personal data would call into question the apparently indiscriminate collection of data on population movements currently carried out under the DTM.

The empirical analysis presented in the previous sections indicates that so far, IOM does not appear to live up to data responsibility principles. While both IOM's 2020 Migration Data Strategy and the 2021 Internal Displacement Data Strategy show a willingness to improve upon current shortcomings, the institutional set-up to date has not been conducive to any meaningful progress: The expansion of DTM activities, both in terms of the number of operations and in terms of the types of movements

[145] DSEG (n 141) 14.

[146] Nathaniel A Raymond, Daniel P Scarnecchia and Stuart R Campo, 'Humanitarian Data Breaches: The Real Scandal Is Our Collective Inaction: Why It's Time for an Independent Investigatory Body' (*The New Humanitarian*, 8 December 2017) <www.thenewhumanitarian.org/opinion/2017/12/08/humanitarian-data-breaches-real-scandal-our-collective-inaction> accessed 11 July 2022.

covered, epitomizes IOM's longstanding history of entrepreneurial behaviour.[147] In this sense, the problems and pathologies outlined above should not be viewed as surprising, but as a consequence of IOM's projectized and highly decentralized structure.[148] What makes the DTM so appealing to donors – its flexibility, quick deployment and adaptability – has a number of negative side-effects as regards data responsibility. Without changes to the incentive structure, it seems unlikely the organization will make real investments in data quality and accountability. However, shortly before this chapter went to press, relevant institutional reforms seemed to take shape: In early 2022, IOM established its new Global Data Institute as an institutional umbrella bringing together all of IOM's data collection and analysis activities under one common roof.[149] At the same time, negotiations about a reform of IOM's budget that would entail permanent funding for IOM's 'core structure' have moved forward, and the new Global Data Institute is considered part of this core structure.[150] Against this background, the concluding section sets out a number of proposals for reform.

9.7 Recommendations for Reform

In order to live up to the core tenets of data responsibility – especially data protection provisions that take into account the potentially sensitive nature of non-personal yet demographically identifiable data and adherence to high standards of data quality – and to ensure that IOM headquarters-level efforts to improve data quality and strengthen accountability – with regard to the DTM in particular – filter through to and are respected in field-level data collection, the following aspects are key.

First, as a matter of principle, an organization's data collection efforts should not exceed its related expertise. A realistic assessment of the limits

[147] Bradley, 'The International Organization for Migration (IOM): Gaining Power in the Forced Migration Regime' (n 7) 100.

[148] IOM's 2020 Migration Data Strategy can be read as implicitly acknowledging this: 'To ensure IOM is well placed to deliver on its data-related aspirations and realize its potential in this area, there is a need to strengthen migration data governance in IOM. This will help address fragmentation resulting from decentralization and projectization, as well as identify and reflect new roles stemming from new IOM responsibilities within the United Nations system.' IOM, *IOM Migration Data Strategy* (n 5) 25.

[149] IOM, 'Global Data Institute' <www.iom.int/global-data-institute>, accessed 11 July 2022.

[150] IOM Standing Committee on Programmes and Finance, 'Draft Resolution on Investing in the Core Structure of IOM' IOM Doc S/30/L/4 <https://governingbodies.iom.int/system/files/en/scpf/30th/s-30-l-4-draft-resolution-investing-in-the-core-structure-of-iom.pdf> accessed 11 July 2022.

of an organization's expertise requires independent external evaluation. Rather than seeking continuous growth and expansion, IOM's management should identify the added value the DTM brings to the international community's humanitarian and development-oriented endeavours, and limit its engagement to these areas. With regard to data on internal displacement, this could mean focusing on the provision of rapid overviews and humanitarian needs assessments, while leaving space for other data actors better equipped to produce data for development programming.

Second, in order to improve the quality of data produced through the DTM, a greater degree of standardization with regard to both the collection and the validation of data is necessary – despite the fact that this entails trade-offs with the tool's cherished flexibility and its adaptability to diverse contexts. This standard-setting should go hand in hand with obligatory trainings for DTM staff with regard to data protection, data responsibility and the systematic integration of protection concerns into data collection.

Third, awareness of the normative dimensions and the potential political instrumentalization of migration data should be strengthened among technical DTM staff at all levels of the hierarchy, but especially in field settings. This awareness-raising should go hand in hand with guidance on how to collect data in a way that makes an active contribution to the protection of IDPs and vulnerable migrants.[151]

IOM's new Global Data Institute opens up new opportunities to achieve these changes and to strengthen IOM's accountability with regard to its data work, for example, by enhancing control and oversight of the DTM in particular. However, at the time of writing, the post of director of this new institutional entity was not yet filled, and there was no publicly available information as to its future structure and mandate. In further specifying this, one key objective ought to be insulating the collection of data on displacement from both the market-based pressure of competition and political imperatives. The planned provision of permanent funding for IOM's core data activities would be a prerequisite for this. If data really is 'the lifeblood of decision-making',[152] the international community should consider high-quality data from politically independent sources to inform humanitarian and development interventions a common good, and establish the conditions for obtaining it.

[151] Cardona-Fox (n 124) 631.
[152] IOM, *IOM Migration Data Strategy* (n 5).

10

IOM and Ethical Labour Recruitment

JANIE CHUANG

In recent years, the International Organization for Migration (IOM) has quietly moved from the periphery of the international system into a central role in global migration governance. IOM's elevation reflects a major shift in the international migration field towards a reluctant recognition by States that international cooperation is needed to address some aspects of cross-border labour migration flows. Citing sovereignty concerns, States had long jealously guarded control over their borders – hence the scarcity of treaties concerning labour migration and the historic lack of an international institution recognized as the lead global migration agency. But growing faith in the potential for labour migration to foster development, combined with the challenges faced in responding to the 2015 mass migrations, prompted States to address labour migration as an issue of international concern. In a bid to assume the institutional lead on these issues, IOM joined the UN system as a 'related organization' in 2016, and rebranded itself as 'UN Migration'. Soon thereafter, IOM assumed a prominent role during the negotiations over the 2018 UN Global Compact on Safe, Orderly, and Regular Migration ('GCM').[1] That instrument ultimately designated IOM to lead UN system-wide efforts to facilitate States' implementation of its provisions – thus reaffirming IOM's role as global lead agency on migration.[2]

From this elevated perch, IOM now enjoys a more powerful platform to promote its approach to global migration, which includes the idea that proper management can make cross-border labour migration 'work for all': for countries of origin and destination, and for

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

[2] The GCM assigns IOM the role of coordinator and secretariat for a new UN migration network – that network is intended 'to ensure effective and coherent system-wide support for implementation, including the capacity-building mechanism, as well as follow-up and review of the Global Compact, in response to the needs of Member States.' GCM, para 45.

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migrants themselves. This approach coincides with a growing faith in the 'migration-development nexus', or the idea that remittance-producing migration can be a solution to poorer countries' development problems. For adherents of this view (i.e. 'migration optimists'), migration offers a 'triple win': countries of origin benefit from remittance revenues generated in foreign labour markets; countries of destination gain access to flexible and cheap labour; and migrants enjoy the opportunity to earn more money abroad than they would back home. Critics (i.e. 'migration pessimists') caution, on the other hand, that migrants do not necessarily emerge as winners from efforts to increase cross-border labour mobility. Not only do they carry the burden of economic development for their home communities, but migrant workers often face substantial risks of abusive recruitment and employment practices, even trafficking and forced labour.

As the lead global migration agency, IOM could help address these concerns by utilizing its extensive networks and soft governance techniques to encourage migrant worker-protective norms and practices be adopted and implemented. IOM's track record provides ample reason to be sceptical that IOM would do so, however. The few studies of IOM's past work on cross-border labour migration reveal that IOM involvement did little to prevent or address rights violations experienced by migrant workers.[3] This is unsurprising, given that, unlike UN agencies (e.g. UNHCR vis-à-vis refugees), IOM does not have a formal protection mandate that would require it to prioritize migrants' rights and well-being in its work, although the 2016 Agreement affirms that it will afford 'due regard' to human rights.[4] IOM's member states insisted that the organization remain 'non-normative' as a condition of it joining the UN system; this has only amplified critics' concerns over IOM's checkered human rights

[3] Pauline Gardiner Barber and Catherine Bryan, 'International Organization for Migration in the Field: "Walking the Talk" of Global Migration Management in Manila' (2018) 44 Journal of Ethnic and Migration Studies 1725; Bruno Dupeyron, 'Secluding North America's Labor Migrations: Notes on the International Organization for Migration's Compassionate Mercenary Business', in Ruben Zaiotti, ed., *Remote Control: The Externalization of Migration Management in Europe and North America* (Routledge 2016); Christina Gabriel and Laura Macdonald, 'After the International Organization for Migration: Recruitment of Guatemalan Temporary Agricultural Workers to Canada' (2018) 44 Journal of Ethnic and Migration Studies 1706.

[4] 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; Helmut Philipp Aust and Lena Riemer, 'A Human Rights Due Diligence Policy for IOM?' Chapter 5, in this volume.

record and the potential 'blue-washing' of IOM's more problematic activities if undertaken as 'UN Migration'.[5]

Whether the mantle of 'UN Migration' will incentivize IOM to pursue a more rights-protective trajectory remains to be seen. But, as explored in this Chapter, one aspect of IOM's activities – its work on ethical labour recruitment through its International Recruitment Integrity System (IRIS) – offers some initial insights into the nature and extent of IOM's commitment, as 'UN Migration', to protecting migrant workers' rights. IOM established IRIS to help 'combat modern slavery' by preventing the exploitation of migrant workers at the recruitment stage – hence, this is an area where IOM has articulated a clear goal of protecting migrant workers. Once mediated by governments operating through bilateral labour migration agreements, cross-border labour recruitment is now largely controlled by a highly profitable – and unregulated – private recruitment industry. The lack of regulation enables unscrupulous recruiters to impose exorbitant recruitment fees and exploitative working conditions with impunity, notwithstanding international norms that prohibit such practices.

How IOM approaches the problem of recruitment abuse is thus instructive regarding IOM's level of commitment to (and understanding of) migrant workers' rights protection – especially in the face of States' strong competing interests in border control and labour market access. As the lead global migration agency, IOM is well-situated to work with States to ratify and implement ILO treaties and standards relating to ethical recruitment (e.g. the prohibition on recruitment fees), particularly as these norms are reaffirmed and reiterated in the GCM. This chapter explores IRIS's approach to ethical recruitment. It begins by exploring IOM's past work on cross-border labour migration, and the potential for IOM's future role, as 'UN Migration', given recent developments in norm-setting in the labour migration field. It then turns to a close examination of IRIS's signature initiative – a voluntary programme through which recruiters can be certified as compliant with a set of IRIS ethical recruitment standards. These standards are derived from ILO treaties and guidance and reproduced in the GCM, and for which meaningful

[5] Hirsch and Doig caution that IOM's joining the UN system as a 'related organization' enables 'blue-washing' of IOM's activities: 'creating the impression of a humanitarian organization while simultaneously carrying out migration control activities on behalf of the donor states of the global north.' Asher Lazarus Hirsch and Cameron Doig, 'Outsourcing Control: The International Organization for Migration in Indonesia' (2018) 22 The International Journal of Human Rights 681.

compliance requires State regulation, labour inspection, and transnational cooperation. Instead, IRIS dilutes these obligations and enables further privatization of this area of governance to a set of unaccountable actors. In so doing, IRIS furthers a trend in transnational labour governance away from binding labour regulations and towards incrementalist, soft law governance,[6] enabling States to abdicate their responsibility to create the necessary structures to prevent and address abuse and exploitation of migrant workers.

10.1 IOM and Labour Migration Governance

With 500 offices and duty stations in over 100 countries, IOM has established a substantial presence in the world, particularly given its tendency to embed itself in local communities. As Geiger and Koch have noted, IOM has successfully cultivated a vast network of partners (NGOs, local governments, businesses, and international institutions), and developed and deployed its expert authority in ways that have shaped States' and non-State actors' approach to migration issues.[7] IOM operates with a decentralized structure, with its many field offices responsible for funding their own operations by undertaking projects for the IOM Member States. This has resulted in IOM operating like a private company, or a 'jack of all trades' 'bureaucratic entrepreneur' whose portfolio of projects has prompted criticism that IOM functions as an 'instrument of Northern foreign policy'.[8] Whether due to projectization or the lack of a protection mandate, IOM projects have drawn a fair amount of criticism for prioritizing States' border control or market goals at the expense of migrants' and refugees' rights.

As discussed below, IOM's past work on labour migration reflects a deep faith in migration as an underutilized solution to the problem of development – but for which rights restrictions unfortunately were treated as an inevitable tradeoff for greater access to foreign labour markets. Growing

[6] Luc Fransen and Genevieve LeBaron, 'Big Audit Firms as Regulatory Intermediaries in Transnational Labor Governance,' (2019) 13 Regulation & Governance 260.

[7] Martin Geiger and Martin Koch, 'World Organization in Migration Politics: The International Organization for Migration' (2018) 9 (1) Journal of International Organizations Studies 25.

[8] Fabian Georgi, 'For the Benefit of Some: The International Organization for Migration and Its Global Migration Management,' in Martin Geiger and Martin Koch (eds), *The Politics of International Migration Management* (Palgrave Macmillan 2010) 63; Megan Bradley, 'The International Organization for Migration (IOM): Gaining Power in the Forced Migration Regime' (2017) 33 (1) Refuge 97, 103.

efforts to establish rights-protective norms for migrant workers – including most notably in the GCM, for which IOM is designated lead global migration agency – make it all the more critical that IOM prioritize rights protection in the face of competing interests in border control and labour market access.

10.1.1 IOM's Approach to Labour Migration

As Pécoud explains, IOM understands labour migration in a supply–demand framework, in which properly managed labour mobility connects labour surpluses in poorer countries with demand for migrant workers in the Global North.[9] Facilitating labour mobility requires, however, IOM to 'overcome the contradiction between the nationalist/protectionist agenda over border control and the need for a flexible foreign workforce in a globalizing economy'.[10] IOM would need to modify its border control- or market-oriented priorities in order to incorporate policy approaches that benefit migrants themselves. IOM's activities and discourse typically assume, however, that the core features of the world's political and economic organization are unchangeable, and that individuals must adapt to this global macroeconomic context.[11] IOM's interventions thus target individual choices – for example, recruiters (and workers) to participate in voluntary ethical frameworks – rather than pressing for broader structural reforms that would provide more robust labour protections for workers.

IOM's neoliberal approach to migration embraces the growing faith among governments and some civil society actors in the 'migration-development nexus' (MDN), or the idea that cross-border labour migration offers a solution to development problems. Leveraging the MDN has become an established mantra of development institutions and thinktanks.[12] Support for the MDN paradigm –known as

[9] Antoine Pécoud, 'Introduction: The International Organization for Migration as the New "UN Migration Agency"' in Martin Geiger and Antoine Pécoud (eds), *The International Organization for Migration: The New 'UN Migration Agency' in Critical Perspective* (Palgrave Macmillan 2020) 10.

[10] Pécoud, 'Introduction' (n 9) 11.

[11] Ibid.

[12] Kerry Preibisch, Warren Dodd and Yvonne Su, 'Pursuing the Capabilities Approach within the Migration-development Nexus' (2016) 42 Journal of Ethnic and Migration Studies 2111, 2116; Kerry Preibisch, Warren Dodd and Yvonne Su, *The Transformation of Work: Challenges and Strategies. Irreconcilable Differences? Pursuing the Capabilities Approach within the Global Governance of Migration* (Solidarity Center, 2014).

'migration optimism' – has arisen in response to increased recognition within the international community of the failures of past development policy – specifically, the tendency towards top-down, state-centred macroeconomic solutions, mediated by (sometimes corrupt) government bureaucracies, that are unmindful of the specificity of local contexts.[13] Remittance-generating migration is thus pitched as a cost-effective, bottom-up alternative that gives individuals and their communities direct access to funds and a greater role in promoting development in their country.[14] Migration optimists argue that, in addition to generating increased foreign currency reserves and improved credit ratings for origin countries,[15] migration yields 'social remittances' in the form of new ideas, values, and skills that migrants gain while working abroad and share with their communities.[16] Moreover, increased emigration eventually creates enough economic growth to push the community over the development curve to the point where migration pressures decrease, giving rise, eventually, to a period of stay-at-home development.[17]

IOM shares this development vision, having increasingly allocated resources towards 'migration and development' for projects to encourage and facilitate remittances from diasporas and migrants to contribute to the development process in the country of origin.[18] IOM publications also emphasize the need to create a favourable investment environment and facilitate remittance flows. As critics – 'migration pessimists' – note, however, while migration may offer anti-poverty effects for individual families, there is little evidence that migration generates local investment and employment.[19] If anything, available studies indicate that migration has tended to spur more migration; and that even after decades of

[13] Martin Geiger and Antoine Pécoud, 'Migration, Development and the "Migration and Development Nexus"' (2013) 19 Population, Space and Place 369; Erin Newmann-Grigg, 'Between Migration and Development: The IOM's Development Fund' (2020) in Martin Geiger and Antoine Pécoud (eds), *The International Organization for Migration: The New 'UN Migration Agency' in Critical Perspective* (Palgrave Macmillan 2020), 103–104.

[14] Geiger and Pécoud, 'Migration, Development' (n 13) 369.

[15] Preibisch, Dodd and Yu, 'Pursuing the Capabilities Approach' (n 12) 2116.

[16] Ezra Rosser, 'Immigrant Remittances' (2008) 41 Connecticut Law Review 3, 9.

[17] Michael Clemens and Kate Gough, 'Unpacking the Relationship between Migration and Development to Help Policymakers Address Africa-Europe Migration' (*Center for Global Development*, 3 April 2019) <www.cgdev.org/blog/unpacking-relationship-between-migration-and-development-help-policymakers-address-africa> accessed 29 March 2022.

[18] Newmann-Grigg, 'Between Migration and Development' (n 13) 99–100, 110.

[19] Hein de Haas, 'The Migration and Development Pendulum: A Critical View on Research and Policy' (2012) 50 (3) International Migration 8, 19.

remittance-producing migration, the promised period of stay-at-home development has yet to occur.[20] Critics argue that relying on migration as *solution* to the need for development fuels States' tendency to overlook features of the political economy that continue to drive people to migrate in the first place – for example, growing inequality between countries and communities, development failures, and poor governance.[21] Moreover, critics caution, migration can produce increased inequality between migrant and non-migrant populations within origin countries, as well as 'brain drain' and 'brawn drain' that reduce the talent available to pursue the reforms necessary to achieve sustainable development.[22] Migration optimism ultimately absolves States of the responsibility to undertake the necessary reforms (e.g. addressing government corruption) to achieve sustainable development, and instead shifts the burden to migrants to engage in 'self-help' development.[23]

That migration optimism continues to dominate development policy despite the lack of evidence of its effectiveness, critics note, suggests other agendas at play, for example, immigration control and neoliberal reliance on migrants and markets as principal drivers of change.[24] In placing the burdens of development on the backs of migrants, however, the model does not sufficiently attend to the negative effects of destination countries' restrictive migration policies on migrant welfare. Guestworker programmes typically impose rights restrictions on participating migrants – the lower the worker's skill level, the greater the rights restrictions as a condition of entry.[25] For migration optimists, rights tradeoffs are an inevitable – and acceptable – cost of increased access to remittance-generating jobs in foreign labour markets. Indeed, some have even cautioned that adherence to international rights standards creates

[20] Kathleen Newland, 'Migration Development, and Global Governance: From Crisis toward Consolidation', (Migration Policy Institute, Policy Briefs, June 2019); Geiger and Pécoud, 'Migration, Development' (n 13) 370.

[21] Preibisch, Dodd and Yu, 'Pursuing the Capabilities Approach' (n 12) 2115–2116.

[22] Rosser, 'Immigrant Remittances' (n 16) 22; Preibisch, Dodd and Yu, 'Pursuing the Capabilities Approach' (n 12) 2116; de Haas, 'Pendulum' (n 19) 16–18; Hein de Haas, 'Migration and Development: A Theoretical Perspective' (2010) 44 International Migration Review 227, 236.

[23] Geiger and Pécoud, 'Migration, Development' (n 13) 371; de Haas, 'Pendulum' (n 19) 8, 10.

[24] Alan Gamlen, 'The New Migration-and-Development Pessimism' (2014) 38 Progress in Human Geography 581, 587–591.

[25] Martin Ruhs and Philip Martin, 'Numbers vs. Rights: Trade-Offs and Guest Worker Programs' (2008) 42 International Migration Review 249, 251; Martin Ruhs, *The Price of Rights: Regulating International Labor Migration* (Princeton University Press 2013).

problematic barriers to labour mobility[26] – for example, they argue that prohibiting recruitment fees ignores migrants' willingness to pay and that governments cannot regulate in an area where they can 'exert little control'.[27]

IOM's past work on labour migration evinces its embrace of migration optimism – not only in its aspirations for developmental economic gains but also in its acceptance of rights tradeoffs in exchange for access to foreign labour markets. Operating labour migration programmes in seventy countries,[28] IOM has actively created labour migration corridors, facilitated governments' efforts to create temporary labour programmes, and even taken on the role of recruiter itself. Its choice of projects has been characterized as a 'deliberate neoliberal calculation as to which areas and which populations are advantageous or not advantageous in appealing to global markets'.[29] IOM-Manila, for example, capitalized on the idea of the Philippines as a 'model' labour export regime, crafting predeparture training sessions to create 'ideal' migrant workers, who would be 'pro-active and self-responsible' for their own successful integration into Canadian markets.[30] In addition to ensuring the ongoing viability of the Philippines government's objectives for economic development, IOM-Manila's success in promoting this labour stream positioned it to assist other countries (e.g. Indonesia) to develop labour markets for their nationals.[31]

Whereas IOM Philippines' activities built on the country's longstanding practice of sending its nationals to Canada, IOM's work in Guatemala proactively introduced a market logic to Guatemala's migration industry.[32] In

[26] 'Labor Mobility Partnerships (LaMP): Helping Connect International Labor Markets' (Center for Global Development), <www.cgdev.org/page/labor-mobility-partnerships-lamp-helping-connect-international-labor-markets> accessed 29 March 2022 (criticizing the promotion of international standards as 'hav[ing] little to do with local circumstances and needs' and 'leav[ing] many countries with critical unanswered demand for support in an era when labor mobility is increasing and desperately needed').

[27] Rebekah Smith and Richard Johnson, 'Introducing an Outcomes-Based Migrant Welfare Fund' (Labor Mobility Partnerships, 16 Jan 2020), <https://lampforum.org/2020/01/16/introducing-an-outcomes-based-migrant-welfare-fund/> accessed 29 March 2022.

[28] 'Labour Migration' (International Organization for Migration) <www.iom.int/labour-migration> accessed 29 March 2022.

[29] 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, 34.

[30] Gardiner and Bryan (n 3) 1728.

[31] Ibid 1734–1736.

[32] Ibid 1730.

response to Canadian interest in finding a new labour source, in 2003, the Guatemalan embassy proposed creating a temporary worker programme that would bring Guatemalan workers to Quebec for agricultural work – tasking IOM-Guatemala with creating and implementing the programme.[33] IOM was to serve as labour recruiter in order to avoid reliance on private labour recruiters[34] and also to help build the Guatemalan government's capacity to independently manage the programme in the future.[35] Although the programme was ultimately a quantitative success – growing from 215 to 5400 Guatemalan workers between 2003 and 2013 – it drew a great deal of criticism for its mistreatment of the workers.[36] The workers' contracts, which were drafted by IOM-Guatemala, were heavily weighted in favour of the employer, with scant language concerning worker's rights and entitlements under the contract. The contracts placed responsibility for all worker protection on the Guatemalan Consulate in Canada, despite the protection of labour rights being within the purview of Canadian federal and local government agencies and trade unions.[37] The workers ended up experiencing verbal abuse and humiliation, ethnic and class discrimination, harassment for bribes, and a 'naming system' that enabled the blacklisting of workers by growers and thus chilled workers' complaints regarding abusive working conditions.[38] Rather than exercise its authority to oversee worker protections, however, the Guatemalan Consulate focused on disciplining workers – for example, returning workers who complained about abuse back to Guatemala, warning workers that unions were deceptive and best avoided, and instructing workers to permit their employers to hold their passports and identification documents.[39] The Guatemala-Quebec programme ended

[33] Dupeyron (n 3) 248; Gabriel and Macdonald, 'After the International Organization for Migration' (n 3), 1714.

[34] Barber and Bryan (n 3) 1706; Gisele Valarezo, 'Offloading Migration Management: The Institutionalized Authority of Non-State Agencies Over the Guatemalan Temporary Agricultural Worker to Canada Project' (2015) 16 Journal of International Migration and Integration 611.

[35] Valarezo (n 34).

[36] *See also* Dupeyron (n 3) 246 (describing IOM as 'very liberal, laissez-faire and pleasant at the top of the hierarchy of the field, with employers and member states, and is conversely short-sighted, paternalistic and rude with those who are at the bottom: migrants, migrant workers and refugees'); Valarezo (n 34) (reporting that Guatemalan migrants confronted 'systemic forms of exploitation' including but not limited to denial of information regarding rights, unwarranted repatriation, blacklisting, confinement on the farm, and racial discrimination).

[37] Dupeyron (n 3) 252–254.

[38] Gabriel and Macdonald (n 3) 1715; Valarezo (n 34); Dupeyron (n 3) 247 (describing the 'extremely discriminatory' selection of workers).

[39] Dupeyron (n 3) 252–254.

in 2013, in the wake of a scandal involving the IOM-Guatemala Chief of Mission, who went on to establish his own private recruitment business (staffed by former IOM-Guatemala employees) that later absorbed IOM's prior market share of the recruitment business.[40] Hence, the end result of the programme was to enable origin and destination countries to maximize the economic benefits of the new labour stream, while minimizing their responsibility for the migrant workers' well-being and rights and strengthening, instead of lessening, the privatization of migration governance.[41]

10.1.2 IOM as 'UN Migration'

Given the checkered history of IOM's labour migration projects, the decision to bring IOM into the UN fold as a 'related organization' in 2016 was thus troubling to those concerned with migrant workers' rights protection.[42] The IOM-UN Agreement enables IOM to remain independent and 'non-normative' in its operations.[43] The Agreement reiterates IOM's independent status – rather than clarifying its inclusion, it frees IOM from UN oversight mechanisms and reporting obligations typically required of actual UN agencies.[44] At the same time, IOM rebranding itself 'UN

[40] Gabriel and Macdonald (n 3) 1716; Valarezo (n 34); Dupeyron (n 3) 250.

[41] In similar vein, in IOM's work to promote Tajik labor migration to Russia and Kazakhstan, IOM was more concerned with maximizing the economic benefits of migration than with protecting the migrant workers. Pleas by Tajik employees of IOM-Tajikistan for IOM-Kazakhstan to address complaints of 'grave' exploitation of Tajik workers in Kazakhstan were met with refusal, not only by IOM-Kazakhstan, but the leadership of IOM-Tajikistan. Karolina Kluczewska, 'When IOM Encounters the Field: Localising the Migration and Development Paradigm in Tajikistan' (2019) 47 Journal of Ethnic and Migration Studies 4457. Another pilot project for which IOM functioned as labor recruiter – bringing Thai workers to Israel to work in the agricultural sector – was also plagued by reports of migrant worker abuse, including the deaths of 122 Thai workers within a five-year span. While the abuses were not directly attributed to IOM conduct, IOM's involvement in establishing this labor migration corridor did little to stave off, much less address, the abuses migrant workers experienced. 'A Raw Deal: Abuse of Thai Workers in Israel's Agricultural Sector' (*Human Rights Watch*, 21 January 2015) <www.hrw.org/report/2015/01/21/raw-deal/abuse-thai-workers-israels-agricultural-sector> accessed 29 March 2022.

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

[43] UNGA Res A/70/296, *Agreement concerning the Relationship between the United Nations and the International Organization for Migration* (25 July 2016), Art. 2(3) (emphasis added).

[44] Guild and others, 'Unfinished Business' (n 42) 36–37; Miriam Cullen, 'The Legal Relationship between the UN and IOM: What Has Changed since the 2016 Cooperation

Migration' enables it to stress to the public IOM's parity with UNHCR, a 'real UN agency'.[45] Despite the UN Secretary General's expressed hope during the GCM negotiations that IOM might one day come further into the UN fold as a UN-specialized agency,[46] IOM has remained independent of the United Nations. Traditionally, IOM has also resisted committing to a rights-based approach to its work, with IOM Director General Antonio Vitorino explaining that in the migration policy field, unlike regarding refugees, 'there is no equivalent normative [base], so everything will depend much more on international cooperation' with IOM member states and international organizations.[47] The Terms of Reference that are to guide IOM's designated role under the GCM as the lead agency for the UN Network on Migration (UNNM) require, however, that the UNNM 'prioritize the rights and wellbeing of migrants and their communities of destination, origin, and transit'.[48] This creates the expectation that IOM – now responsible for coordinating UN system-wide efforts to assist States in implementing the GCM – will adopt a rights-based approach to its work.

The notion that there is no normative base from which IOM could pursue a rights-based agenda with respect to migrant work is at odds with international treaty law and the GCM. While the International Convention on the Protection of the Rights of Migrant Workers and Members of their Families ('UN Migrant Workers Convention') and the ILO Conventions pertaining to migrant workers are poorly ratified, many of the treaties' provisions are already contained in international human rights and labour treaties that *are* widely ratified.[49] Indeed, all States have

Agreement?' in Megan Bradley, Cathryn Costello and Angela Sherwood, *IOM Unbound? Obligations and Accountability of the International Organization for Migration in an Era of Expansion* (Cambridge University Press 2023); Cf. Aust and Riemer (n 4).

[45] Geiger and Koch, 'World Organization' (n 7) 32.

[46] The UN Secretary General noted in providing input on the first draft of the GCM, strengthening the international community's work on migration issues would best be achieved if, in time, 'IOM [was] brought more fully into the United Nations system as a specialized agency, properly equipped for that role.' UNGA, *Making Migration Work for All: Report of the Secretary-General,* UN Doc A/72/643 (12 December 2017) para 73.

[47] Migration Policy Institute, 'A Conversation with António Vitorino, the Director General of the International Organization for Migration' (6 March 2019), <www.migrationpolicy.org/events/conversation-director-general-international-organization-migration> accessed 29 March 2022 (answering a question posed by audience member).

[48] UN Network on Migration, 'Terms of Reference for the United Nations Network on Migration, Mission Statement', <www.un.org/en/conf/migration/assets/pdf/UN-Network-on-Migration_TOR.pdf> accessed 29 March 2022.

[49] Ryszard Cholewinski, 'The Rights of Migrant Workers' in Ryszard Cholewinski, Euan Macdonald, Richard Perruchoud (eds), *International Migration Law* (Asser Press 2007) 255.

human rights obligations towards those within their borders, including migrants, and norms derived from other areas of law (e.g. refugee and labour) apply to migrant workers to varying degrees.[50] Moreover, as a practical matter, fulfilling States' positive obligations to prohibit and prevent trafficking and forced labour entails compliance with a wide range of protections against abusive labour recruitment practices and working conditions.[51]

Indeed, the past fifteen years have brought significant advances in norm development pertaining to migrant workers, as labour migration has increasingly claimed a place on the international agenda. The establishment of the UN High-Level Dialogues on Migration and Development in 2006 – which framed migration as a potential solution to development – enabled labour migration to be accepted as an issue of international concern as opposed to exclusively a matter of domestic law or bilateral agreement. These dialogues, held every few years, helped provide the necessary groundwork for mainstreaming migration into development policy. The dialogues coincided with a 'pendulum swing' towards migration optimism and growing faith that migration could be leveraged to reduce poverty and prompt economic development.[52] Globalization, in enabling increased mobility across borders, has yielded a rapid growth in remittances, which now account for as much as 43% of a country's gross domestic product (GDP).[53] Out-migration for labour has thus become a *de facto* development policy for some countries. The idea of migration as a *solution* to development has thus become a 'mantra' of development

[50] For in-depth discussion of the various legal regimes relevant to the situation of migrant workers, see Chantal Thomas, 'Convergences and Divergences in International Legal Norms on Migrant Labor' (2011) 32 Comparative Labor Law and Policy Journal 405.

[51] See Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319; ILO Forced Labour Convention 1930 (No. 29) (adopted 28 June 1930, entered into force 1 May 1932) C029; Protocol of 2014 to the Forced Labour Convention 1930 (adopted 11 June 2014, entered into force 9 Nov 2016) P029. For a discussion of the relationship between trafficking and broader labor exploitation, see Janie A Chuang, 'Exploitation Creep and the Unmaking of Human Trafficking Law' (2014) 108 American Journal of International Law 609.

[52] de Haas, 'Pendulum' (n 19) 19 (emphasis in original).

[53] For example, the Global Knowledge Partnership on Migration and Development (KNOMAD) reports the following amounts of remittances as a percentage of GDP for 2021: Tonga (43.9%), South Sudan (37.9%), Kyrgyz Republic (30.1%), Tajikistan (27.8%), El Salvador (26.2%), Nepal (24.8%), and Haiti (15.4%). KNOMAD, 'Remittances Data' <www.knomad.org/data/remittances> accessed 29 March 2022.

institutions and thinktanks[54] – with the 2030 Agenda for Sustainable Development (SDGs) positing a clear relationship between well-governed migration and sustainable development.[55]

Further incentivizing acceptance of labour migration as an international issue were the large-scale movements of migrants (and refugees) in 2015, which severely tested the government's capacity to control their borders and to ignore any longer the rights abuses suffered by migrants. The mass migrations prompted the international community to adopt the GCM, which signified the first attempt by the international community to develop a shared vision of safe and orderly global migration and a framework to facilitate international cooperation to that end. Building on the linkage between migration and development,[56] the GCM attempts to balance three competing interests: (1) border security; (2) access to flexible labour markets; and (3) migrant welfare. While the GCM focuses more on preventing irregular and precarious migration than on creating additional legal migration pathways, it includes a number of provisions that, if implemented, would significantly advance migrant workers' rights.

Among these is GCM Objective 6, which seeks to '[f]acilitate fair and ethical recruitment and safeguard conditions that ensure decent work'[57] – issues for which IOM has staked a claim to expertise and a leadership role. Objective 6 reflects growing awareness and attention to the endemic problem of abusive cross-border labour recruitment, which has become a preoccupation of governments, advocates, and scholars in recent years. The ILO's Fair Recruitment Initiative, launched in 2014, brought greater understanding and visibility to the problem and lay the groundwork for norm development.[58] It helped elevate the 1997 ILO Private Employment Agencies Convention, which prohibits recruitment fees from being charged to workers and reaffirms crucial workplace rights, including the

[54] Devesh Kapur, 'Remittances: The New Development Mantra?' (United Nations Conference on Trade and Development, G-24 Discussion Paper Series, No. 29, April 2004); Preibisch, Dodd and Su, 'Irreconcilable Differences' (n 12).

[55] UNGA Res 70/1, 'Transforming Our World: The 2030 Agenda for Sustainable Development' (21 October 2015) UN Doc A/RES/70/1.

[56] GCM (n 1) para 6 (noting that the GCM 'is rooted in the 2030 Agenda for Sustainable Development […] and informed by the Declaration of the High-level Dialogue on International Migration and Development').

[57] GCM (n 1) objective 6.

[58] ILO: Fair Recruitment Initiative, *General Principles and Operational Guidelines for Fair Recruitment and Definition of Recruitment Fees and Related Costs* (22 May 2019) <www.ilo.org/global/topics/labour-migration/publications/WCMS_536755/lang--en/index.htm> accessed 29 March 2022.

freedom of association and collective bargaining, and the right to non-discrimination.[59] Building on those norms, in 2016, the ILO developed a set of 'General principles and operational guidelines for fair recruitment' ('ILO Principles and Guidelines') and two years later developed a comprehensive definition of 'recruitment fees and related costs', recognizing that workers ought not to be charged directly or indirectly, in whole or in part, any fees or costs for their recruitment.[60] Offering a wide-ranging set of guidance – for governments, recruiters/employers, and workers – derived from international labour standards, the ILO Principles and Guidelines have become a touchstone for efforts to promote and ensure fair recruitment.

Building on the ILO Principles and Guidelines, through its International Recruitment Integrity System (IRIS), IOM has sought to develop its *own* set of ethical recruitment norms (known as the 'IRIS Standard'), and a plan for their dissemination and uptake by various actors. The ILO Principles and Guidelines articulate a broad set of ethical recruitment norms, articulated in terms of States' and recruiters' respective responsibilities based on international labour standards and related ILO instruments (and cited throughout). Framed as the product of a multistakeholder initiative, the IRIS Standard, in comparison, focuses on a subset of those norms (sans references to relevant international instruments), for which recruiters are to develop management systems to facilitate compliance. Through IRIS, IOM has sought to develop and claim expertise on ethical recruitment issues, operating parallel to, but distinct from, the ILO's Fair Recruitment Initiative. Indeed, while GCM Objective 6 explicitly calls upon States to consider the ILO Principles and Guidelines in developing national policies relating to international labour mobility,[61] it references IRIS (rather than the ILO) as a source of institutional expertise.

IOM/IRIS thus has a crucial role to play in helping States to achieve Objective 6, which sets forth a number of suggested measures States should adopt to address abusive recruitment and employment practices. These include, for example, prohibiting recruiters and employers from charging or shifting recruitment fees or related costs to migrant workers – a measure that recognizes how high recruitment fees can prevent migrant workers from leaving even extreme situations or exploitation. Objective 6

[59] ILO Private Employment Agencies Convention, 1997 (No. 181) (adopted 19 Jun 1997, entered into force May 10, 2000) C181.
[60] ILO, *General Principles and Operational Guidelines for Fair Recruitment* (n 58).
[61] GCM (n 1) objective 6, para l.

also calls upon States to ensure migrants have access to safe and effective complaint and redress mechanisms for workplace violations 'in a manner that does not exacerbate vulnerabilities of migrants who denounce such incidents'.[62] This measure recognizes and addresses the risk migrant workers face of being subjected to retaliatory termination or deportation, or potential blacklisting from future jobs, should they complain about abuse or mistreatment. Progress on any one of these proposed measures would significantly advance the rights of migrant workers. IRIS's work on ethical recruitment thus offers crucial insights into IOM's commitment and capacity to pursue a rights-based approach, as explored below.

10.2 Case Study: IOM/IRIS and Ethical Labour Recruitment

Through IRIS, IOM 'seeks to ensure that ethical recruitment, protection of migrant workers, transparency, due diligence and provision of remedy are prioritized throughout the recruitment and deployment process'.[63] Whereas foreign labour recruitment used to be mediated through bilateral agreements and State administration of migrant worker programmes, cross-border labour recruitment now rests largely in the hands of a powerful and unregulated private recruitment industry.[64] Recruiters are omnipresent in all migrant work sectors, providing crucial services to employers and migrants including, for example, identifying and interviewing candidates, processing visa documentation, matching candidates with employers, and assisting with travel and accommodations arrangements.[65] While most recruiters operate in ways that are beneficial for workers, governance gaps in this industry have enabled, if not encouraged, abusive practices by some, fueling the human rights violation that is forced labour in our global economy. Through IRIS, IOM seeks to transform the recruitment industry by promoting 'ethical recruitment', which it defines as 'hiring workers lawfully and in a fair and transparent manner

[62] GCM (n 1) paras 12–13.

[63] 'What We Do' (IRIS Ethical Recruitment) <https://iris.iom.int/what-we-do> accessed 29 March 2022.

[64] Philip Martin, *Merchants of Labor: Recruiters and International Labor Migration* (Oxford University Press 2017); Jennifer Gordon, 'Regulating the Human Supply Chain' (2017) 102 Iowa Law Review 445; Jennifer Gordon, 'Global Labour Recruitment in a Supply Chain Context' (2015) International Labor Organization, Fundamentals Working Papers <www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_377805.pdf> accessed 29 March 2022.

[65] Gordon, 'Regulating the Human Supply Chain' (n 64) 459.

that respects and protects their dignity and human rights'.[66] IOM offers IRIS as a necessary corrective to the exploitation and abuse migrant workers too frequently endure at the hands of their recruiters.

Migrant worker exploitation often begins at the recruitment stage, when workers are misled about the job on offer, and/or charged exorbitant recruitment fees and costs (which can amount to nine months or more of average monthly earnings in some corridors, often taken on as debt to be paid off with their labour),[67] or are misled about the job on offer. Unethical recruiters can remain profitable despite their exploitative practices due to their perpetually large client base – the supply of workers seemingly limitless (especially for low-skilled jobs) compared to the finite demand for their labour.[68] A lax or non-existent regulatory environment enables recruiters to prioritize placing workers rather than ensuring that their jobs are decent. This encourages worker turnover rather than worker retention. Indeed, recruiters may offer financial incentives to employers to entice them to replace existing workers with new workers. Recruiters can then earn fees from both the new worker and the terminated worker, the latter having to pay another recruitment fee for a new placement.[69] Such practices can plunge workers into perpetual debt bondage, unable to pay off the debts accumulated as a result of the (often exorbitant) recruitment fees, such that the work devolves into a form of trafficking and forced labour. Meanwhile, market dynamics make it all the more difficult for *ethical* recruiters – who would shift the costs of recruitment from workers to employers – to compete for space in a market with well-established unethical recruiters who can offer their services to employers at a lower cost.[70] Corruption and kickbacks further skew the market, as recruiters in origin countries are pressured to pay recruiters in the destination countries in order to win bids to supply workers.

[66] 'Who We Are: Frequently Asked Questions, "What Do We Mean by Ethical Recruitment?"' (IRIS) <https://iris.iom.int/frequently-asked-questions> accessed 29 March 2022.

[67] International Labour Organization, *A Global Comparative Study on Defining Recruitment Fees and Related Costs: Interregional Research on Law, Policy and Practice* (2020) <www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_761729.pdf> accessed 29 March 2022.

[68] Open Working Group on Labour Migration & Recruitment, 'Ethical Recruitment' (Policy Brief #5) <http://mfasia.org/recruitmentreform/wp-content/uploads/2015/03/Policy-Brief-Support-for-Ethical-Recruitment.pdf> accessed 29 March 2022.

[69] Open Working Group (n 68); Amnesty International, *Exploited for Profit, Failed by Governments: Indonesian Domestic Workers Trafficked to Hong Kong* (2013) 72–74 <www.amnesty.org/en/documents/asa17/029/2013/en/> accessed 29 March 2022.

[70] Open Working Group (n 68).

Regulating international labour recruiters poses its own set of challenges. Where foreign labour recruitment *is* regulated, recruitment practices have typically come under the purview of domestic labour laws, which may require licensing, prohibit certain activities and assign (mainly civil) penalties for non-compliance.[71] The fact that foreign labour recruitment practices span multiple jurisdictions enables easy deflection of legal responsibility, however, with blame redirected at the parties operating outside the jurisdiction. Meanwhile, most efforts to prevent and discipline recruiter abuse through registration and licensing requirements appear to have had little impact, with fines for violations typically too low to deter future violations.[72] Moreover, the political influence wielded by the highly profitable recruitment industry in the countries of origin and of destination may exacerbate the weak or deficient enforcement of recruitment regulations. Indeed, where there is a persistent lack of decent work opportunities at home, unethical recruitment practices may become the accepted norm rather than the exception.[73] In such contexts, aspiring migrant workers may view protections against recruitment abuse as impediments to securing a livelihood, and workers may even collude with recruiters to circumvent them to secure jobs abroad.[74]

Of the complex dynamics and array of actors enabling, even fueling, recruitment abuse, IOM's IRIS initiative has focused on transforming the private recruitment industry. IRIS has developed – and through a voluntary certification programme, encouraged recruiters to adopt – a set of ethical recruitment standards, known as the 'IRIS Standard'. The IRIS Standard calls upon recruiters to respect all applicable laws related to labour recruitment, the ILO 'core labour standards' (prohibiting trafficking, forced labour, and child labour, discrimination, and upholding freedom of association and collective bargaining rights),[75] and relevant norms of professional and ethical

[71] See, for example, Judy Fudge and Daniel Parrott, 'Placing Filipino Caregivers in Canadian Homes: Regulating Transnational Employment Agencies in British Columbia', in Judy Fudge and Kendra Strauss (eds), *Temporary Work, Agencies and Unfree Labour: Insecurity in the New World of Work* (Routledge 2014) 85–88.

[72] Gordon, 'Global Labour Recruitment' (n 64) 10. By contrast, the regulatory structure utilized in Manitoba, Canada – which requires both employer registration and foreign recruiter licensing – offers a rare example of effective regulation of transnational brokers. See Fudge and Parrott (n 71) 85–88.

[73] Open Working Group (n 68).

[74] Ibid.

[75] The core labor standards are set out in eight fundamental ILO conventions, and are among the most widely ratified ILO instruments. The ILO Declaration on Fundamental Principles and Rights at Work clarified that all ILO Members are bound to uphold these core labor

conduct.[76] The IRIS Standard also enumerates specific principles: prohibiting recruitment fees and related costs to migrant workers; and ensuring respect for freedom of movement, transparency of terms and conditions of employment, confidentiality and data protection, and access to remedy.[77] Developed through multistakeholder consultations, the IRIS Standard draws from a number of sources, including international human rights instruments, UN Guiding Principles on Business and Human Rights, international labour standards and related ILO instruments, the ILO's General Principles and Operational Guidelines for Fair Recruitment, as well as 'best practice from government regulators and the recruitment industry'.[78]

In hopes of inspiring industry-wide adoption of the IRIS Standard, IRIS collaborates with industry associations (e.g. the Consumer Goods Forum and the Leadership Group for Responsible Recruitment) and other IOM programmes such as IOM's Corporate Responsibility in Eliminating Slavery and Trafficking (CREST) Initiative to encourage recruiters to embrace the IRIS Standard by making the 'business case' for ethical recruitment.[79] IRIS has also developed 'capacity building' programmes for recruitment agencies, employers, suppliers, brands, governments, and civil society organizations, to introduce them to the IRIS Standard.[80] The capacity-building programming aims to enhance recruiters' capacity to meet the IRIS Standard, in hopes of encouraging and readying private recruitment agencies to participate in the IRIS Certification programme. Labour recruiters that send or receive workers from overseas can apply for IRIS certification, which if granted, offers inclusion in a public list of 'IRIS certified labour recruiters' and the right to use the IRIS-certified trademark on their websites and promotional materials. IRIS pitches this as an opportunity for recruiters to 'increase their market visibility and attract new clients and workers'.[81]

standards, regardless of whether they ratified the ILO conventions from which they are derived.

[76] IRIS, 'The IRIS Standard' (2019) <https://iris.iom.int/iris-standard> accessed 29 March 2022.

[77] Ibid.

[78] Ibid., Preamble.

[79] IRIS, 'IRIS Factsheet 1: Overview of IRIS' 2 <https://iris.iom.int/sites/iris/files/documents/Factsheet1-Overview-of-IRIS_2020.pdf> accessed 29 March 2022; 'Corporate Responsibility in Eliminating Slavery and Trafficking (CREST)' (IOM) <https://crest.iom.int> accessed 29 March 2022.

[80] 'What We Do: Capacity Building' (IRIS) <https://iris.iom.int/capacity-building> accessed 29 March 2022.

[81] 'IRIS Voluntary Certification Scheme' (IRIS) <https://iris.iom.int/iris-voluntary-certification-scheme> accessed 29 March 2022.

IRIS describes its certification model as taking a 'management system approach', requiring applicants to demonstrate that 'the way [the recruiter] manages the different, interrelated parts of it[s] business, in order to meet its objectives' meets the requirements of the IRIS Standard.[82] The audit has two phases: the first involves a desk review of the recruiter's business practices based on documentation of the company's policies, operating procedures, contracts, job advertisements, etc.; the second phase occurs on-site and involves interviews with recruiters, workers, and business partners, to verify that a management system is being followed. The auditor is ultimately the one to decide about IRIS Certification, for which there are five possible outcomes – from best to worst level of compliance with IRIS principles: leading, performing, developing, no rating, or alert. After undergoing the certification process, IRIS-certified recruiters will be subject to compliance monitoring, which involves 'lighter' 'surveillance audits' every six months for two years, after which the recruiter will undergo IRIS recertification.[83]

Rather than conducting the certification itself, IRIS outsources the certification process to a third-party 'Scheme Manager'. IOM/IRIS serves as 'Scheme Owner', responsible for developing the IRIS Standard, advocating for ethical recruitment, capacity building, and stakeholder engagement. IRIS appoints a separate 'Scheme Manager' to manage the IRIS certification process, including training and certifying the third-party auditors who conduct the actual audits of the labour recruiters. IOM has appointed as Scheme Manager the Social Accountability Accreditation Services (SAAS), 'an independently managed division' of Social Accountability International (SAI), a US-based charitable, nongovernmental organization that seeks to advance human rights at work.[84] SAI is a prominent multi-stakeholder initiative (MSI) – a collaboration among businesses, civil society organizations, and other stakeholders to advance fair and decent workplace practices through social auditing. Social auditing establishes a set of standards and an audit process by which businesses can be assessed for compliance with the relevant standards. SAI's SAAS division evaluates and accredits auditors to assure they are qualified to hold their clients accountable to social standards.[85] The actual IRIS Certification

[82] IRIS, 'IRIS Factsheet 2: IRIS Certification System 1'.
[83] IRIS, 'Voluntary Certification' (n 81).
[84] 'About SAI: Mission' (Social Accountability International) <https://sa-intl.org/about/> accessed 29 March 2022.
[85] 'Audit Assurance, Social Accountability Accreditation Services (SAAS)' (Social Accountability International) <https://sa-intl.org/services/assurance/> accessed 29 March 2022.

audits are thus conducted by third-party, SAAS-certified private audit companies, a key shortcoming of its institutional design as discussed further below.

10.3 IRIS: Challenges and Opportunities for a Rights-Based Approach

In undertaking to establish labour recruitment norms and a process for certifying compliance with ethical recruitment, IRIS is not charting new territory. But what is noteworthy – and concerning – is that these efforts carry the imprimatur of 'UN Migration', and the presumed legitimacy that comes with the affiliation with an international institution.

In appointing SAAS as 'Scheme Manager', IRIS is essentially outsourcing the running of the IRIS Certification process to the private enforcement industry. This is in some ways not surprising, as it is consistent with what critics have identified as a tendency by IOM to rely on market-based approaches to migration governance. In its past forays into labour migration management, IOM prioritized creating new migration corridors in order to reap the benefits of increased labour market access, but with insufficient attention to migrant workers' rights protections. The structure of the IRIS certification scheme maintains this prioritization, despite its stated goal of promoting ethical recruitment practices and advancing migrant workers' rights protections. Not only does the IRIS certification process leave migrant workers vulnerable to rights violations by labour recruiters and employers, but it enables States to abdicate their responsibility to protect migrant workers' rights, as discussed below.

10.3.1 The Perils of Governance by Audit

In outsourcing to SAAS, IOM in effect places recruiter certification in the hands of a private enforcement industry that has been criticized by scholars and labour advocates for being ill-equipped to identify, much less address, workers' rights violations.[86] The private enforcement industry has grown rapidly since its emergence in the 1990s when cuts to labour inspection budgets and the rise of 'corporate social responsibility' (CSR) norms led to increased reliance on social auditing of firm practices for

[86] Genevieve LeBaron, *Combatting Modern Slavery: Why Labour Governance Is Failing and What We Can Do About It* (Polity Press 2020) 120; The American Federation of Labor – Congress of Industrial Organizations (AFL-CIO), *Responsibility Outsourced: Social Audits, Workplace Certification and Twenty Years of Failure to Protect Workers Rights* (2014) 7, 37.

compliance with labour (and environmental) standards. Social auditing has since become a multibillion-dollar business, dominated by large multinational companies – with publicly traded stocks, thousands of employees, and highly paid CEOs – that fiercely compete for market share in the CSR and social auditing industry.[87]

Social auditing has drawn criticism, however, as a poor substitute for labour inspection and enforcement by government entities.[88] Accusing the private enforcement industry of 'brokering in deception', critics argue that these auditors profit off of the impression that they can rid supply chains of labour abuse despite 'mounting evidence of their ineffectiveness' at doing so.[89] Audit firms increasingly resemble the global companies they monitor and assess, with their own long supply chains and incentives to keep costs low and executive salaries and stock values high. Downward pressure can cause audit firms to reduce the amount of time spent on worksites and on auditor trainings, or to outsource the audits to subcontractors who may be inadequately trained to conduct thorough assessments of firm practices.[90] Moreover, because the audit industry is not subject to a set of professional standards, auditors who overlook or conceal problems can do so with impunity as they are rarely held accountable for the content of their reports. The fierce competition among audit firms can even incentivize pandering to the audit targets, in hopes of retaining the targets as clients for future audits.[91]

Given industry dynamics, it comes as little surprise that workers at workplaces deemed compliant with labour standards by private auditors have experienced devasting rights violations. For example, the 2012 Ali Enterprises fire, which claimed the lives of nearly 300 workers in a single garment factory fire in Pakistan, took place at a factory that had passed muster in an audit conducted by an audit firm accredited by Social Accountability International, SAAS's parent entity. As it turned out, the auditors had never set foot in the factory, having instead subcontracted the audit to a local firm

[87] LeBaron, *Combatting Modern Slavery* (n 86) 120.

[88] Genevieve LeBaron, Jane Lister and Peter Dauvergne, 'Governing Global Supply Chain Sustainability through the Ethical Audit Regime' (2017) 14 Globalizations 958; Fransen and LeBaron (n 6); Carolijn Terwindt and Amy Armstrong, 'Oversight and Accountability in the Social Auditing Industry: The Role of Social Compliance Initiatives' (2019) 158 International Labor Review 245; Genevieve LeBaron and Jane Lister, 'Benchmarking Global Supply Chains: The Power of the 'Ethical Audit' Regime,' (2015) 41 Review of International Studies 905.

[89] LeBaron, *Combatting Modern Slavery* (n 86) 149.

[90] Ibid 126.

[91] Terwindt & Armstrong, 'Oversight and Accountability' (n 88) 247.

that had certified the factory despite its lack of fire safety measures, its failure to register with the Pakistani government, and its failure to provide the majority of the workers with formal employment contracts.[92]

Even apart from the problematic dynamics of the audit industry, many aspects of the audit design can undermine the identification of problematic recruiter practices. When auditing a company with a long supply chain, for example, auditors typically assess the Tier 1 companies at the top of the chain, leaving the bottom tiers of the supply chain – where the abusive practices are most prevalent – entirely unexamined. Even when audit scrutiny extends to the bottom of the chain, companies can readily circumvent the discovery of problematic practices. On-site audits are typically announced in advance, enabling audit targets to make disgruntled workers unavailable for interviews, to engage in fraudulent bookkeeping, and to make superficial adjustments to pass inspection.[93] Uncovering problematic practices is further hampered by the fact that audit reports are typically held strictly confidential, thus shielding the audit findings from government or public scrutiny that might otherwise enable the findings to be contested or corrected. Indeed, confidentiality requirements may even prohibit auditors from reporting worker abuses to those positioned (e.g. government agencies and NGOs) to provide assistance or to advocate on the workers' behalf.[94]

While, in theory, the IRIS certification process could involve an audit design that addresses at least some of these deficiencies, it does not appear to do so. IRIS audits are announced in advance,[95] and the audit reports are the property of the labour recruiter and may only be shared with other parties with the express written permission of the labour recruiter.[96] The process does not appear to adequately safeguard against SAAS-certified auditors subcontracting the audits to other firms. While the IRIS Certification procedures include a mechanism for workers (and recruiters) to lodge complaints about labour recruiter performance, or the integrity of the audit, complainants must first pursue their complaints with the auditor; only after exhausting the auditor's complaint mechanism can the complaint be brought before the SAAS.[97] Without meaningful

[92] AFL-CIO, *Responsibility Outsourced* (n 86) 37.
[93] LeBaron, *Combatting Modern Slavery* (n 86) 133.
[94] Ibid.
[95] IRIS, *IRIS Certification Scheme Manual: General Requirements Document* (issue 2.1, 8 January 2021) sec 4 (audit process requirements).
[96] *IRIS Certification Scheme Manual* (n 95) sec 2.5.
[97] Ibid sec 6.1.

anti-retaliation measures in place, however, workers may reasonably fear being blackballed for future jobs or subjected to retaliatory termination and/or deportation if they complain – thus rendering it unlikely that workers would avail themselves of the grievance mechanism. Moreover, the IRIS certification scheme does not include any vehicle or metric for assessing SAAS's own performance as Scheme Manager. Meanwhile, IOM explains its own recusal from the IRIS Certification process as designed 'to deliver capacity building programmes without conflicts of interest' and also, out of recognition that 'certification is beyond IOM's mandate and expertise'.[98]

10.3.2 Abdicating State Responsibility to Protect Migrant Workers' Rights

The problems of the audit industry and audit design aside, IOM's approach to fostering ethical recruitment raises a host of broader concerns regarding IOM's commitment and ability to protect and enhance migrant welfare. In response to the seemingly intractable problem of recruitment abuse, IOM has adopted a neoliberal, market-based approach that focuses on reforming a highly profitable, unregulated industry through CSR measures that have proven inadequate to meaningfully protect migrant workers.[99] Not only does this approach fundamentally fail to understand the dynamics of the recruitment market, but it enables the continued abdication by States to fulfil their responsibilities to ensure decent work and protect the rights of migrant workers.

IOM's attempt to incite industry-wide change through a voluntary certification system – one IRIS-certified recruiter at a time – seems quixotic when one considers the highly competitive nature of the recruitment market. For example, so long as market norms continue to place the burden of recruitment fees on the workers instead of the employers, IRIS-certified recruiters will be hard-pressed to compete with non-certified recruiters. Cost-conscious employers are far more likely to hire recruiters who charge recruitment fees to workers than recruiters who would shift the costs to the employers. Meanwhile, recognizing that uncertified recruiters

[98] IRIS Factsheet 2 (n 82) 2.

[99] See, for example, Genevieve LeBaron, *The Global Business of Forced Labor: Report of Findings* (Sheffield Political Economy Research Institute (SPERI) 2018) (finding that 'ethical certification schemes are largely ineffective in combatting labour exploitation and forced labour in tea and cocoa supply chains').

likely have greater access to placement opportunities, workers may actually prefer the services of uncertified recruiters over 'ethical' recruiters, notwithstanding the risk of potential recruitment abuses. Ethnographic studies of migrant worker streams reveal the lengths to which migrant workers will go to secure job opportunities abroad, knowingly engaging in debt-financed migration – even at exorbitant rates and with the expectation of poor working conditions (at least temporarily).[100] Absent a regulatory environment that prevents unethical recruiters from maintaining their market advantage, the benefits of IRIS Certification – for either recruiter or worker – remain unclear.

Even the World Employment Confederation (WEC) – which represents the private employment services industry at the global level – recognizes that 'the best way to promote ethical recruitment is by creating an appropriate regulatory framework for private employment services in countries of origin and of destination'.[101] Only decent recruitment regulation and enforcement – including a prohibition on recruitment fees – can drive rogue recruiters out of the market and enable professional cross-border recruiters to develop 'a decent free-of-charge service to jobseekers'.[102] WEC thus advocates for States to adopt the ILO Convention on Private Employment Agencies (No. 181),[103] which bans the charging of recruitment fees to workers. Curiously, IOM does not cite this treaty in support of IRIS Standard, Principle 1 (prohibition of recruitment fees and related costs to migrant workers), referencing instead (non-binding) ILO instruments.[104] IRIS's focus on transforming the cross-border recruitment industry through voluntary certification without also pressing for government regulation and enforcement of ethical recruitment standards is thus a half-measure at best, doomed to failure. It enables States' abdication of the responsibility under the GCM to 'enhance[e] the abilities of labour inspectors and other authorities to better monitor recruiters'.[105] Moreover, should a State choose to adopt recruitment regulations, it remains unclear what role IRIS Certification ought to play – for example,

[100] See, for example, Antonella Ceccagno, Renzo Rastrelli and Alessandra Salvati, 'Exploitation of Chinese Immigrants in Italy' in Gao Yun (ed), *Concealed Chains: Labour Exploitation and Chinese Migrants in Europe* (International Labor Office 2010) 89, 135.

[101] 'Fair Recruitment and Migration' (World Employment Confederation (WEC)) <https://wecglobal.org/topics-global/fair-recruitment-and-migration/> accessed 29 March 2022.

[102] WEC, 'Fair Recruitment' (n 101).

[103] ILO Convention on Private Employment Agencies (n 59).

[104] IRIS, 'The IRIS Standard' (n 76).

[105] GCM (n 1) para 22f.

with recruiters potentially using their IRIS Certification as grounds for avoiding State labour scrutiny.

10.3.3 A Better Direction

Despite the apparent launch of IRIS Certification in late 2018, as of this writing, the IRIS website has yet to list any recruiters as having achieved IRIS Certification. Moreover, for a website that is otherwise frequently revised, there have been few updates on the status of the programme over the past year. This suggests the possibility that the certification programme may be stalled – perhaps due to a lack of financial or political support, or perhaps recognition that 'transformative change' via voluntary certification may be difficult to achieve. There are, however, two relatively new IRIS initiatives that could hold nascent potential – if reoriented – for advancing ethical recruitment norms: (1) IRIS's 'Global Policy Network on Recruitment' (GPN), launched in December 2020; and (2) an effort to focus on 'Migrant Worker Voice and Engagement'. As discussed above, a greater focus on States' role (and responsibilities) to ensure migrant worker protection, and on incorporating migrant workers' perspectives into IRIS programming are necessary for IRIS to meaningfully advance ethical recruitment norms and implementation.

The GPN perhaps signifies IRIS's belated recognition of the need to target States as key actors in enabling and promoting ethical recruitment practices, rather than relying primarily on voluntary certification to transform recruiter behaviour. The GPN is 'a Member State-led collaboration to bring together senior policymakers, regulators, and practitioners to address challenges, identify solutions, and highlight promising practices to strengthen recruitment regulation and migrant worker protection'.[106] The GPN emerged from a conference IRIS held in 2019, in Montreal, Canada, that brought together 100 State policymakers from over 30 countries, and produced IRIS's 'flagship resource': the Montreal Recommendations on Recruitment: A Road Map towards Better Regulation'[107] (Montreal Recommendations), which IRIS recommends States now adopt.[108]

[106] 'What We Do: Global Policy Network on Recruitment' (IRIS Ethical Recruitment) <https://iris.iom.int/global-policy-network-recruitment> accessed 29 March 2022.

[107] Katherine Jones and others, 'The Montreal Recommendations on Recruitment: A Road Map towards Better Regulation' (IOM 2020) <https://publications.iom.int/books/montreal-recommendations-recruitment-road-map-towards-better-regulation> accessed 29 March 2022.

[108] 'What We Do: Stakeholder Engagement' (IRIS Ethical Recruitment) <https://iris.iom.int/stakeholder-engagement> accessed 29 March 2022.

The Montreal Recommendations are intended to provide practical guidance to governments 'to enable more effective regulation of international recruitment and protection of migrant workers'.[109]

The Montreal Recommendations reflect, however, IOM's 'soft touch' when it comes to States' obligations to uphold the human rights and labour rights of migrant workers. The Montreal Recommendations are largely derivative of the ILO General Principles, but unlike the ILO General Principles[110] – which frames its guidance in the language of States' 'responsibilities' and cites extensive treaty law in support[111] – the Montreal Recommendations omit such references. This gives the overall impression that the contents of the Montreal Recommendations are simply the negotiated outcome of a conference, rather than rooted in international legal obligations. IOM would do better to reorient its engagement with States to emphasize States' obligations under international law. Particularly given IOM's role as lead agency under the GCM, IRIS should utilize the GPN to encourage States to implement GCM Objective 6(a): '[p]romote signature and ratification of, accession to and implementation of relevant international instruments related to international labour migration, labour rights, decent work and forced labour'.[112]

The second aspect of IRIS's work that could be redirected to advance a rights-based approach lies in its recent efforts to enhance 'migrant worker voice and engagement'. As this initiative is pitched on its website, IRIS seeks 'to empower migrant workers and the organizations that advocate on their behalf'.[113] IRIS defines 'migrant voice' broadly to include 'migrant-centred activities'. But it lists as examples only training programmes for migrants and support for civil society organizations (CSOs), suggesting a top-down approach to migrant engagement that does not offer migrants a meaningful opportunity to voice their concerns or offer policy input. Moreover, IRIS envisions CSOs being involved in 'overseeing compliance of international recruitment practices and grievance mechanisms that link CSOs in countries of origin and destination'.[114] While, as discussed above,

[109] IOM, Montreal Recommendations (n 107) 1.
[110] ILO, *General Principles and Operational Guidelines For Fair Recruitment* (n 58).
[111] See ILO, *General Principles and Operational Guidelines for Fair Recruitment – Appendix* <www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_536263.pdf> accessed 29 March 2022 (listing the treaty sources for each of the general principles and operational guidelines).
[112] GCM (n 1) objective 6(a).
[113] 'What We Do: Migrant Worker Voice and Engagement' (IRIS Ethical Recruitment) <https://iris.iom.int/migrant-worker-voice-and-engagement> accessed 29 March 2022.
[114] Ibid.

a far more robust grievance mechanism than that currently included in the IRIS Certification process is sorely needed,[115] the apparent outsourcing of both design and implementation of such a crucial mechanism to CSOs suggests IRIS's anaemic commitment (or perhaps lack of expertise) to migrant worker protection. A more concerted effort to centre migrant voices in IRIS programming would better enable IRIS to achieve its stated goal of developing 'an ethical recruitment 'safety net', promoting remedy (when needed), and enhancing holistic safe migration experience for migrants'.[116]

10.4 Conclusion

With IRIS, IOM has sought to address a complex and vexing problem that requires substantive State engagement and commitment to migrant workers' rights protections. Overall, however, IRIS's approach reflects a lacklustre commitment to migrant welfare that is consistent with the market-friendly, neoliberal underpinnings of IOM's approach to migration governance. In outsourcing crucial elements of its programming to unaccountable non-state actors, IOM falls short of its potential – and, indeed, its responsibility under the UNNM Terms of Reference and arguably under its 'due regard' human rights obligation under the 2016 Agreement – as lead global migration agency under the GCM to prioritize migrant workers' rights protections. Notwithstanding its espoused commitment to ethical recruitment, the IRIS certification process lacks a mechanism for ensuring that rights protections are meaningfully implemented. Its approach foregoes the opportunity to press governments to adopt binding treaties and pass regulations – hewing instead to IOM's tendency towards fostering dialogue and inter-state cooperation, and acceptance of non-binding standards. It also fails to appreciate the importance of creating meaningful and safe opportunities for migrant workers to engage in the certification process and to provide input into IRIS programming. Without a baseline normative commitment to migrant workers' rights protection – and labour expertise to guide States towards realizing such a commitment – IRIS offers, at best, the rhetoric, but not the reality, of ethical recruitment practices. Only by redirecting its efforts can IOM/IRIS transform cross-border labour recruitment such that it operates to 'the benefit of all' – that is, not simply States and employers, but also migrant workers.

[115] See above discussion accompanying note 97.
[116] IRIS Migrant Worker Voice (n 113).

11

The International Organization for Migration in Humanitarian Scenarios

GEOFF GILBERT

11.1 Introduction

The International Organization for Migration (IOM) is not explicitly identified in its Constitution as a humanitarian organization,[1] yet a lot of its work now takes place in situations of acute crisis alongside UNHCR, the ICRC and other traditional humanitarian actors.[2] A series of questions arise as to the framework for those activities, IOM's accountability to those with whom it works, its engagement with other actors, and the relationship it has with its member states.[3]

This chapter deals with those, so far, unanswered questions by looking at the nature of IOM and its related organization status with the United Nations. It then moves on to its major focus, the first-ever detailed analysis of the impact of IOM's 2015 Humanitarian Policy – Principles for Humanitarian Action,[4] and related internal policy documents, including the 2012 Migration Crisis Operational Framework, which provides a reference frame for IOM's response to the mobility dimensions of

[1] Megan Bradley, *The International Organization for Migration: Challenges, Commitments, Complexities*, (Routledge 2019); Megan Bradley, 'The International Organization for Migration (IOM): Gaining Power in the Forced Migration Regime' (2017) 33 Refuge 97.

[2] IOM, 'Director-General's Report to the 111th Session of the IOM Council' (20 November 2020) IOM Doc C/111/11 para 10. See also Anders Olin, Lars Florin and Björn Bengtsson, 'Study of the International Organization for Migration and its Humanitarian Assistance' (SIDA Evaluations 2008) 9.

[3] In 2011, the United Kingdom's Department for International Development produced a report on IOM that found, amongst other things, that 'IOM has a market oriented approach as a reactive project-based organization. IOM's Strategy is a statement of the range and scope of services IOM provides' (document in the possession of the author – see generally, Department for International Development, 'Multilateral Aid Review' (March 2011) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/224993/MAR-taking-forward.pdf> accessed 19 May 2022.

[4] See IOM, 'IOM's Humanitarian Policy – Principles for Humanitarian Action' (12 October 2015) IOM Doc C/106/CRP/20 (hereafter 2015 Humanitarian Policy).

crisis situations.[5] Consideration is also given to humanitarian actions in the context of mixed populations, especially given cross-border movements consequent upon natural disasters.[6] As its work in these scenarios increased, it became evident to IOM and its members that these policies and frameworks needed further development.

The chapter then looks more generally at IOM's engagement with IDPs, referring to the remit of the Guiding Principles on Internal Displacement with respect to all actors,[7] and IOM's involvement with refugees. The chapter addresses IOM's engagement with these populations in light of UNHCR's unique mandate for refugees, including returning refugees, and in the light of the Global Compact on Refugees. While not designed for responding to humanitarian scenarios, the Global Compact for Safe, Orderly and Regular Migration (GCM) also provides a framework that can be applied thereto.[8] Within the GCM, there is a reference to refugees not being a mere subset of migrants, but recognition nevertheless that they might make independent use of migratory pathways to seek their own durable solutions. The final discussion sheds light on the fact that while IOM is an actor in humanitarian scenarios, it is not a humanitarian agency per se: under its Constitution and in its relationship with its member states it has specific functions that often place it in humanitarian situations, but its mandate has not yet developed to turn it into a humanitarian agency like the ICRC or UNHCR,[9] one that

[5] IOM Council, 'Migration Crisis Operational Framework' (15 November 2012) IOM Doc MC/2355; IOM Council, 'Migration Crisis Operational Framework Resolution' (27 November 2012) Resolution 1243 IOM Doc MC/2362. See also OCHA, 'Civil-Military Guidelines & Reference for Complex Emergencies' (1 March 2008) <https://reliefweb.int/report/world/civil-military-guidelines-reference-complex-emergencies> accessed 19 May 2022; OCHA, '"Oslo Guidelines": Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief' (Rev 1.1, November 2007) <www.unocha.org/sites/unocha/files/OSLO%20Guidelines%20Rev%201.1%20-%20Nov%2007.pdf> accessed 19 May 2022; IOM Constitution (adopted 19 October 1953, entered into force on 30 November 1954; amended 20 May 1987, 55th Session of the Council (Resolution no. 724); 24 November 1998, 76th Session of the Council (Resolution No. 997); and 28 October 2020, Fourth Special Session of the Council (Resolution No.1385), in force, 28 October 2020); and IOM, 'Annual Report for 2018' (12 June 2019) IOM Doc C/110/4.

[6] UNHCR, 'Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters' (1 October 2020) <www.refworld.org/docid/5f75f2734.html> accessed 19 May 2022.

[7] ECOSOC, 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement' (11 February 1998) UN Doc E/CN.4/1998/53/Add.2.

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

[9] Any suggestion that 'international protection' in Paragraph 1 of the Statute of the Office of the United Nations High Commissioner for Refugees, UNGA Annex to Res/428(V), 'Statute of the

acts independently of states and gives primacy to the principle of humanity. Bringing together for the first time its 2016 related organization status with the UN with its own 2015 Humanitarian Policy, and providing a framework in international law to understand IOM's obligations and, to an extent, its accountability, this chapter proposes that, even if they are not explicitly in its Constitution, human rights and protection must be accorded priority with respect to all its work in humanitarian scenarios – given its related organization status with the UN and the fact that some of the people with whom it interacts may be refugees, the Constitution needs a further amendment to specifically include references to international human rights law and protection.

11.2 The Nature of IOM

Vis-à-vis the responsibility of the different organizations in international law, there is little or no distinction.[10] However, UN agencies with humanitarian mandates generally strive to act independently of member states

Office of the United Nations High Commissioner for Refugees' Res 428/V (14 December 1950) UN Doc A/RES/428(V) (hereafter 1950 Statute) was ever limited simply to international protection that the country of nationality would otherwise have offered to the refugee is refuted by the history of refugee protection before 1950 and through reading the Statute as a whole. On the pre-1950 meaning of protection from persecution, see Jane McAdam, 'Rethinking the Origins of "Persecution" in Refugee Law' (2913) 25 International Journal of Refugee Law 667, 668; throughout, contradicting the limited understanding put forward by James Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 31 Harvard International Law Journal 129, 139, 175; Antonio Fortin, 'The Meaning of "Protection" in the Refugee Definition' (2000) 12 International Journal of Refugee Law 548; Guy S Goodwin-Gill, *International Law and the Movement of Persons between States* (Clarendon Press 1978) 138–139; Guy S Goodwin-Gill 'The Dynamic of International Refugee Law' (2013) 25 International Journal of Refugee Law 651; The Editor-in-Chief and the Members of the Editorial Board, 'Refugee Law and the Protection of Refugees' (1989) 1 International Journal of Refugee Law 1. On the reading the Statute as a whole, see Paragraph 8 that sets out that 'The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by', *inter alia*, improving the situation of refugees by agreements with governments (sub-paragraph b), supervising the application of international conventions for the protection of refugees (sub-paragraph a), and facilitating the co-ordination of efforts by private organizations concerned with the welfare of refugees (sub-paragraph i), that has to be read with UNHCR's administration and distribution of funds for assistance to refugees (Paragraph 10). Equally: '9. The High Commissioner shall engage in such additional activities, including repatriation and resettlement, as the General Assembly may determine, within the limits of the resources placed at his disposal.' The General Assembly has expanded the mandate repeatedly – see Volker Türk and Elizabeth Eyster, 'Strengthening Accountability in UNHCR' (2010) 22 International Journal of Refugee Law 159.

[10] See also UNGA, 'ILC Articles on the Responsibility of International Organizations' annexed to UNGA Res 66/100 (27 February 2012) UN Doc A/RES/66/100 (ARIO) Article 2.

of the United Nations, while IOM openly claims to be closely engaged with its member states:

> IOM's structure is highly decentralized and this has enabled the Organization to acquire the capacity to deliver an ever-increasing number and diversity of projects *at the request of its Member States*.[11]

On its face, IOM's mandate is about facilitating state objectives while UNHCR's is to protect individuals, but that is too simplistic an approach – it is not enough to look at mandates, but one needs to set them in their practical context. The fact that the source of funding for both IOM and UNHCR states is the unavoidable consequence of the nature of international society: UNHCR is funded by states but it aims to act independently[12] and even earmarked funding is for the protection of individuals, not to promote programmes that states want in order to facilitate migration as those states desire it. Equally, UNHCR has to preserve the 'protection space', which requires cooperating with states where there are persons of concern to ensure access and better protection of assistance to persons of concern. The lack of a Constitutional mandate for IOM to uphold the rights of migrants is pertinent, though, here: whereas the UN Charter promotes and encourages respect for human rights and UNHCR's Statute sets out its mandate as providing international protection to refugees,[13] Article 1 of IOM's Constitution is focused in part on inter-state co-operation to facilitate migration; the lack of a reference to the protection of the human rights of migrants in the Constitution means that there could appear to be a lack of a counterbalance.[14]

As regards operations in humanitarian scenarios, though, there could be a significant difference in approach by IOM and humanitarian actors because of the humanitarian principles of humanity, impartiality, neutrality and independence:[15] the humanitarian principles apply to states

[11] See its decentralized structure, IOM, 'IOM Organizational Structure' (emphasis added) <www.iom.int/organizational-structure> accessed 19 May 2022.

[12] *Cf.* The United Nations Development Programme (UNDP), like other development actors, has a radically different approach, working through national ownership of Development Plans, rather than the policy of independence of humanitarian actors, although the distinction was never clear cut and could not be given the protracted nature of displacement primarily to low- or middle-income countries.

[13] UNHCR, '1950 Statute' (n 9) para 1.

[14] IOM Council, 'Migration Crisis Operational Framework' (n 5); 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 (2016 Agreement) Art 2.

[15] See UNGA Res 46/182, 'Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations' (19 December 1991) UN Doc A/RES/46/182, and

and international organizations operating in the humanitarian sphere and reflect human rights standards such as non-discrimination, respect for the dignity of everyone, and norms of international humanitarian law, such as neutrality. Their legal status in international law is complex and whether they are binding on international organizations, and, if so, how there could be accountability for breach, are issues touched on below, but some discussion of the basic concepts here will set the context.

By way of corollary, Riedel has argued that there is wide acceptance that Article 55(c) of the UN Charter is binding on the United Nations as an organization and that the UDHR represents the first step by UN organs to realize 'the programme enshrined in Article 55(c)'.[16]

Thus, with respect to the ICRC, the humanitarian principles are binding given that the Movement adopted them at its 20th International Conference in Vienna (1986).[17] A similar argument can be made in relation to the humanitarian agencies of the United Nations following the adoption of UNGA Resolution 46/182 (1991). The Office for the Co-ordination of Humanitarian Affairs (OCHA) stated in 2011 at the time of the twentieth anniversary of Resolution 46/182 that, through long use, it:[18]

> remains the common basis for the provision of humanitarian assistance. In the resolution, Member States set out the principles that guide

subsequent resolutions on the subject, especially UNGA Res 58/114, 'Strengthening of the Coordination of Emergency Humanitarian Assistance of the United Nations' (17 December 2003) UN Doc A/RES/58/114; set out at UN Office for Co-ordination of Humanitarian Affairs' website, OCHA, 'Humanitarian Principles' (2012) <www.unocha.org/sites/dms/Documents/OOM-humanitarianprinciples_eng_June12.pdf> accessed 19 May 2022. See also International Committee of the Red Cross (ICRC), 'Fundamental Principles of the International Red Cross and Red Crescent Movement' (1986) <www.icrc.org/en/doc/resources/documents/red-cross-crescent-movement/fundamental-principles-movement-1986-10-31.htm> accessed 19 May 2022.

[16] See Eibe H Riedel, 'Article 55(c)' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (Volume 1, 3rd edn, Oxford University Press 2012) 920, 922–923,925.

'Article 55(c) – With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

[…]

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.'

[17] ICRC, 'Fundamental Principles of the International Red Cross and Red Crescent Movement'(n 15).

[18] Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator. Opening remarks for the ECOSOC Humanitarian Affairs Segment, OCHA, 'What is General Assembly Resolution 46/182?' (2012) <www.unocha.org/sites/unocha/files/dms/Documents/120402_OOM-46182_eng.pdf> accessed 19 May 2022.

> humanitarian work, whether it is undertaken by States, the United Nations, or other humanitarian agencies such as the International Red Cross and Red Crescent Movement and non-governmental organizations.

However, does that have any bearing on their applicability to IOM? The 2016 General Assembly resolution to establish IOM as a related organization,[19] provides as follows:

> **Article 2: Principles**
> 5. 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.
>
> 6. The United Nations and the International Organization for Migration will cooperate and conduct their activities without prejudice to the rights and responsibilities of one another under their respective constituent instruments.

IOM only agrees to pay 'due regard' to UN policies that further the Purposes and Principles of the Charter, such as the humanitarian principles. Given that the text of the Resolution will have been agreed between the United Nations Office for Legal Affairs and IOM's Legal Department, it can only be assumed that IOM insisted on 'due regard' being the level of obligation, rather than a commitment to 'uphold' which would have equated IOM with UN agencies.[20] IOM and the UN co-operate without prejudice to the rights and responsibilities of each other. Thus, even after 2016 there is no straightforward applicability of the humanitarian principles for IOM. On the other hand, when read with Paragraph III.1 of the 2015 Humanitarian Policy,[21] which endorses the four humanitarian principles, then no-one can say IOM should not pay them due regard in its humanitarian operations, although the glosses IOM adds in the 2015 document may mean that it has not unequivocally internalised them.[22] Given IOM's close relationship with states in its operational activities under its Constitution, closer than that of other humanitarian actors whose mandates focus on individuals, there needs to be a delicate balancing exercise to ensure independence is maintained whilst at the same time acknowledging that states need to co-operate to provide access if protection of the displaced populations is to be effected

[19] UNGA, 2016 Agreement (n 14).
[20] See Riedel (n 16).
[21] IOM, '2015 Humanitarian Policy' (n 4).
[22] See IOM, '2015 Humanitarian Policy' (n 4). IOM is also part of the UN Migration Network that has adopted its own Terms of Reference. The Network is broad including almost 40 UN agencies with their own mandates, so the ToRs cannot be seen as conferring any mandate on IOM or any other member of the Network. Likewise, the ToRs were negotiated by the Network members for themselves, so it is not the same as the protection mandates conferred on UNHCR, the ICRC or OHCHR, for instance.

and effective. What is even more difficult, but here IOM is no different from every other international organization, is to determine how it might be held to account if it were to fail to uphold the humanitarian principles. This aspect is discussed more fully below.

The text of the 2015 Humanitarian Policy is a dry international document without any context or history, so before analysing it, it is useful to look at IOM's fieldwork that led to its adoption.

11.2.1 IOM Field Operations

IOM has a large institutional footprint, with over 590 offices and sub-offices in over 100 countries around the world.[23] In many places, it facilitates the return of migrants or carries out the resettlement of refugees to third countries.[24] In other operations, its work in-country has much to do with the protection of persons on the move, some of whom may be international migrants, but many of whom are refugees or IDPs. For example, a recent IOM report details its involvement in assistance and repatriation from Libya, especially for vulnerable persons, but it does not mention once that some of them might be refugees; that said, it does refer to upholding human rights.[25] In contrast to its earlier practice of sometimes referring to the Rohingya in Bangladesh as 'undocumented Myanmar nationals', recent reports on IOM's work in Bangladesh are much more oriented towards recognizing the need for humanitarian protection and that the Rohingya in Cox's Bazar are refugees.[26] As stated, IOM is very decentralized,[27] which can mean that protection and human rights are more to the fore in some operations than in others.

[23] See IOM, 'Where We Work' <www.iom.int/where-we-work> accessed 19 May 2022.

[24] For example, with respect to returning migrants, its work in Niger in 2020–2021 included assisting Nigeriens to re-establish themselves despite a deteriorating security situation and COVID-19 restrictions – see IOM, 'IOM Niger Hits Milestone of Supporting the Reintegration of 1,000 Nigerien Migrants' (*IOM News-Local*, 20 April 2021) <https://niger.iom.int/news/iom-niger-hits-milestone-supporting-reintegration-1000-nigerien-migrants> accessed 19 May 2022; in Lebanon in 2014, IOM assisted 'with all travel arrangements and airport exit procedures for refugees resettling to the [USA], Canada, Australia and Scandinavian countries including family reunification, in addition to the voluntary return of country nationals', IOM, 'Lebanon' <www.iom.int/countries/lebanon> accessed 19 May 2022.

[25] IOM, 'Libya' <www.iom.int/countries/libya> accessed 19 May 2022.

[26] IOM, 'Bangladesh' <https://bangladesh.iom.int> accessed 19 May 2022; IOM, 'IOM to Provide Humanitarian Assistance to Undocumented Myanmar Nationals in Bangladesh' (*IOM News-Global*, 8 January 2015) <www.iom.int/news/iom-provide-humanitarian-assistance-undocumented-myanmar-nationals-bangladesh> accessed 19 May 2022.

[27] IOM, 'IOM Organizational Structure' (n 11).

11.2.2 IOM and Its 'Related Organization' Status with the United Nations

IOM's entry into related organization status with the United Nations in 2016 has consequences for understanding its role in humanitarian scenarios.[28] Related organization status does not mean IOM is legally part of the United Nations itself,[29] and, furthermore, IOM had already worked with the UN for decades before the 2016 Agreement.[30] The related organization status, though, does affect how one must assess IOM's activities in humanitarian scenarios. According to Article 2.5 of the 2016 Agreement, set out above, IOM '*undertakes to conduct its activities in accordance with the Purposes and Principles of the Charter of the United Nations*' (emphasis added).[31] As such, Articles 1 and 2 of the UN Charter are now expressly endorsed as part of IOM's operational practice.[32] Human rights should now be an explicit part of all the agency's operations in order that it acts in accordance with Article 1.3 of the Charter, which also reflects customary international law binding on international organizations that provide services to and interact with individuals.[33] However, there is no reference

[28] UNGA, 2016 Agreement (n 14). For a legal discussion of IOM as a related organization in the UN system, 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). For a discussion of the political dimensions of the IOM-UN relationship, and the role of cooperation in the humanitarian sector in bringing IOM into the UN system in 2016, see Megan Bradley, 'Joining the UN Family? Explaining the Evolution of IOM-UN Relations' (2021) 27 Global Governance 251; Vincent Chetail, *International Migration Law* (Oxford University Press 2019).

[29] UNGA, 2016 Agreement (n 14) Article 2.3.

[30] See UNGA Res 47/4, 'Observer status for the International Organization for Migration in the General Assembly' (16 October 1992) UN Doc A/RES/47/4; UNGA Res 51/148, 'Cooperation between the United Nations and the International Organization for Migration' (4 February 1997) UN Doc A/RES/51/148. IOM-UN cooperation has often focused on facilitating refugee resettlement to third countries, Cullen (n 28).

[31] UNGA, 2016 Agreement (n 14).

[32] Above (n 5) The Preamble to the Constitution recognises: 'that there is a need to promote the cooperation of States and international organizations, governmental and non-governmental, for research and consultation on migration issues, not only in regard to the migration process but also the specific situation and needs of the migrant as an individual human being'. This paragraph still does not incorporate human rights standards into IOM's Constitution, but it provides an opening through which to attach general protection duties onto IOM's day-to-day practice.

[33] Kristina Daugirdas, 'How and Why International Law Binds International Organizations', (2016) 57 (2) Harvard International Law Journal 325.

to human rights or even 'protection' in the IOM Constitution.[34] The 1991 UNGA resolution on the Humanitarian Principles, which expressly mentions IOM as a standing invitee to the United Nations Inter-Agency Standing Committee,[35] should also be seen as integral to all IOM humanitarian operations as a relevant UN instrument in 'the international migration, refugee and human rights fields'.[36]

IOM's project-based financing model can implicitly privilege state interests over those of individual migrants.[37] The explicit 'protection' *lacuna* in IOM's constituting document *vis-à-vis* its expanding role in humanitarian situations is even more problematic given that it has the lead for the IASC's Cluster on Camp Co-ordination and Camp Management (CCCM) in relation to 'assistance, *protection*, and services' in natural disaster internal displacement situations.[38] By comparison, UNHCR's 1950 Statute establishes that its mandate is to provide international protection to refugees.[39] In parallel with its protection mandate, it assists governments to create durable and sustainable solutions through voluntary repatriation, local integration or resettlement; UNHCR's protection is no longer required when a state provides a solution, dismissing thereby any notion of a protection-solutions dichotomy.[40] IOM

[34] Protection is a broadly understood concept – see generally, ICRC, 'International Humanitarian Law and Protection' (Report of the Workshop November 1996); ICRC, 'Protection: Towards Professional Standards' (Report of the Workshop March 1998); ICRC 'Workshop on Protection for Human Rights and Humanitarian Organizations: Doing Something About It and Doing It Well' (Report of the Workshop January 1999); 'The Challenges of Complementarity' (Report of the Workshop February 2000). A summary was produced, Sylvie Giossi Caverzasio (ed), 'Strengthening Protection in War: a Search for Professional Standards' (ICRC May 2001) <www.icrc.org/en/publication/0783-strengthening-protection-war-search-professional-standards> accessed 19 May 2022; IOM's understanding, that is broader and includes elements of assistance, can be found in IOM, '2015 Humanitarian Policy' (n 4). See also 'The Protection of Refugees in Armed Conflict' (2001) 83 (843) International Review of the Red Cross 569, and Global Protection Cluster, 'The Centrality of Protection in Humanitarian Action Review 2019' (2019) <www.globalprotectioncluster.org/wp-content/uploads/GPC-Centrality-of-Protection-Review-2019.pdf> accessed 19 May 202.

[35] UNGA Res 46/182, 'Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations' (n 15) para 38.

[36] Article 2.5 2016 Agreement, above note 19.

[37] Sida Report 2008 (n 2) 23, 45.

[38] Camp Coordination and Camp Management (CCCM) (emphasis added) <https://cccmcluster.org/about> accessed 19 May 2022.

[39] UNHCR, '1950 Statute' (n 9).

[40] See Geoff Gilbert and Anna Magdalena Rüsch, 'Rule of Law and UN Interoperability' (2018) 30 International Journal of Refugee Law 31, 54–56.

has no such protection mandate for migrants, whom the organization defines very broadly,[41] and that is potentially problematic if it is working in humanitarian scenarios. While assistance to displaced populations is central to their survival, all humanitarian actors must first and foremost 'protect' those displaced populations, that is, they must, at minimum, act independently of political, military or economic objectives, uphold their own neutrality and carry out their work impartially and with humanity, not facilitate states' political objectives.[42] The commitment to promote and encourage respect for human rights, in line with the customary character of the purposes and principles of the UN Charter, also infuses a protection mandate.

On the other hand, since the conclusion of the GCM in 2018, IOM's mandate needs also to be considered in the light of the Compact's implications with respect to both human rights and protection.[43] As stated, the GCM is not designed to respond to persons caught up in humanitarian crises. That said, there are frequent references in the GCM to human rights and to protection. As regards protection, the GCM sets out in Paragraph 4 of its Preamble that while refugees and migrants benefit from international human rights law and that those rights must be respected, protected and fulfilled, only refugees 'are entitled to the specific international protection defined by international refugee law'.[44] In several places, the GCM refers to respecting, protecting and fulfilling human rights,[45] but there are also occasions where protection takes on a broader understanding relevant to humanitarian scenarios and which helps to shape the application of the 2015 Humanitarian Policy. For example, GCM Objective 7(j),

[41] IOM Constitution (n 5) Article 1, which provides no definition of migrants, but is comprehensive in its reach; IOM, 'About Migration' <www.iom.int/about-migration> accessed 19 May 2022. See also Jane McAdam and Tamara Wood, 'The Concept of "International Protection" in the Global Compacts on Refugees and Migration' (2021) 23 Interventions 191.

[42] The ICRC has been accused of helping Russia move Ukrainian civilians to Russia during the 2022 conflict – see Imogen Foulkes, 'Why the Red Cross has to be neutral in the Ukraine conflict' (*BBC News*, 29 March 2022) <www.bbc.com/news/world-europe-60921567> accessed 19 May 2022.

[43] GCM (n 8); McAdam and Wood (n 41). At the 2016 New York Summit, States mandated IOM to support the negotiation of the GCM. IOM has subsequently taken on a leading role in facilitating its implementation.

[44] GCM (n 8).

[45] For example, GCM (n 8) Objective 2, paragraph (h) refers to respecting, protecting and fulfilling human rights in the context of 'natural disasters, the adverse effects of climate change, and environmental degradation' – yet there is no clear and obvious distinction to be made between protecting human rights and humanitarian protection.

dealing with vulnerabilities in migration, provides that member states of the United Nations shall:

> (j) Apply specific support measures to ensure that migrants caught up in situations of crisis in countries of transit and destination have access to consular protection and humanitarian assistance, including by facilitating cross-border and broader international cooperation, as well as by taking migrant populations into account in crisis preparedness, emergency response and post-crisis action;

Unlike refugees, however, there is no international organization with a formal mandate to provide international protection where that consular protection is unavailable to non-refugee migrants.[46] The GCM also discusses the protection of trafficked persons, something that increasingly pertains in humanitarian crises.[47] In interpreting the 2015 Humanitarian Policy, though, it is Objective 2 on minimizing the 'the adverse drivers and structural factors that compel people to leave their country of origin' that is the most pertinent.[48]

Taken together, the 2016 Agreement and the 2018 GCM should have the effect of expanding IOM's mandate beyond its very limited Constitution, and the 2015 Principles for Humanitarian Action should be read in the light of these dynamic developments. The member states of IOM sit in the United Nations General Assembly and endorsed the 2016 Agreement, the New York Declaration and, subsequently, the GCM.[49] Nevertheless, that does not necessarily mean that when sitting in the IOM Council,[50] its member states prioritize those United Nations documents over 'opportunities for orderly migration' set out in its own Constitution.[51] Furthermore, the

[46] Regarding international protection in international law, the 1950 Statute has to be read as a whole and UNHCR's mandate to provide international protection to refugees (paragraph 1) cannot be confined to the simple international law definition that applies to states *vis-à-vis* their citizens but must also include aspects of 'protection' as set out in paragraph 8, which clearly overlaps with its work as a humanitarian agency.

[47] IOM, 'Libya' (n 25).

[48] See GCM (n 8) Objective 2(g). 'Account for migrants in national emergency preparedness and response, including by taking into consideration relevant recommendations from State-led consultative processes, such as the Guidelines to Protect Migrants in Countries Experiencing Conflict or Natural Disaster (Migrants in Countries in Crisis Initiative Guidelines)'.

[49] UNGA Res 71/1, 'New York Declaration for Refugees and Migrants' (19 September 2016) UN Doc A/RES/71/1 (New York Declaration); UNGA, 2016 Agreement (n 14); GCM (n 8).

[50] IOM Constitution (n 5) Art 7.

[51] IOM Constitution (n 5) Art 1.1(a). On the law of international organizations, see Jan Klabbers, *An Introduction to International Organizations Law* (Cambridge University Press 2015). By comparison, UNHCR as a subsidiary organ of the General Assembly

decentralized character of IOM also means that headquarters agreements are not unswervingly implemented at national level. The consequence is that since 2016 and even 2018, there have been situations where the human rights of migrants, some of whom at least were also refugees, were not upheld by IOM.[52] IOM, like any other international organization that deals directly with individuals, has always been bound under customary international law by international human rights norms.[53] The 2016 Agreement and the GCM re-enforce such obligations and its Constitution should be imbued with them shaping all Council decisions.

11.2.3 National Prioritization and the Development Actors

A criticism levelled at IOM in this field of operations is that it often works more openly and more closely with states than traditional humanitarian actors, such as the ICRC, calling into question its independence and impartiality in relation to both the humanitarian principles and the international law of armed conflict, where pertinent.[54] However, the development actors within the United Nations also operate on the basis of national ownership and leadership. UNDP works with states to develop National Development Plans over which states have ownership. The World Bank's work with states, even the poorest that host so many displaced persons, is based on loans and grants to support the state's development under national leadership.[55] Furthermore, partly in recognition that most situations of forced displacement are protracted

established under Article 22 of the UN Charter automatically incorporated the Global Compact on Refugees, paragraphs 3 and 31–48, especially 33 and 35, UNGA Res. 73/151, 'Office of the United Nations High Commissioner for Refugees' (17 December 2018) UN Doc A/RES/73/151 (GCR).

[52] IOM, 'Bangladesh' (n 26), Libya (note 25); IOM, 'Return of Undocumented Afghans – Weekly Situation Report (13–19 Aug 2021)' <https://reliefweb.int/report/afghanistan/return-undocumented-afghans-weekly-situation-report-13-19-aug-2021-enpsdari> accessed 19 May 2022.

[53] See Daugirdas (n 33).

[54] See text at (n 15) to (n 21) above. As for the international law of armed conflict, that is binding on parties to the conflict, but those parties shall allow the delivery of *humanitarian* aid in an *impartial* manner – Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts 1977 (Protocol I) 1125 UNTS 3 Article 70 ('AP 1'); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts 1977 (Protocol II), 1125 UNTS 609 Article 18(2).

[55] See the work of the International Development Association in states affected by fragility, conflict and violence (FCV), see International Development Association (IDA),

and that to deem them 'humanitarian crises' throughout their duration was hardly commensurate with reality, the Global Compact on Refugees calls on the international community as a whole, including development actors, to work together to resolve situations of displacement; this is also a major theme in the 2021 report of the UN High-Level Panel on Internal Displacement.[56]

Thus, while humanitarian agencies traditionally acted independently of the states where they operated, the humanitarian-development dichotomy was always false,[57] so IOM's perceived greater deference to its member states and its closer engagement with states is not necessarily as distinctive as might have first been thought. That said, while all international organizations need the state's permission to operate within its borders,[58] IOM's Constitution defers more to its member states and the states in which IOM operates than the 1950 UNHCR Statute, for example.[59]

With this general context set out, it is possible to review IOM's 2015 Humanitarian Policy, the associated organizational documents, and other international instruments that are pertinent to IOM's role in humanitarian operations.

11.3 IOM's 2015 Humanitarian Policy on Principles for Humanitarian Action and Related Documents[60]

IOM's 2015 Humanitarian Policy does not stand on its own but has to be read along with its Migration Crisis Operational Framework and its 1953 Constitution, as amended 2020.[61] In addition, there are several general UN documents that apply to all humanitarian actors and which, especially after the adoption of the UN-related organization agreement of 2016,

'IDA18 Replenishment' <https://ida.worldbank.org/en/replenishments/ida18-replenishment> accessed 19 May 2022; IDA, 'IDA20 Final Replenishment Report' <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/163861645554924417/ida20-building-back-better-from-the-crisis-toward-a-green-resilient-and-inclusive-future> accessed 19 May 2022.

[56] GCR (n 51); McAdam and Wood (n 41).

[57] Gilbert and Rüsch (n 40) 5; IOM, '2015 Humanitarian Policy' (n 4) Principle VI.4.

[58] For the purpose of this chapter, the possibility of the United Nations Security Council authorising humanitarian actors to operate under a Responsibility to Protect mandate will not be explored – '2005 World Summit Outcome', UNGA Res. 60/1, paragraphs 138–140 (16 September 2005), and Report of the Secretary-General, 'Implementing the Responsibility to Protect', UN doc A/63/677 (12 January 2009) paras 28–48.

[59] IOM Constitution (n 5) especially Article I.3.

[60] IOM, '2015 Humanitarian Policy' (n 4); see (n 5) (n 38); cf text at (n 74) below.

[61] IOM Council, 'Migration Crisis Operational Framework' (n 5); IOM Constitution (n 5).

should apply to IOM, too, although it has added its own glosses.[62] In addition, customary international law can apply to international organizations in certain circumstances.[63] Given that IOM's own instruments were promulgated over a period of time as humanitarian action was developing in the field,[64] it is inevitable that there will be no simple and perfect confluence of policy and operational approach. Therefore, while this section is focused on the 2015 Humanitarian Policy document, if one is to assess it against IOM's long history of practice in humanitarian situations, one must have regard to all these additional and related documents.

The 2015 Humanitarian Policy references international humanitarian, human rights and refugee law, the 2012 Migration Crisis Operational Framework (MCOF),[65] the IASC's Civil-Military Guidelines & Reference for Complex Emergencies, 2008,[66] and the OCHA Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief, the 'Oslo Guidelines'.[67] These provide a firm basis in which to locate the 2015 Principles for Humanitarian Action. As will be seen, much of the 2015 document does reflect the approach of other humanitarian actors, particularly supporting states as the primary duty bearers (Principle IV.2). What needs to be addressed in particular are those occasions where IOM is dealing with more than one scenario within a single document and the different policies it might be applying in parallel for the benefit of migrants (Principle III.7).

According to Principle I.4 of the 2015 Humanitarian Policy, IOM's role as a humanitarian institution with respect to movement by people during a crisis is 'ultimately to save lives, alleviate human suffering and protect the human dignity of the persons affected'.[68] While this is commendable,

[62] See documents cited above in (n 15) and (n 5); GCM (n 8).

[63] Daugirdas (n 33); ECOSOC, 'Report of the Representative of the Secretary-General' (n 7) paragraph 3 of the Introduction and Scope to the Guiding Principles.

[64] Most significantly in the last 15 to 20 years. For the history of the 2015 Humanitarian Policy, see IOM, '2015 Humanitarian Policy' (n 4) paragraphs 1–3, which reveal its organic development and acceptance by IOM's Council. The policy was approved by the Director General and members of the Policy Coordinating Committee in April 2015. It is also a consequence of donor review and pressure to adopt a stronger protection stance given its increasing role in the humanitarian sphere – see also SIDA Report (n 2) and DfID's reports (n 3).

[65] IOM Council, 'Migration Crisis Operational Framework' (n 5).

[66] IASC, 'Civil-Military Guidelines' (7 March 2008) <https://interagencystandingcommittee.org/other/documents-public/civil-military-guidelines-and-references-complex-emergencies> accessed 19 May 2022.

[67] OCHA, 'Oslo Guidelines' (n 5).

[68] IOM, '2015 Humanitarian Policy' (n 4).

the lack of any direct reference in this Principle to international human rights law, rule of law and the humanitarian principles as underpinning this role as a humanitarian institution is indicative of an international organization that has no legal protection mandate. Principle II highlights this even more. There is a clear overlap in part with the work of UNHCR,[69] but the 2015 Humanitarian Policy focuses first and foremost on movement, not protection, indicating:

> II.1 IOM, as the leading intergovernmental organization dedicated to migration, is guided by the *migration mandate* conferred on it by the IOM Constitution, the Migration Governance Framework and other formal IOM documents.

On the other hand, the rest of Principle II, as will be discussed, is protection focused,[70] drawing on the MCOF,[71] despite protection not being part of the Constitution. Principle II of the 2015 Humanitarian Policy, taken as a whole, therefore, needs to be understood as the foundation for IOM's humanitarian activities, and through which other protection frameworks, whether internal to IOM or courtesy of external commitments and obligations, can be incorporated.[72] This is particularly the case with the humanitarian principles of humanity, impartiality, neutrality, and independence,[73] which are replicated in Principle III, but with a gloss that undercuts them; the gloss IOM puts on the terms in Principle III is generally helpful, but some points do require further analysis, especially in relation to impartiality and independence – Principle III.1(b) and (d). As regards impartiality, IOM explains that '[while] it recognises the importance of balancing the needs and interests of different *stakeholders*, it strives to be strictly non-partisan in its humanitarian action', prioritizing

[69] IOM, '2015 Humanitarian Policy' (n 4) principle II.2 refers to Article 1.1(b) of the IOM Constitution (n 5) that includes the migration needs of 'refugees [and] displaced persons'. In principle II.4, IOM notes that it works as part of the humanitarian response system: 'The humanitarian response system includes any mechanism at the local, national, regional or international level aimed at coordinating the response of humanitarian actors. For instance, in addition to the cluster approach, *IOM also contributes to the refugee response organized by the Office of the United Nations High Commissioner for Refugees*' (emphasis added)

[70] See above (n 34)–(n 46) and associated text.

[71] IOM Council, 'Migration Crisis Operational Framework' (n 5).

[72] IOM, '2015 Humanitarian Policy' (n 4). According to Principle II.3(a), IOM's humanitarian activities include, 'camp management and displacement tracking, shelter and non-food items, transport assistant, health support, psychosocial support, counter-trafficking and protection of vulnerable migrants, and humanitarian communication'.

[73] See above (n 15).

the most vulnerable (emphasis added). The term 'stakeholders' is only used twice in the entire document, the other reference being with respect to humanitarian partnerships (Principle V.2). In that context, other stakeholders are described in Principle V.4:

> IOM works to strengthen and build on existing and new partnerships at local, national, regional and global level with States, international and non-governmental organizations, civil society, the persons affected and other relevant actors in all fields relevant to migration crisis response, including humanitarian action, migration, recovery, peace and security, and development.

That states are included as partners and, hence, stakeholders, raises unanswered questions about 'impartiality' in Principle III.1(b). For certain, all humanitarian actors must cooperate with the state where the displaced population now finds itself. However, the language of this sub-paragraph suggests that IOM only *strives* to be 'strictly impartial in its humanitarian action'.[74] For humanitarian action to be effective, it *must* be available to all those affected by humanitarian crises, an approach that also facilitates continued access without hindrance by any actors, particularly in the context of armed conflict. Many humanitarian actors also have a presence in states outside of crises, where they work more closely with national authorities in order to build capacity and reduce the likelihood of future emergencies, but their crisis mode is independent, as discussed below, and it is in this context that impartiality is particularly important. It is a fact that in its Principles of Humanitarian Action, IOM explicitly refers to working with states that questions its impartiality and, as will be seen, independence.

In relation to independence, Principle III.1.d itself is completely aligned with what is expected of humanitarian actors, in that it 'must remain independent of the political, financial or other objectives that any others may have in areas where humanitarian action is being implemented'. On the other hand, most of IOM's funding is project-based.[75] As such, the influence of donors and remaining 'independent of the political, financial or other objectives that any others may have' could prove difficult in practice.[76] This is not to question IOM's objectives or intentions, but to recognize that implementation in the field is always more complex and complicated. Since a lot of funding for humanitarian actors by donor

[74] IOM, '2015 Humanitarian Policy' (n 4).
[75] See Bradley, *The International Organization for Migration: Challenges, Commitments, Complexities* (n 1) 99.
[76] IOM, '2015 Humanitarian Policy' (n 4) principle III.1.d.

governments is earmarked, IOM is not that different, but that is why, in part, humanitarian agencies call for increased unearmarked funding. This issue is a challenge for all humanitarian actors.

According to sub-paragraph 7 of Principle II, IOM endorses states' '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'.[77] Therefore, by definition, IOM's role arises where there is displacement in a humanitarian crisis or where persons are caught up in a humanitarian crisis during their migration and where the transit state or state of destination is unable or unwilling, either wholly or in part, to provide that protection, unless a different international actor has that mandate, such as UNHCR *vis-à-vis* refugees, conflict-driven IDPs and stateless persons.[78] Likewise, if there is an armed conflict, the ICRC has a protection mandate in relation to all civilians, non-combatants or non-fighters caught up therein as it upholds the international law of armed conflict.[79] While the combination of the 2015 Humanitarian Policy and the MCOF lay down for IOM a framework for engagement in humanitarian crises, it should be noted that the MCOF is not limited to humanitarian activities and the 2015 document occasionally seeks to differentiate the nature of its work, even when dealing with people whose migration might have started during a humanitarian context. For example, Principle II.6 indicates:

> These Principles guide IOM's overall response to migration crises when the Organization is also engaged in non-humanitarian activities under the Migration Crisis Operational Framework (Principle II.3). This is particularly relevant when IOM is involved in the progressive resolution of displacement situations […]

Unlike UNHCR's ongoing protection mandate, Principle II.6 indicates that IOM's Humanitarian Policy is only a guide to activities outside

[77] IOM, '2015 Humanitarian Policy' (n 4) principle II.7.

[78] IOM, '2015 Humanitarian Policy' (n 4) Principle II.4 and .5:

'4. … IOM is a standing invitee on the Inter-Agency Standing Committee (IASC), which coordinates the international humanitarian response system through the cluster approach.

5. In addition to coordinating its action through the existing humanitarian response system, IOM responds to the migration dimensions of a crisis by taking action within other international, regional and national systems addressing peace and security, migration governance and development issues.' (footnotes omitted).

[79] See ICRC, 'Statutes of the International Committee of the Red Cross' (2018) Art 4 <www.icrc.org/en/document/statutes-international-committee-red-cross-0> accessed 19 May 2022.

humanitarian crises, although the policy applies to all activities in countries facing a humanitarian crisis, even if it is not directly related thereto.[80] It would be better if the 2015 Humanitarian Policy were explicitly referenced as a foundational institutional commitment within a revised version of IOM's constitutional framework and applicable in all humanitarian crisis settings for the benefit of all migrants.

Humanitarian Protection and Partnerships, Principles IV and V, need to be read in conjunction. As regards humanitarian protection, IOM adheres to the IASC definition,[81] and as such IOM supports states, as the primary duty-bearers under international law, in meeting their commitments to 'migrants, displaced persons and affected communities' (Principle IV.3). What is really helpful about IOM's approach to humanitarian protection is its focus on the drivers of vulnerability set out in Principle IV.4.

> These vulnerabilities and protection risks are the result of the interplay of four principal factors:
>
> IV.4.a individual characteristics (such as age, sex, gender identity, physical condition, ethnic or religious affiliation);
>
> IV.4.b pre-crisis social, economic, environmental and political features of the local context (e.g. patterns of marginalization and exploitation, of access to power and resources);
>
> IV.4.c external disruptive factors induced by, or resulting from, forced migration (such as lack of access to resources and services, family separation, disruption of traditional livelihoods, etc.); and
>
> IV.4.d the specific environments in which the persons concerned are located as a result of migration and displacement (camp, transitional shelters, detention centres, borders, etc.).

By spelling out all these interlinked factors, it provides the humanitarian actors with guidance and direction as to the gaps and failings in the protection regime and the focus for advocacy so as to address and remedy them. Ensuring states and other duty-bearers, including where appropriate IOM and other humanitarian agencies, respect, *protect* and fulfil the rights of displaced persons and ensure non-discrimination is an aspect of humanitarian protection.[82]

[80] IOM, '2015 Humanitarian Policy' (n 4).

[81] IOM, '2015 Humanitarian Policy' (n 4) fn 12: 'The bodies of law referenced in the IASC definition are human rights law, international humanitarian law and refugee law. For the protection of migrants, other bodies of law may be relevant as well, for example labour law, maritime law and consular law, as per IOM Council document MC/INF/298.'

[82] See also IOM, '2015 Humanitarian Policy' (n 4) Principle IV.5 that incorporates the broader operational elements of humanitarian protection, with IOM conducting its 'activities in ways that seek to do no harm, prioritize safety and dignity, foster empowerment and

No humanitarian operation ever involves just one actor, so partnerships are fundamental to protection. Of course, the moment that two organizations are working in tandem, there are greater difficulties in guaranteeing all obligations will be fulfilled because there may be differences in mandates and policies. Accordingly, the policy provides:

> V.2 IOM engages in partnerships and cooperates with the stakeholders involved in humanitarian action on the basis of shared principles to promote mutual respect, complementarity, predictability and reliability for a more effective humanitarian response.

Detailed working arrangements need to be agreed, for example, where information and data sharing will take place.[83] According to Principle V.8, IOM will seek to engage more with the private sector in humanitarian scenarios. This is a trend throughout the humanitarian sector.[84] Ensuring that they abide by humanitarian principles, therefore, should be a sector-wide endeavour to guarantee interoperability between different organizations.

Potentially more significant as a threat to protection is the reference in Principle V.9, referring to links with diaspora populations.[85] For certain, diasporas can provide support to people on the move who are outside their country of nationality. On the other hand, many states that have witnessed population outflows are fragmented and stratified in ways that mean that not all elements of the diaspora will be supportive to those presently migrating and within IOM's mandate. Mixed population flows from different ethnic groups from the state in crisis mean that some of

participation, and are non-discriminatory and needs-based'. Generally, see Jan Klabbers, 'Sources of International Organizations' Law: Reflections on Accountability', in Jean d'Aspremont and Samantha Besson (eds), *Oxford Handbook of the Sources of International Law*, (Oxford University Press 2017); Daugirdas (n 33) 331–335.

[83] Nathaniel Raymond, Laura Walker McDonald and Rahul Chandran, 'Opinion: The WFP and Palantir Controversy Should be a Wake-up Call for Humanitarian Community' (*devex*, 14 February 2019) www.devex.com/news/opinion-the-wfp-and-palantir-controversy-should-be-a-wake-up-call-for-humanitarian-community-94307 accessed 19 May 2022; Privacy International, 'One of the UN's largest aid programmes just signed a deal with the CIA-backed data monolith Palantir' <https://privacyinternational.org/news-analysis/2712/one-uns-largest-aid-programmes-just-signed-deal-cia-backed-data-monolith> accessed 29 April 2021.

[84] For example, see GCR (n 51) paragraphs 32 and 42.

[85] GCR (n 51) principle V.9 reads: 'Given the growing links between diasporas and their home communities, IOM engages when appropriate and possible with diasporas, following *ethical verification*, during and after a crisis, to maximize the benefits of their involvement, both directly and through their networks abroad and in the country concerned.' (emphasis added).

the tensions internal to that state may be continued in the context of displacement. Therefore, sharing information about a displaced population with a diaspora community requires even greater care to ensure that humanitarian actors 'do no harm'. The fact that Principle V.9 refers only to 'ethical verification' as the check measure seems weak in this context, especially when there are international human rights law standards, rule of law, and the humanitarian principles which also need to be respected in this context.

Principle V.13 is a useful link between Humanitarian Partnerships and Humanitarian Practice under Principle VI:

> V.13 When required to coordinate with military actors for the delivery of relief assistance forming part of a humanitarian response, including the use of military assets, IOM subscribes to the relevant [Inter-Agency Standing Committee guidelines and policy.[86]

Engagement with peacekeeping forces or with parties to a conflict is largely unavoidable in some humanitarian crises. The IASC CivMil Guidelines 2008[87] and the 2007 Oslo Guidelines[88] provide IOM with the standard rules for all humanitarian agencies and, as such, promote interoperability. A careful line needs to be drawn, though, so as to avoid being seen as working with one or more parties to a conflict in order to preserve neutrality and independence, while, at the same time, humanitarian actors need to ensure the safety of staff working in and moving around conflict zones.[89] In sum, IOM's policy in this particular context complies and is fully in line with other humanitarian actors.

[86] That is, IASC, 'Civil-Military Guidelines' (n 66) and OCHR, 'Oslo Guidelines' (n 5).
[87] IASC, 'Civil-Military Guidelines' (n 66).
[88] OCHR, 'Oslo Guidelines' (n 5).
[89] This is particularly the case where peacekeeping forces are working under a UNSC Chapter VII mandate. IASC, 'Civil-Military Guidelines' (n 66) Operating Principle 2 'Military assets should be requested only where there is no comparable civilian alternative and only the use of military assets can meet a critical humanitarian need. The military asset must therefore be unique in nature or timeliness of deployment, and its use should be a last resort.' See also, 'Civil-Military Relationship in Complex Emergencies: An IASC Reference Paper 28, Part 2, Principles and Concepts, paragraph M June 2004. Both references from IASC, 'Civil-Military Guidelines' (n 66); OCHR, 'Oslo Guidelines' (n 5) para 5 and 35 similarly look on utilising military support in a humanitarian crisis as a matter of last resort. As regards the security of humanitarian actors, the Oslo Guidelines expressly provide at paragraph 43 as follows:' 43. Under no circumstance will UN [Military and Civilian Defence Assets] be used to provide security for UN humanitarian activities. A separate security force may, however, be used to ensure security in areas where humanitarian personnel may be attacked while delivering humanitarian assistance.'

With respect to humanitarian practice, the 2015 Humanitarian Policy needs careful analysis. It has to be read alongside the MCOF,[90] the 2007 Oslo Guidelines[91] and the 2007 IASC CivMil Guidelines.[92] The latter two documents have been dealt with in part already, but the MCOF needs a fuller discussion. Principle VI.1 provides that 'IOM applies a principled approach to humanitarian action in different operating contexts, integrating humanitarian principles into the Migration Crisis Operational Framework'. The 2012 MCOF is designed to allow IOM to better support its member states, who bear the primary 'responsibility to protect and assist crisis-affected persons'.[93] The MCOF '[supplements] the humanitarian response for migrants caught in a crisis situation' (paragraph 8). The MCOF has two pillars, 'Phases of a Crisis' and 'Sectors of Assistance', and identifies 15 sectors of assistance that apply to the three phases of a crisis, 'before, during and after'. Before looking at the sectors, the approach to the phases does not bear close scrutiny given that humanitarian crises may be at different phases in different parts of the same operation, and distinguishing between the pre-crisis phase and when the crisis is occurring, let alone divining clear dividing lines from the post-crisis phase, suggests a level of naivety that is worrying for an agency operating in conflict zones or disaster operations. It has always been difficult to differentiate phases of a crisis, so to establish that as an integral part of an operational framework may well create false distinctions. For certain, the sectors of assistance that IOM lists all occur where there is displacement at whatever stage of a crisis and their operationalization is central to protecting persons who have been affected, whether that be the people on the move themselves or the communities where they find themselves at any particular time.[94] To take but one example, the IASC has given IOM leadership for camp co-ordination and camp management with respect to persons displaced by disasters. The assistance in relation to camp management during the immediate aftermath of a natural disaster will develop and change if it takes a long time to rebuild homes or relocate affected populations, but the phases tend to be more fluid in practice. For example, after an earthquake, there will

[90] IOM Council, 'Migration Crisis Operational Framework' (n 5).
[91] OCHR, 'Oslo Guidelines' (n 5).
[92] IASC, 'Civil-Military Guidelines' (n 66).
[93] IOM Council, 'Migration Crisis Operational Framework' (n 5).
[94] IOM Council, 'Migration Crisis Operational Framework' (n 5) Annex 1 p 7, 'Diagram for a slow-onset natural disaster: Internal and cross-border movements' – some elements are critical for all phases.

be a need for emergency shelter and other support, but annual storms or other natural events in the region may cause temporary setbacks in progress. This calls into question why IOM felt the need to refer to the phases of a crisis: what is essential is that IOM should provide the most appropriate protection and assistance to those affected by a humanitarian crisis throughout and until a durable and sustainable solution is attained.[95] The phases create a false, unwieldy and ultimately unworkable trichotomy.[96] They also reflect the fact that IOM's Constitution relates to the movement of persons, not their protection or human rights. To that end, it is good that Principle VI.3 refers to embedding the humanitarian principles in its response.[97]

Sub-paragraphs 6–9 of Principle VI raise a question about mandates. IOM operates a very broad definition of migrants that includes notably IDPs[98] and the 2015 Humanitarian Policy sets out how it will work in the context of a crisis scenario. UNHCR, on the other hand, has a unique mandate for refugees and the lead for conflict-driven IDPs and all stateless persons. ICRC's mandate is to uphold the laws of armed conflict.[99] These sub-paragraphs focus on armed conflicts, but also on scenarios where there is no armed conflict but a human-made disaster such as 'internal violence, disorder or conflict'.[100] If this is a case of internal displacement, then UNHCR would have the mandate lead. Equally, since UNHCR issued Guideline No.12 (2016) on claims for refugee status related to

[95] In that regard, Sector 7 on 'Activities to Support Community Stabilization and Transition' (n 5) clearly has relevance at all stages, so there is no need for the phases, simply appropriate implementation.

[96] With respect to the 15 sectors, some will have more relevance at different phases: while 'Disaster Risk Reduction and Resilience Building' is directed to the pre-crisis phase, resilience applies during and after the crisis; whereas '(Re)integration Assistance' targets post-crisis intervention, it nevertheless has bearing on the crisis itself when the displaced population is living alongside a host community outside the immediate disaster or conflict zone. On the other hand, 'Transport Assistance for Affected Populations' is clearly relevant throughout the crisis, from initial evacuation through to return or resettlement, and is the primary activity for which IOM is known. Furthermore, it should never be forgotten that refugees retain the autonomy to resolve their own displacement and may well migrate from their initial country of asylum to find employment in a third state. In that context, they remain refugees until they have a durable and sustainable solution and within UNHCR's mandate, but also might be able to call on the services of IOM in certain situations; see also, complementary pathways set out at GCR (n 51) paras 94–96.

[97] IOM, '2015 Humanitarian Policy' (n 4).

[98] See above (n 41).

[99] ICRC, 'Statutes of the International Committee of the Red Cross' (n 79).

[100] IOM, '2015 Humanitarian Policy' (n 4) fn 22.

armed conflict and violence,[101] based on its Statutory Mandate and Article 35 of the 1951 Convention relating to the Status of Refugees,[102] UNHCR has clearly set out that those who have crossed a border due to armed conflict or violence are generally to be considered refugees under the 1951 Convention because they meet the criteria set out in Article 1A.2.[103] Where sub-paragraphs 8 and 9 of Principle 6 come into play is in the context of some of the people who have crossed the border are not nationals of the state where the conflict is occurring, but are migrants caught up in its effects. They would not be unwilling to avail themselves of its protection, although it is possible that they would be unable to do so. Given that they were able to safely return to their country of nationality, they would not be refugees, but if that were not the case, they could be *réfugiés* sur place. If it is a case of internal displacement, though, then the non-nationals fall under the Global Protection Cluster where UNHCR has the lead for conflict-driven IDPs.

UNHCR is formally mandated to apply the humanitarian principles, and it is important that in those cases where IOM is dealing with migrants displaced across a border, it too will apply those principles in humanitarian crises. For certain, UNHCR fails on occasions, but that is because there has been a failure to carry out its mandate;[104] IOM can fail to protect individuals to whom it is providing migration services and not 'respect, protect and fulfil' their human rights, even when it is fulfilling its constitutional mandate to:

> transfer … refugees, displaced persons and other individuals in need of international migration services for whom arrangements may be made between the Organization and the States concerned, including those States undertaking to receive them.[105]

The Constitution explicitly prioritizes the interests of the member states and, until that is amended, the danger is that human rights will not be to the

[101] UNHCR, 'Guidelines on International Protection' (2 December 2016) HCR/GIP/16/12 <www.refworld.org/docid/583595ff4.html> accessed 19 May 2022.

[102] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

[103] Only if there is no causal link between a person's well-founded fear of persecution caused by the armed conflict and one of the five grounds (race, religion, nationality, membership of a particular social group or political opinion), would they fail – UNHCR, 'Guidelines on International Protection' (n 101) no 12 paras 10, 12–13, 17–20, 21–23, 28–30, and 34–39.

[104] See UNHCR, Reports of the Inspector General's Office <www.unhcr.org/52e11b746.html> accessed 19 May 2022.

[105] IOM Constitution (n 5) Article 1.1(b) (emphasis added).

fore. For example, in August 2021, after President Ashraf Ghani had fled Kabul and the Taliban took control of the country,[106] IOM was still seeking additional funding to help return undocumented Afghans to Afghanistan.[107] UNHCR issued a non-return advisory on 17 August 2021,[108] but IOM did not immediately withdraw its request for funding for returns from donor governments. Up to August, IOM's return policy may have upheld the rights of returning Afghan nationals and met the needs of refugee hosting states in the region, but that programme should have been suspended pending a new evaluation in the light of the Taliban assumption of control.[109]

Sub-paragraphs 10–14 of Principle VI highlight even more the inappropriateness of IOM's three-phase analysis, 'before, during, after', and the false humanitarian-development dichotomy prevalent in some organizations dealing with crises, not least the United Nations.[110] These sub-paragraphs, taken together with sub-paragraph 4, bring to the fore the evolution of displacement situations over time and the need to bring development actors in from the earliest stage possible:

> If economic, social, and cultural rights are fully implemented within a rule of law approach, then the rights to work and shelter must be given prominence alongside freedom from arbitrary detention. Given that the modal average length of a protracted situation [of displacement] is around 20 years, priorities will inevitably change and the humanitarian crisis that prompted flight will become a situation of protracted displacement. The displaced will then need to be seen as part of the development plans for the [hosting state] …. Failure to address the practical reality of situations of protracted displacement has led to the creation of a parallel 'State' on the territory of the [hosting state] that traps the [displaced person] and has no benefit for the hosting government of the local population. … Rule of law approaches that are underpinned by all human

[106] BBC, 'Afghanistan Conflict: Kabul Falls to Taliban as President Flees' (*BBC News*, 16 August 2021) <www.bbc.co.uk/news/world-asia-58223231> accessed 19 May 2022.

[107] IOM, 'Return of Undocumented Afghans'(n 52).

[108] UNHCR UK, 'UNHCR Issues a Non-Return Advisory for Afghanistan' (17 August 2021) <www.unhcr.org/uk/news/briefing/2021/8/611b62584/unhcr-issues-non-return-advisory-afghanistan.html> accessed 19 May 2022.

[109] Hugo Williams and Ali Hamedani, 'Afghanistan: Girls Despair as Taliban Confirm Secondary School Ban' (*BBC*, 8 December 2021) <www.bbc.co.uk/news/world-asia-59565558> accessed 19 May 2022. Of course, as the consequences of the Taliban takeover became clear, IOM engaged in an in-country and regional response to meet the needs of those displaced and those returning – IOM, 'IOM Comprehensive Action Plan for Afghanistan and Neighbouring Countries, August 2021-December 2024 (updated February 2022)' (2022) <https://reliefweb.int/report/afghanistan/iom-comprehensive-action-plan-afghanistan-and-neighbouring-countries-august-2021> accessed 19 May 2022.

[110] IOM, '2015 Humanitarian Policy' (n 4).

> rights and whole society participation facilitate this understanding and promote stability and development in the [hosting state] and the State of return. Equally, they promote interoperability between [humanitarian and development actors].[111]

Ultimately, protracted displacement itself is a failure, particularly if the affected group are migrants who fear no persecution in their country of nationality but have been driven out of a state where they were living and working or a transit state by armed conflict or violence; moreover, IOM's work can include IDPs moving because of human-made or natural disasters and refugees may equally have been caught up in that more general population flow.

IOM's work with persons displaced by natural disasters applies whether it is internal or cross-border according to sub-paragraphs 15–17 of Principle VI.[112] The Guiding Principles on Internal Displacement include people who have to move because of natural or human-made disasters and do not cross an international border.[113] Moreover, the Guiding Principles reflect, at least in part, customary international law,[114] and provide guidance to all actors working with IDPs.

> 3. These Principles reflect and are consistent with international human rights law and international humanitarian law. They provide guidance to:
> […]
> (d) Intergovernmental and non-governmental organizations when addressing internal displacement.

In 1998, the status in international law of the Guiding Principles was unclear. However, it is now generally accepted that through long use and domestic implementation, they reflect customary international law.[115] As such, IOM must have regard to them and is bound to the extent that

[111] Gilbert and Rüsch (n 57) 53–54. The original text focused on the work of UNHCR with refugees and conflict-driven IDPs, but it is equally applicable to all persons affected by protracted displacement and, thus, Principle VI of IOM, '2015 Humanitarian Policy' (n 4).

[112] See also, CCCM (n 38). For a more detailed discussion of IOM's involvement with IDPs, see Bríd Ní Ghráinne and Ben Hudson, 'IOM's Engagement with the UN Guiding Principles on Internal Displacement' 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).

[113] ECOSOC, 'Report of the Representative of the Secretary-General' (n 7) Introduction – Scope and Purpose, paragraph 2.

[114] See Walter Kälin, 'The Guiding Principles on Internal Displacement as International Minimum Standard and Protection Tool' (2005) 24 (3) Refugee Survey Quarterly 27, 29–30.

[115] See generally Jane McAdam, 'The Guiding Principles on Internal Displacement: 20 Years On' (2018) 30 International Journal of Refugee Law 187; Megan Bradley, Durable Solutions

Paragraph 3(d) of the Introduction and Scope can be read to now attribute them to international organizations as customary international law. Thus, its 2015 Humanitarian Policy should be read in that light.[116] In particular, sub-paragraphs 4 and 5 of Principle III on humanitarian access should be read with Guiding Principles 25.3 and 30.[117]

> 25.3. All authorities concerned shall grant and facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced.
>
> 30. All authorities concerned shall grant and facilitate for international humanitarian organizations and other appropriate actors, in the exercise of their respective mandates, rapid and unimpeded access to internally displaced persons to assist in their return or resettlement and reintegration.

IOM can assert this in the context of internal displacement, but it also claims this role with respect to cross-border natural disaster displacement.[118] In this context, there is less applicable international law to guide agencies' engagements. UNHCR's mandate *vis-à-vis* refugees do not apply to those moving because of natural disaster or climate change.[119] Other relevant documents, such as the Sendai Framework[120] and the Nansen

and the Right of Return for IDPs: Evolving Interpretations'(2018) 30 International Journal of Refugee Law 218; Walter Kälin and Hannah Entwisle Chapuisat, 'Guiding Principle 28: The Unfulfilled Promise to End Protracted Internal Displacement' (2018) 30 International Journal of Refugee Law 243; Daniel MacGuire, 'The Relationship between National Normative Frameworks on Internal Displacement and the Reduction of Displacement'(2018) 30 International Journal of Refugee Law 269; Louise Aubin, Elizabeth Eyster and Daniel MacGuire, 'People-Centred Principles: The Participation of IDPs and the Guiding Principles' (2018) 30 International Journal of Refugee Law 287; Nina Schrepfer, 'Protection in Practice: Protecting IDPs in Today's Armed Conflicts' 30 International Journal of Refugee Law 292; Simon Russel, 'The Operational Relevance of the Guiding Principles on Internal Displacement' 30 International Journal of Refugee Law 307; Roberta Cohen and Fancis M Deng, 'Reflections from Former Mandate Holders: Developing the Normative Framework for IDPs' 30 International Journal of Refugee Law 310; Walter Kälin 'Consolidating the Normative Framework for IDPs' 30 International Journal of Refugee Law 314.

[116] IOM, '2015 Humanitarian Policy' (n 4) principle VI.15 'The applicable international legal frameworks and norms IOM applies are contained in human rights law and international disaster response law.'

[117] ECOSOC, 'Report of the Representative of the Secretary-General' (n 7).

[118] See IOM's collaborative work in this field at <https://environmentalmigration.iom.int> accessed 19 May 2022.

[119] Although see the UNHCR, 'Legal Considerations Regarding Claims for International Protection Made in the Context of the Adverse Effects of Climate Change and Disasters' (1 October 2020) <www.refworld.org/docid/5f75f2734.html> accessed 19 May 2022.

[120] Platform on Disaster Placement, 'Sendai Framework for Disaster Risk Reduction 2015–2030' <https://disasterdisplacement.org/portfolio-item/sendai-framework-for-disaster-risk-reduction-2015-2030> accessed 19 May 2022.

Initiative's Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change,[121] are not legally binding in and of themselves.[122] Therefore, IOM's 2015 Humanitarian Policy provides it with guidance that helps to fill a protection gap when taken with other international frameworks and the work of other international organizations, intergovernmental organizations and NGOs.

Finally with respect to the 2015 Humanitarian Policy, sub-paragraphs 12–17 of Principle II on Humanitarian Accountability deal with the accountability of IOM. IOM has no equivalent of the 1946 Convention on the Privileges and Immunities of the United Nations on which to rely.[123] Nevertheless, it will usually have a memorandum of understanding with all the states where it operates ensuring immunity from the jurisdiction of local courts for all its international staff unless that is waived. Moreover, the International Law Commission's 'Draft Articles on the Responsibility of International Organizations' will, to the extent that they reflect customary international law, be binding on IOM, although that does not guarantee there is any remedy for a breach by IOM before domestic courts.[124] As regards the 2015 document, Principle II.12 provides:

> II.12 In its humanitarian response, IOM is accountable to the persons and States concerned, its Member States, donors, and its partners within the humanitarian response system. IOM is committed to strengthening its accountability mechanisms and to keeping them under continuous review.

While all of that is commendable, it does call into question how IOM balances accountability to donors, states where it is operating, and the persons who should be the focus of its 2015 Humanitarian Policy.

[121] The Nansen Initiative, 'Agenda for the Protection of Cross-border Displaced Persons in the Context of Disasters and Climate Change: Volume I' (December 2015) <https://disasterdisplacement.org/wp-content/uploads/2014/08/EN_Protection_Agenda_Volume_I_-low_res.pdf> accessed 19 May 2022.

[122] Their status as customary international law is not clear.

[123] Convention on the Privileges and Immunities of the United Nations (adopted 13 February 1946) 1 UNTS 15; Article 105 UN Charter. See also HR 13 April 2012 10/04437 (Mothers of Srebrenica Association v State of The Netherlands and the United Nations) para 4.3.14. There is not the space here to analyse this issue in full, but see Carla Ferstman, *International Organizations and the Fight for Accountability* (Oxford University Press 2017) generally, and with respect to IOM, specifically 37–38, 82.

[124] International Law Commission (ILC), 'Articles on the Responsibility of International Organizations', UN doc A/66/10 (2011) (ARIO). The General Assembly commended them to governments and international organizations in December 2017, but they have yet to be adopted – UNGA Res 72/122 (7 December 2017). See also sources cited above note 82.

Overall, the 2015 Humanitarian Policy does not stand alone. It has to be read with other IOM documents and with a range of instruments developed beyond the organization. It also has implications for IOM's entire range of activities, not just its humanitarian crisis activities. The obligations fit with those of other humanitarian actors, although there are occasions where more direct reference to the humanitarian principles promulgated by the United Nations and ICRC would be helpful. More often the question is not whether IOM claims to uphold those principles, more whether they have priority over its constitutional focus on assisting states and its project-based financing model.[125]

11.4 Conclusion

IOM is a major actor in humanitarian crises. Given that its Constitution does not set out any protection mandate or embed international human rights law or international humanitarian law standards into its operating policy, there are gaps in protection for persons who do not fall within the mandates of any of the other humanitarian actors. Thus, the 2015 Humanitarian Policy is a positive addition to the frameworks of protection, even if it could never fill the gap left by the lack of an explicit protection mandate set out in a revision to the Constitution that prioritized humanity, neutrality, impartiality and independence over the organized transfer of migrants agreed between IOM and the states concerned. That said, the loose language on occasions and the regular reference to supporting member states and donors in the 2015 document calls into question IOM's commitment to the humanitarian principles, particularly independence and impartiality. As IOM's relationship with the United Nations develops over time, particularly now that it is a related organization, it may be that IOM's operating procedures will reflect more and more fully the humanitarian principles. At the minute, rather than thinking of IOM as a humanitarian agency per se, it may be better to consider it an intergovernmental organization that works in humanitarian scenarios.[126]

The principal issues arising from the 2015 Humanitarian Policy concern not so much what is set out there, but the gaps and its centrality to the organization. IOM still has no protection in its mandate or reference to human rights.[127] The humanitarian actors with whom it will engage in crises have

[125] SIDA Report 2008 (n 2).
[126] IOM, 'Return of Undocumented Afghans' (n 52).
[127] 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?*

that focus. IOM's Constitution has evolved over the course of the organization's history and the member states may still revise it. The explicit inclusion of a humanitarian mandate in the Constitution, and recognition of the obligations that come along with this identity, would confirm the agency's status and more squarely place it alongside the ICRC and UN humanitarian actors, prioritizing human rights, the humanitarian principles and rule of law. As it stands, the Constitution[128] still reflects its 1953 focus on facilitating migration for the good of its member states and there are several instances where the rights of migrants have not been prioritized.[129] As this chapter has made clear, despite the positive developments seen in the 2015 Humanitarian Policy, its related organization status with the UN and the fact that some of the people with whom it interacts may be refugees, require that the Constitution be further amended to explicitly include references to international human rights law and protection.

Obligations and Accountability of the International Organization for Migration in an Era of Expansion (Cambridge University Press 2023).

[128] IOM Constitution (n 5).

[129] IOM, 'Libya' (n 25); IOM, 'Bangladesh' (n 26); IOM, 'Return of Undocumented Afghans'(n 52).

12

IOM's Engagement with the UN Guiding Principles on Internal Displacement

BRÍD NÍ GHRÁINNE AND BEN HUDSON

12.1 Introduction

The vast majority of migrants with whom IOM works directly are Internally Displaced Persons (IDPs) in conflict and disaster situations. For example, in 2019 IOM provided protection and assistance to more than 21 million IDPs.[1] This makes IOM one of the largest global actors in responding to IDPs and their protection needs. It is one of the few agencies whose operations on internal displacement span the crisis continuum – from preparedness and risk reduction, to humanitarian protection and assistance, through the transition to longer-term solutions and recovery.[2] Responses to internal displacement constitute most of IOM's crisis-related programming, whether implemented at the individual or community levels.[3] Put simply, all these factors mean IOM is a major player – if not *the* major player – in the international community's response to internal displacement.

Yet, IOM has been remarkably under-studied – especially compared to other agencies such as the UN High Commissioner for Refugees (UNHCR).[4] IOM's operations with IDPs have received even less attention.[5]

[1] IOM, 'Internal Displacement' <www.iom.int/internal-displacement> accessed 18 May 2022.

[2] IOM, 'Internally Displaced Persons Must Be "Agents of Their Own Solutions": IOM Joins High-Level Discussion to Resolve Internal Displacement' (11 June 2020) <www.iom.int/news/internally-displaced-persons-must-be-agents-their-own-solutions-iom-joins-high-level-discussion-resolve-internal-displacement> accessed 18 May 2022. For comparison, other bodies like the UN Office for the Coordination of Humanitarian Affairs (OCHA) and the United Nations High Commissioner for Refugees (UNHCR) focus on one of these three dimensions.

[3] IOM, 'Our Work' <www.iom.int/our-work> accessed 18 May 2022.

[4] Megan Bradley, Cathryn Costello and Angela Sherwood, 'Introduction' 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).

[5] Megan Bradley has argued that 'more attention should be devoted to the consequences of IOM's work for the majority of migrants moving within the "global south", particularly

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Thus, although IOM has made an explicit commitment to human rights and humanitarian principles,[6] scholars are not holding IOM accountable to these norms.

As such, this chapter is the first to take the important initial step in holding IOM to account from the perspective of the key international instrument for the protection of IDPs – the UN Guiding Principles on Internal Displacement (GPs). Specifically, it assesses to what extent IOM has integrated the GPs into its policies and frameworks and, through two case studies of IOM's work with IDPs in Haiti and Iraq, examines the extent to which IOM has implemented the GPs in its practice and approach in these country-specific contexts. At present, these aspects of IOM's work are very unclear for three reasons. First, as aforementioned, there is little scholarly analysis on this topic. Second, IOM contended, as recently as 2004, that it was not bound by international human rights law.[7] This contention is of particular concern as many of the GPs are in substance grounded in international human rights law and hence form part of IOM's obligations.[8] Third, although several of IOM's more recent core institutional policies and frameworks have explicitly recognized an obligation to protect and promote human rights,[9] these frameworks and policies are not yet well known outside the agency, and they rarely mention the GPs.[10] This omission is striking because IOM's operations are overwhelmingly focused on the 'global south', particularly with IDPs in conflict and disaster situations.[11] Moreover, IDPs are amongst the most

overlooked populations such as IDPs'; see Megan Bradley, *The International Organization for Migration: Challenges, Commitments, Complexities* (Routledge 2020) 129.

[6] Bradley, *The International Organization for Migration: Challenges, Commitments, Complexities* (n 5).

[7] As discussed in Bradley, *The International Organization for Migration: Challenges, Commitments, Complexities* (n 5) 23.

[8] Walter Kälin, 'The Guiding Principles on Internal Displacement – Introduction' (1998) 10 *International Journal of Refugee Law* 557, 562; Bríd Ní Ghráinne, *Internally Displaced Persons and International Refugee Law* (Oxford University Press 2022).

[9] See, for example, IOM, 'The Human Rights of Migrants: IOM Policy and Activities' (12 November 2009) IOM Doc MC/INF/298. This refers to IOM as having 'a key supporting role to play' alongside States 'in achieving the effective respect of the human rights of migrants' (para 2).

[10] 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).

[11] Bradley, *The International Organization for Migration: Challenges, Commitments, Complexities* (n 5).

vulnerable groups in the world,[12] and naturally, it is highly desirable that one of the largest actors responding to their needs pays close heed to their key rights as encapsulated by the GPs.

The chapter proceeds as follows. Part 2 sets out what an IDP is and introduces the GPs, the obligations reflected in the GPs, and the centrality of the GPs in the overall international framework of IDP protection. Part 3 then explains the basis for IOM's operations with IDPs. In particular, we explain that although IOM does not have a clear formal mandate for assisting and protecting IDPs, it has justified its IDP activities in various ways, including through its Constitution, its role in the Inter-Agency Standing Committee (IASC), and the cluster system. Part 4 holds IOM to account by critically examining the extent to which it has delivered on its explicit undertaking 'to promote and respect the Guiding Principles in its work, and to disseminate them as widely as possible'.[13] We do this by mapping explicit references to the GPs in pertinent IOM policy instruments and by interrogating IOM's adherence to the durable solutions approach that is espoused by the GPs. Part 5 then critically examines how the GPs have been implemented by IOM in practice in the context of disaster (Haiti) and conflict-induced displacement (Iraq).

While it is important to recognize the positive impacts of IOM's work with IDPs,[14] this chapter identifies and interrogates, with some concern, substantial inconsistencies that exist between IOM's activities and both the letter and ethos of the GPs. Concerns arise from a seeming decline in explicit IOM references to the GPs as the leading international standards for IDP protection, evidenced in part by their absence in key IOM documents such as the 2015 Humanitarian Policy and its 2012 Migration Crisis Operational Framework. In addition, some of IOM's policies and frameworks not only neglect to refer to the GPs but also suffer inconsistencies with the GPs in terms of content. Inconsistencies also exist between IOM's operations and the ethos of the GPs. For example, this chapter is critical of IOM's almost exclusive camp-based focus in Haiti and its predominant preference for return as a durable solution to internal displacement, which is evident in IOM's operations in Iraq. Adherence to the GPs cannot thus be taken as a given and should be more concertedly systematized in IOM's ongoing work with IDPs.

[12] Romola Adeola, *The Internally Displaced Person in International Law* (Elgar 2020).

[13] IOM, 'Internally Displaced Persons: IOM Policy and Activities' (18 November 2002) IOM Doc MC/INF/258 para 14.

[14] The scope of this chapter includes both IOM's protection and non-protection activities.

12.2 The International Protection of Internally Displaced Persons

IDPs are persons who have been forced or obliged to leave their places of habitual residence as a result of factors such as armed conflict, violence, human rights violations or natural or human-made disasters, but who have not crossed an international border.[15] IDPs often have similar wants, fears, and needs as refugees such as access to shelter, medicines, food, water, and safety from harm.[16] However, unlike refugees, IDPs do not have a specific legal status under international law and there is no dedicated global (as opposed to regional) treaty that grants them protection.[17] In addition, while the UNHCR has a specific mandate for the protection of refugees,[18] there is no international organization that has a dedicated mandate for protecting IDPs. IDPs are therefore amongst the most vulnerable groups in the world in terms of the harm to which they are exposed, the relative lack of binding international legal frameworks dedicated to their protection, and the absence of institutions with a specific responsibility for their protection.

In 1998, Francis Deng, the then Representative of the UN Secretary General on Internal Displacement, concluded the drafting of a protection framework for IDPs. The form of the framework was unspecified in the UN resolutions asking him to draft the framework. Consequently, the Representative decided to elaborate a set of non-binding principles based

[15] ECOSOC, 'Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement' (11 February 1998) UN Doc E/CN.4/1998/53/Add.2, Introduction para 2.

[16] Bríd Ní Ghráinne, *Internally Displaced Persons* (n 8); Adeola (n 12).

[17] Bríd Ní Ghráínne, 'Internally Displaced Persons', Max Planck Encyclopaedia of Public International Law (2015) <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e833> accessed 18 May 2022. Some regional conventions prohibit internal displacement, for example, the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted 23 October 2009, entered into force 6 December 2012) (Kampala Convention) Article 3; the Protocol on the Protection and Assistance to Internally Displaced Persons (adopted 30 November 2006, entered into force 21 June 2008).

[18] UNGA Annex to Res/428(V), 'Statute of the Office of the United Nations High Commissioner for Refugees' Res 428/V (14 December 1950) UN Doc A/RES/428(V). The UNHCR's protection mandate formally requires it to promote the protection of refugees and makes it the 'custodian' of international refugee law. UNHCR also has a mandate to protect stateless persons. See Ben Hudson and Bríd Ní Ghráinne, 'Enhancing State-to-State Dialogue on Internal Displacement: Current Global Fora and Future Prospects' (2020) 34 Refugee Survey Quarterly 425; Bríd Ní Ghráinne, 'The UNHCR's Involvement with IDPs: "Protection of that Country" for the Purposes of Precluding Refugee Status?' (2014) 26 International Journal of Refugee Law 536.

on existing provisions of human rights and humanitarian law and drawing from refugee law by analogy. The 30 principles were divided into five parts – (i) General Principles; (ii) Principles Relating to Protection from Displacement; (iii) Principles Relating to Protection during Displacement; (iv) Principles Relating to Humanitarian Assistance; and (v) Principles Relating to Return, Resettlement and Reintegration. Under the GPs, states have primary responsibility for protecting IDPs within their borders. Yet, the GPs also address the roles and responsibilities of international actors. For example, Principle 27 indicates that international humanitarian organizations and other appropriate actors should 'give due regard to the protection needs and human rights' of IDPs, and that they should 'respect relevant international standards and codes of conduct'.

The publication of the GPs has been described as a 'benchmark'[19] and a 'watershed event'[20] in IDP protection. Although technically a soft law instrument and not in themselves legally binding, most of the principles are based on existing international law. Moreover, the GPs have received widespread endorsement, with IOM itself noting that the GPs 'reflect and are consistent with international human rights and humanitarian law'.[21] At least 78 displacement affected states from all over the world have adopted national laws or policies on IDPs,[22] many of which explicitly recognize or are based on the GPs. The GPs have also inspired the development of two regional treaties on internal displacement in Africa,[23] and they have been heralded as 'the key international framework' for the protection of the internally displaced by the UN General Assembly.[24] That is not to say the GPs are without limitations. For example, parts of the GPs, such as the prohibition on internal refoulement in Principle 15, appear to go further than existing hard law provisions.[25] This confuses and conflicts

[19] John Holmes, 'Foreword' (2008) Special Issue: Ten Years of the Guiding Principles on Internal Displacement Forced Migration Review 3.

[20] Jon Bennett, 'Forced Migration within National Borders: The IDP Agenda' (1998) 1 Forced Migration Review 4, 5.

[21] IOM, 'Internally Displaced Persons' (n 13) para 13.

[22] Global Protection Cluster, 'Global Database on Laws and Policies on Internal Displacement' (Global Protection Cluster) <www.globalprotectioncluster.org/global-database-on-idp-laws-and-policies> accessed 18 May 2022.

[23] Kampala Convention (n 17) Article 3; Protocol on the Protection and Assistance to Internally Displaced Persons (n 17).

[24] UNGA Res 63/307, 'Status of internally displaced persons and refugees from Abkhazia, Georgia, and the Tskhinvali region/South Ossetia, Georgia' (30 September 2009) UN Doc A/RES/63/307.

[25] Bríd Ní Ghráinne, *Internally Displaced Persons* (n 8).

with the common assertion that the GPs simply reflect and reassert existing international law provisions.[26] The GPs are also limited in respect to durable solutions, most notably in their lack of an explicit IDP right to return.[27] Nevertheless, the GPs are the globally acknowledged blueprint for all actors addressing internal displacement, which thus justifies their use in this chapter as an analytical lens through which to critique IOM's work on internal displacement.

Despite the introduction of the GPs in 1998, internal displacement remains a major global challenge. We are indeed now witnessing the highest number of IDPs on record. Numbering 55 million by the end of 2020,[28] IDPs can be found on almost every continent. Moreover, internal displacement is expected to rise even further in the future, particularly because of new and ongoing protracted conflicts that will likely displace millions of people, and the increased displacement anticipated as a result of disasters associated with the effects of climate change.[29] Internal displacement is therefore a multi-causal issue that is set to become even more significant in the coming years. It is precisely for this reason that it is important to appraise to what extent IOM's policies and frameworks integrate the GPs, and to what extent IOM abides by the GPs in practice.

12.3 IOM's Justification for Its Activities with Internally Displaced Persons

Even though IOM is one of the largest global actors on IDP issues, it does not actually have an explicit legal mandate to protect the rights of migrants, let alone the rights of IDPs. Rather, IOM's Constitution tasks it

[26] For further discussion, see Catherine Phuong, *The International Protection of Internally Displaced Persons* (Cambridge University Press 2005) 61–65; and Ben Hudson, *Challenges in the Law of IDP Returns* (PhD thesis, University of Bristol 2019) <https://research-information.bris.ac.uk/en/studentTheses/challenges-in-the-law-of-idp-returns> accessed 18 May 2022 73–78.

[27] Hudson, *Challenges in the Law of IDP Returns* (n 26). For further critique of the GPs in respect to durable solutions, and most notably returns, see David Cantor, 'The IDP in International Law?: Developments, Debates Prospects' (2018) 30 *International Journal of Refugee Law* 191.

[28] Internal Displacement Monitoring Centre, 'Global Report on Internal Displacement 2021' (IDMC 2021) <www.internal-displacement.org/global-report/grid2021> accessed 18 May 2022. This figure does not include climate-induced displacement or displacement in the context of development/infrastructure projects.

[29] Bríd Ní Ghráinne, *Internally Displaced Persons* (n 8); Thekli Anastasiou, 'Public International Law's Applicability to Migration as Adaptation: Fit for Purpose?' in Simon Behrman and Avidan Kent (eds), *Climate Refugees: Beyond the Legal Impasse?* (Taylor and Francis 2018).

with facilitating orderly migration flows generally. The IOM Constitution has been described as 'permissive' because it allows IOM to provide assistance without limiting the categories of persons with whom it engages, or the forms of assistance it provides.[30]

IOM has defined the term 'migrant' broadly, encompassing 'any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of (1) the person's legal status; (2) whether the movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) what the length of stay is'.[31] As such, this definition includes IDPs as persons of concern to IOM. Specifically, it is broad enough to include all IDPs described as such by the GPs, that is

> persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border.[32]

IOM's permissive Constitution has allowed the organization to strategically position itself as a 'jack of all trades',[33] filling key gaps in the international humanitarian system. IOM is involved in a wide variety of activities with IDPs ranging from providing shelter and aid packages in crisis situations, to facilitating IDP evacuations and return processes, transport and logistics, and addressing displaced persons' housing and property concerns. More recently, it jointly designed and prepared the UN High-Level Panel on Internal Displacement (with UNHCR and the UN Office for the Coordination of Humanitarian Affairs (OCHA)).

While IOM's activities span a very broad range, it has also carved out distinctive niches in particular areas. For example, IOM has played a significant role in responding to disaster-induced displacement. As Hall's chapter in this volume indicates, IOM has conducted extensive research and facilitated discussions on displacement associated with the effects of climate change,[34]

[30] Bradley, *The International Organization for Migration: Challenges, Commitments, Complexities* (n 5) 4.

[31] IOM Georgia, 'IOM Definition of "Migrant"' (IOM Georgia) <https://georgia.iom.int/who-is-a-migrant> accessed 6 December 2021.

[32] ECOSOC, 'Report of the Representative of the Secretary-General' (n 15) Introduction, para 2.

[33] Megan Bradley, *The International Organization for Migration: Challenges, Commitments, Complexities* (n 5).

[34] See Nina Hall, 'How IOM Reshaped Its Obligations on Climate Change and Migration' in Megan Bradley, Cathryn Costello and Angela Sherwood (eds), *IOM Unbound? Obligations*

and has taken on major operational roles in post-disaster displacement crises.[35] IOM has also developed disaster risk reduction and management initiatives intended to prevent large-scale and protracted displacement linked to natural hazards,[36] convened policy discussions on displacement linked to the effects of climate change,[37] and also provides training on how to use the GPs.[38] It was involved in many high-profile disaster situations including the 2003 earthquake in Bam, Iraq; and the 2004 Indian Ocean tsunami.[39]

IOM's role as a global leader in disaster situations is solidified by its participation in the 'cluster approach' to international coordination in humanitarian crises, including in relation to internal displacement. The cluster approach focuses on nine different areas of humanitarian response, with each assigned a 'cluster lead'. The cluster lead sets out the needs for the relevant situation as well as organizes planning, coordination and reporting. It is the first port of call and the provider of last resort in respect of each individual operation in which the system is applied. Within the cluster approach, UNHCR and IOM are co-leads of the Camp Coordination and Camp Management cluster (CCCM), with UNHCR leading in conflicts and IOM leading in disasters. In taking on this role, IOM saw itself as a 'key and consistent actor within this collective [i.e. cluster] response'.[40] It crystallized IOM's influential position in the humanitarian system, which it has leveraged to facilitate further growth and influence, making IOM among the largest humanitarian agencies in disaster settings. Within the cluster approach, IOM has responded to many high-profile disaster situations including the 2013 Typhoon Haiyan

and Accountability of the International Organization for Migration in an Era of Expansion (Cambridge University Press 2023); Bradley, *The International Organization for Migration: Challenges, Commitments, Complexities* (n 5).

[35] Bradley, *The International Organization for Migration: Challenges, Commitments, Complexities* (n 5).

[36] IOM, 'IOM Contributions to Progressively Resolve Displacement Situations: Compendium of Activities and Good Practice' (2016) <https://publications.iom.int/system/files/pdf/compendium_of_activities.pdf> accessed 18 May 2022.

[37] Ibid.

[38] IOM, 'Internally Displaced Persons' (n 13) para 14.

[39] IOM, 'IOM News: Managing Migration for the Benefit of All' (March 2004) <https://publications.iom.int/system/files/pdf/iom_infos_mar04_en.pdf≥ accessed 18 May 2022; Asmita Naik, Elca Stigter and Frank Laczko, 'Migration, Development and Natural Disasters: Insights from the Indian Ocean Tsunami' (IOM 2007) <https://publications.iom.int/system/files/pdf/mrs30.pdf> accessed 18 May 2022.

[40] IOM, 'IOM Framework for Addressing Internal Displacement' (6 June 2017) IOM Doc S/20/4.

in the Philippines, the 2017 Iraqi earthquake,[41] and the 2019 Cyclone Idai in Mozambique.[42] IOM's role within the cluster approach will be further analysed in the case studies explored in Section 12.5.

IOM has also carved out a niche for itself as a major player in data collection in IDP situations, as set out in Koch's chapter in this volume.[43] Specifically, it has developed the Displacement Tracking Matrix (DTM).[44] The DTM is:

> [A] system to track and monitor displacement and population mobility. It is designed to regularly and systematically capture, process, and disseminate information to provide a better understanding of the movements and evolving needs of displaced populations whether on site or en route.[45]

The DTM was initially developed in Iraq in 2004 where it was used to inform needs assessment and monitoring activities pertaining to the enormous IDP population created by the US invasion of Iraq and the subsequent widespread conflict.[46] Through the DTM, IOM identifies and counts people as IDPs. IOM also determines, in cooperation with states, when individuals are no longer counted in the DTM, consequently implying that they are no longer IDPs, at least in the eyes of IOM.

Although IOM's 'permissive' Constitution has some strengths, allowing it to engage in the wide varieties of activities as outlined above, it has drawbacks. Taken in the context of its historical status outside the UN, its tendency to engage in a diverse range of activities and its project-based funding model, IOM's permissive Constitution has led to considerable

[41] IOM, 'IOM Iraq Provides Medical Assistance to Earthquake-Affected Families' (14 November 2017) <www.iom.int/news/iom-iraq-provides-medical-assistance-earthquake-affected-families> accessed 18 May 2022.

[42] IOM, 'Mozambique – Cyclone IDAI Response – Situation Report – Round 10 (October 2019)' (2019) <https://displacement.iom.int/reports/mozambique-%E2%80%94-cyclone-idai-response-situation-report-%E2%80%94-round-10-october-2019> accessed 18 May 2022; IOM Iraq, 'IOM Iraq Provides Medical Assistance to Earthquake-Affected Families' (n 41).

[43] See Anne Koch, 'The International Organization for Migration as a Data Entrepreneur: The Displacement Tracking Matrix and Data Responsibility Deficits' 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).

[44] For an analysis of IOM's evolving roles in respect to data, particularly DTM development and deployment, see Koch (n 43). See also IOM, 'Haiti: From Emergency to Sustainable Recovery. IOM Haiti Two-Year Report (2010–2011)' (2012) <https://reliefweb.int/sites/reliefweb.int/files/resources/Full%20Report_645.pdf> accessed 18 May 2022.

[45] IOM DTM, 'About' (2019) <https://dtm.iom.int/about> accessed 18 May 2022.

[46] Ibid.

confusion about the organization's mandate and, by extension, its obligations, accountability, and ethos. The following sections will provide some clarity on these matters in respect to IOM's work on internal displacement, through the analytical lens of the GPs.

12.4 IOM Policies and the GPs

This section identifies the manner and extent to which IOM engages with the GPs in its policies and frameworks. It does so, first, by mapping explicit references to the GPs in pertinent IOM documents. Five IOM policies and frameworks form the basis of this analysis, spanning the early 2000s to the present day. We examine the: (i) 2002 document, 'Internally Displaced Persons: IOM Policy and Activities'; (ii) 2012 Migration Crisis Operational Framework; (iii) 2015 IOM Humanitarian Policy – Principles for Humanitarian Action; (iv) 2016 Framework on the Progressive Resolution of Displacement Situations; and (v) 2017 Framework for Addressing Internal Displacement. These have been chosen because they are the principal documents guiding IOM's global approach to mobility and humanitarian action as applies to internal displacement. Second, it presents a critique of the extent to which these IOM policies and frameworks promote, in letter and ethos, the durable solutions approach that is central to the GPs.[47] A focus on durable solutions is apt given the centrality of this issue in the GPs' approach to resolving internal displacement and, as will be shown, 'resolving' internal displacement is core to much of IOM's work in respect to internal displacement.

12.4.1 Explicit Engagement

The IOM Executive Committee first considered IOM policy and practice in respect to IDPs in May 1997.[48] At this time, the GPs were in a developmental phase. Nonetheless, IOM used themes drawn from the then draft GPs to shape its 'general principles and operational guidelines' on internal displacement.[49] In its 2002 document, 'Internally Displaced Persons: IOM Policy and Activities' ('the 2002 IOM Policy and Activities'), IOM made a series of affirmatory statements and commitments in respect to the GPs. IOM here recognised that the GPs 'consolidate into one

[47] ECOSOC, 'Report of the Representative of the Secretary-General' (n 15) Section V.
[48] IOM, 'Internally Displaced Persons' (n 13) para 10.
[49] Ibid.

document the relevant rights and norms and state them in a way as to be specifically relevant to the situation in internal displacement',[50] and that the GPs 'thus provide a practical tool for implementation and should be closely followed in all programmes benefiting IDPs, and in all attempts to address the issue of displacement'.[51] Crucially, it then states that 'IOM has undertaken to promote and respect the GPs in its work, and to disseminate them as widely as possible',[52] with the then IOM Emergency and Post-Conflict Unit[53] tasked with 'ensuring that IOM project proposals are consistent with the Guiding Principles'.[54]

Since 2002, and especially in the past decade, IOM has published a plethora of policies and frameworks, many of general application and one in particular that is specific to internal displacement. Much of this policy development came in part as a consequence of a far-reaching review by the Swedish International Development Agency (SIDA) of IOM's work in the field of humanitarian assistance.[55] In 2012, the IOM Council published its Member State-approved Migration Crisis Operational Framework (MCOF).[56] The MCOF 'provides a reference frame for IOM's response to the mobility dimensions of crisis situations'.[57] It was 'developed at the request of IOM Member States, pursuant to their growing interest in the migration consequences of crisis situations'.[58] The overarching intention of the MCOF is to 'allow IOM to improve and systematize the way in which the Organization supports its Member States and partners to better respond to the assistance and protection needs of crisis-affected populations'.[59]

The MCOF is underpinned by 'the migration crisis approach'.[60] IOM explains this approach as being more holistic than that offered by existing migration frameworks, which, in its view, do not comprehensively

[50] IOM, 'Internally Displaced Persons' (n 13) para 13.
[51] Ibid.
[52] IOM, 'Internally Displaced Persons' (n 13) para 14.
[53] Now the IOM Department of Operations and Emergencies.
[54] IOM, 'Internally Displaced Persons' (n 13) para 15.
[55] Anders Olin, Lars Florin and Björn Bengtsson, '*Study of the International Organization for Migration and Its Humanitarian Assistance*' (SIDA Evaluations 2008).
[56] IOM Council, 'IOM Migration Crisis Operational Framework' (15 November 2012) MC/2355. Approved unanimously in IOM Council, 'Migration Crisis Operational Framework Resolution' (27 November 2012) Resolution 1243 IOM Doc MC/2362.
[57] IOM Council, 'IOM's Humanitarian Policy – Principles for Humanitarian Action' (12 October 2015) IOM Doc C/106/CRP/20.
[58] IOM Council, 'Migration Crisis Operational Framework' (n 56) para 1.
[59] IOM Council, 'Migration Crisis Operational Framework' (n 56) para 3.
[60] IOM Council, 'Migration Crisis Operational Framework' (n 56) para 6.

cover 'all patterns of mobility during crises' or 'all those on the move during crises'.[61] IOM thus seeks through the MCOF 'to complement systems that privilege certain categories of affected populations through a focus on the vulnerability of a variety of people on the move and the affected communities'.[62] Within the MCOF, IOM identifies what it calls the '[m]ost relevant frameworks and modalities for cooperation'.[63] The list is extensive, with reference made to, *inter alia*, the IASC cluster approach and the UNHCR,[64] the 1951 Refugee Convention and its associated 1967 Protocol,[65] and the Hyogo Framework for Action 2005–2015 on disaster risk reduction.[66] Yet, there is one glaring omission when the MCOF is viewed through the lens of internal displacement – there is no reference whatsoever to the GPs. This is despite, as discussed in Section 12.2, the GPs having been widely cited in international fora as the leading normative statement on minimum IDP protection and assistance standards.[67] Moreover, it is indeed highly curious to see the GPs neglected in the MCOF when the concept of a 'migration crisis' is intended to apply not only in cross-border contexts but also in relation to internal displacement[68] and, as discussed, IOM has advocated for the GPs to be 'closely followed in all programmes benefiting IDPs, and in all attempts to address the issue of displacement',[69] and has committed itself 'to promote and respect the Guiding Principles in its work'.[70]

This situation is then repeated in the 2015 IOM Humanitarian Policy – Principles for Humanitarian Action ('the Principles for Humanitarian Action').[71] These Principles constitute 'a key element of IOM's efforts to

[61] IOM Council, 'Migration Crisis Operational Framework' (n 56) para 6. For example, IOM pinpoints international migrants who are not refugees but have been 'caught in crisis' (in either destination or transit locations) as absent from these frameworks (para 5(d)).
[62] IOM Council, 'Migration Crisis Operational Framework' (n 56) para 6.
[63] IOM Council, 'Migration Crisis Operational Framework' (n 56) paras 14–19.
[64] IOM Council, 'Migration Crisis Operational Framework' (n 56) paras 14 and 15 respectively.
[65] IOM Council, 'Migration Crisis Operational Framework' (n 56) para 15.
[66] IOM Council, 'Migration Crisis Operational Framework' (n 56) para 17.
[67] See, for example, UN Human Rights Council, 'Mandate of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons' (14 December 2007) UN Doc A/HRC/RES/6/32, para 5; UNGA Res 64/162, 'Protection of and Assistance to Internally Displaces Persons' (18 December 2009) UN Doc A/RES/64/162 para 10.
[68] IOM, 'Migration Crisis Operational Framework' (version 2.0, 2020) <https://emergencymanual.iom.int/entry/17002/migration-crisis-operational-framework-mcof> accessed 4 October 2021.
[69] IOM, 'Internally Displaced Persons' (n 13) para 13.
[70] IOM, 'Internally Displaced Persons' (n 13) para 14.
[71] IOM Council, 'IOM's Humanitarian Policy – Principles for Humanitarian Action' (n 57).

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prioritize policy development as part of its engagement to strengthen its humanitarian role'.[72] They aim to 'define IOM's responsibilities vis-à-vis internationally agreed core humanitarian principles and to clarify its role at all levels'.[73] While the Principles for Humanitarian Action recognise IDPs (alongside refugees, asylum seekers and stateless persons) as being 'covered by dedicated international protection frameworks and norms',[74] and while 'internal movements' explicitly feature in the series of 'operating contexts' presented,[75] at no point are the GPs mentioned. This is in contrast to international humanitarian law and refugee law, which feature throughout.

Although neither the MCOF nor the Principles for Humanitarian Action contain any explicit reference to the GPs, the 2016 Framework on the Progressive Resolution of Displacement Situations ('the PRDS Framework')[76] does, albeit only in endnotes. It 'aims to guide IOM and inform its partners to frame and navigate the complexity of forced migration dynamics and support efforts to progressively resolve displacement situations'.[77] The PRDS Framework explicitly cites the GPs on two occasions. It does so first by simply identifying them as an existing IDP durable solutions framework.[78] Second, and more importantly, it states that IOM's 'key programmatic principles' are inspired by, *inter alia*, the GPs, in recognition of these as a 'key international framework'.[79]

Lastly, in 2017, IOM published its Framework for Addressing Internal Displacement ('the 2017 Framework').[80] This goes one step further than the PRDS Framework by recognising the GPs as 'the most important international framework for the protection of IDPs'.[81] The 2017 Framework lays

[72] Ibid para 2.
[73] Ibid.
[74] IOM Council, 'IOM's Humanitarian Policy – Principles for Humanitarian Action' (n 57) Annex, para I.5.
[75] IOM Council, 'IOM's Humanitarian Policy – Principles for Humanitarian Action' (n 57) paras VI.5-VI.17.
[76] IOM, 'The Progressive Resolution of Displacement Situations' (2016) <www.iom.int/sites/default/files/our_work/DOE/humanitarian_emergencies/PRDS/IOM-PRDS-Framework.pdf> accessed 18 May 2022.
[77] OCHA, 'Rethinking Solutions to Displacement in Chad: Applying IOM's New PRDS Framework' (IOM 2016) <https://reliefweb.int/report/chad/rethinking-solutions-displacement-chad-applying-iom-s-new-prds-framework> accessed 18 May 2022.
[78] IOM, 'The Progressive Resolution of Displacement Situations' (n 76) 5.
[79] IOM, 'The Progressive Resolution of Displacement Situations' (n 76) 14.
[80] IOM, 'IOM Framework for Addressing Internal Displacement' (2017) <www.iom.int/sites/default/files/press_release/file/170829_IDP_Framework_LowRes.pdf> accessed 18 May 2022.
[81] Ibid 7.

out three key 'Principles of Engagement' – (1) primary responsibility of States; (2) grounded in prevailing principles, policies, and practices; and (3) people-centred.[82] In respect to the second principle, IOM commits to its programmes and activities on internal displacement being 'in line with prevailing normative and legal frameworks, including international human rights law, international humanitarian law, the Guiding Principles on Internal Displacement and relevant IASC-endorsed standards and practices'.[83] Additionally, the 2017 Framework asserts that it 'consolidates its comprehensive and diverse programming on internal displacement' under a series of operational objectives[84] that are '[i]n line with' what it accurately identifies as the GPs' goals. These are namely 'to prevent conditions that might lead to internal displacement and to minimize its adverse effects when it does occur; to provide protection and assistance to IDPs during displacement; and to promote durable solutions'.[85] The 2017 Framework therefore not only contains several substantive and explicit references to the GPs but gives the GPs their due weight alongside other applicable frameworks. The 2017 Framework is indeed highly complimentary of the GPs, and respects that while the document itself is not legally binding, it nonetheless 'consolidate[s] international legal norms found in existing treaties and conventions'.[86]

Overall, despite the welcome publication of the 2017 Framework, it remains apparent that explicit reference and endorsement of the GPs is, despite promises made elsewhere, notably absent in key general (i.e. not IDP-exclusive) IOM policies and frameworks. Indeed, on the basis of this analysis alone, there is little evidence that IOM has, in the context of its internal policy-making processes, met its own commitment 'to promote and respect the Guiding Principles in its work, and to disseminate them as widely as possible'.[87] However, this evidenced lack of explicit mention of the GPs does not necessarily mean that inconsistencies exist between IOM policies and frameworks and the content of the GPs. Equally, simply because there are references in support of the GPs in, for example,

[82] IOM, 'IOM Framework for Addressing Internal Displacement' (n 80) 8.
[83] Ibid.
[84] These operational objectives are: '(a) bolster preparedness and resilience-building and address root causes; (b) provide protection and assistance through timely and effective humanitarian responses; (c) support and pursue durable solutions and sustainable recovery', IOM, 'IOM Framework for Addressing Internal Displacement' (n 80).
[85] IOM, 'IOM Framework for Addressing Internal Displacement' (n 80) 14.
[86] IOM, 'IOM Framework for Addressing Internal Displacement' (n 80) 7.
[87] IOM, 'Internally Displaced Persons' (n 13) para 14.

the 2017 Framework, does not guarantee that the content of such policies and frameworks is in accordance with the ethos and spirit of the GPs. Assessing whether IOM respects and ensures consistency with the GPs in its work requires a more substantive examination of the content of these documents, which is the focus of Section 12.4.2, and its field-based operations and approach, which is examined in Section 12.5.

12.4.2 Advancing the Pursuit of Durable Solutions?

This section will analyse the extent to which IOM's policies and frameworks reveal an approach to resolving displacement that is compatible with the durable solutions approach laid out in the GPs, which has become the dominant approach internationally.

As outlined in Section 12.2 of this chapter, the GPs cover all phases of displacement. In respect to the post-displacement phase, Principle 28 is most relevant. Principle 28(1) states that 'the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily … or to resettle voluntarily' lies with the competent authorities, with such authorities also expected to 'endeavour to facilitate the reintegration of returned or resettled internally displaced persons'. Principle 28(2) then goes on to promote IDPs' 'full participation … in the planning and management of their return or resettlement and reintegration'.[88]

Although the term 'durable solutions' does not feature in the GPs, the three durable solutions of 'return, local integration in the locations where persons have been displaced, and resettlement in another part of the country'[89] are evident in Principle 28. In respect to return and

[88] Principle 29 then goes on to state that IDPs who have returned or resettled 'shall not be discriminated against as a result of their having been displaced', in particular that 'They shall have the right to participate fully and equally in public affairs at all levels and have equal access to public services' (Principle 29(1)). Moreover, competent authorities have 'the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions', and, when such recovery is not possible, to 'provide or assist these persons in obtaining appropriate compensation or another form of just reparation' (Principle 29(2)).

[89] Walter Kälin, *Guiding Principles on Internal Displacement: Annotations* (The American Society of International Law 2008) 3. As stated by the Inter-Agency Standing Committee (IASC), these three means by which to secure a durable solution to internal displacement are complementary and non-hierarchical, IASC, 'Framework on Durable Solutions for Internally Displaced Persons: Project on Internal Displacement' (The Brookings Institution – University of Bern Project on Internal Displacement 2010) <https://interagencystandingcommittee.org/system/files/2021-03/IASC%20Framework%20

resettlement, both of course explicitly feature. In respect to local integration, although there is no explicit mention of this in Principle 28, that return or resettlement be chosen voluntarily means IDPs cannot be forced, or in any way coerced, into further movement, whether onward or return, for the purpose of seeking a durable solution to their displacement. This therefore implicity includes local integration within the scope of Principle 28. Kälin confirms in the Annotations to the GPs that all three types of durable solution, including local integration, are indeed envisioned by the GPs.[90] It is also widely acknowledged, including by IOM,[91] that the GPs endorse the three types of durable solutions, even if not explicitly or by that precise name.

The language of 'durable solutions' does feature in IOM policies and frameworks. For instance, in the MCOF and the Principles for Humanitarian Action, there is explicit mention of 'advocating for',[92] 'laying the foundations for',[93] 'allowing'[94] and 'promoting'[95] durable solutions. While IOM itself does not unequivocally define 'durable solutions', it does refer, namely in the PRDS Framework[96] and the 2017 Framework,[97] to the three solutions of return, resettlement and local integration as featured in the GPs and elsewhere. Yet, despite this, it is nonetheless apparent that IOM policies tend towards supporting the mobility-related solutions of return and resettlement. For example, in the MCOF, although there are several references to '(re)integration support',[98] these typically appear in the context of securing sustainable return.[99] 'Local integration' is in fact explicitly mentioned only once, and this is in respect to refugees.[100] This focus on return and resettlement is also implicit at other points

on%20Durable%20Solutions%20for%20Internally%20Displaced%20Persons%2C%20April%202010.pdf> accessed 18 May 2022, 12).

[90] Kälin, *Guiding Principles on Internal Displacement: Annotations* (n 89) 125.

[91] IOM, 'IOM Framework for Addressing Internal Displacement' (n 80) 7; IOM, 'The Progressive Resolution of Displacement Situations' (n 76) 5.

[92] IOM Council, 'Migration Crisis Operational Framework' (n 56) para 10 on p 3.

[93] IOM Council, 'Migration Crisis Operational Framework' (n 56) para 10 on p 6, and para 16.

[94] IOM Council, 'Migration Crisis Operational Framework' (n 56), para 10 on p 6.

[95] IOM Council, 'IOM's Humanitarian Policy – Principles for Humanitarian Action' (n 57) paras I.7, VI.17.

[96] IOM, 'The Progressive Resolution of Displacement Situations' (n 76) 5.

[97] IOM, 'IOM Framework for Addressing Internal Displacement' (n 80) 7.

[98] For example, para 10 on p 5.

[99] For example, para 10 on p 6. In this respect, an important distinction is to be made between *re*-integration upon return or resettlement, and integration at the location to which one has been displaced.

[100] IOM Council, 'Migration Crisis Operational Framework' (n 56) para 15.

throughout the MCOF, for example, in respect to health, when it is stated that IOM 'provide[s] comprehensive migrant health-care and prevention services … at the pre-departure stage, during travel and transit and upon return'.[101] It is additionally revealed by IOM's promise to 'improve living conditions of displaced persons and migrants in transit, by … advocating for durable solutions and ensuring organized closure and phase-out of camps'.[102] This thus seemingly closes off any possibility of a 'local integration' durable solution to displacement in a camp-based setting, for instance, through the transformation of camps into permanent residential districts.

This mobility-centred approach is even more explicit in the 2016 PRDS Framework, which provides an intriguing insight into IOM's approach and underlying ethos in respect to resolving displacement. The PRDS Framework expresses concern that 'the growing complexity and unpredictability' of migration crises 'challenge[s] the versatility of the three traditional durable solutions – voluntary return and sustainable reintegration, sustainable settlement elsewhere and sustainable local integration'.[103] Indeed, the very existence of the PRDS Framework reveals unease on the part of IOM with the definition of a durable solution as presented by the IASC and/or the idea that the achievement of a durable solution is determinative of when displacement ends. The 2010 IASC Framework on Durable Solutions for Internally Displaced Persons ('IASC Framework')[104] defines a durable solution, and thus the end of displacement, as 'when IDPs no longer have any specific assistance and protection needs that are linked to their displacement and such persons can enjoy their human rights without discrimination resulting from their displacement'.[105] The PRDS Framework instead proposes a 'resilience-based approach' aimed towards *progressively* resolving displacement situations.[106] As explained by IOM, '[m]obility can be a crucial component of resilience',[107] thus, mobility lies at the core of the PRDS' mission statement to 'maximize opportunities that employ mobility strategies to foster

[101] IOM Council, 'Migration Crisis Operational Framework' (n 56) para 10 on p 4.
[102] IOM Council, 'Migration Crisis Operational Framework' (n 56) para 10 on p 3.
[103] IOM, 'IOM Contributions to Progressively Resolve Displacement Situations: Compendium of Activities and Good Practice' (18 July 2016) <https://publications.iom.int/fr/books/iom-contributions-progressively-resolve-displacement-situations-compendium-activities-and> accessed 18 May 2022.
[104] IASC, 'Framework on Durable Solutions for Internally Displaced Persons' (n 89).
[105] Ibid 5.
[106] IOM, 'The Progressive Resolution of Displacement Situations' (n 76) 10.
[107] IOM, 'The Progressive Resolution of Displacement Situations' (n 76) 6.

the resilience of displaced populations'.[108] It is argued that the PRDS Framework therefore 'embraces broader, more inclusive approaches which integrate mobility dimensions',[109] and that as a framework it complements the three durable solutions of local integration, return and resettlement.[110] Although a detailed critique of the PRDS Framework lies beyond the scope of this chapter, when viewed through the lens of the GPs, it is telling to see the weight given to mobility. Even though IOM asserts its approach as being complementary to the three durable solutions approach, the PRDS Framework says nothing that encourages or respects local integration as a possible solution to internal displacement. Moreover, it is concerning that, aside from IOM stating that it 'recognizes those affected by crisis and displacement as central actors and agents in finding their own solutions',[111] and calling in its PRDS key programmatic principles to '[s]upport the freedom of choice of affected persons to identify appropriate solutions…',[112] the language of 'voluntariness' is noticeably sparse throughout.[113]

In sum, while the GPs and other associated frameworks embrace a durable solutions approach that views such solutions as not being exclusively mobility-related, IOM's approach appears to favour mobility-related solutions to internal displacement. The PRDS Framework in particular articulates a view that is clearly critical of the durable solutions framework espoused by the GPs. This focus on mobility is perhaps understandable in the light of IOM's own expertise.[114] Indeed, the MCOF proclaims IOM's 'unique expertise in the transportation of beneficiaries in emergency (evacuation) and post-crisis (resettlement or return) situations',[115] and it is mentioned in the Principles for Humanitarian Action that 'IOM Member States recognize IOM's comparative advantage in addressing the mobility

[108] IOM, 'The Progressive Resolution of Displacement Situations' (n 76) 10.
[109] IOM, 'The Progressive Resolution of Displacement Situations' (n 76) 6.
[110] IOM, 'Progressive Resolution of Displacement Situations Framework (PRDS)' (Emergency Manual version 1.8, IOM 2020) <https://emergencymanual.iom.int/entry/17151/progressive-resolution-of-displacement-situations-framework-prds#1,1638809738806> accessed 12 October 2021.
[111] IOM, 'The Progressive Resolution of Displacement Situations' (n 76) 12.
[112] IOM, 'The Progressive Resolution of Displacement Situations' (n 76) 14.
[113] For a related discussion of IOM's involvement in assisted voluntary returns of migrants internationally, 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).
[114] This will be explored in greater detail in Section 12.5.
[115] IOM Council, 'Migration Crisis Operational Framework' (n 56) para 10 on p 4.

dimensions of crises'.[116] It nonetheless calls into question the adherence of IOM policies and frameworks with the GPs, as well as IOM's stated commitment to respect and ensure consistency with the GPs in its work.[117]

Even more importantly, however, it raises concerns in respect to voluntariness. Any imbalance in the emphasis placed on mobile and non-mobile means by which to resolve displacement risks undermining 'free choice' on the part of IDPs.[118] A 'free choice' in this context draws legally binding force from the right to liberty of movement and freedom to choose one's residence, as articulated throughout international human rights law.[119] To realise a 'free choice' requires the availability of feasible options[120] – a choice to return or resettle cannot be deemed freely-made when decided in the context of unbearable local conditions or when IDPs perceive local integration to not be an option. Moreover, the IASC Framework tells us that further movement, whether onward or return, by an already displaced individual is not required to resolve displacement.[121] Indeed, to in any way coerce onward movement would be to subject IDPs to secondary displacement. It is therefore to some extent reassuring to see IOM caveat its embrace of mobility strategies to those that 'suppose progression towards resolving displacement, while ensuring safety nets are in place to avoid potentially harmful mobility strategies',[122] which could for

[116] IOM Council, 'IOM's Humanitarian Policy – Principles for Humanitarian Action' (n 57) para II.3. Similarly, Article 2(2) of the 'Agreement concerning the Relationship between the UN and the IOM' states that the UN recognises IOM as 'an essential contributor… in operational activities related to migrants, displaced people and migration-affected communities, *including in the areas of resettlement and returns*', 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 (emphasis added).

[117] IOM, 'Internally Displaced Persons' (n 13) paras 14–15.

[118] As stated by Kälin, 'At the core of Principle 28 lies the notion of free choice of internally displaced persons between return, local integration and resettlement in another part of the country', Kälin, *Guiding Principles on Internal Displacement: Annotations* (n 89) 129.

[119] For example, in Article 12(1) of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

[120] Walter Kälin, 'Legal Aspects of Return of Internally Displaced Persons and Refugees to Abkhazia, Georgia' (*The Brookings Institution,* 29 November 2007) <www.brookings.edu/on-the-record/legal-aspects-of-return-of-internally-displaced-persons-and-refugees-to-abkhazia-georgia> accessed 18 May 2022; Elizabeth Ferris and Nadine Walicki, 'Local Integration of Internally Displaced Persons in Protracted Displacement: Some Observations' in Elizabeth Ferris (ed) '*Resolving Internal Displacement: Prospects for Local Integration*' (The Brookings Institution – London School of Economics Project on Internal Displacement 2011) 20.

[121] IASC, 'Framework on Durable Solutions for Internally Displaced Persons' (n 89) 5.

[122] IOM, 'Progressive Resolution of Displacement Situations Framework (PRDS)' (n 110).

instance include coercion into smuggling. Extreme caution must nevertheless be taken to ensure that any institutional preference for mobility, even if based on a well-founded belief in the beneficial role that further movement can play in ultimately resolving displacement, does not undermine the paramount principle of voluntariness that lies at the heart of the durable solutions model.[123]

Having established the extent to which IOM policies and frameworks explicitly refer to the GPs and reflect their durable solutions approach, this chapter now shifts the focus to IOM's field-based practice. Specifically, Section 12.5 examines IOM's in-country operations and approach to internal displacement in Haiti and Iraq, doing so once again through the analytical lens of the GPs.

12.5 Putting the GPs into Practice?

12.5.1 Experiences in Haiti

IOM has a long history of activities in Haiti. From 1994 onwards it was involved in a wide variety of activities including community stabilization, border management, responding to disasters such as Tropical Storm Jeanne and the massive flooding in Fonds-Verettes, and facilitating returns.[124] The focus of this section is on IOM's 2010 response to the 7.0 magnitude earthquake that hit Haiti on 12 January 2010. This focus is justified for four main reasons. First, the disaster was enormous in scope – it killed more than 100,000 people, destroyed some 300,000 homes, and displaced over 1.5 million people into 1,555 camps at the peak of the crisis.[125] In fact, it was the worst disaster to hit the Western hemisphere in recorded history.[126] As such it has been widely studied and there are ample reports of IOM's operations at that time.[127] Second, it represented one of IOM's

[123] Kälin, *Guiding Principles on Internal Displacement: Annotations* (n 89) 129.

[124] IOM, 'Haiti: From Emergency to Sustainable Recovery. IOM Haiti Two-Year Report (2010–2011)' (n 44).

[125] UN Human Rights Council, 'Report of the Special Rapporteur on the human rights of internally displaced persons, Chaloka Beyani. Addendum: Mission to Haiti' (8 May 2015) UN Doc A/HRC/29/34/Add.2 para 6.

[126] Greger B Calhan, 'Forced Evictions, Mass Displacement, and the Uncertain Promise of Land and Property Restitution in Haiti' (2014) 11 Hastings Race and Poverty Law Journal 157.

[127] Calhan (n 126); Bradley, *The International Organization for Migration: Challenges, Commitments, Complexities* (n 5); IOM, 'Haiti: From Emergency to Sustainable Recovery. IOM Haiti Two-Year Report (2010–2011)' (n 44).; Elizabeth Ferris and Sara Ferro-Ribeiro, 'Protecting People in Cities: The Disturbing Case of Haiti' (2012) 36 *Disasters* 43; Angela Sherwood and others, 'Supporting Durable Solutions to Urban,

biggest ever missions – not only in Haiti but globally. At its peak, IOM had almost 100 international staff in Haiti and more than 600 Haitian employees, making it one of the largest teams in the earthquake zone.[128] Third, the Haitian operation was in response to a disaster, which, as set out in Section 12.3 is one of the major niches that has been carved out by IOM. Fourth, as aforementioned, many from the displaced population crowded into camps. Camp coordination and camp management in disaster contexts is IOM's responsibility under the cluster system; hence IOM was the major player in Haiti at that time.

After the earthquake hit Haiti, IOM mobilised and began deploying resources within 24 hours.[129] IOM engaged in a wide variety of crisis response efforts including distributing shelters and 'non-food items', constructing emergency water and sanitation facilities, and responding to the autumn 2010 cholera outbreak.[130] Moreover, IOM was one of the largest recipients of funding in the entire international community's response to the earthquake.[131] However, its main activities focused on camp coordination/camp management and facilitating camp closures, activities in which its data collection and management work, thought the DTM, figured centrally. These two facets of IOM's work in Haiti will be analysed in turn, with a view to determining to what extent IOM's work abided by the GPs.

12.5.1.1 Camp Coordination and Camp Management

As cluster lead, IOM coordinated the actors working in the camps and attempted to manage the provision of basic services in the camps. The scale of IOM's tasks in Haiti was colossal. As aforementioned, there were over 1.5 million IDPs living in 1,555 camps at the peak of the crisis. These camps varied enormously in size and logistics – ranging from massive sites at the airport to smaller clusters of tents on hillsides and crammed alongside

Post-Disaster Displacement: Challenges and Opportunities in Haiti' (The Brookings Institution/IOM 2014); Simon Levine and others, 'Avoiding Reality: Land, Institutions and Humanitarian Action in Post-Earthquake Haiti (Working Paper, Humanitarian Policy Group 2012); Isabel Macdonald, 'Erasing the Dead' (*The Intercept*, 22 October 2019) <https://theintercept.com/2019/10/22/haiti-tps-earthquake-displacement-camps> accessed 18 May 2022.

[128] Bradley, *The International Organization for Migration: Challenges, Commitments, Complexities* (n 5).

[129] IOM Haiti, 'Camps & Returns' <https://haiti.iom.int/camps-returns> accessed 18 May 2022.

[130] IOM, 'Haiti: From Emergency to Sustainable Recovery. IOM Haiti Two-Year Report (2010–2011)' (n 44).

[131] Vijaya Ramachandran and Julie Walz, 'Haiti: Where Has All the Money Gone?' (Policy Paper 004, Center for Global Development, May 2012) <www.cgdev.org/sites/default/files/1426185_file_Ramachandran_Walz_haiti_FINAL_0.pdf> accessed 18 May 2022.

flattened buildings. Conditions were dire, with residents struggling to find access to adequate water, food, sanitation, shelter, and security. In addition, IOM was responsible for coordinating the hundreds of NGOs and UN agencies working in the camps. However, the camp population did not represent Haiti's total IDP population. Many displaced Haitians did not shelter in camps but pursued other options such as moving in with friends or family, and many of these people also needed assistance.[132] Yet international actors and the Haitian government focused almost exclusively on camps, and this is where the most data collection happened.

IOM's work in the camps was commendable in many respects. IOM teams carried out daily camp management operations making sure that basic services were provided, including distribution of non-food items; camp infrastructure improvement; referral of vulnerable cases to health and protection partners; support to statistical data collection; support to cholera response operations in camps; and emergency response (e.g. during Hurricane Tomas and several other storms).[133] In addition, IOM identified the protection of women, children, elderly people with special needs, and people with disabilities and health conditions as a priority within its relief strategy.[134] This approach aligns with Principle 4 of the GPs, which identifies such categories of individuals as meriting protection and assistance that takes account of their special needs.

Yet IOM's focus on camp-based IDPs was problematic in three main respects. First, the camp-based focus gave the impression that to be an IDP, one must live in a camp.[135] Viewed from the perspective of the GPs, this is simply not true. The GPs' description of IDPs sets out just one geographic limitation on who can be an IDP – they must not have crossed an international border. Hence an individual can, in principle, be an IDP regardless of where they find themselves in their state, be it within an IDP camp or elsewhere. In fact, not only did IOM focus on camps, but it also seemed to exclude smaller camps from its remit. As aforementioned, IOM's DTM is its main tool for assessing IDP figures, which in turn plays a huge role in designing its IDP-related programmes. During IOM's Haiti

[132] Megan Bradley and Angela Sherwood, 'Addressing and Resolving Internal Displacement: Reflections on a Soft Law "Success Story"' in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (Oxford University Press 2016).

[133] IOM, 'Haiti: From Emergency to Sustainable Recovery. IOM Haiti Two-Year Report (2010–2011)' (n 44).

[134] Ibid.

[135] Bradley and Sherwood (n 132).

operations, very small or far-flung camps could slip under the DTM radar, leaving their residents with little aid (and those living outside the camps often with even less). Thus, IOM's camp focus was criticised by the then UN Special Rapporteur on IDPs, Chaloka Beyani:

> The Special Rapporteur makes the case for the need for a comprehensive profiling exercise for the overall displaced population, the location of those IDPs, both in and outside camps, and their specific needs. He considers the absence of such profiling and needs assessment (with disaggregated data) to be a handicap to formulating evidence-based, durable solutions, having regard to the causes and magnitude of internal displacement (i.e. the earthquake and other causes of displacement) and, most importantly, their consequences on the human rights of IDPs.[136]

Second, although IOM's lead role in the CCCM cluster might explain its focus on IDPs in camps, the cluster mandate does not limit the organization from assisting IDPs who live outside the camp environment. In addition, as set out in Sections 12.3 and 12.4, there is nothing in IOM's mandate or in its policy documents that limits its role to camp-based IDPs. IOM could have assisted those in camps while at the same time offering assistance to the many IDPs who lived outside camps. Moreover, IOM's focus on camp-based IDPs may have violated Principle 4 of the GPs, which states that the GPs shall be applied 'without discrimination of any kind', providing a non-exhaustive list of grounds for discrimination. Thus, IOM's policy of conditioning much of its assistance based on residency in a camp not only misrepresented who is an IDP in Haiti but was also potentially discriminatory vis-à-vis non-camp-based IDPs.

12.5.1.2 Camp Closures

As outlined in Section 12.4, IDPs have achieved a durable solution when they 'no longer have specific assistance and protection needs that are linked to their displacement and such persons can enjoy their human rights without discrimination on account of their displacement'.[137] The GPs foresee three means by which a durable solution can be achieved: (1) return voluntarily, in safety and dignity, to their homes or places of habitual residence; (2) local integration; or (3) voluntary resettlement in another part of the country. Special efforts should be made to ensure the full participation of IDPs in the planning and management of their return or resettlement.[138]

[136] UN Human Rights Council, 'Report of the Special Rapporteur on the human rights of internally displaced persons, Chaloka Beyani. Addendum: Mission to Haiti' (n 125) para 28.
[137] IASC, 'Framework on Durable Solutions for Internally Displaced Persons' (n 89) 5.
[138] Guiding Principle 28(2).

It is important to acknowledge here that the concept of 'durable solutions' was particularly difficult to deploy in the context of the Haitian earthquake. This was because of the conditions in Haiti, and Port-au-Prince in particular, that preceded the earthquake. Many Haitians were extremely poor, and they often changed their places of residence because of massive tenure insecurity, high rents, and lack of accessible shelter. Against this background, understanding the meaning and application of the IDP concept and the idea of 'durable solutions' was a challenge for all humanitarian actors, including but not limited to IOM.[139]

IOM's approach to durable solutions focused predominantly on camp closures. As the emergency response wound down, IOM's work shifted to shutting camps and supporting the progressive resolution of the IDP situation. Camp closures were pursued because of the dire conditions and/or lack of services in many camps and the fact that they were often erected on important public spaces, flood-prone areas and/or on private property.[140] In addition, the Haitian government was determined to see the camps closed and thus painted the camp-based IDPs as opportunists who wanted to take advantage of the aid system.[141]

IOM employed various approaches to facilitate camp closures, some of which arguably assisted former camp residents to find a durable solution. It helped displaced landowners who lost their homes by building temporary shelters on their properties.[142] It also provided more modest support for the reconstruction of permanent homes, and its legal team attempted to mediate land disputes and support the negotiation of land tenure agreements.[143] Yet these initiatives left out the majority of IDPs without property on which to rebuild. The main mechanism by which IOM facilitated camp closures was the provision of a cash grant to former camp residents to support the cost of one year's rental accommodation.[144] In many cases, the

[139] Mark Schuller, *Humanitarian Aftershocks in Haiti* (Rutgers University Press 2016); Mark Schuller, *Killing with Kindness: Haiti, International Aid, and NGOs* (Rutgers University Press 2012).

[140] IOM, 'Haiti: From Emergency to Sustainable Recovery. IOM Haiti Two-Year Report (2010–2011)' (n 44).

[141] Bradley and Sherwood (n 132).

[142] IOM, 'Haiti: From Emergency to Sustainable Recovery. IOM Haiti Two-Year Report (2010–2011)' (n 44); Sherwood and others (n 127).

[143] Bradley, *The International Organization for Migration: Challenges, Commitments, Complexities* (n 5).

[144] IOM, 'Haiti: From Emergency to Sustainable Recovery. IOM Haiti Two-Year Report (2010–2011)' (n 44); Emmett Fitzgerald, 'Helping Families, Closing Camps: Using Rental Support Cash Grants and Other Housing Solutions to End Displacement in Camps. A Tool Kit of Best Practice and Lessons Learned: Haiti 2010–2012' (IASC Haiti E-Shelter/CCCM Cluster 2012).

grant was supplemented by training and skills development programmes and other forms of (admittedly modest) reintegration assistance.[145]

However, these approaches did not always assist IDPs to achieve durable solutions in practice. They helped some IDPs but for many these approaches did not enable durable solutions or even sustainable progress towards them. Given the high costs of rent in Haiti some did not want to leave the camp environment at all but were forced to do so.[146] Many of these IDPs could not secure rental accommodation and had to relocate to temporary settlements and/or buildings that were not structurally safe, with many living in worse conditions than they were in before the earthquake struck.[147]

IOM's approach towards durable solutions thus suffered from major shortfalls. By heralding camp closures as the yardstick by which to measure progress,[148] IOM seemed to lose focus on the actual outcomes for the IDPs themselves. In the words of Chaloka Beyani:

> Durable solutions are reached only when the needs related to displacement no longer exist, which is a medium-to-long-term complex development-led process for all IDPs and not just those living in camps or sites. Therefore, the closure of camps by itself does not mean that durable solutions for IDPs have been found.[149]

A more accurate indicator of progress would have been based on the durable solutions evident in the GPs: the numbers of individuals who had returned voluntarily to their homes, resettled voluntarily in another part of the country and/or integrated locally. In addition, the focus on the closure of camps as an indicator of whether displacement had ended entirely neglected the experiences of those who did not live in camps. Finally, the forced closure of the camps seems to have violated Principle 28 of the GPs, which emphasises that IDP return or resettlement must be voluntary. It might also have

[145] IOM, 'Haiti: From Emergency to Sustainable Recovery. IOM Haiti Two-Year Report (2010–2011)' (n 44).

[146] The IOM Displacement Tracking Matrix of June 2014 indicates that, since the earthquake, just over 249,747 households left the camps spontaneously; over 69,192 households left because they had accessed alternative housing or other assistance; and over 14,444 households were forcibly evicted, IOM, 'Displacement Tracking Matrix (DTM) Haiti, Round 19, June 2014' <https://reliefweb.int/report/haiti/displacement-tracking-matrix-dtm-haiti-round-19-june-2014> accessed 18 May 2022. See also UN Human Rights Council, 'Report of the Special Rapporteur on the human rights of internally displaced persons, Chaloka Beyani. Addendum: Mission to Haiti' (n 125); Calhan (n 126).

[147] Bradley and Sherwood (n 132); Calhan (n 126).

[148] IOM, 'Haiti: From Emergency to Sustainable Recovery. IOM Haiti Two-Year Report (2010–2011)' (n 44).

[149] UN Human Rights Council, 'Report of the Special Rapporteur on the human rights of internally displaced persons, Chaloka Beyani. Addendum: Mission to Haiti' (n 125) para 62.

violated Principle 6 of the GPs which states that 'every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence'. Rather than contribute to a durable solution, camp closures in many cases fuelled continued displacement.[150]

To conclude, IOM should be credited for its swift response to the Haitian earthquake and its focus on particularly vulnerable IDPs. However, its focus on IDPs in camps was 'practically and morally unsustainable'[151] and its adherence to the GPs – particularly regarding who it considered to be an IDP and its approach to durable solutions – is unsatisfactory. As neatly summed up by Bradley:

> [A]lthough IOM supports the Guiding Principles on Internal Displacement, in its data collection work in post-earthquake Haiti, IOM's implementation of the Displacement Tracking Matrix focused predominantly on IDPs resident in camps. This perpetuated the perception that, despite the broader conceptualization of internal displacement in the Guiding Principles, IDPs in Haiti were simply those resident in camps, and that closing camps was tantamount to resolving the IDPs' predicament.[152]

Having examined IOM's in-country operations and approach in the Haitian disaster setting, the next section will focus on internal displacement in conflict contexts by way of a case study of Iraq.

12.5.2 Experiences in Iraq

Forced displacement has been an enduring feature of Iraqi life for many decades.[153] Iraq has experienced several significant waves of displacement, both internal and cross-border.[154] These waves can perhaps be best categorised into three 'epochs'.[155] Throughout the second half of the twentieth century and up to 2003, displacement was 'an instrument of rule in the

[150] UN Human Rights Council, 'Report of the Special Rapporteur on the human rights of internally displaced persons, Chaloka Beyani. Addendum: Mission to Haiti' (n 125).

[151] Ibid para 65.

[152] Bradley, *The International Organization for Migration: Challenges, Commitments, Complexities* (n 5).

[153] UN Human Rights Council, 'Visit to Iraq: Report of the Special Rapporteur on the human rights of internally displaced persons' (13 May 2020) A/HRC/44/41/Add.1 para 6; Daryl Grisgraber, 'Displaced in Iraq: Little Aid and Few Options' (Field Report, Refugees International 2015) 3; Roberta Cohen, 'Iraq's Displaced: Where to Turn?' (2008) 24 American University International Law Review 301, 302.

[154] UN Human Rights Council, 'Visit to Iraq' (n 153) para 6; Grisgraber (n 153) 3; Cohen (n 153) 302.

[155] IDMC, 'Iraq: IDPs Caught between a Rock and a Hard Place as Displacement Crisis Deepens' (IDMC, 30 June 2015) 3.

hands of Iraq's Ba'athist regime',[156] utilised to effect ethnic cleansing and ultimately strengthen State control over a disempowered population.[157] Post-2003 and the fall of Saddam Hussein, displacements not only continued but expanded to cover the entire Iraqi State,[158] driven by intense sectarian fighting and generalised violence.[159] Most recently, unprecedented mass displacement was triggered by the advance of the self-proclaimed Islamic State in Iraq and the Levant (ISIL) and the ensuing conflict against ISIL.[160] Internal displacement in Iraq thus contrasts with that in Haiti in several ways. Most important of these differences is that displacement in Iraq is predominantly a consequence of armed conflict, generalised violence, and political and religious persecution,[161] rather than disaster induced. It is also important to note that the majority of IDPs in Iraq reside in non-camp, urban and peri-urban settings,[162] within or alongside host communities.[163]

The search for durable solutions in Iraq is complicated by several factors. First, Iraq faces ongoing insecurity and political instability. History shows that any cessation of hostilities and consequent reductions in internal displacement rates are often short-lived.[164] No sooner does one wave of displacement slow and people begin to rebuild their lives, then further waves

[156] Philip Marfleet, 'Displacement and the State: The Case of Iraq' in Khalid Koser and Susan Martin (eds), *The Migration-Displacement Nexus: Patterns, Processes, and Policies* (Berghahn Books 2011) 96.

[157] Elizabeth Ferris, 'The Looming Crisis: Displacement and Security in Iraq' (Policy Paper, The Brookings Institution 2008) x; David Romano, 'Whose House is this Anyway? IDP and Refugee Return in Post-Saddam Iraq' (2005) 18(4) Journal of Refugee Studies 431. For an exposition of displacement in Iraq pre-2003, see Romano (n 157) 431–434. For an overview of the pre-Ba'ath era in Iraq, see Marfleet (n 156) 96–99.

[158] Marfleet (n 156) 96.

[159] Cohen (n 153) 303.

[160] UN Human Rights Council, 'Visit to Iraq' (n 153) para 6; Salma Al-Shami and others, 'Access to Durable Solutions among IDPs in Iraq: Three Years in Displacement' (IOM 2019) 11. For a contextualised overview of ISIL-induced displacement in Iraq, see: IOM, 'Iraq Displacement Crisis: 2014–2017' (IOM 2018).

[161] IDMC (n 155) 5.

[162] UN Human Rights Council, 'Visit to Iraq' (n 153) para 8.

[163] Roger Guiu and Nadia Siddiqui, 'In it for the Long Haul: A New Response for IDPs in the Kurdistan Region of Iraq' (Middle East Research Institute, October 2015) 10.

[164] For instance, the then Representative of the Secretary-General on the Human Rights of IDPs, Walter Kälin, in his 16 February 2011 report to the UN Human Rights Council, noted that the rate of internal displacement had 'declined markedly' since 2009, with displacement 'confined to sporadic incidents', UN Human Rights Council, 'Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin. Addendum: Visit to Iraq' (16 February 2011) UN Doc A/HRC/16/43/Add.1 para 16. With hindsight, it is now known that this was but a lull, with approximately 6 million people soon to be internally displaced due to conflict with the self-proclaimed

commence, with individuals often displaced multiple times.[165] Second, displacement is not a single issue event in Iraq – its multiple displacement epochs are in many ways distinct in respect to their causes, yet they overlap temporally as displacement becomes protracted.[166] Third, displacement in Iraq is underpinned and exacerbated by ethnic and sectarian tensions, with the State having become increasingly fragmented along such lines.[167] Fourth, internal displacement is interwoven with the wider regional context. Displacement in Iraq cannot be viewed as distinct from, for example, the situation in Syria.[168] This is especially so given that many previous Iraqi refugees in Syria have been forced to return, yet, being unable to return to their former places of residence, are now internally displaced within Iraq.[169] Fifth, and finally, the Iraqi authorities have demonstrated an ambivalent attitude towards durable solutions other than return, particularly in respect to local integration. Despite an apparent shift in 2011 towards accepting settlement options other than return,[170] in 2016, the UN Special Rapporteur on IDPs reported 'a lack of dialogue with or willingness on the part of the Government to pursue local integration, which it currently does not consider as a viable alternative to returns'.[171] In 2020, IOM itself asserted that 'the national [government] priority for durable solutions remains the return of IDPs', and that coerced returns have occurred

Islamic State in Iraq and the Levant (ISIL), from early 2014 to the end of December 2017, UN Human Rights Council, 'Visit to Iraq' (n 153) para 6.

165 IDMC (n 155) 9.

166 Lorenza Rossi and others, 'Iraqi IDPs' Access to Durable Solutions: Results of Two Rounds of a Longitudinal Study' (2019) 57 (2) International Migration 48; Peter Van der Auweraert, 'Displacement and National Institutions: Reflections on the Iraqi Experience' (Middle East Institute/Foundation pour la Recherche Stratégique, June 2011) 6.

167 Van der Auweraert (n 166) 5; IDMC (n 155) 1; Hewa Haji Khedir, 'IDPs in the Kurdistan Region of Iraq (KRI): Intractable Return and Absence of Social Integration Policy' (2021) 59 (3) International Migration 145, 153.

168 Brookings-LSE Project on Internal Displacement, 'Improving Prospects for Durable Solutions for Iraqi Internally Displaced Persons and Refugees' (The Brookings Institution-London School of Economics Project on Internal Displacement and The International Rescue Committee, March 2012) 12.

169 IOM, 'Iraqi Returnees from Syria: Following the 2011 Syria Crisis' (December 2014) 16–17.

170 '[I]n early 2011 Iraq put in place a durable solutions strategy, which shifted its focus on return of IDPs to include other settlement options', Elizabeth Ferris and Nadine Walicki, 'Local Integration of Internally Displaced Persons in Protracted Displacement: Some Observations' in Elizabeth Ferris (ed), *Resolving Internal Displacement: Prospects for Local Integration* (Brookings-LSE Project on Internal Displacement, June 2011) 18.

171 UN Human Rights Council, 'Report of the Special Rapporteur on the human rights of internally displaced persons on his mission to Iraq' (5 April 2016) UN Doc A/HRC/32/35/Add.1, para 70.

against this backdrop.[172] Khedir has similarly argued that the 'social integration of IDPs is by no means a government policy/priority',[173] citing the absence of social integration from the mandates of relevant government institutions.[174] Khedir identifies this as being in part a consequence of an 'ominously pervasive' preference for return among authorities and host communities,[175] but also 'an obvious lack of a policy concept and tradition of social integration in Iraq'.[176] Khedir notes fear of demographic change (and the associated impact this might have on election constituencies), security concerns, and the perceived economic burden of displacement on host locations all as reasons for such a strong focus on return.[177]

IDPs' durable solutions intentions have shifted markedly over time. According to IOM data, the number of IOM-assessed IDPs expressing a desire to integrate locally increased from 25% in 2006, to 37% in 2010, and then 44% in 2011.[178] In 2016, a survey of IDPs living with host families revealed that the vast majority of those surveyed, 97.6%, indicated that they intended to return.[179] The trend has seemingly since again reversed as, in 2019, the percentage of IDPs not intending to return in the short- and long-term was 90% and 70%, respectively.[180] IOM has found that intentions often depend upon, and shift with, the prevailing security situation, the availability of basic services, and the degree to which IDPs feel settled in their place of displacement.[181]

It is within this complex context that international organizations in Iraq operate. Alongside UNHCR, IOM performs a leading role in addressing internal displacement.[182] Since commencing operations in 2003, IOM Iraq

[172] IOM Iraq, 'Cities as Home: Understanding Belonging and Acceptance among IDPs and Host Communities in Iraq' (2020) 28.
[173] Khedir (n 167) 153.
[174] Ibid.
[175] Khedir (n 167) 145, 154 and 156.
[176] Khedir (n 167) 145, 155.
[177] Khedir (n 167) 145, 154.
[178] Brookings-LSE Project on Internal Displacement (n 168) 7–8; IOM, 'IOM Iraq: Review of Displacement and Return in Iraq, August 2010' (2010) <www.iom.int/sites/g/files/tmzbdl486/files/jahia/webdav/shared/shared/mainsite/activities/countries/docs/Iraq/IOM_Iraq_Review_of_Displacement_and_Return_in_Iraq_August_2010.pdf> accessed 18 May 2022, 4.
[179] UN Human Rights Council, 'Report of the Special Rapporteur on the human rights of internally displaced persons on his mission to Iraq' (n 171) para 19.
[180] UN Human Rights Council, 'Visit to Iraq' (n 153) para 55.
[181] Brookings-LSE Project on Internal Displacement (n 168) 7–8; IOM, 'IOM Iraq: Review of Displacement and Return in Iraq, August 2010' (n 178) 4.
[182] UN Human Rights Council, 'Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin (n 164) para 24.

has established a presence in all 18 Iraqi governorates.[183] Its work extends across multiple diverse areas, broadly categorised under the headings of humanitarian emergencies and operations, recovery and community stabilisation, migration management, and migration and displacement data.[184] In respect to the latter, IOM's DTM is recognised as the primary means by which to track displacement movements in Iraq.[185] Aside from the DTM, IOM Iraq has invested substantial energy into internal displacement research. This includes empirical work to measure IDP needs and intentions in respect to durable solutions,[186] and to 'better understand the progress IDPs are making toward durable solutions and the end of displacement among IDPs'.[187]

Viewing this activity through the lens of the GPs and the framing of durable solutions, it is evident that operationally – as in Haiti – IOM is predominantly concerned with returns. This manifests itself in two main ways. First, assisted voluntary return and reintegration activities are at the core of IOM's migration management work stream.[188] Since 2016, IOM has chaired the Returns Working Group (RWG), which has 'invested considerably' in sustaining IDP return levels in Iraq.[189] The RWG develops guidance, policies and operational recommendations for governorates affected by returns; provides technical advice to support the implementation of IDP returns; and determines to what extent returnees have, in its view, achieved durable

[183] IOM, 'IOM Iraq' <https://iraq.iom.int/iom-iraq> accessed 18 May 2022.

[184] IOM, 'Iraq Mission' (IOM) <https://iraq.iom.int/> accessed 18 May 2022. Since February 2020, IOM's work has understandably shifted to the response and management of the COVID-19 pandemic in Iraq, see: IOM Iraq, 'COVID-19 Strategic Response Plan: February-December 2020' (2020) <https://reliefweb.int/report/iraq/iom-iraq-covid-19-strategic-response-plan-february-december-2020> accessed 18 May 2022.

[185] IDMC (n 155) 4–5.

[186] UN Human Rights Council, 'Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin (n 164) para 25.

[187] IOM Iraq, 'Access to Durable Solutions Among IDPs in Iraq: Moving in Displacement' (IOM 2019) 4 <https://iraqdtm.iom.int/files/DurableSolutions/20203221324797_IOM%20Iraq%20Access%20to%20Durable%20Solutions%20Among%20IDPs%20in%20Iraq-%20Moving%20in%20Displacement.pdf> accessed 18 May 2022. Since 2016, IOM Iraq has partnered with Georgetown University to conduct a mixed-method longitudinal study, titled 'Access to Durable Solutions among IDPs in Iraq', which seeks to understand how 4,000 IDP households displaced by ISIL are trying to achieve a durable solution to their displacement.

[188] IOM, 'Assisted Voluntary Return and Reintegration' <www.iom.int/return-and-reintegration> accessed 18 May 2022.

[189] Returns Working Group (RWG), 'Annual Progress Report: January–December 2018' (IOM 2019) <https://reliefweb.int/report/iraq/returns-working-group-rwg-annual-progress-report-january-december-2018> accessed 18 May 2022.

solutions. Second, since 2007, the DTM has recorded not only instances of displacement as they occur, but also IDP and refugee returns.[190] The DTM includes a sophisticated returns dashboard that records numbers of returnees, disaggregated and ranked by, *inter alia*, location, time period and shelter category.[191] In contrast to this dedicated work on returns, local integration is not core to IOM Iraq's functions or expertise. Moreover, while the DTM tracks return, the same cannot be said for other means by which to achieve a durable solution, including local integration.

This is not, however, to say that IOM Iraq is exclusively concerned with returns. In 2013, for example, IOM Iraq partnered with the Internal Displacement Monitoring Centre (IDMC) and the Brookings-LSE Project on Internal Displacement to conduct research into the experience of IDP integration.[192] This research sought to provide 'a fresh look into the issues pertinent to the integration of IDPs in Iraq', by 'explor[ing] the causes and effects of displacement and integration, so that the perceived benefits can be exploited and the barriers to integration identified and mitigated'.[193] The research drew upon pertinent international standards on durable solutions, including the IASC Framework, in its analysis. This is important because conceptualising local integration through the lens of the IASC Framework demonstrates support for local integration as a valid means by which to achieve a durable solution.[194] The research concluded with a clear statement in support of local integration, that it is 'of critical importance that the Government of Iraq and the international community redouble their efforts to help facilitate local integration'.[195] More recently, IOM Iraq has conducted further research into local integration as a durable solution in Iraq. This includes a 2019 study in the Sulaymaniyah and Baghdad Governorates, titled 'Reasons to Remain';[196] and the 2020 study, 'Cities as Home', which examined conditions and prospects for local integration across several localities in Iraq.[197] In 2021, IOM Iraq unequivocally

[190] IOM, 'IOM Monitoring and Needs Assessments: Assessment of Iraqi Return: May 2009' (2009)13<https://reliefweb.int/sites/reliefweb.int/files/resources/B9F765D938860254852575BD00762652-Full_Report.pdf> accessed 18 May 2022.
[191] DTM-Iraq, 'Dashboard: Returns' (IOM) <http://iraqdtm.iom.int/Dashboard#Returns> accessed 18 May 2022.
[192] IOM Iraq, 'Internal Displacement in Iraq: Barriers to Integration' (December 2013).
[193] IOM Iraq, 'Internal Displacement in Iraq: Barriers to Integration' (n 192) 7.
[194] Ibid 7.
[195] IOM Iraq, 'Internal Displacement in Iraq: Barriers to Integration' (n 192) 43.
[196] IOM Iraq, 'Reasons to Remain (Part 2): Determinants of IDP Integration into Host Communities in Iraq' (2019).
[197] IOM Iraq, 'Cities as Home' (n 172).

recognised that a durable solution can be achieved through 'integration in locations of displacement'.[198]

This embrace of the IASC Framework and local integration as a means by which to achieve a durable solution is also evident in ongoing IOM Iraq research. Since 2016, IOM Iraq has partnered with Georgetown University to conduct a longitudinal mixed-method study, titled 'Access to Durable Solutions among IDPs in Iraq' ('the IOM-GU study').[199] This research involves tracking 4,000 Iraqi IDP households, all of whom were displaced by ISIL to non-camp settings between January 2014 and December 2015, over several years.[200] The purpose of the research is to understand how these households progress towards achieving a durable solution to their displacement.[201] It does this by 'examining the ways in which Iraqis *themselves* seek durable solutions',[202] using data collected through quantitative surveys and interviews with IDPs, host communities, relevant authorities, and others.[203] The IOM-GU study 'relies on [the IASC Framework] as an analytical frame for assessing IDPs' access to durable solutions in Iraq'.[204] This is an explicit recognition of the IASC Framework as 'the principal point of reference for understanding the process of achieving durable solutions',[205] and 'the primary international standard for supporting and assessing durable solutions'.[206] The study's findings are presented against each of the eight durable solutions assessment criteria outlined in the IASC Framework.[207]

[198] IOM Iraq, 'Protracted Displacement in Iraq: Revisiting Categories of Return Barriers' (January 2021) 5.

[199] The project reports on an approximately annual basis. For all reports, see: IOM, 'Publications Platform' (IOM) <https://publications.iom.int> accessed 18 May 2022.

[200] IOM Iraq, 'Access to Durable Solutions among IDPs in Iraq: Three Years in Displacement' (IOM 2019) 8–11 <https://reliefweb.int/report/iraq/access-durable-solutions-among-idps-iraq-three-years-displacement> accessed 18 May 2022.

[201] IOM Iraq, 'Access to Durable Solutions among IDPS in Iraq: Moving in Displacement' (n 187) 4.

[202] Rossi and others (n 166) (emphasis added).

[203] IOM Iraq, 'Access to Durable Solutions among IDPs in Iraq: Five Years in Displacement' (2020) 4 <https://reliefweb.int/report/iraq/access-durable-solutions-among-idps-iraq-five-years-displacement> accessed 18 May 2022.

[204] Rossi and others (n 166) 50; IOM Iraq, 'Access to Durable Solutions among IDPs in Iraq: Three Years in Displacement' (n 200) 10.

[205] Rossi and others (n 166) 50.

[206] IOM Iraq, 'Access to Durable Solutions among IDPs in Iraq: Unpacking the Policy Implications' (2020) 11 <https://iraqdtm.iom.int/files/DurableSolutions/202011151610653_IOM%20Iraq%20Access%20to%20Durable%20Solutions%20Among%20IDPs%20in%20Iraq-Unpacking%20the%20Policy%20Implications.pdf> accessed 18 May 2022.

[207] Rossi and others (n 166) 53.

Yet, it would be erroneous to conclude that IOM Iraq's approach towards durable solutions fully aligns with that found in the IASC Framework. Even in respect to IOM Iraq's research into local integration, a preference for return still filters through. For instance, within the 2013 research on barriers to integration, a tendency remains towards conceptualising and thus implicity promoting return as the primary means by which to achieve a durable solution in Iraq. The report does this through its framing of local integration as an option that is secondary to return. This is especially evident when it states:

> IDPs are not able to consider return as a safe option and a means of achieving a durable solution to their displacement because the security conditions do not allow this. Those that remain displaced are left with two remaining options. The intentions of the displaced are now, predominantly, to integrate.[208]

This perspective on local integration contrasts with the IASC Framework approach, which unequivocally espouses the equality of all three means by which to achieve a durable solution. It also fails to recognise that any decision to pursue a durable solution by a particular means can only be considered voluntary if IDPs have a real choice between all three options. It is nonetheless positive to see the views of those affected by displacement at the core of IOM Iraq's research, particularly the ongoing IOM-GU study. This reveals respect within IOM Iraq's research activities for the principle of voluntary choice and for the active participation of IDPs themselves in the pursuit of durable solutions to their displacement, as well as learning being guided by IDPs as experts in their own experience. It remains to be seen whether this approach as manifest in IOM Iraq's recent research outputs will feed into practice on the ground.

In sum, IOM Iraq evidently embraces durable solutions, including local integration, in its research activities, yet its operations remain predominantly concerned with return. This reflects IOM's traditional expertise in managed mobility. When viewed through the lens of the durable solutions approach, the conceptual shift initiated by the GPs and made explicit in the IASC Framework has thus far not been fully realised in IOM's in-country operations on internal displacement, in either Iraq or Haiti. In other words, its actual implementation of durable solutions in practice is limited. It is of course true and right to acknowledge that IOM, as an international organization, cannot alone achieve durable solutions for IDPs – indeed, the primary responsibility for doing so remains with States. IOM nonetheless has

[208] IOM Iraq, 'Internal Displacement in Iraq: Barriers to Integration' (n 192) 42.

the ability and the means by which to influence States. Yet, IOM has to date often been highly deferential and reluctant to actively push States on human rights principles. It is time for IOM to use its, perhaps uniquely close, working relationship with States to positively pursue durable solutions in the States in which it operates. This is especially important given that IOM is no longer, if ever it was, a small, niche operator – as argued at the beginning of this chapter, IOM might very well be *the* major player in the international community's response to internal displacement. Relatedly, IOM's responsibility extends to all IDPs regardless of their relative mobility.

12.6 Conclusion

IOM has obligations under international human rights law and international humanitarian law, many of which are reflected in the GPs. There are limited channels available to ensure that IOM is compliant with these obligations, including in relation to its responses to IDPs and particularly vis-à-vis the struggle to achieve durable solutions to internal displacement. It is therefore particularly important that the academic community scrutinises the extent to which IOM engages with the GPs both in principle and in practice.

This chapter has taken the first important steps in addressing this gap in the research. Its central argument is that IOM's activities are inconsistent in many ways with both the letter and ethos of the GPs. For example, some of IOM's policies and frameworks not only neglect to refer to the GPs but are also inconsistent with the GPs in terms of content. Inconsistencies also exist between the GPs and IOM's operations in practice, as evidenced by IOM's almost exclusive camp-based focus in Haiti and its predominant preference for return as a durable solution to internal displacement in both Haiti and Iraq. IOM's future policies and frameworks need to make explicit reference to the GPs, which should in turn feed into how these policies and frameworks are implemented on the ground.

It is difficult to understand why IOM pays such little attention to the GPs. This may stem from a lack of external pressure on IOM; IOM's lack of a formal protection mandate for IDPs; the fact that the GPs are technically a non-binding, soft law document; and/or practical difficulties faced by IOM, for example in contexts where the State vocally prefers returns. The reasons behind why IOM has not substantially engaged with the GPs are outside the scope of this chapter and remain important questions for further research. It is indeed hoped that this chapter is just the beginning of a new conversation of IOM's engagement with the GPs and of its substantial role in internal displacement contexts worldwide.

13

IOM's Immigration Detention Practices and Policies

Human Rights, Positive Obligations and Humanitarian Duties

ANGELA SHERWOOD, ISABELLE LEMAY, AND CATHRYN COSTELLO*

13.1 Introduction

IOM's activities around immigration detention raise serious questions about its role in enabling, obscuring and even actively perpetrating serious human rights violations, in particular given its foundational role in Australian offshore detention in Nauru and Manus Island (Papua New Guinea) from 2001 to 2007. This chapter attempts to trace IOM's practices and policies on immigration detention from the 1990s to date, identifying significant shifts, both normative and operational. Normatively, as other chapters in this volume also explore, IOM now generally speaks the language of human rights to states, and acknowledges that it itself has human rights obligations as an international organization (IO). As regards detention in particular, we trace the shift from a tendency to evade legal constraints by falsely claiming its detention practices were not detention at all, to a position today where IOM not only purports to respect international law on detention, but also to minimise detention, encouraging states to adopt 'alternatives to detention' (ATDs).[1] Focusing

* We thank Jara Al-Ali (University of Hamburg) for editorial assistance on this chapter, Professor Alice Riccardi for sharing details of the CEDAW Complaint discussed below, and Dr Miles Jackson for his helpful comments.

[1] See, for example, IOM, 'Quick Guide on Alternatives to Detention' (2019). IOM has adopted a definition of ATDs from the International Detention Coalition (IDC), defining ATDs as 'Any legislation, policy or practice, formal or informal, aimed at preventing the unnecessary detention of persons for reasons relating to their migration status'. Common ATDs include open reception centres and bail and bond arrangements.

on ATDs emerged via global advocacy,[2] which has been adopted by both UNHCR[3] and IOM.[4]

We also trace significant shifts in operational practice: from a role where it actively engages in detention practices and diffuses them, to its contemporary statement that its activities 'strictly exclude any participation in the running or managing of detention facilities'.[5] IOM currently frames its role in and around immigration detention as 'humanitarian', claiming to simultaneously improve conditions in detention and minimise detention. A large part of IOM's activities around detention relate to its central global role in offering assisted voluntary return (AVR)[6] services to those in detention,[7] a linkage we problematise.

Part I (Section 13.2) begins by briefly recapitulating the pertinent international human rights law (IHRL) on migration-related detention, noting both regional variations and imbrication with questions of migration status. Part II (Section 13.3) then briefly examines IOM's normative statements on immigration detention,[8] arguing that it typically emphasises

[2] In particular the work of IDC and Global Detention Project (GDP). See IDC and LaRRC, *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention* (1st edn, 2011); Grant Mitchell 'Engaging Governments on Alternatives to Immigration Detention' (2016) GDP Working Paper No. 14 <www.globaldetentionproject.org/wp-content/uploads/2016/07/GDP-Mitchell-Paper-July-2016.pdf> accessed 5 August 2022.

[3] See, for example, UNHCR, 'Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention' (2012).

[4] We identify the emergence of ATD language in IOM documents in the late 2000s and early 2010s. See Part II below.

[5] IOM, 'Migration Detention and Alternatives to Detention' <www.iom.int/migration-detention-and-alternatives-detention> accessed 5 August 2022.

[6] In some contexts, AVR is styled as 'AVRR' – assisted voluntary return and reintegration programs. See IOM, 'Assisted Voluntary Return and Reintegration- AVRR' <https://eea.iom.int/assisted-voluntary-return-and-reintegration-avrr> accessed 5 August 2022. As is discussed in Part III below, in Libya, IOM's AVR program is dubbed 'Voluntary Humanitarian Return' (VHR).

[7] For assessments of IOM's AVR practices, see 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; Shoshana Fine and William Walters 'No Place Like Home? The International Organization for Migration and the New Political Imaginary of Deportation' (2022) 48 Journal of Ethnic and Migration Studies 3060; 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).

[8] By 'normative role', we refer to its extensive role in the synthesis, development and dissemination of standards and guidance that purports to have authoritative status. In that regard, we treat IOM's characterisation as 'non-normative' in the 2016 Agreement between IOM and the UNHCR with scepticism. UNGA Res A/70/296, 'Agreement concerning the

states' 'prerogative' to detain, and often frames alternatives as an option rather than a legal obligation. It also tends to weave in its distinctive role in AVR into its policy documents. Part III (Section 13.4) then turns to IOM's past and current roles in relation to immigration detention by means of four critical case studies: IOM's involvement in US interdiction and detention of protection seekers on its military base in Guantanamo Bay, Cuba (1990s–early 2000s); in Australian-sponsored offshore detention in Nauru and Manus Island (Papua New Guinea) (2001–2007); in Indonesia (2000–present); and in Libya (2007–present). These cases reveal its changing role not only as regards detention, but its part in the global system whereby powerful states and regions (US, Australia, EU in particular) deflect and deter protection seekers by seeking to contain them 'elsewhere'.[9]

Drawing on Parts II and III, in Part IV (Section 13.5) we suggest that while the transformations in both policy and practice might seem to be coherent, the emergent picture is more complex and concerning. Living up to both IHRL *and* humanitarian obligations when working with arbitrarily detained populations is challenging. The lack of accountability mechanisms to deal with IOM's human rights violations overshadows any positive assessment of its current approaches. There are still many individuals who live with the enduring consequences of the inhuman and degrading conditions and treatment in Nauru and Manus Island in particular. Moreover, its current practices, although not actually establishing detention facilities and detaining people, also raise serious questions about complicity in serious violations, a legally complex matter. Concerning humanitarian obligations, we contrast IOM's opacity around detention with that of other humanitarian organizations, arguing that, without deeper critical reflection, its contemporary practice risks expanding and legitimating detention. In particular, we identify tensions around IOM's espousal of ATDs and its own AVR and other operational programming, which risk lending both practical support and legitimacy to arbitrary detention and other human rights violations.

In the Conclusion, we suggest that attention to detention practices and policies reveals the need for IOM constitutional and institutional reforms. Constitutional reforms are required to enable IOM to properly advocate

Relationship between the United Nations and the International Organization for Migration' (25 July 2016) UN Doc A/RES/70/296 (hereafter 2016 Agreement).

[9] See generally, BS Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) 11 Journal of Refugee Studies 350; David Scott Fitzgerald, *Refuge Beyond Reach: How Rich Democracies Repel Asylum Seekers* (Oxford University Press 2019); Daniel Ghezelbash *Refuge Lost: Asylum Law in an Interdependent World* (Cambridge University Press 2018).

for and 'protect' those subject to the human rights violation of arbitrary detention, and to offer effective remedies against its own violations. Furthermore, IOM's constitutional deference to states' immigration laws needs reconsideration.

13.2 Immigration Detention and International Human Rights Law

This chapter proceeds from the premise that IOM has human rights obligations in virtue of its legal nature as an IO, deriving from general international law, its own internal policies and the international agreement it entered into with the UN in 2016 ('the 2016 Agreement').[10] The 2016 Agreement obliges IOM to have 'due regard' to human rights in its activities.[11] While a 'due regard' obligation may have its limitations, when read contextually, this is a sound endorsement of IOM's existing human rights obligations.[12] IOs' human rights obligations include various positive obligations,[13] including to provide effective remedies.[14] Although IOs do not routinely acknowledge or institutionalise this obligation, the argument to do so is legally compelling.[15] Humanitarian obligations often overlap with human rights, although both systems have different genealogies and logics.[16] When IOs style their activities as humanitarian, they may bind themselves legally as well as ethically to prioritise the alleviation of human suffering and respect other humanitarian principles in their activities.[17]

[10] See further, Vincent Chetail 'The International Organization for Migration and the Duty to Protect Migrants: Revisiting the Law of International Organizations' in Jan Klabbers (ed) *Cambridge Companion to International Organizations Law* (Cambridge University Press 2022) 244.

[11] 2016 Agreement (n 8) Art 2 (5).

[12] Helmut Philipp Aust and Lena Riemer, 'A Human Rights Due Diligence Policy for IOM?' Chapter 5; Miriam Cullen, 'The Legal Relationship between the UN and IOM after the 2016 Cooperation Agreement: What has Changed?' in Chapter 6 of this volume.

[13] Ellen Campbell and others, 'Due Diligence Obligations of International Organizations under International Law' (2018) 50 NYU Journal of International Law and Politics 541, 569.

[14] See in particular, Kristina Daugirdas and Sachi Schuricht 'Breaking the Silence: Why International Organizations Should Acknowledge Customary International Law Obligations to Provide Effective Remedies' (2020) 3 AIIB Yearbook of International Law 54; Eyal Benvenisti, *The Law of Global Governance* (Brill 2014), 110–111.

[15] See generally Carla Ferstman *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (Oxford University Press 2017).

[16] See generally Michael Barnett (ed) *Humanitarianism and Human Rights: A World of Differences* (Cambridge University Press 2020).

[17] Geoff Gilbert, 'The International Organization for Migration in Humanitarian Scenarios' in Chapter 11 of this volume.

Immigration detention is not in itself a human rights violation. International human rights law (IHRL) permits immigration detention, albeit subject to strict conditions set out in international human rights treaties of global scope, notably the International Covenant on Civil and Political Rights (ICCPR) and regional human rights treaties. There are significant variations across regional human rights systems on how immigration detention is treated.[18] Notably, while the European Court of Human Rights (ECtHR) has treated immigration detention as a 'necessary adjunct' of the power to control admission, the Inter-American Court has taken a different approach, giving greater effect to the presumption of liberty of the individual irrespective of migration status.[19] Of great import is the impact of the Convention on the Rights of the Child (CRC), which greatly limits detaining children on immigration grounds.[20] International refugee law protects asylum seekers and refugees from penalisation for irregular entry and stay,[21] and the principle of non-penalisation also protects other categories of vulnerable migrants, including those who have been smuggled and victims of trafficking.[22] It is also important to note that IHRL not only prohibits arbitrary detention, but also unjustified restrictions on internal mobility, and indeed on the right to leave any country (including one's own).[23]

IHRL only permits detention in defined circumstances. There are only limited acceptable grounds for detention relating to states' migration control

[18] See further, Cathryn Costello, 'Human Rights and the Elusive Universal Subject: Immigration Detention under International Human Rights and EU Law' (2012) 19 Indiana Journal of Global Legal Studies 257.

[19] Cathryn Costello 'Immigration Detention: The Grounds Beneath Our Feet' (2015) 68 Current Legal Problems 143.

[20] UN CMW and CRC, 'Joint General Comment No 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 23 of the Committee on the Rights of the Child on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return' (16 November 2016) UN Doc CMW/C/GC/4-CRC/C/GC/23 para 5. See further Ciara Smyth, 'Towards a Complete Prohibition on the Immigration Detention of Children' (2019) 19 Human Rights Law Review 1, 2.

[21] Cathryn Costello, Yulia Ioffe and Teresa Büchsel, 'Article 31 of the 1951 Convention Relating to the Status of Refugees' (July 2017) UNHCR Legal and Protection Policy Research Series PPLA/2917/01.

[22] Cathryn Costello and Yulia Ioffe 'Non-Penalisation and Non-Criminalization' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *Oxford Handbook International Refugee Law* (Oxford University Press 2021).

[23] International Covenant on Civilian and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 Article 9(1); Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) (ECHR) Article 5; Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 16 September 1963,

prerogatives, both to control entry and deport unwanted foreigners. IHRL demands that state actions be 'in accordance with law'. This is a quality-of-law standard, requiring a particular standard of predictability and clarity in the legal standards and judicial supervision. In order to ensure that the detention in question is linked to an acceptable ground, IHRL generally requires that states demonstrate that the detention is necessary in the particular case, or at least that it is reasonable or non-arbitrary in light of the aim pursued.[24] Crucially, detention must be open to challenge before domestic courts. To demonstrate the necessity of detention, authorities must show that there are no alternative means suitable to achieve the same aim, which entails a positive duty to make this assessment, and even establish such policies and practices. This assessment of ATDs requires states to create alternative means of 'managing migration'. While ATDs may be seen as part of a strategy to minimise detention – as many commentators have identified – in practice, some ATDs themselves are highly coercive and restrictive, and may entail *other* human rights violations, including of the rights to liberty and free movement.[25]

There are also important IHRL standards that relate to detention conditions. IHRL requires detention conditions that are appropriate for immigration detention. Evidently, conditions must not entail torture, inhuman or degrading treatment. Furthermore, IHRL prescribes more demanding standards, above this threshold of bare humanity. For example in *Saadi v United Kingdom*,[26] the ECtHR stipulated that 'the place and conditions of detention should be appropriate', bearing in mind that 'the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country'; and the 'length of the detention should not exceed that reasonably required for the purpose pursued'.[27] This final stipulation means that detention should

entered into force 1 November 1998) Art 2(2); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 Article 22(2); Arab Charter on Human Rights (adopted 15 September 1994) Article 21.

[24] There has been some academic debate about the absence of a necessity standard in the case-law of the ECtHR, but it is explicitly part of the analysis by the HRC (see eg *A v Australia* (30 April 1997) Communication No 560/1993 UN Doc CCPR/C/59/D/560/1993 et seq) and other human rights courts. The ECtHR is arguably moving towards such a standard of assessment. See generally, Costello 'Immigration Detention: The Grounds Beneath our Feet' (n 19).

[25] For critical assessments, see Alice Bloomfield, 'Alternatives to Detention at a Crossroads: Humanisation or Criminalisation?' (2016) 35 (1) Refugee Survey Quarterly 29; Antje Missbach, 'Substituting Immigration Detention Centres with "Open Prisons" in Indonesia: Alternatives to Detention as the Continuum of Unfreedom' (2021) 25 Citizenship Studies 224.

[26] *Saadi v UK* no [GC] 13229/03 (ECtHR, 29 January 2008).

[27] Ibid para 74.

never be indefinite, and that whether detention should continue depends on an assessment of its necessity for the official purpose in question.

The assessment of any detention practice under IHRL depends on questions of migration status and nationality, in particular with respect to who is regarded as irregular in their entry and residence. In practice, people may be wrongly deemed 'irregular' who ought to be recognised as having a right to stay, whether deriving from international or domestic law. The overarching concept of 'international protection' cuts across the refugee/migrant binary. As UNHCR puts it:

> The need for international protection arises when a person is outside their own country and unable to return home because they would be at risk there, and their country is unable or unwilling to protect them.[28]

The determination of who is irregular and whether they should be detained to 'prevent irregular entry' (to borrow the ECHR formulation) or with a view to deportation demands careful assessment of a range of sources of law. However, IOM's Constitution means that it is remarkably deferential to domestic law, recognising admission decisions as falling 'within the domestic jurisdiction of States', and pledging that 'in carrying out its functions, [IOM] shall conform to the laws, regulations and policies of the States concerned'.[29] Against this backdrop, and also in light of IOM's extensive experience of offering 'return' as a service to states, its practice of tending to accept and even amplify states' treatment of individuals as 'irregular' risks lending support to the illegalisation of refugees and migrants and the attendant detention practices.

13.3 IOM's Normative Role on Immigration Detention

IOM undertakes several diverse normative activities. For decades, it has engaged in synthesising standards for the disparate body of international law it styles as 'international migration law'.[30] It has also taken on an active role in convening consultative processes on migration, both regional[31]

[28] UNHCR, 'Persons in Need of International Protection' (June 2017) 1.

[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) Article 1.3.

[30] IOM, International Migration Law <www.iom.int/international-migration-law> accessed 5 August 2022.

[31] IOM, Regional Consultative Processes on Migration <www.iom.int/regional-consultative-processes-migration> accessed 5 August 2022.

and sectoral.[32] Most recently, it facilitated the process leading to the Global Compact on Migration.[33] In order to trace the evolution of IOM's policy positions on detention, we screened IOM documents including its annual reports (1999–2019), financial reports (1999–2019), programmes and budgets (2001–2021) and other publications (appearing on its website or the online publication platform as of May 2021) for any mentions of the keyword 'detention'.

In light of this review of IOM policy documents, this section briefly identifies three of the distinguishing features of IOM's normative approach to immigration detention: First, it generally does not overtly question states' right to detain, and in some instances, seems to overstate it. Secondly, it has embraced the rhetoric of ATDs, but does not always frame the pursuit of alternatives as legally obligatory but rather as part of a menu of options for states. Thirdly, even in its normative work, it weaves an operational role for itself, notably highlighting AVR programmes as an ATD in and of itself. IOM's contribution to the development of the Global Compact of Migration (GCM) reflects those policy positions, although the final text of the Compact is a progressive distillation of IHRL.[34]

13.3.1 IOM and States' Detention 'Prerogative'

IOM policy documents tend to flatten out regional disparities across IHRL, often taking a generic statist view on immigration detention. The organization generally recognises the right of states to detain, often framing it as the 'State's prerogative'.[35] IOM usually goes on to insist on the exceptional nature of detention, and as such reflects IHRL to the extent that it frames detention as a measure of 'last resort'.[36] However, the

[32] See, eg, Janie Chuang, 'IOM and Ethical Labour Recruitment', Chapter 10 of this volume.

[33] UN GA, 'Global Compact for Safe, Regular and Orderly Migration' (19 December 2018) UN Doc A/RES/73/1957 (hereafter GCM).

[34] See GCM (n 33) para 29. See further Justin Gest, Ian M Kysel and Tom K Wong, 'Protecting and Benchmarking Migrants' Rights: An Analysis of the Global Compact for Safe, Orderly and Regular Migration' (2019) 57 (6) International Migration 60. However, some concern has been expressed as regards the standard for detention of children. See, eg, Izabella Majcher 'Immigration Detention under the Global Compacts in the Light of Refugee and Human Rights Law Standards' (2019) 57 (6) International Migration 91.

[35] IOM, 'Migration Detention and Alternatives to Detention' (2020); IOM, 'Immigration Detention and Alternatives to Detention' (Global Compact Thematic Paper: Detention and Alternatives to Detention) 1; IOM, *Advocating for Alternatives to Migration Detention – Tools series No. 2* (2021) 1.

[36] See e.g. IOM and the International Institute of Humanitarian Law, 'International Migration Law and Policies: Responding to Migration Challenges in Western and Northern Africa: Round Table 8–9 December 2009 Dakar' (2010); IOM International Migration Law Unit,

organization often does not state clearly that in many instances, detention itself constitutes a human rights violation. It rather positions its interventions in this 'exceptional' context of detention as 'ensur[ing] migrants' human rights are fully upheld', often focusing on improving conditions in detention.[37]

A relative exception is found in its 2014 *Submission to the Working Group on Arbitrary Detention*.[38] In this submission, IOM characterises detention as 'an overarching problem severely impacting migrants' well-being and enjoyment of a number of rights'. While encouraging states to 'put an end to migration detention', the organization also notes its own activities' focus on improving detention conditions.[39]

More recently, in response to the COVID-19 pandemic, IOM has issued a call with OHCHR, UNHCR and WHO arguing that 'the situation of refugees and migrants held in formal and informal places of detention, in cramped and unsanitary conditions, is particularly worrying. Considering the lethal consequences a COVID-19 outbreak would have, they should be released without delay'.[40]

In a similar vein, IOM issued a joint statement with UNHCR and UNICEF on Safety and Dignity for Refugee and Migrant Children: Recommendations for Alternatives to Detention and Appropriate Care Arrangements in Europe in July 2022.[41] It takes an appropriately strong line against detention of children, stating that 'in light of its documented devastating impact on children, detention is never in a child's best interests and should not be presented as a measure of protection'.

Overall, while such statements demonstrate an awareness of the likely harmful consequences of detention, in particular in poor conditions, they

'International Migration Law Information Note: International Standards on Immigration Detention and Non-custodial Measures' (2011); IOM, 'IOM Quick Guide on Alternatives to Detention' (n 1); IOM, *IOM Road Map on Alternatives to Migration Detention – Tools series No 1* (2019); IOM, Migration Detention and Alternatives to Detention (n 35).

[37] IOM, Migration Detention and Alternatives to Detention (n 35).

[38] IOM, 'Submission to the Working Group on Arbitrary Detention on the Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of His or Her Liberty by Arrest or Detention to Bring Proceedings Before Courts' (February 2014) 2–3.

[39] Ibid 3–4.

[40] OHCR, IOM, UNHCR and WHO, 'The Rights Health of Refugees, Migrants and Stateless Must Be Protected in Covid-19 Response' (31 March 2020) <www.unhcr.org/news/press/2020/3/5e836f164/rights-health-refugees-migrants-stateless-must-protected-covid-19-response.html> accessed 5 August 2022; cited in IOM, 'COVID-19 Analytical Snapshot #9: Immigration detention. Understanding the migration & mobility implications of COVID-19' (April 2020).

[41] IOM, UNHCR & UNICEF, 'Safety and Dignity for Refugee and Migrant Children: Recommendations for alternatives to detention and appropriate care arrangements in Europe' (July 2022).

do not always convey the human rights violation that is arbitrary detention itself. Moreover, these calls have not percolated into all of IOM's policy documents on immigration detention, which still give a strong endorsement of states' right to detain and generally refer to alternatives to detention as a desirable option rather than a state obligation – as the next section discusses.

13.3.2 ATDs as an Obligation or a Desirable Option?

While IOM tends to state that it has 'always' supported ATDs,[42] this is rather misleading. Our review identified the first references to ATDs around 2010.[43] As is explored further below, IOM practices enabled rather than limited recourse to detention throughout the 1990s and early 2000s. In 2011, IOM published an information note by the International Migration Law Unit, *International Standards on Immigration Detention and Non-custodial Measures*.[44] This document's stated purpose was to offer a 'tool for those who are dealing with the issue of detention of migrants and non-custodial measures to acquaint them with international instruments that set the standards to be respected by States in this field'.[45] In 2016, IOM updated this information note, adopting an understanding of ATDs as any 'measures […] applied by States to migrants and asylum seekers on their territories where some form of control is deemed necessary […]'.[46]

[42] IOM, 'UN Migration Agency Facilitates Release of Refugees from Indonesian Detention Centres' (9 February 2018) <www.iom.int/news/un-migration-agency-facilitates-release-refugees-indonesian-detention-centres> accessed 5 August 2022; IOM Regional Office for the Central America, North America and the Caribbean, '5 Recommendations for Alternatives to Immigration Detention during COVID-19' (2020) <https://rosanjose.iom.int/site/en/blog/5-recommendations-alternatives-immigration-detention-during-covid-19> accessed 5 August 2022. In its Quick Guide (n 1), IOM rather indicates that 'discussions around alternatives to detention (ATD) have been ongoing at the global level for a few years now.'

[43] See, for instance, Statement of IOM's Director of International Migration Law and Legal Affairs at the IOM and IIHL December 2009 Round Table (n 36); IOM, 'Guidelines for Border Management and Detention Procedures Involving Migrants: A Public Health Perspective' (2010).

[44] IOM IML, 'International Migration Law Information Note' (n 36).

[45] Ibid. at 2.

[46] IOM International Migration Law Unit, 'International Migration Law Information Note: International Standards on Immigration Detention and Non-custodial Measures' (2016). In the Quick Guide on ATDs (n 1), IOM modified its definition of ATDs as 'any legislation, policy or practice, formal or informal, aimed at preventing the unnecessary detention of persons for reasons relating to their migration status' 4.

Over the years, promoting ATDs has come to the fore of IOM's detention discourse.[47] Yet IOM does not always frame the pursuit of alternatives as legally obligatory. The language of 'obligation' indeed remains limited to a few documents, and tends to state that if detention is not justified, ATDs are required, while the legal position is that all detention is prohibited unless alternatives have been assessed and ruled out.[48] ATDs are otherwise discussed as an avenue that states 'should consider'[49] and which IOM seeks to 'promote'.[50] IOM notably presents its road map on ATDs as a 'non-prescriptive process to progressively develop migration governance systems that prevent the unnecessary detention of migrants through the use of alternative options in the community'.[51]

13.3.3 Acronymic Ambiguities: 'AVR' as an 'ATD'

In addition to advocating for ATDs, IOM promotes the idea that its AVR programmes are, in and of themselves, ATDs. In its 2011 and 2016 information notes, IOM introduces AVR as 'a humane alternative to detention and deportation'.[52] IOM's AVRR Framework (2018) further develops this linkage. While the Framework highlights that 'strict safeguards' are required 'to ensure that migrants have access to all relevant information and are counselled on all options available to them to enable an informed decision',[53] it also acknowledges that AVR can be the only way to end 'unnecessary and sometimes prolonged' detention.[54] To the legally complex issue of how to assess whether those in detention ought to have a right to stay, the

[47] See e.g. IOM, 'Submission to the Working Group on Arbitrary Detention' (n 38); IOM, 'Quick Guide on ATD' (n 1); IOM, *Road Map on Alternatives to Migration Detention* (n 36); IOM, Migration Detention and Alternatives to Detention (n 35).

[48] In particular, IOM, 'Quick Guide on ATD' states (at p. 2) that 'When the use of detention is not justified based on legal grounds, States have an obligation to establish alternatives to detention in law and to apply them in practice' (n 1). This statement differs from earlier IOM documents, which state that 'the exceptional character of the detention of migrants […] entails the existence of an obligation on States to secure the availability of non-custodial measures.' (IOM, 'International Migration Law Information Note' (n 36) 6; see similar wording in IOM IML, 'International Migration Law Information Note' (n 46) 6).

[49] IOM, 'Immigration Detention and Alternatives to Detention' (n 35) 2.

[50] IOM, Migration Detention and Alternatives to Detention (n 35).

[51] IOM, *Road Map on Alternatives to Migration Detention* (n 36) 6.

[52] IOM IML, 'International Migration Law Information Note' (n 36) 8; IOM IML, 'International Migration Law Information Note' (n 46) 8. AVR programmes are also mentioned as interventions that support ATDs in IOM's Quick Guide on ATDs (n 1) and IOM, *Road Map on Alternatives to Migration Detention* (n 36) 6.

[53] IOM, A Framework for Assisted Voluntary Return and Reintegration (2018) 9.

[54] Ibid.

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Framework merely refers to other agencies (including UNHCR) who may be 'well placed to provide targeted assistance over the longer term and can ensure migrants' access to legal assistance and the right to seek asylum'.[55] This seems to suggest that IOM does not see its role as verifying whether detainees do have a right to stay, or as advocating for such a right.

It is apparent here that IOM's normative and operational roles are closely imbricated, and that its normative syntheses seek to ensure space for its key operational role in AVR. Perhaps this is unsurprising given its projectised structure and dependency on earmarked funds. However, weaving in this role in normative documents – and thereby failing to distinguish matters of international law and operational practice – is at best self-serving. It may also lend legitimacy to detention practices that ought to be condemned outright as violations of human rights, by wrongly conveying the impression that by offering AVR as a route out of detention, the detention itself is no longer a human rights violation.

13.3.4 IOM and the Global Compact on Migration

The Global Compact on Migration is a complex, non-binding document, reflecting and indeed transforming international standards.[56] While various interlocutors pushed for progressive readings of international norms, IOM's Global Compact Thematic Paper on Detention and Alternatives to Detention, which aimed to 'inform actors involved in the […] consultation process',[57] gave a strong endorsement of states' rights to control their own borders, stating:

> Many States consider immigration detention as an unavoidable and necessary migration management tool. States have the right to control their borders and determine their migration policies. However, in doing so they must ensure respect for international law and standards. Detention of migrants is usually for the purpose of identifying persons and determining nationalities, preventing persons from gaining unauthorized entry, and expelling or ensuring the enforcement of a deportation order. Some transit countries also detain migrants to prevent them from leaving the country irregularly. In some instances, asylum seekers are detained pending a decision on their asylum application.[58]

[55] Ibid.
[56] Vincent Chetail, 'The Global Compact for Safe, Orderly and Regular Migration: A Kaleidoscope of International Law' (2020) 16 International Journal of Law in Context 253; Gest, Kysel and Wong (n 34).
[57] IOM, 'Immigration Detention and Alternatives to Detention' (n 35) 1.
[58] Ibid.

https://doi.org/10.1017/9781009184175 Published online by Cambridge University Press

This paragraph contains a remarkable mix of descriptive statements describing what states do in practice, alongside a general acknowledgement that states have the 'right to control their borders'.[59] What remains unstated is that many of the practices described violate international law – detention of asylum seekers pending decisions on their claim, for instance, or preventing migrants from leaving, which often violates the human right to leave any country. This Thematic Paper further addresses the organization's commitment to 'humane conditions of detention' through two policy suggestions, namely:

> '7. Improve detention infrastructure and services as required for ensuring a humane living environment, according to international standards and best practices and accounting for gender and age-specific requirements'.
>
> '8. Ensure that existing detention facilities meet international standards, if necessary through immediate infrastructural and other upgrades'.[60]

Again, here we see the weaving of the normative and operational in a manner that may be self-serving. Detention, even in pleasant surroundings, may be a human rights violation, and the line between improving detention conditions and expanding detention capacity is blurry at best. As is discussed further below, whether to engage or disengage in such activities needs careful calibration not only in light of IHRL, but more generally in light of any given organization's humanitarian commitments and self-understanding.

In the final text of the Compact, Objective 13 calls to 'Use migration detention only as a measure of last resort and work towards alternatives'. As mentioned above, the detention principles in the Compact are generally taken as a fairly progressive distillation of IHRL. Since the adoption of the Compact in 2018, IOM policy documents on detention usually frame their work as advancing these key aims.[61] IOM notably refers to GCM Objective 13 as providing 'an opportunity to continue working towards the expansion and systematization of alternatives to detention as the customary means of addressing irregular migration'.[62] However, the three key features of IOM's approach to detention remain unchanged: a generally strong sovereigntist approach; ATDs more often cast as a desirable

[59] Ibid.
[60] Ibid 4.
[61] See e.g. IOM, 'Quick Guide on ATD' (n 1); IOM, *Road Map on Alternatives to Migration Detention* (n 36); IOM, Migration Detention and Alternatives to Detention (n 35).
[62] IOM, 'Quick Guide on ATD' (n 1) 2.

option than an obligation; and AVR and other IOM operational practices such as the refurbishment of detention centres included in its normative discussion.

13.4 IOM's Operational Practices in Immigration Detention

IOM's operational practices are decentralised, diverse and projectised. Accordingly, generalising about what it does is difficult. The scholarship on IOM's role in relation to detention is limited and tends to focus on single sites. For instance, Miramond's important assessment of IOM's anti-trafficking activities in Laos and Thailand identifies its deferential stance to the 'existing repressive apparatus' for the 'treatment' of those identified as victims of trafficking, including detention.[63]

In this part, we examine four critical cases of IOM's detention-related practices, drawing from three decades of involvement in detention regimes. These cases offer insight into how IOM practices have shifted alongside its gradual moves towards publicly acknowledging its own human rights obligations. The first two cases predate IOM's gradual human rights rebranding, so they allow for an assessment of the impact of this shift in rhetoric. The first case concerns IOM's role in relation to US practices of interdiction and detention in the Caribbean (in the 1990s and 2000s), when the US first employed its military base in Guatanamo Bay as a detention site. This set of practices provided a model for the second case, its lynchpin role in establishing Australian offshore detention in the first iteration of its 'Pacific Solution' (2001–2007).[64] The two later cases illustrate IOM's practices after the intensification of its human rights rebranding, in relation to its role in Indonesia (from 2000 to present) and Libya (2007–present). Its practices in Indonesia, funded again largely by Australia, follow on from its previous role in the Pacific Solution,[65] while

[63] Estelle Miramond, 'Humanitarian Detention and Deportation: The IOM and Anti-Trafficking in Laos' in Martin Geiger and Antoine Pécoud (eds), *The International Organization for Migration: The New 'UN Migration Agency' in Comparative Perspective* (Palgrave MacMillan 2020) 262–263.

[64] On the policy transfer from the US to Australia, see Azadeh Dastyari, 'Refugees on Guantanamo Bay: A Blue Print for Australia's 'Pacific Solutions'?' (2007) 79 (1) Australian Quarterly 4; Ghezelbash (n 9).

[65] Amy Nethery, Brynna Rafferty-Brown, and Savitri Taylor, 'Exporting Detention: Australia-funded Immigration Detention in Indonesia,' (2013) 26 Journal of Refugee Studies 88; Asher Lazarus Hirsch and Cameron Doig, 'Outsourcing Control: The International Organization for Migration in Indonesia,' (2018) 22 The International Journal of Human Rights 681.

in Libya, its activities are mainly funded by the EU and its Member States, but with the Australian 'model' frequently invoked.[66]

13.4.1 IOM's Role in US Interdiction and Detention in the Caribbean (1990s–2000s)

In the 1980s, the US began experimenting with new methods of extraterritorial border control, with a particular focus on preventing the arrival of people travelling irregularly on boats, in particular from Haiti. IOM's role developed in the 1990s, after a military coup ousted Haiti's democratically elected president, prompting a larger exodus of Haitians fleeing by boat. The US responded by scaling up its interdiction programme, although abandoning its previous practice of summary returns given the political situation.[67] Yet, rather than transfer interdicted Haitians to the United States (for a proper asylum procedure), the US decided to adjudicate claims for asylum onboard the *USNS Comfort*, a navy hospital ship docked in Jamaica.[68] IOM was involved in this highly contentious practice of 'shipboard' detention and processing. Working with US authorities onboard the *Comfort,* IOM was charged with 'undertaking initial interviews and data collection for the asylum claims of Haitian boat people'.[69] It was also involved in 'transporting asylum seekers to countries offering temporary shelter [of which few obliged] and moving the small minority who were recognised as refugees on to the United States and other host states'.[70]

As the shipboard asylum processing became unsustainable, the US turned to its military base on Guantanamo Bay as a detention and processing site.[71] IOM continued to assist US authorities with asylum

[66] See, for example, Fabio Scarpello 'The "Australian Model" and Its Long-term Consequences: Reflections on Europe' (2019) 5 Global Affairs 221.

[67] Bill Frelick, 'US Refugee Policy in the Caribbean: No Bridge Over Troubled Waters,' (1996) 20 (2) The Fletcher Forum of World Affairs 67.

[68] Ibid.

[69] Marianne Ducasse-Rogier, *The International Organization for Migration, 1951–2001* (International Organization for Migration 2002) 140.

[70] Megan Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (Routledge 2020) 68.

[71] Carl Lindskoog. *Detain and Punish: Haitian Refugees and the Rise of the World's Largest Immigration Detention System* (University Press of Florida 2018); Azadeh Dastyari and Libbey Effeney, 'Immigration Detention in Guantánamo Bay (Not Going Anywhere Anytime Soon)' (2012) 6 (2) Shima: The International Journal of Research into Island

interviews and data collection at Guantanamo.[72] Incidentally, IOM was also engaged in running the US's 'in-country processing programme' for Haitians, which forced asylum seekers to make their applications and await decisions *in Haiti* despite serious risks there.[73] Serious concerns were expressed that those detained at Guantanamo Bay faced pressure to accept US offers for immediate repatriation.[74] Of the 20,000 Haitians interdicted and transferred to Guantanamo Bay (including hundreds of children), most were eventually repatriated back to Haiti.[75]

While UNHCR spoke out against the detention and processing of interdicted Haitians at Guantanamo, IOM remained publicly silent.[76] The exact date of IOM's withdrawal from Guantanamo Bay is unknown given the organization's limited reporting on its activities on the military base, and lack of public access to IOM archival documentation.[77] Far beyond the Haitian boat movements of the 1990s, the US continued to use Guantanamo Bay for the offshore detention and processing of asylum seekers, apparently overlapping with its more notorious afterlife as a detention and torture site for alleged terrorist suspects brought there by US military forces as part of the 'War on Terror'. It appears IOM also maintained a presence at the site for at least another decade. In 2008, for example, IOM confirmed (responding to an academic inquiry) that it was still working with US authorities to provide services at Guantanamo Bay immigration detention camps, including 'community liaison assistance, translation and interpreting, education and recreation programmes, employment facilitation, and coordinating medical services'.[78]

Cultures 49; Azadeh Dastyari *United States Migrant Interdiction and the Detention of Refugees in Guantanamo Bay* (Cambridge University Press 2015).

[72] Ducasse-Rogier (n 69) 140.

[73] Bill Frelick, 'In-country Refugee Processing of Haitians: the Case Against' (2003) 21 (4) Refuge: Canada's Journal on Refugees 66. See also Americas Watch, National Coalition for Haitan Refugees and Jesuit Refugee Service, 'No Port In A Storm: The Misguided Use of In-Country Refugee Processing in Haiti' (Human Rights Watch, 1 September 1993) <www.hrw.org/report/1993/09/01/no-port-storm/misguided-use-country-refugee-processing-haiti> accessed 5 August 2022.

[74] Lindskoog (n 71).

[75] Ibid. 128.

[76] Robert Suro, 'U.N. Refugee Agency Says U.S. Violates Standards in Repatriating Haitians,' *Washington Post* (Washington D.C., 11 January 1995).

[77] IOM's online media archives and institutional reports make little mention of its work in Guantanamo Bay.

[78] Dastyari and Effeney (n 71).

Establishing accountability for these 'offshore' practices has been notoriously difficult, with the US Supreme Court upholding the legality of interdiction at sea,[79] in sharp contrast to the Inter-American human rights system and the dominant interpretation of international human rights and refugee law.[80]

13.4.2 IOM's Role in Australia's 'Pacific Solution' (2001–2007)

After Guantanamo Bay, IOM played a more visible role in immigration detention by aiding Australia to implement its so-called 'Pacific Solution', a set of laws and practices designed to intercept and transfer asylum seekers arriving by boat to detention facilities on the territory of other states, in this instance Nauru and Papua New Guinea (Manus Island). Australian naval vessels intercepted protection seekers at sea and brought them forcibly to both countries, where they were subject to automatic indefinite detention in Australian-constructed facilities.[81] In both countries, detained protection seekers had no means to challenge their detention legally.

On both Nauru and Manus Island, IOM directly managed and administered detention sites under the direction of the Australian government.[82] As a contractor of the Australian government, IOM's performance of its services were monitored 'weekly' by DIAC officials, through 'direct personal contact with its [IOM's] officers in Nauru and Canberra ….'.[83] At the time, neither Nauru nor Papua New Guinea were member states of IOM.[84] Over the course of IOM's involvement, 1,637 persons were interdicted by Australia, transferred and detained at these sites where their claims were assessed by Australian immigration officials.[85] Of these, 1,153 persons were eventually found to be refugees or in need of protection for other compelling

[79] Sale v. Haitian Ctrs. Council, 509 US 155, 113 S. Ct. 2549 (1993).

[80] *The Haitian Centre for Human Rights et al. v. United States, Case 10.675*, 10.675, Inter-American Commission on Human Rights (IACHR), 13 March 199.

[81] Susan Kneebone 'The Pacific Plan: The Provision of "Effective Protection"?' (2006) 18 International Journal of Refugee Law 696, 711.

[82] Under the first phase of the 'Pacific Solution' the detention facility in Manus Island closed in 2004, while the last refugee was removed from the Nauru facility in 2008.

[83] Australian Government Department of Immigration and Citizenship, 'DIAC Annual Report 2006–07' (Commonwealth of Australia 2007) 34.

[84] Human Rights Watch report, *By Invitation Only: Australian Asylum Policy* (Human Rights Watch 2002).

[85] UNHCR 'Australia's "Pacific Solution" Draws to a Close' (11 February 2008) <www.unhcr.org/uk/news/latest/2008/2/47b04d074/australias-pacific-solution-draws-close.html?query=nauru> accessed 5 August 2022.

humanitarian reasons, while 483 detainees were returned to their countries of origin or residence following negative refugee determination decisions.[86] Although Nauru and Papua New Guinea both requested UNHCR to assist with the processing of asylum seekers' claims, UNHCR argued publicly that detention practices violated human rights and refugee laws.[87]

Within detention facilities, IOM's managerial responsibilities included providing 'security, water, sanitation, power generation, health, and medical services'.[88] Its Memorandum of Understanding with the Nauruan Government elaborates on the scope of IOM's functions, listing the organization's responsibilities as providing 'good order and discipline' at detention sites; regulating entry; and overseeing the 'movement of asylum seekers'.[89] To fulfil its function of overseeing detention, the organization frequently subcontracted to companies, including private security firms.[90] Another role undertaken by IOM on behalf of the Australian government was to assist in the 'voluntary' return of asylum seekers to their home countries.[91] Besides movement operations, this assistance entailed helping the Australian government to socialise cash incentive schemes for 'voluntary' return amongst the detainee population, while they were being deprived of their liberty and facing poor living conditions.[92]

The detention conditions were generally poor, and it is well established that they amounted to inhuman and degrading treatment, of which IOM was well aware.[93] For example, in mid-2002, IOM's medical staff in Nauru reported that thirty unaccompanied children were showing signs of trauma.[94] IOM employed an independent medical doctor to investigate health conditions and write a report for IOM managers. The doctor's opinion was that no amount of mental health training or support would

[86] UNHCR 'Australia's "Pacific Solution" Draws to a Close' (11 February 2008) <www.unhcr.org/uk/news/latest/2008/2/47b04d074/australias-pacific-solution-draws-close.html?query=nauru> Accessed 29 April 2022

[87] Human Rights Watch *By Invitation Only: Australian Asylum Policy* (n 84) at 66; UNHCR 'UNHCR Mid-Year Progress Report' (UNHCR 2002) <www.unhcr.org/uk/publications/fundraising/3daabf013/unhcr-mid-year-progress-report-2002-east-asia-pacific-regional-overview.html?query=nauru> accessed 5 August 2022.

[88] Tania Penovic and Azadeh Dastyari, 'Boatloads of Incongruity: The Evolution of Australia's Offshore Processing Regime,' (2007) 13 (1) Australian Journal of Human Rights 33.

[89] Human Rights Watch report (n 84) 66.

[90] Penovic and Dastyari (n 88).

[91] Ibid.

[92] Kneebone (n 81) 715.

[93] Human Rights Watch report (n 84).

[94] Ibid. (n 84) 69.

be able to mitigate the desperate situation and suffering of detainees.[95] He later resigned his post in protest over detention conditions and IOM's disregard for his clinical professional opinion.[96] On Manus Island, detainees protested IOM's management of the site by '[tying] placards to the fence of the camp pleading to be dealt with by UNHCR instead of IOM'.[97]

IOM actively sought to avoid public scrutiny about the detention practices. Detainees' communications with the outside world were also tightly controlled, including email and telephone calls with family members and legal representatives.[98] Working together with Australian Federal Police and hired private security, IOM limited the access of lawyers, journalists and human rights activists, for which it drew criticism from international human rights organizations for being 'fundamentally resistant to independent scrutiny'.[99] However, IOM has not formally acknowledged its role in managing these detention facilities. Initially, both IOM and the Australian government maintained that Nauru and Manus Island were 'migrant processing centres', likening their operation to refugee camps.[100] Their denials included attempting to claim that the practices did not entail detention, a clear distortion of the legal concept.[101] The Australian government argued that since 'it would be against IOM's constitution … to manage a detention centre', the containment practices should not be viewed as detention.[102]

Yet, there was no doubt that a regime of interdiction and automatic indefinite detention violated human rights. The evidently arbitrary nature of detention fuelled international criticism of both Australia and IOM. For example, the UN Human Rights Committee repeatedly condemned Australia's practices of mandatory detention.[103] Amnesty International, after a monitoring visit to Nauru's detention camps, concluded that IOM 'as administrator of the Nauru and Manus Island facilities … *has effectively*

[95] Penovic and Dastyari (n 88) 43.
[96] Ibid.
[97] Human Rights Watch report (n 84).
[98] Ibid (n 84) 67.
[99] Ibid.
[100] Human Rights Watch, 'The International Organization for Migration and Human Rights Protection in the Field: Current Concerns' (Human Rights Watch Statement to the 86th Session of the Council of the International Organization for Migration 18–21 November 2003).
[101] Amnesty International, 'Australia Pacific: Offending human dignity – the 'Pacific Solution' (Amnesty International 2002) Index No. 12/009/2002 18.
[102] Human Rights Watch report (n 84) at 66.
[103] UN GA, 'Report of the Human Rights Committee, Volume 1: General Assembly 55th Session Supplement 40' (3 October 1995) UN Doc A/50/40.

become the detaining agent on behalf of the governments involved' (emphasis added).[104] Addressing the IOM Council, Human Rights Watch called upon IOM to 'cease managing detention centres … on Nauru and Manus Island … where detention is arbitrary and contrary to international standards for the treatment of asylum seekers'.[105] Several academics have also written about IOM's integral role in the operation and legitimation of these sites.[106]

On 31 March 2008, IOM officially closed both detention sites, and in Nauru, assisted with the decommissioning of the site for future government use.[107] However, the detention sites were reopened later in 2008 in a new phase of the 'Pacific Solution' when a new government came to power in Australia. Its externalisation practices have continued, re-emerging under new names and arrangements with the shifts in Australian electoral politics.[108] IOM's activities changed significantly, however, apparently in light of the international criticism of IOM's role. In the second iteration of the Pacific Solution, its AVR programmes dominate, still funded by the Australian government.[109] Although IOM has distanced itself from the management of detention facilities *per se*, it is still imbricated in the containment system.

Establishing legal accountability in this context has been challenging. Although the system was clearly designed and run by Australia, Australian courts, which lack strong powers of judicial review, generally gave effect to the relevant Australian legislation, viewing themselves as constitutionally unable to give effect to international law as regards Australia's detention practices (both onshore and offshore). Australia routinely ignores the UNTB's views finding legal violations.[110] In contrast, in April 2016, the highest court in Papua New Guinea found (in a unanimous decision) that detention of refugees and asylum seekers in its

[104] Amnesty International report (n 101).
[105] Human Rights Watch Statement to IOM Council (n 100) 17.
[106] See, e.g., Ishan Ashutosh and Alison Mountz, 'Migration Management for the Benefit of Whom? Interrogating the Work of the International Organization for Migration,' 15(1) Citizenship Studies 21.
[107] Australian Government Department of Immigration and Citizenship, 'DIAC Annual Report 2007–08' (Commonwealth of Australia 2008).
[108] See Kaldor Centre, *Offshore Processing: An Overview* (August 2021) <www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/factsheet_offshore_processing_overview.pdf> accessed 5 August 2022.
[109] Australian Government Department of Immigration and Citizenship, 'DIAC Annual Report 2013–14' (Commonwealth of Australia 2014).
[110] See, for example, HRC, *A v Australia* (n 24).

Australian-funded 'processing' centres is unconstitutional.[111] Notably, in 2014, the government of Papua New Guinea attempted to amend its Constitution to insulate from constitutional review the detention of foreign nationals 'under arrangements made by Papua New Guinea with another country *or with an international organisation* that the Minister responsible for immigration matters, in his absolute discretion, approves' (emphasis added).[112] The Court also found this constitutional amendment unconstitutional.

13.4.3 IOM's Role in Australian-Funded Immigration Detention and ATDs in Indonesia (2000–2020)

Since the mid-1990s, Australia has elicited Indonesia's cooperation to implement its regional deterrence policy to asylum-seeking, leading to an increase of containment practices, including detention.[113] Prior to Australian involvement, Indonesia employed immigration detention in a limited manner. Centres were few and designed to hold only convicted foreign nationals awaiting deportation.[114] Between 2000 and 2018, however, Australia provided significant financial support to Indonesia to bolster its capacity to detain large numbers of people who were assumed to be otherwise likely to move on to Australia to claim asylum.[115] As a result, tens of thousands of protection seekers ended up in indefinite detention while awaiting asylum decisions and resettlement options.[116] Over the years, Indonesia shifted its approach towards ATDs.[117] Following the withdrawal of Australian funding in 2018, the Indonesian government issued a circular ending the indefinite detention of intercepted refugees

[111] *Namah v Pato* no SC1497 Papua New Guinea Supreme Court of Justice 13 (26 April 2016). See Azadeh Dastyari and Maria O'Sullivan, 'Not for Export: The Failure of Australia's Extraterritorial Processing Regime in Papua New Guinea and the Decision of the PNG Supreme Court in Namah' (2016) 42 Monash University Law Review 308; See further Thomas Gammeltoft-Hansen and Nikolas Feith Tan 'A Topographical Approach to Accountability in Human Rights Violations in Migration Control' (2020) 21 German Law Journal 335.

[112] Constitution of the Independent State of Papua New Guinea (adopted 16 September 1975), Section 1 of Constitutional Amendment (No.37) (Citizenship) Law 2014 (the 2014 Amendment) adds after s.42 (g) paragraph (ga).

[113] Nethery, Rafferty-Brown and Taylor (n 65); Hirsch and Doig (n 65).

[114] Antje Missbach, 'Falling Through the Cracks' (*Asia Pacific Policy Forum*, 8 August 2018) <www.policyforum.net/falling-through-the-cracks/> accessed 5 August 2022.

[115] Nethery, Rafferty-Brown and Taylor (n 65).

[116] Missbach, 'Substituting Immigration Detention Centres with "Open Prisons" in Indonesia' (n 25).

[117] Ibid. 2 and 6.

and asylum seekers.[118] While Indonesia's change led to the use of more community shelters styled as an ATD, these residences are still characterised by serious restrictions on mobility, and work within a broader framework of containment.[119]

IOM's role is evident in the Regional Cooperation Agreement (RCA), a tripartite agreement signed between Australia, Indonesia and IOM in 2000, which sets out the operational arrangements for intercepting asylum seekers, framed as *en route* to Australia, and detaining them.[120] Under the RCA, Australia was to provide material support to Indonesia to arrest and detain transiting asylum seekers, while IOM was contracted by Australia to provide 'care and maintenance' to those in detention (entailing the provision of food, nutrition, medical aid and psycho-social support). Indonesia's legal framework placed few limits on detention and allowed detention for up to ten years without judicial review, enabling these practices.[121]

IOM's activities under the RCA have varied. In its earliest phases (2000–2001), those intercepted by Australia were accommodated in hotels and shelters run by IOM, as their first point of reception in Indonesia, before being transferred onwards to Indonesian-run shelters.[122] Within IOM and government-run facilities, asylum seekers were encouraged to take up IOM's AVR.[123] Until 2006, IOM's annual financial reports show that it received regular funding from Australia for a project entitled 'Care and Voluntary Return of Irregular Migrants in Indonesia', presumably to provide the abovementioned services.[124] Some 23,000 asylum seekers and refugees were placed under IOM's 'care and maintenance' within Indonesian detention facilities between 2000 and 2018, with many documenting shortcomings in both the food and the conditions in detention.[125]

Between 2007 and 2013, IOM significantly expanded its detention-related activities, as part of its Australian-funded 'Management and Care of Irregular Immigrants Project' (MCIIP). This project had three main

[118] Ibid (n 25).
[119] Ibid.
[120] See Nethery, Rafferty-Brown and Taylor (n 65); Hirsch and Doig (n 65).
[121] See further Global Detention Project, 'Immigration Detention in Indonesia' (22 January 2016).
[122] Human Rights Watch report (n 84).
[123] Ibid. (n 84)
[124] See IOM financial reports here: IOM, 'Financial Reports' <https://governingbodies.iom.int/financial-reports> accessed 5 August 2022-
[125] See e.g. Human Rights Watch, *Barely Surviving: Detention, Abuse, and Neglect of Migrant Children in Indonesia* (Human Rights Watch 2013) 58; Nethery, Rafferty-Brown and Taylor (n 65).

elements. The first aimed to 'enhance the Indonesian Directorate General of Immigration's capacity to care and manage irregular migrants in Indonesia … with a standard of care that meets international standards'[126] and involved major works to refurbish and renovate several Indonesian detention centres.[127] IOM's work supported significant expansion of detention capacity.[128] The second element was to improve detention conditions by developing standard operating procedures and training Indonesian officials.[129] According to IOM, these activities 'brought to life the concept of human rights in Indonesian immigration detention' by 'highlighting the human rights needs of people in Indonesian detention and providing officers of the Director General the tools to ensure human rights are protected'.[130] The third component was AVR work from detention sites. Overall, reliable reports demonstrated that human rights violations in detention continued.[131] Moreover, while IOM has generally framed the MCIPP project as human rights-protective, its underlying aims were more explicitly stated by Australia's Department of Immigration and Citizenship as: 'provid[ing] funding to the IOM to *enhance* Indonesian immigration detention and transit facilities' (emphasis added).[132]

As the MCIPP project evolved, IOM also started to work on supporting asylum seekers outside detention, framed as an ATD. Indonesia became one of a handful of countries to adopt UNHCR's *Beyond Detention* agenda.[133] In 2010, with funding from the Australian government, IOM began working on the release of some detainees, in collaboration with UNHCR and the International Detention Coalition (IDC). It also started refurbishing and administering a network of non-custodial

[126] IOM, 'Indonesia 2008 Annual Report' (31 December 2008).

[127] Australian Government Department of Immigration and Citizenship, 'DIAC Annual Report 2011–12 and 'DIAC Annual Report 2012–13' (Commonwealth of Australia 2012 and 2013).

[128] Centre for Migration Studies, 'Immigration Control Beyond Australia's Borders' <https://cmsny.org/immigration-control-beyond-australias-border/#:~:text=The%20renovation%20involved%20increasing%20the,(Taylor%202010%2C%20339)> accessed 5 August 2022. See also Savitri Taylor, 'Australian Funded Care and Maintenance of Asylum Seekers in Indonesia and Papua New Guinea: All Care but No Responsibility?' (2010) 33(2) University of New South Wales Law Journal 337.

[129] Missbach, 'Falling through the Cracks' (n 114).

[130] IOM (n 126) 88.

[131] See HRW, *Barely Surviving: Detention, Abuse, and Neglect of Migrant Children in Indonesia* (n 125); Hirsch and Doig (n 65).

[132] Australian Government Department of Immigration and Citizenship, 'DIAC Annual Report 2010–11' (Commonwealth of Australia 2011).

[133] Missbach, 'Falling through the Cracks' (n 114).

accommodation, covering all financial costs for these sites.[134] Initially, only those who had been granted refugee status could be released from detention.[135] By 2016, it was reported that one-third of the protection seekers' population remained in detention facilities, with their basic needs being covered by IOM, while another third lived in IOM-administered 'community shelters'.[136] The remaining population lived independently in Indonesian communities.[137]

Despite better conditions in non-custodial accommodation, refugees and asylum seekers have still been subject to restrictions on their mobility within these arrangements, giving the impression that they still form part of a broader strategy of containment.[138] Within IOM-run centres, refugees and asylum seekers can move freely during the day, but are required to remain in them at night, with different centres placing different restrictions on movement.[139] Asylum seekers and refugees who violate immigration regulations (e.g. 'violating curfew') lose access to community shelters and their services.[140] Many asylum seekers and refugees have described their experience as effectively living in 'an open prison'.[141] In March 2018, new asylum seekers were barred from admission into IOM's 'care' programme due to a lack of resources.[142]

In 2018, IOM ended its 'care' programme within Indonesia's detention facilities on account of significant cuts to its Australian funding for such activities. Coinciding with these changes to IOM's funding, the Indonesian government issued a circular ending the indefinite detention of intercepted refugees and asylum seekers.[143] Although international advocacy played some role in this shift away from detention,[144] it appears Australia's withdrawal of funding to IOM's 'care

[134] Ibid. (n 114)
[135] Ibid.
[136] Missbach, 'Substituting Immigration Detention Centres With "Open Prisons" in Indonesia' (n 25).
[137] Ibid. (n 25)
[138] Missbach, 'Falling through the Cracks' (n 114).
[139] UNHCR, 'Global Strategy Beyond Detention 2014–2019: Final Progress Report' 55-
[140] Missbach, 'Falling through the Cracks' (n 114).
[141] Missbach, 'Substituting Immigration Detention Centres with "Open Prisons" in Indonesia' (n 25).
[142] Missbach, 'Falling through the Cracks' (n 114).
[143] Ibid. (n 114); Missbach, 'Substituting Immigration Detention Centres with "Open Prisons" in Indonesia' (n 25).
[144] UNHCR, 'Global Strategy Beyond Detention: Final Progress Report, 2014–2019' (UNHCR 2020) at 55.

and maintenance' programmes was a game changer for Indonesia and its willingness to use detention to accommodate asylum seekers.[145] Nevertheless, IOM still takes credit for enhancing the protection of 'stranded migrants and refugees' in Indonesia, and frequently refers to Indonesia as a shining example of its ATD work.[146] In 2002, the organization briefly admitted to Human Rights Watch that Australia was inevitably a beneficiary of its 'care' to migrants, while also affirming that it was 'not, strictly speaking, a humanitarian organization'.[147] Yet, today IOM does not acknowledge that it has been involved in expanding Indonesia's detention regime, or tensions in the different roles it has undertaken. Instead, the organization tells a simplified story about its detention work, claiming that it has 'always advocated for alternatives to detention, resulting in the successful establishment of open migrant housing facilities across the country'.[148]

13.4.4 Detention in Libya: IOM, the EU's Containment Practices and Mass Human Rights Violations (2007–Present)

Alongside the US and Australia, the EU's migration policies and practices generally seek to contain protection seekers elsewhere, by externalising migration controls and preventing people leaving third countries.[149] These practices include bilateral and multilateral cooperation with states with poor human rights records, notably Libya. The range of practices in bilateral (in particular Italy-Libya) and multilateral (mainly EU-Libya) cooperation have shifted from Italy's interception of irregular boats at sea and direct return of protection seekers to Libya, to engaging with the Libyan authorities (in particular the Libyan Coast Guard, LCG) to have

[145] On 30 July 2018, the Directorate General of Immigration issued a Circular concerning 'Restoring the Function of Immigration Detention Centres', which restated the function of immigration detention centres to temporarily host irregular migrants subjected to administrative measures, and not to hold refugees and asylum seekers. See Antje Missbach, 'Substituting Immigration Detention Centres with "Open Prisons"' (n 25).

[146] IOM, 'UN Migration Agency Facilitates Release of Refugees from Indonesian Detention Centres' (n 42).

[147] Human Rights Watch report (n 84).

[148] IOM, 'UN Migration Agency Facilitates Release of Refugees from Indonesian Detention Centres' (n 42).

[149] Cathryn Costello 'Overcoming Refugee Containment and Crisis' (2020) 21 German Law Journal 17; Lilian Tsourdi and Cathryn Costello 'The Evolution of EU Law on Refugees and Asylum' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (4th edn, Oxford University Press 2021).

them intercept and prevent those seeking to leave irregularly, as well as funding the refurbishment of immigration detention facilities.[150]

The shift in approach, alongside the deep instability and fractured authority in Libya since the 2011 revolution and military intervention, has led to the emergence of a system of detention – both formal and informal – characterised by well-documented massive human rights violations, including torture, inhuman and degrading conditions, forced labour and slavery. A 2016 report by the Office of the UN High Commissioner for Human Rights (OHCHR) and the UN Support Mission in Libya (UNSMIL) defined the situation of refugees, asylum-seekers and migrants in Libya as a 'human rights crisis'.[151] On 1 October 2021, the United Nations High Commissioner for Human Rights published a report on Libya qualifying the violence against migrants in the country since 2016, including systematic torture in and outside official detention centres, as 'amount[ing] to crimes against humanity'.[152]

Amnesty International's 2021 report on Libya noted that the LCG 'intercepted and forcibly returned 32,425 refugees and migrants to Libya, where thousands were detained indefinitely in harsh conditions in facilities overseen by the Libyan Directorate for Combating Illegal Migration (DCIM)'.[153] It concludes that '[r]efugees and migrants were subjected to widespread and systematic human rights violations and abuses at the hands of state officials, militias and armed groups with impunity'.[154] Detention standards and conditions fall below IHRL standards due to

[150] In 2012, the Grand Chamber of the ECtHR in *Hirsi Jamaa and Others v Italy* [GC] no 27765/09 (ECtHR, 23 February 2012) condemned Italy's forced returns as a violation of *non-refoulement* and the prohibition of collective expulsion. The more recent 'pull-back' practices are arguably at least in part a response to this ruling, and are also subject to legal challenge in light of Italy's strong 'contactless control' over the LCG. See further in Violeta Moreno-Lax 'The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, SS and Others v Italy, and the "Operational Model"' (2020) 21 German Law Journal 385.

[151] Office of the UN High Commissioner for Human Rights (OHCHR) and UN Support Mission in Libya (UNSMIL), '"Detained and Dehumanised" Report on Human Rights Abuses against Migrants in Libya' (13 December 2016).

[152] Human Rights Committee, 'Report of the Independent Fact-Finding Mission on Libya' (1 October 2021) UN Doc A/HRC/48/83.

[153] Amnesty International, 'Libya: Horrific Violations in Detention Highlight Europe's Shameful Role in Forced Returns' (15 July 2021) <www.amnesty.org/en/latest/press-release/2021/07/libya-horrific-violations-in-detention-highlight-europes-shameful-role-in-forced-returns/> accessed 5 August 2022.

[154] Amnesty International, 'Libya' <www.amnesty.org/en/location/middle-east-and-north-africa/libya/report-libya/> accessed 5 August 2022.

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lack of regulation and judicial oversight. Moreover, the situation is such that the entire containment system creates multiple, persistent and severe human rights violations. The containment practices of the LCG and official detention sites of DCIM are closely imbricated with a wider extractive system including various private sites of detention and abuse, with the line between public detention and private kidnapping, torture, forced labour, extortion and other human rights abuses blurred.

Inevitably, IOM's detention work in Libya is 'riddled with tensions'.[155] IOM has been involved in Libya for some time, for example overseeing a large evacuation programme for migrant workers at the time of the 2011 revolution.[156] IOM plays some operational roles in the containment system: For instance, when the LCG intercepts and pulls back boats, IOM provides those disembarked with 'life-saving equipment, medical first aid, psycho-social support, and protection referrals'.[157] It has also set up some of the infrastructure necessary for 'safe reception', such as medical, water and sanitation facilities,[158] and provides some training to the LCG.[159] Its detention-related roles include refurbishing detention centres and running a large AVR programme, as discussed further.

While IOM offers AVR to home states, UNHCR also has a presence, and seeks to offer evacuation/resettlement opportunities to vulnerable asylum seekers and refugees. The Libyan authorities only permit UNHCR to engage with nine nationalities: those from Ethiopia, Eritrea, Sudan, Syria, Palestine, Somalia, Iraq, South Sudan and Yemen.[160] Libya is not a party to either the 1951 or the 1969 OAU Refugee Conventions, and UNHCR's ability to access and assist refugees (in particular those of other nationalities) is limited. Moreover, as states accept to resettle few refugees from Libya, UNHCR is limited in being able to offer transfers to Rwanda and Niger, in addition to evacuating very small numbers directly to Italy

[155] Bradley (n 70) 75.

[156] IOM, 'IOM Opens Office in Tripoli' (24 April 2006) <www.iom.int/news/iom-opens-office-tripoli> accessed 5 August 2022. See also Bradley (n 70).

[157] Including 'life jackets, emergency blankets, first aid kits, buoys, body bags, operation suits, gloves and masks.' See IOM, 'Libya Crisis Response Plan 2022' (2022).

[158] Ibid.

[159] IOM, 'IOM, EU Train Libyan Mediterranean Migrant Rescuers' (6 January 2017) <www.iom.int/news/iom-eu-train-libyan-mediterranean-migrant-rescuers> accessed 5 August 2022.

[160] Pietro Scarpa, 'International Evacuations of Refugees and Impact on Protection Spaces: Case Study of UNHCR Evacuation Programme in Libya' (2021) RLI Working Paper No 59 <https://sas-space.sas.ac.uk/9544/> accessed 5 August 2022.

under a 'humanitarian corridor' programme.[161] Between 2017 and 2020, UNHCR in Libya evacuated around 4,500 refugees.[162] Notably, UNHCR shifted its practices when it realised that focusing on detained populations has the perverse effect that 'persons bribed the guards of detention centres to be detained and then be able to access the UNHCR programme of evacuation and resettlement'.[163] The crude division of population between UNHCR and IOM belies the otherwise close cooperation between the two IOs. For instance, they routinely issue joint statements on the situation in Libya in relation to its treatment and approaches to refugees and migrants.[164]

Within detention, IOM provides a range of services, including responding to critical food shortages in specific facilities and improving the physical conditions in places where deteriorated living conditions have led to high numbers of migrant deaths.[165] IOM implemented 307 interventions to upgrade Libya's detention infrastructure between 2017 and 2020 – including refurbishments to toilets, showering facilities, sewage systems, ventilation and heating systems.[166] Its psycho-social programmes purportedly help migrants to 'cope' with the mental and emotional trauma of confinement.[167] These activities, including human rights training for Libyan detention staff, are justified as 'promoting and protecting migrants' human rights'.[168] IOM also conducts 'detention

[161] UNHCR, 'Emergency Transit Mechanism' (Factsheet May 2021); Scarpa (n 160), 15–19.

[162] Scarpa (n 160), citing UNHCR, 'Evacuation Factsheet – Libya' (2020) <https://data2.unhcr.org/en/dataviz/111?sv=0&geo=0> accessed 13 October 2020.

[163] Scarpa (n 160) note 182.

[164] See for instance, UNHCR UK, 'UNHCR and IOM Joint Statement: International Approach to Refugees and Migrants in Libya Must Change' (11 July 2019) <www.unhcr.org/uk/news/press/2019/7/5d2765d04/unhcr-iom-joint-statement-international-approach-refugees-migrants-libya.html and www.unhcr.org/uk/news/press/2021/6/60ca1d414/iom-unhcr-condemn-return-migrants-refugees-libya.html> accessed 5 August 2022.

[165] IOM, 'IOM Works to Improve Conditions in Libyan Immigration Detention Centre' (8 November 2016) <www.iom.int/news/iom-works-improve-conditions-libyan-immigration-detention-centre> accessed 5 August 2022; IOM, 'IOM Responds to Life-threatening Starvation of Migrants in Libyan Detention Centres' (16 December 2016) <www.iom.int/news/iom-responds-life-threatening-starvation-migrants-libyan-detention-centres> accessed 5 August 2022.

[166] EU-IOM Joint Initiative for Migrant Protection and Reintegration, 'Flash Report #32' (September 2020).

[167] IOM 'IOM Launches Psychosocial Support Programme for Migrants at Detention Centres in Libya' (3 February 2017) <www.iom.int/news/iom-launches-psychosocial-support-programme-migrants-detention-centres-libya> accessed 5 August 2022.

[168] IOM, 'Libyan Detention Centre Staff Receive Human Rights Training' (28 February 2017) <www.iom.int/news/libyan-detention-centre-staff-receive-human-rights-training> accessed 5 August 2022.

centre mapping', an activity it suggests will produce routine and reliable data on Libya's detention centres for 'evidence-based humanitarian and policy interventions'.[169] These activities are framed as 'enhancing conditions' to protect human beings.[170] IOM on occasion gives the impression that it is making headway on limiting detention through support to ATDs.[171] However, it is unclear if there is any evidence to support this claim. Its Libya Crisis Response Plan (2022), for example, makes some mention of ATDs, but its other activities around search and rescue, refurbishment and material support programmes for intercepted and detained migrants are given prominence.[172]

IOM's 'assisted voluntary return and reintegration' (AVRR) has greatest prominence in its own self-presentation of its detention-related work in Libya. In 2015, IOM launched a new return programme targeting migrants in detention, called 'Voluntary Humanitarian Return' (VHR).[173] This programme, with funding from the UK[174] and EU, has led to the release and 'return' of approximately 53,000 so-called 'stranded migrants' since 2015.[175] IOM distinguishes VHR from its usual AVRR programming, claiming it is tailored to the Libyan context (and now rolled out in Yemen) to integrate components of 'humanitarian protection'.[176] As reflects its general practice, IOM states that VHR is 'voluntary', because 'returns are arranged at the express request of the individual returning, and humanitarian, as this assistance represents

[169] IOM, 'UN Migration Agency Launches Detention Centre Mapping in Libya' (20 June 2017) <www.iom.int/news/un-migration-agency-launches-detention-centre-mapping-libya> accessed 5 August 2022.

[170] IOM, 'UN Migration Agency (IOM) Improves Living Conditions for Detained Migrants in Libya' (5 May 2017) <www.iom.int/news/un-migration-agency-iom-improves-living-conditions-detained-migrants-libya> accessed 5 August 2022.

[171] Ibid.

[172] IOM, 'Libya Crisis Response Plan 2022' (n 157).

[173] Even prior to the EU-IOM Joint Initiative, Switzerland (2015) and the Netherlands (2016) started to provide funding to IOM for something called 'humanitarian repatriation.' These projects identified within IOM's financial reports would suggest this time period marks a shift in the way IOM frames its return activities in Libya.

[174] IOM, 'Evaluation of the Voluntary Return Assistance in Libya' (August 2017).

[175] EU-IOM Joint Initiative for Migrant Protection and Reintegration, 'Protection' <www.migrationjointinitiative.org/protection> accessed 5 August 2022; IOM, 'IOM Resumes Voluntary Humanitarian Return Assistance Flights from Libya After Months of Suspension' (22 October 2021) <www.iom.int/news/iom-resumes-voluntary-humanitarian-return-assistance-flights-libya-after-months-suspension> accessed 5 August 2022.

[176] IOM Libya, 'Voluntary Humanitarian Return (VHR)' <https://libya.iom.int/voluntary-humanitarian-return-vhr> accessed 5 August 2022.

a lifesaving option for many migrants who live in particularly deplorable conditions'.[177] Published evaluations of IOM's VHR programmes (undertaken for IOM by private consultancy firms) suggest that migrants neither have the ability to contest their detention nor understand how long their detention will last. This means they are making decisions about return while being subjected to different forms of abuse, harassment and precarious living conditions within detention sites.[178]

This matter will shortly be the subject of international adjudication. The Italian NGO ASGI has brought a complaint to the CEDAW Committee, the Committee charged to assess potential violations of this Convention on the Elimination of Discrimination Against Women.[179] The particular facts concern two Nigerian women who were offered AVR by IOM. The complaint alleges the 'return' was not voluntary, and emphasises the positive obligations of both Libya and the funding state, Italy, to ensure proper protection of victims of trafficking. Notably, the NGO cites the ECtHR case of *N.A. v Finland*, in which the court accepted that an individual who had returned to his home state under such a programme could have been subject to a human rights violation.[180] The complaint to CEDAW also indirectly highlights the problematic nature of the operational division between refugees and migrants in Libya, which leads to a situation where 'return' from detention is normalised, rather than a wider concept of human rights protection that would fully protect against *refoulement* and avoid disguised deportations.

13.5 IOM, Human Rights and Humanitarianism in Detention Contexts

IOM's role in relation to detention has transformed, both normatively and practically. However, much of the change has been unacknowledged. IOM tends to claim, in particular in its press releases, that it has 'always' encouraged the use of ATDs and treated detention as a 'last resort'.

[177] IOM, 'IOM Movements' (2021) 12.
[178] IOM, 'Evaluation of the Voluntary Return Assistance in Libya' (n 174).
[179] Alice Riccardi and others, 'Legal Expert Opinion Rendered in the Context of an Individual Communication to Be Submitted to the Committee on the Elimination of All Forms of Discrimination against Women (Roma Tre University, Department of Law, International Protection of Human Rights Legal Clinic, 12 April 2021) on file with the author.
[180] *NA v Finland* no 25244/18 (ECtHR, 13 July 2021). See further, Gauci, Chapter 14 in this volume.

However, given its clear and active role in perpetrating human rights violations in immigration detention, questions of accountability for past wrongs arise. The case studies reveal acts clearly attributable to IOM itself, and also breaches of other obligations. Many of the scenarios discussed in Part III entail multiple and systematic breaches of many human rights – not only arbitrary detention, but also torture and violations of other norms of *jus cogens*, such as race discrimination and slavery.[181] International law has clarified the regime of responsibility for IOs for general breaches of international law, and for 'serious breaches of peremptory norms'. When the latter are at issue, international law sets out additional consequences in terms of both state and IO responsibility.[182] Such serious breaches are characterised by 'gross or systematic failure … to fulfil the obligation' and may emerge through the accumulation of various acts or omissions. The additional consequences include an obligation to cooperate to bring such violations to an end; not to recognise situations brought about by such serious breaches as lawful; nor to render aid or assistance in their maintenance.[183] The duty not to render aid or assistance forms part of general international law on complicity, reflected in other key articles of the ASR and ARIO.[184] Where a state or IO hands individuals over to other authorities knowing that they will suffer serious human rights violations, it is now well-established that they incur legal responsibility.[185] Developments in international law on shared responsibility are particularly pertinent

[181] See generally International Law Commission Report, Peremptory norms of general international law (jus cogens) 18 April–3 June and 4 July–5 August 2022.

[182] Art. 41 ARSIWA provides for obligations of states in relation to serious breaches by states, and Art. 42 ARIO provides for obligations of states and international organizations in relation to serious breaches by international organizations. Principle 13 of the Guiding Principles of on Shared Responsibility in International Law extends the scope of those provisions by including obligations for international organizations in relation to serious breaches of peremptory norms by states. See André Nollkaemper and others, 'Guiding Principles on Shared Responsibility in International Law' (2020) 31 European Journal of International Law, 15, 64–65.

[183] See further Helmut Aust 'Legal Consequences of Serious Breaches of Peremptory Norms in the Law of State Responsibility: Observations in the Light of the Recent Work of the International Law Commission' in Dire Tladi (ed), *Peremptory Norms of General International Law: Perspectives and Future Prospects* (Brill Nijhoff 2021).

[184] On IO complicity, see in particular Magdalena Pacholska, *Complicity and the Law of International Organizations: Responsibility for Human Rights and Humanitarian Law Violations in UN Peace Operations Elgar International Law* (Edward Elgar 2020).

[185] André Nollkaemper 'Complicity in International Law: Some Lessons from the US Rendition Program' (2015) 109 Proceedings of the Annual Meeting of the American Society of International Law 177; Miles Jackson 'Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction' (2016) 27 European Journal of International Law 817.

in contexts such as those discussed above, where IOs, host and funding states work together closely.[186] While each of the scenarios warrant careful examination, it is clear that they reveal multiple instances of breaches of these obligations to cooperate to bring violations to an end, and not to render aid or assistance in their maintenance.

The detention and containment complexes considered in this chapter have also been framed as potential international crimes, with attendant individual criminal responsibility. Under this frame, attention has also focused on the criminal responsibility of the private contractors. For instance, one well-argued Communication to the ICC attempted to frame the Australian offshore detention system as a crime against humanity perpetrated by Australian officials and private sector contractors.[187] IOM officials were not considered. As the co-author of one of the ICC communications explained, 'I don't think we were sophisticated enough back then to proactively seek the IOM angle. The angle that did present itself from the material, powerfully, was that of private contractor liability. Many of our discussions back then revolved around that'.[188] Remarkably, overall, there has been more legal scholarship on the role of private corporations in the offshore detention system[189] than examination of IOM's key role, as architect and enforcer of the first iteration of the offshore detention system on Manus Island and Nauru.

The case studies also reveal significant shifts in UNHCR-IOM relations. In the first two cases, IOM clearly took on a role where UNHCR was unwilling. Nowadays, when containment practices have become so embedded and widespread, both organizations work together, often dividing populations in crude and somewhat arbitrary ways. The crude division of populations in Libya is a case in point, but there are others.[190]

[186] Eric Wyler and Leon Castellanos-Jankiewicz 'Serious Breaches of Peremptory Norms' in André Nollkaemper and Illias Plakokefalos (eds) *Principles of Shared Responsibility in International Law – An Appraisal of the State of the Art* (Cambridge University Press 2014) 291.

[187] Global Legal Action Network, 'Communication to International Criminal Court Requesting Investigation of Australia and Corporations' <www.glanlaw.org/single-post/2017/02/13/communication-made-to-international-criminal-court-requesting-investigation-of-australia> accessed 5 August 2022.

[188] Email Communication with Professor Itamar Mann, on file with the authors.

[189] Brynn O'Brien,'Extraterritorial Detention Contracting in Australia and the UN Guiding Principles on Business and Human Rights' (2016) 1 Business and Human Rights Journal 333.

[190] Angela Sherwood, Cathryn Costello, and Emile McDonnell, 'The Displacement Regime Complex: Reform for Protection' (2021) Background Paper for the preparation of the seventh edition of UNHCR's *The State of the World's Forcibly Displaced* (on file with the authors).

IOM's focus on offering 'return' services, rather than advocating for a right to stay or further migration opportunities, means that its ability and willingness to 'protect' those in detention or otherwise at the sharp end of migration control, is limited.

As well as having human rights obligations as an IO, IOM also routinely styles it activities around detention and AVR as 'humanitarian'. Humanitarian organizations often face various ethical challenges working with detained populations, in securing access (while maintaining neutrality and independence) and in ensuring efficacy and humanity. Many reflect openly on these ethical tensions. For example, in 2016, Kotsioni reflected on the ethical dilemmas and decision-making surrounding MSF's role in Greek detention sites,[191] which led MSF to refuse to repair infrastructure in detention facilities, for fear that would lend tangible support for detention.[192] However, MSF staff saw this as a difficult choice, in particular when health difficulties were clearly attributable to poor detention conditions. When it determined that its actions were futile in light of the systematic nature of the harms of detention, it discontinued some action, reflective of its 'ethic of refusal'.[193] In 2020, MSF published a reflection on its role in Libya, concluding that there were 'no safe options inside Libya' so that the only way for refugees and migrants to achieve 'safety and security [was] by leaving'.[194] In 2019, International Rescue Committee (IRC) commissioned a report on its detention work in Greece and Libya, and invited its staff to contribute frankly to the researchers on their ethical concerns.[195] The report identified various ethical tensions in their work, including in particular that it would be seen to support detention. Again, this concern manifested itself in ensuring that IRC's work did not support the 'infrastructure' of detention.[196] In the case of both humanitarian organizations, the duty to advocate (both through quiet diplomacy and public condemnation) was vital to their mission.

[191] Ioanna Kotsioni, 'Detention of Migrants and Asylum-Seekers: The Challenge for Humanitarian Actors' (2016) 35 (2) Refugee Survey Quarterly 41.

[192] Ibid. 51

[193] Ibid.

[194] Médecins Sans Frontières, 'Out of Libya: Opening Safe Pathways for Migrants Stuck in Libya' (20 June 2022).

[195] Jason Phillips, *Working with Detained Populations in Greece and Libya: A Comparative Study of the Ethical Challenges Facing The International Rescue Committee* (International Rescue Committee and Stichting Vluchteling 2019).

[196] Ibid. 27

IOM frames its operational work in immigration detention as humanitarian. In contrast to IRC and MSF, it continues to work heavily on detention infrastructure, in spite of these activities risking an expansion of detention capacity. Moreover, its AVR work is entirely in lockstep with the containment system of which detention is part. On advocacy, while it regularly speaks out against migrant deaths and abuses in detention centres, in particular in Libya,[197] it also stands accused of lack of ethical reflection in terms of how the organization may be 'blue-washing' EU policies and 'sanitiz(ing) a brutal system of abuse'.[198] Such concerns also extend to UNHCR, which is similarly entangled in the implementation of EU containment practices.[199] While both agencies have heightened international attention to some of the worst human rights violations in Libyan detention centres, they have also remained relatively silent on many questions of EU responsibility.[200] In IOM's case, the fact that its programmes are so heavily funded by the actors (in particular the EU and its Member States) that have created the containment system in the first place should be part of the ethical reflection. Importantly, for IOs with international legal obligations, the duties to cooperate to bring serious *jus cogens* violations to an end are binding in international law.

13.6 Conclusions on Constitutional and Institutional Reform

This chapter reveals the urgent need for three interrelated constitutional and institutional reforms. The first set of reforms relates to IOM's human rights obligations. Taking these obligations seriously calls into question the suitability of IOM's overreliance on AVR and its constitutional deference to national immigration systems. Secondly, the question of legal accountability and redress, for its past and current violations require institutional reform. Thirdly, the chapter points to the need for institutional reform to ensure reflection on how to fulfil human rights and humanitarianism

[197] IOM, 'IOM Statement: Protecting Migrants in Libya Must be Our Primary Focus' (2 April 2019) <www.iom.int/news/iom-statement-protecting-migrants-libya-must-be-our-primary-focus> accessed 5 August 2022.

[198] Sally Hayden, 'The UN is Leaving Migrants to Die in Libya' (*Foreign Policy*, 10 October 2019) <https://foreignpolicy.com/2019/10/10/libya-migrants-un-iom-refugees-die-detention-center-civil-war/> accessed 5 August 2022.

[199] Azadeh Dastyari and Asher Hirsch, 'The Ring of Steel: Extraterritorial Migration Controls in Indonesia and Libya and the Complicity of Australia and Italy' (2019) 19 Human Rights Law Review 435–465 at 453.

[200] Hayden (n 198).

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duties in practice, a process that warrants candour, openness and scrutiny that has not historically been an IOM's strong point.

IOM's Constitution is unusual when compared to other IOs in deferring to national migration prerogatives. Against this backdrop, and also in light of IOM's extensive experience of offering 'return' as a service to states, its practice of tending to accept and even amplify states' treatment of individuals as 'irregular' risks lending support to the illegalisation of refugees and migrants, and attendant detention practices. To protect migrants, it needs to be able to defend their right to stay, where applicable, and/or enable their onward migration, not only their 'return home'. Institutional reforms are needed to ensure that its practices do not contribute to human rights violations.

IOM's role in relation to detention illustrates the classic legal accountability gap that persists for many IOs. When IOM violates human rights, victims have no obvious place to seek redress directly against the IO. IO's immunities generally render national courts inaccessible, a legal position that many rightly deplore.[201] Some regional human rights courts indirectly scrutinise IO acts, in particular if the IO lacks internal legal accountability mechanisms. This offers an indirect and limited way to call IOs to account. Some complaints to UNTBs concerning state action also indirectly call into question IO practices. To that end, the recent CEDAW communication is noteworthy and attempts to engage states' positive human rights duties as regards how they engage with IOM.[202] As noted at the outset, human rights legal obligations include a positive obligation to create effective remedies, which is also incumbent on IOs.[203] More broadly, the right to truth itself, in particular concerning mass human rights violations, is itself a matter of human rights obligation.[204] The need for institutional reform to include internal legal accountability and redress mechanisms is urgent.[205] Meanwhile, at a minimum, it would serve victims and the IO itself well to open up its historical records and engage in more frank analysis of its own recent and current practices.

[201] For a recent powerful critique, see Rishi Gulati, *Access to Justice and International Organisations: Coordinating Jurisdiction between the National and Institutional Legal Orders* (Cambridge University Press 2022).

[202] N 179.

[203] Daugirdas and Schuricht (n 14).

[204] Marloes van Noorloos 'A Critical Reflection on the Right to the Truth About Gross Human Rights Violations' (2021) 21 Human Rights Law Review 874.

[205] Stian Øby Johansen, 'An Assessment of IOM's Human Rights Obligations and Accountability Mechanisms', Chapter 4 in this volume.

IOM is the bearer of important, but underspecified, positive human rights obligations, and general international law duties to cooperate with other actors to bring serious human rights violations to an end. How it ought to do this should be a matter of frank internal and public discussion. As its current detention policies and practices stand, they tend to maintain strategic silences on its relatively recent role in establishing and expanding detention across the globe, meaning its *bona fides* and efficacy as an actor working to reduce or limit immigration detention remain in doubt. Even if it does not breach human rights itself, its policies and practice set a benchmark for which practices are acceptable under the guise of 'migration management' and 'humanitarianism'. Its AVR practices are tightly imbricated with immigration detention. In so doing, with its blue logos and international staff, it may be seen to confer legitimacy on practices of contestable legality, or indeed practices that conform to international law but nonetheless are manifestly harmful and unjust. Moreover, with funding from the advocates of containment (the US, Australia and the EU in particular), its key operational role in the system that deflects protection seekers elsewhere is manifest.

Detention practices often demand institutional reflection on the tensions between human rights and humanitarianism. If an IO (or NGO) takes on a humanitarian role in order to improve detention conditions, it may indirectly support or legitimate that detention. Such role conflicts sometimes lead humanitarian organizations to withdraw from detention contexts, for fear of supporting the human rights violation. It also often prompts reflection on the need to avoid moral taint, and ensure their activities are not seen to benefit from the association with the perpetrators of human rights violations. Such choices are not easy, but unless there is a frank and frequent assessment of the impact of assistance, humanitarian organizations risk undermining both missions – human rights and humanitarianism.

On this basis, we urge IOM to abandon the figleaf of non-normativity: as an IO, it not only bears negative human rights obligations, but also positive duties to respect, protect and promote human rights. To this end, a constitutional moment for IOM is long overdue. Having set the legal framework to cooperate with the UN, and cloak itself in UN legitimacy, it should take a clearer position on immigration detention in general, and in particular revisit its constitutional stance of deference to national migration control prerogatives, which are often overbroad and misused. Human rights standards and humanitarian duties require institutionalisation,

including internal and external accountability mechanisms. IOM has historically enabled and legitimated the containment practices that have led to the expansion and normalisation of the human rights violation that is arbitrary immigration detention. If its new human rights-friendly form is to deliver, institutional change is required.

14

IOM and 'Assisted Voluntary Return'

Responsibility for Disguised Deportations?

JEAN-PIERRE GAUCI*

14.1 Introduction

Recent years have seen the proliferation and implementation of assisted voluntary return (AVR) schemes across Europe and around the world.[1] These programmes, many of which are administered by the International Organization for Migration (IOM) in cooperation with the governments of host States, aim to facilitate the return and reintegration of migrants who are unwilling or unable to stay in host or transit countries to their countries of origin. Typically offering financial assistance, transportation, logistical support or reintegration and development assistance (or some combination thereof) to returning migrants, AVR schemes are often presented as providing a more humane alternative to 'forced deportations'.[2] In practice, however, the voluntary nature of such return is questionable, and these programmes can easily morph into so-called 'soft' or 'disguised' deportations.[3]

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[1] See, e.g. Ine Lietaert, Eric Broekaert and Ilse Derluyn, 'From Social Instrument to Migration Management Tool: Assisted Voluntary Return Programmes – The Case of Belgium' (2017) 51 Social Policy and Administration 961, 962.

[2] See, e.g. the objectives set out in IOM, *A Framework for Assisted Voluntary Return and Reintegration* (2018); see also, Commission, 'The EU Strategy on Voluntary Return and Reintegration' (Communication) COM (2021) 120 final.

[3] See generally: Barak Kalir, 'Between "Voluntary" Return Programs and Soft Deportation: Sending Vulnerable Migrants in Spain Back "Home"' in Zana Vathi and Russell King (eds), *Return Migration and Psychosocial Wellbeing* (Routledge 2017); Arjen Leerkes, Rianne van Os and Eline Boersema, 'What Drives "Soft Deportation"? Understanding the Rise in Assisted Voluntary Return among Rejected Asylum Seekers in the Netherlands' (2017) 23 Population, Space and Place e2059; Shoshana Fine and William Walters, 'No Place like

Given the legal implications of the 'dichotomy' between voluntary and other forms of return (as highlighted by the European Court of Human Rights in *Khan v UK*), the critical role that IOM plays in the field of AVR, and IOM's stated limitations on what forms of returns it will engage with, the question of whether a return situation is indeed voluntary or otherwise becomes critically important.[4] This chapter seeks to unpack the conditions under which returns can be considered voluntary from a legal perspective. In doing so, it contributes to the debate on the voluntariness of AVR emerging from ethics, political science and other social sciences, especially migration studies.[5] It adds a legal dimension to the debate, by providing a close look at the legal issues related to IOM's role in AVR.

The chapter is organized as follows. Section 14.2 provides an overview of the work IOM does in the field of AVR and how its internal policy documents articulate IOM's role in this field. Section 14.3 analyses the evolution of IOM's definition of AVR across the three editions of the IOM Glossary on Migration (from 2004, 2011 and 2019), comparing these to the definitions used by other organizations, in particular the Office of the United Nations High Commissioner for Refugees (UNHCR). Sections 14.4 and 14.5 focus on the requirement of 'free' consent (Section 14.4) and informed consent (Section 14.5). Section 14.6 reconceptualises consent and voluntariness as a process, arguing for consent to be present throughout the process, and the implications on the enforceability of 'voluntary' return. Section 14.7 touches upon a number of related issues including financial incentives, the need for staff training and the requirement to respect the genuine demands of migrants seeking to return. Section 14.8 considers the implications of these principles for IOM and makes a number of recommendations for reform.

As a matter of its own policies, IOM states that 'As an intergovernmental organization, IOM cannot carry out forced returns of migrants for, or on behalf of, governments'.[6] International law does not clearly prohibit

Home? The International Organization for Migration and the New Political Imaginary of Deportation' (2021) 48 Journal of Ethnic and Migration Studies 3060.

[4] *Khan v UK* App no 35394/97 (ECtHR, 12 May 2000); For IOM policies indicating that the agency only supports voluntary returns, see e.g. IOM, *Policy on the Full Spectrum of Return, Readmission and Reintegration* (2021) 3.

[5] See, e.g. Marta Bivand Erdal and Ceri Oeppen, 'Theorising Voluntariness in Return', in Katie Kuschminder and Russell King (eds), *Handbook of Return Migration* (Edward Elgar 2022) 70; Mollie Gerver, *The Ethics and Practice of Refugee Repatriation* (Edinburgh University Press 2018); Frances Webber, 'How Voluntary Are Voluntary Returns?' (2011) 52 (4) Race & Class 98.

[6] IOM, *Policy on the Full Spectrum of Return* (n 4) 3. The legal reasoning behind this statement is not provided in the policy.

international organizations such as IOM from being involved in deportations, as long as these are consistent with, for example, international human rights law. This chapter does not engage in debates on whether IOM should be involved in non-voluntary returns – although IOM's own policies would need to be revised if this were to be the case. Rather, it argues that some situations IOM describes as 'voluntary' are not actually voluntary and given the legal implications should be more accurately defined as forms of soft deportations. Particularly when human rights violations ensue, this would have implications for the accountability of IOM in relation to its own policy frameworks, as well as under international human rights law and the International Law Commission Draft Articles on the Responsibility of International Organizations; and for the States involved.[7]

14.2 IOM and AVR

IOM has been involved in the promotion and implementation of AVR programmes since 1979 and positions itself as the leading organization for voluntary return globally. Indeed, AVR programmes are one of IOM's core areas of business and a 'means by which it has grown in funding and authority'.[8] According to its website, during the past four decades, IOM has assisted more than 1.7 million migrants to return voluntarily to their countries of origin.[9] In 2020, despite limitations on AVR programmes as a result of COVID-19, IOM facilitated the return of 37,043 migrants to their countries of origin through AVR channels.[10]

[7] This, however, does not mean that non-voluntary return is not permitted under international law. The assumption in international law is that States may indeed return people to their country of origin, with limitations on that right being the exception rather than the rule. The limitations include the principle of *non-refoulement* as established in Article 33 of the Refugee Convention and other related instruments; the protection of the right to life, the prohibition of torture, cruel and inhuman treatment as set out in, inter alia, Article 3 of the Convention Against Torture, the European Convention on Human Rights; and the protection of the right to family life. Critically, it is worth noting that these rights and related obligations, most notably the prohibition of torture, cruel and inhumane treatment, are principles of customary international law and as such are arguably binding upon international organizations including IOM. This, in turn, has implications for both the activation of the responsibility of international organizations themselves as well as that of the States which instruct IOM's actions.

[8] Fine and Walters (n 3) 7.

[9] See IOM, 'Migration Management' <https://eea.iom.int/migration-management> accessed 26 April 2022.

[10] IOM, *Return and Reintegration Key Highlights 2020* (2021) 4.

Pre-pandemic, this figure was 64,958 in 2019.[11] AVR programmes implemented in cooperation with IOM play an increasingly important role in the migration policies of many countries, particularly European nations,[12] and such schemes have steadily grown in number, size, and scale over recent years.[13]

IOM's commitment to assisting with voluntary returns can be traced back to its Constitution which, in Article 1, lists the provision of voluntary return migration services to States, including in cooperation with other international organizations, as a key purpose and function of IOM.[14] By 'offering migrants the possibility to return in a safe and dignified manner',[15] IOM considers AVR programmes to be 'essential to the Organization's mission'.[16] Such schemes are a key component of IOM's broader engagement with returns. In addition to its AVR activities, IOM is also engaged in promoting and facilitating the return of internally displaced persons (IDPs) in post-conflict and post-disaster settings,[17] as well as supporting some aspects of repatriation processes for refugees, sometimes in cooperation with UNHCR.[18] IOM's work on return migration is guided by its 2021 Policy on the Full Spectrum of Return, Readmission and Reintegration, which promotes a 'holistic, rights-based

[11] IOM, *Return and Reintegration Key Highlights 2019* (2020) 2.

[12] Webber (n 5) 99.

[13] Katie Kuschminder, 'Taking Stock of Assisted Voluntary Return from Europe: Decision Making, Reintegration and Sustainable Return – Time for a Paradigm Shift' (2017) Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2017/31, 2 <https://ssrn.com/abstract=3004513> accessed 21 June 2022; Leerkes, Os and Boersema (n 3) 2; Lietaert, Broekaert and Derluyn (n 1) 962.

[14] *Constitution of the International Organization for Migration* (Intergovernmental Committee for European Migration, 1953) art 1, para 1(d), amended 1989. Notably, the Constitution does not explicitly indicate that IOM may provide services in support of returns *only* when they are voluntary; under the 'permissive provisions' of the IOM Constitution, the agency engages in a wide range of activities that are not expressly provided for in its constitutive document. See Vincent Chetail, 'The International Organization for Migration and the Duty to Protect Migrants: Revisiting the Law of International Organizations' in Jan Klabbers (ed), *Cambridge Companion to International Organizations Law* (Cambridge University Press 2022) 245

[15] IOM, *A Framework for Assisted Voluntary Return and Reintegration* (n 2) 5.

[16] IOM, *Return and Reintegration Key Highlights 2018* (2019).

[17] See, e.g. IOM, 'IOM Framework for Addressing Internal Displacement' (6 June 2017) IOM Doc S/20/4.

[18] See, e.g. United Nations High Commissioner for Refugees, *Handbook on Voluntary Repatriation: International Protection* (1996) 69; 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.

and sustainable development-oriented approach that facilitates safe and dignified return, readmission and sustainable reintegration'.[19]

Indeed, in contrast to forced deportation, AVR programmes are typically conceived of and presented as offering migrants a more humane and dignified form of return. IOM states that it does not carry out forced returns for governments, as this is a sovereign power and 'enforcement measure exercised solely by governments'.[20] Accordingly, its role is self-limited to assist only with returns that are voluntary – although, strikingly, IOM contends that this does not prohibit it from 'providing non-movement services prior to or after a forced return movement, such as pre-departure counselling or post-arrival assistance, as long as they are provided with the informed consent of the migrant and contribute to protecting their rights and well-being, nor from providing policy and technical support to governments to enhance their capacities in this space, in compliance with applicable international law'.[21] This focus on voluntariness, at least when it comes to physically moving individuals, is confirmed by IOM's 'Framework for Assisted Voluntary Return and Reintegration' policy document, which lists voluntariness as the first guiding principle for the implementation of effective AVR programmes.[22] The Framework further lists as a key objective for AVR processes that migrants be capable of making 'an informed decision and tak[ing] ownership of the voluntary return process'.[23]

However, scholars and commentators have often queried the true voluntariness of AVR schemes. Indeed, in situations where the main other legal option available to rejected asylum seekers or irregular migrants is deportation, it is difficult to conceive of AVR as offering such migrants a genuine, informed choice in the matter of return.[24] In this way, the tactics

[19] IOM, *Policy on the Full Spectrum of Return* (n 4) 3. As a policy framework on a broader issue, this document appears to provide a broader frame for the AVRR framework adopted in 2018. Whilst the latter appears more operationally focused, this document sets out policy guidance.

[20] IOM, *Policy on the Full Spectrum of Return* (n 4) 3; Koch (n 18) 912; Human Rights Watch, 'The International Organization for Migration (IOM) and Human Rights Protection in the Field: Current Concerns' (November 2003) 7 <www.hrw.org/legacy/backgrounder/migrants/iom-submission-1103.pdf> accessed 21 June 2022. On the exercise of sovereign powers of states by international organizations see: Dan Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (Oxford University Press 2007).

[21] IOM, *Policy on the Full Spectrum of Return* (n 4) 3.

[22] IOM, *A Framework for Assisted Voluntary Return and Reintegration* (n 2) 3.

[23] Ibid.

[24] Webber (n 5) 103; Koch (n 18) 911; Erlend Paasche, May-Len Skilbrei and Sine Plambech, 'Vulnerable Here or There? Examining the Vulnerability of Victims of Human Trafficking Before and After Return' (2018) 10 Anti-Trafficking Review 34.

of persuasion often involved in such schemes have led some to describe AVR as a form of 'soft deportation', or a 'transformation within the regime of deportation itself',[25] or to conceptualise forced and voluntary returns not as dichotomous but rather as falling somewhere along a continuum with forced deportation on one extreme and spontaneous voluntary return on the other.[26]

14.3 The (D)evolving Definition of Assisted Voluntary Return

This section explores the way in which the definition of AVR has changed across subsequent editions of the IOM Glossary on Migration. Like other IOM publications, the glossary includes a standard disclaimer that 'the opinions expressed in this Glossary do not necessarily reflect the views of the International Organization for Migration'.[27] However, the definition of AVR in the third edition is replicated in IOM's policy documents about return, suggesting that it does in fact represent IOM's conceptualisation of the term and thereby 'the views of the organisation.'[28]

The first edition (2004) of the IOM Glossary defines AVR as:

> Logistical and financial support to rejected asylum seekers, trafficked migrants, stranded students, qualified nationals and other migrants unable or unwilling to remain in the host country who volunteer to return to their countries of origin.[29]

The second edition (2011) makes a number of changes, and defines it as:

> Administrative, logistical, financial and reintegration support to rejected asylum-seekers, victims of trafficking in human beings, stranded migrants, qualified nationals and other migrants unable or unwilling to remain in the host country who volunteer to return to their countries of origin.[30]

[25] Fine and Walters (n 3) 2. On the point of soft deportation, Fine and Walters refer to: Kalir (n 3).

[26] Barak Kalir and Lieke Wissink, 'The Deportation Continuum: Convergences between State Agents and NGO Workers in the Dutch Deportation Field' (2016) 20 Citizenship Studies 34, 35.

[27] See the introductory note to Alice Sironi, Céline Bauloz and Milen Emmanuel (eds), *Glossary on Migration* (3rd edn, IOM 2019).

[28] See, e.g. IOM, *A Framework for Assisted Voluntary Return and Reintegration* (n 2) 1.

[29] Richard Perruchoud (ed), *Glossary on Migration* (1st edn, IOM 2004).

[30] Richard Perruchoud and Jillyanne Redpath-Cross (eds), *Glossary on Migration* (2nd edn, IOM 2011).

The third and most recent edition (2019) further changes the definition and AVR is now defined as:

> Administrative, logistical or financial support, including reintegration assistance, to migrants unable or unwilling to remain in the host country or country of transit and who decide to return to their country of origin.[31]

There are two notable differences between the original definition and the definition in the latest edition. First, the wording changes from 'volunteers' to return to 'decides' to return. This may seem like semantic parsing of words. However, the use of the verb 'volunteers' denotes a more active willingness to return. Indeed, an ordinary definition of 'volunteer' is 'one who of his own free will takes part in any enterprise'.[32] The Merriam-Webster legal definition of 'voluntary' is that it is 'proceeding from one's own free choice or consent rather than as the result of duress, coercion or deception', 'not compelled by law: done as a matter of choice or agreement' and that it is 'made freely and with an understanding of the consequences'.[33] An ordinary meaning of the term defines volunteering as 'to offer to do something that you do not have to do, often without having been asked to do it and/or without expecting payment'.[34]

Decide, on the other hand, is a more intransitive term defined as 'to make a choice or judgment'.[35] This subtle but significant difference dilutes the requirement of voluntariness. A decision may be the only option available, but to be voluntary, there must be a selection between different options. This reading of the change (which, I argue, would not have been made had it not been meaningful) is less protective and dilutes the concept of voluntariness.

The second change concerns the categories of persons for whom AVR programmes are offered. The evolution moves from an inclusive list (rejected asylum seekers, victims of human trafficking, stranded students,

[31] Sironi, Bauloz and Emmanuel (n 27).
[32] See: Oxford English Dictionary, 'Volunteer, n. and adj.' (Oxford University Press 2020).
[33] Kalir (n 3).
[34] See: Cambridge Dictionary, 'Volunteer' (Cambridge University Press 2022). The idea of the ordinary meaning is relevant here given that under (Article 31 of the Vienna Convention on the Law of Treaties: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose').
[35] See: Merriam-Webster Dictionary, 'Decide' (Merriam-Webster 2022).

qualified nationals, and other migrants) to a broad reference to 'migrants'.[36] The focus on migrants generally appears to detract attention from the notion that AVR is targeted towards rejected asylum seekers, as shown in the definition in the first two editions. The 2019 glossary does not provide a definition of the term 'migrant' but rather explains it as a non-legal term reflecting a 'common lay understanding'.[37] The examples provided are migrant workers, smuggled migrants, and international students. That said, the various categories of migrants listed in previous editions (of the AVR definition) would still be captured by the new definition of 'migrant'.

The definition of AVR in the third edition of the glossary is accompanied by a note which reads:

> [v]oluntariness is assumed to exist if two conditions apply: (a) freedom of choice, which is defined by the absence of physical or psychological pressure to enrol in an assisted voluntary return and reintegration program; and (b) an informed decision which requires the availability of timely, unbiased and reliable information upon which to base the decision.[38]

It is notable that the key requirements of 'voluntariness' are set out in an accompanying note rather than within the AVR definition itself. The two key requirements set out are 'freedom of choice' and an 'informed decision'. These generate an 'assumption' that voluntariness is present. Freedom of choice is defined by an absence of pressure rather than a presence of a will. Moreover, only certain forms of pressure are acknowledged as undermining voluntariness, namely 'physical or psychological' pressure, thus apparently excluding other forms of pressure such as abuse of a vulnerable position, economic and legal pressure. Furthermore, voluntariness is tested with regard to the decision 'to enrol in the program' rather than the return decision itself, further undermining the voluntariness standard. We return to this issue in discussing abuse of a position of vulnerability later in this article.

Beyond the dilution of the articulation of voluntariness by IOM over time, it is also revealing to compare IOM's AVR definition with those of other international organizations. For example, UNHCR's Master Glossary defines voluntary repatriation as:

> The free and informed return of refugees to their country of origin in safety and dignity. Voluntary repatriation may be organized (i.e.

[36] It is worth noting that the definition of migrant provided in the glossary has also changed between the first and the third edition of the glossary.
[37] Sironi, Bauloz and Emmanuel (n 27) 132.
[38] Ibid 13.

> when it takes place under the auspices of the concerned States and/or UNHCR) or spontaneous (i.e. when refugees repatriate by their own means with little or no direct involvement from government authorities or UNHCR).[39]

Critically, the reference to 'refugees' in the definition speaks to the ability of that person to remain in the State in question, thereby making the repatriation 'voluntary'. However, the UNHCR Master Glossary further defines AVR as:

> Administrative, logistical, financial and reintegration support to non-nationals unable or unwilling to remain in the host country and who make a free and informed decision to return to their country of origin or habitual residence.[40]

A few critical similarities are worth highlighting. Both definitions refer to a decision to return rather than volunteering to return, raising the questions discussed above. More importantly, the reference in both definitions (including different editions of the IOM definition) to 'unable or unwilling' to remain in the host country raises the question as to whether the reference to inability to remain includes, for instance, decisions by the host State rendering stay 'unauthorised' and therefore requiring the person to leave the host State.

14.4 Freedom of Choice

The definition discussed above refers to voluntariness as being the result of a combination of freedom of choice and informedness. This section explores the notion of freedom of choice further, in particular in light of the fact that AVR programmes are often designed for those who would otherwise face deportation. How does the existence of such a legal obligation to leave the country impact on freedom of choice? This issue has been considered by the European Court of Human Rights (ECtHR) in its 2019 ruling in *NA v Finland*.[41] Although the decision has since been annulled for factual reasons, the reasoning is nonetheless still persuasive and may inform debates on IOM's activities, in light of its stated commitment not to engage in forced returns.

[39] UNHCR, 'Master Glossary of Terms' (2022) <www.unhcr.org/glossary/> accessed 21 June 2022.
[40] Ibid.
[41] *NA v Finland* App no 25244/18 (ECtHR, 14 November 2019).

14.4.1 NA v Finland *before the European Court of Human Rights*

Judicial determination of the question of whether a return is voluntary or otherwise is rare. In *NA v Finland*, the ECtHR examined this issue for the first time. The case was brought by Ms NA, arguing that Finland had violated her father's rights under the ECHR. Having been denied asylum, he had returned to Iraq from Finland through an AVR programme. Upon return to Iraq, he had allegedly been murdered. The applicant alleged that 'her late father's expulsion to Iraq violated Articles 2[42] and 3 of the Convention,[43] and that her father's expulsion and his violent death caused her considerable suffering under Article 3 of the Convention'. The applicant's father had unsuccessfully applied for asylum in Finland. He applied for an AVR programme coordinated by the Finnish Government and IOM after the decision by the Administrative Court (rejecting his appeal) but before his application to the Supreme Administrative Court (which was eventually also rejected). A voluntary return was granted on 13 October 2017. He left Finland on 29 November 2017.

The judgment of the ECtHR was annulled on 13 July 2021 under Rule 80 of the Rules of Court, on the basis of abuse of the right of application based on the subsequent discovery that documents and information central to the Court finding a rights violation had been forged by the applicant, warranting annulment of the judgment. In brief, evidence emerged (and was confirmed by the Finnish Courts) that the applicant's father was in fact alive and that the documents presented to the Court (including his death certificate) had been forged. The Court noted that:

> It has thus been established that the applicant has relied on false information and forged documents to support the key allegations on which her complaint before the Court was based. The Court notes in this respect that the alleged death of the applicant's father was decisive for the applicant's victim status.[44]

Despite the annulment of the judgment, the deliberation of the Court in the admissibility stage provides relevant considerations as to the argument on the voluntariness of return and on the spectrum of deportation. Those arguments are not based on the facts of the case, but on the legal scope of the concept of 'voluntariness'. At that stage of the proceedings, the Finnish government argued that the application for AVR meant that it

[42] Right to life.
[43] Prohibition of torture, cruel, and inhuman treatment.
[44] *NA v Finland (revision)* App no 25244/18 (ECtHR, 13 July 2021) para 12.

could not be held liable for what happened to the applicant's father upon his return to Iraq. Indeed, the agent for Finland argued that:

> [F]ollowing the applicant's father's voluntary departure to Iraq, it could be considered that his *voluntary departure* put an end to his victim status and that after his departure he could no longer be regarded as a potential victim of any violation of the Convention.[45]

The crux of the submission of the Finnish government was that the applicant's father had decided to return home and that therefore the applicant's claim was inadmissible. The applicant in turn argued that participation in the AVR programme was simply a means to avoid detention, attract less attention from the Iraqi authorities and to avoid a two year entry ban to the Schengen area, all of which would flow from a forced return. The arguments were summarised by the Court as follows:

> The Court notes that according to the Government's argument, the circumstances of the case did not engage the jurisdiction of Finland, because the applicant's father had left Finland voluntarily for Iraq, where he had subsequently been killed. The applicant in turn argues that her father's return had not been genuinely voluntary but based on the decisions already taken by the Finnish authorities with a view to his expulsion, and that her father's death had thus been a consequence of the risk to which he had been exposed by the actions of the Finnish authorities.[46]

The Court decided in favour of the applicant on this matter:

> For the Court the fact that the applicant's father had first lodged an application under the voluntary returns programme before submitting his application for leave to appeal before the Supreme Administrative Court cannot be regarded as decisive, either. In the light of the circumstances of the case, in particular the factual background of the applicant's father's flight from Iraq as acknowledged by the domestic authorities, the Court sees no reason to doubt that he would not have returned there under the scheme of 'assisted voluntary return' had it not been for the enforceable removal order issued against him. Consequently, his departure was not 'voluntary' in terms of his free choice.[47]

The argument of the Court on this point of admissibility reinforces the argument that provided that there is a removal requirement from the host State, then the return cannot be considered to be voluntary. This shifts the return away from being a 'voluntary return' to some other form of

[45] *NA v Finland* (2019) (n 41) para 46 (emphasis added).
[46] Ibid para 53.
[47] Ibid para 57.

deportation (soft deportation/disguised deportation) – that is, a form of return that IOM insists it does not undertake. This, in turn, is a relevant consideration, especially when seen in the broader jurisprudence of the Court including when in *Abdul Wahab Khan v The UK* the Court determined that:

> There is no principled reason to distinguish between, on the one hand, someone who was in the jurisdiction of a Contracting State but voluntarily left that jurisdiction and, on the other, someone who was never in the jurisdiction of that State.[48]

In that decision, the Court determined that the voluntary departure meant that the UK's jurisdiction was not engaged. This in turn highlights the relevance of accurately differentiating between 'genuinely voluntary return' and forms of deportation that fall into categories other than 'voluntary'.

The Finnish Government's argument was complemented by a statement that before his departure, the applicant's father had signed a declaration in which he had agreed that, in return for receiving financial aid, any agency or government participating in the voluntary return could not in any way be held liable or responsible. The signature of such declarations appears to be part of IOM practice.[49] For example, the IOM-facilitated 2011 UK Voluntary Assisted Return and Reintegration programme – Declaration of Voluntary Return includes a provision stating that

> I agree for myself as well as for my dependants, heirs and estate that, in the event of personal injury or death during and/or after my participation in the IOM programme, neither IOM nor any other participating agency or government can in any way be held liable or responsible.[50]

Similarly, the sample forms available in the Standard Operating Procedures for Reintegration of Returnees in Ghana produced by IOM provide the following wording:

> I acknowledge, for (name of migrant) and for any person for whom I have the right to do so as well as for his/her relevant heirs and estate, that IOM will not be held liable for any damage caused, directly or indirectly, to me

[48] *Abdul Wahab Khan v UK* App no 11987/11 (ECtHR, 28 January 2014) para 26.

[49] See, e.g., IOM, 'Standard Operating Procedures for Reintegration of Returnees in Ghana' (September 2020) 83 <www.iom.int/sites/g/files/tmzbdl486/files/country/docs/ghana/sops_for_reintegration_of_returnees_in_ghana_sept_2020.pdf> accessed 21 June 2022.

[50] See annex to Katy Brickley, *Communicating Assisted Voluntary Return (AVR) Programmes in the UK: Examining Tensions in Discursive Practice* (PhD dissertation, Cardiff University 2015) 300.

> or any such person in connection with IOM assistance that derives from circumstances outside the control of IOM.[51]

On this point, in *NA v Finland* the Court found that:

> In the present case, the applicant's father had to face the choice between either staying in Finland without any hope of obtaining a legal residence permit, being detained to facilitate his return by force, and handed a two year– entry ban to the Schengen area, as well as attracting the attention of the Iraqi authorities upon return; or agreeing to leave Finland voluntarily and take the risk of continued ill-treatment upon return. In these circumstances the Court considers that the applicant's father did not have a genuinely free choice between these options, which renders his supposed waiver invalid. Since no waiver took place, his removal to Iraq must be considered as a forced return engaging the responsibility of the Finnish State.[52]

The Court was therefore clear that given the options available to him, the agreement to participate in a programme of AVR, and indeed to sign a waiver of responsibility, does not render the return, in fact, voluntary. This, in turn, has implications for the responsibility of the States involved (as parties to the relevant Convention) but also for the organizations involved in such returns, including IOM. If the Court's analysis also holds for international organizations, IOM can no longer claim to be involved only in voluntary returns.

14.4.2 Lessons from Other Areas of Law

It is also instructive to consider other areas of law where the concept of voluntariness plays a role. Two areas are considered particularly interesting. One is the international law relating to human trafficking and in particular the inclusion of 'abuse of a position of vulnerability' as one of the means listed in the definition of trafficking. The other is the ordinary law of contract, and in particular the issues around vitiated consent, a basic legal acknowledgement that coercion undermines consent. The reasons for this selection include that the legal space in which these debates occur is often similar. For example, the discussion of voluntariness in movement is often a key point in the case of trafficking, as is the question of abuse of one's migration status as a 'means' through which trafficking occurs (and thereby rendering consent irrelevant). Moreover, one can identify parallels between situations of duress as a vitiating factor in the context of contract law (for example related to threats of detention) having a clear parallel in the return space.

[51] IOM, 'Standard Operating Procedures for Reintegration of Returnees in Ghana' (n 49) 83.
[52] *NA v Finland* (2019) (n 41) para 60.

This section aims to offer two different examples of how voluntariness is understood in law, in order to clarify whether situations that have been described as being of 'voluntary return' are indeed so.

Article 3 of the Trafficking Protocol[53] considers abuse of a position of vulnerability to be a means of trafficking alongside coercion, fraud, deception and abuse of a position of power. The same provision is included in the definition of trafficking under the Council of Europe Trafficking Convention,[54] the EU Directive,[55] and the Association of Southeast Asian Nations (ASEAN) Trafficking Convention.[56] If any of the means are present, any consent given by the victim to the intended exploitation is rendered irrelevant from a legal perspective.

Despite the apparent consensus on the trafficking definition, elements thereof remain unclear and continue to be interpreted and applied differently in different jurisdictions. This includes the idea of abuse of a position of vulnerability. It should be clarified that the focus here is not on the idea of vulnerability as susceptibility to trafficking but rather on the abuse of vulnerability as a means of trafficking.[57] The notion of abuse of a position of vulnerability requires two elements – the existence of a 'vulnerability' and the 'abuse' of that vulnerability for the purpose of exploitation. According to the *travaux preparatoires* of the Trafficking Protocol, the reference to the abuse of a position of vulnerability is understood as referring 'to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved'.[58] This same

[53] Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted and opened for signature, ratification and accession by UNGA Res 55/25, 15 November 2000) 2237 UNTS 319. For more on the Protocol, see David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and Its Protocols* (Oxford University Press 2007); Anne T Gallagher, *The International Law of Human Trafficking* (Cambridge University Press 2010).

[54] Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw, 16 May 2005) CETS 197.

[55] Council and Parliament Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L 101/1.

[56] ASEAN Convention Against Trafficking in Persons, especially Women and Children (adopted 21 November 2015, entered into force 8 March 2017).

[57] For more on the importance of the distinction, see: Anne T Gallagher, *Issue Paper: Abuse of a Position of Vulnerability and Other 'Means' within the Definition of Trafficking in Persons* (United Nations Office on Drugs and Crime 2013).

[58] *Travaux preparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (United Nations Office of Drugs and Crime, 2006) 347.

interpretation of vulnerability is carried through the EU Directive, which uses the same definition in Article 2.2.

No further explanation is given of what a 'real and acceptable alternative' is. The inclusion of the term seems to have been an attempt to cover the myriad of more subtle means of coercion by which people are exploited.[59] The commentary to the Council of Europe Convention notes that abuse of a position of vulnerability means:

> [A]buse of any situation in which the person involved has no real and acceptable alternative to submitting to the abuse. The vulnerability may be of any kind, whether physical, psychological, emotional, family-related, social or economic. The situation might, for example, involve insecurity or illegality of the victim's administrative status, economic dependence or fragile health. In short, the situation can be any state of hardship in which a human being is impelled to accept being exploited.[60]

When examining abuse of position of vulnerability, one must consider both the objective situation to assess whether there is a position of vulnerability which is being abused as well as understanding the situation as experienced and perceived by the victim.[61] If the victim perceives themselves as being in a vulnerable situation where they have no real or acceptable alternative, then irrespective of whether this is the objective reality or not, the situation can still be one of abuse of a position of vulnerability sufficient to vitiate consent.

Beyond the idea of abuse of a position of vulnerability there is also the idea of abuse of a position of power within the context of the trafficking definition that might have some resonance in the current context.[62] For instance, one can think of the situation of a migrant who is undocumented or who is held within a detention centre where the people/organizations who are running the centre (or who are otherwise involved in the management) propose return as the most viable solution. In that context, it could be that there is a situation of a position of power, perceived or actual, that can hinder effective consent.

[59] Gallagher (n 57) 18.

[60] Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings* (2005) CETS 197 para 83.

[61] See also on this: Maria Grazia Giammarinaro and Letizia Palumbo, 'Situational Vulnerability in Supranational and Italian Legislation and Case Law on Labour Exploitation' (*Vulner Blog*, 7 April 2022) <www.vulner.eu/99788/Situational-Vulnerability> accessed 21 June 2022.

[62] Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (n 53).

The other issue to keep in mind is the question of vulnerability and how the concept is framed from a legal perspective.[63] Whilst a detailed discussion of the definition of vulnerability is beyond the scope of this chapter, vulnerability is a contextualised notion and therefore an individual migrant who might not otherwise be considered to be vulnerable can be rendered vulnerable partly because of the context in which they find themselves. This includes situational vulnerability, such as being a detained or undocumented migrant.[64] Therefore, if abuse of a position of vulnerability is sufficient to render any consent in the context of trafficking irrelevant (including to the extent of it being a criminal offence), then where a migrant is in a vulnerable position, which is used for the purposes of recruiting that person into an AVR programme, then that sitation cannot be considered to be one where the individual is genuinely exercising free choice, meaning that the return is not genuinely voluntary.

Contract law also turns on individual agency and consent to enter into contractual relations. Without consent, contracts are not freely entered into and so are not contracts. A contract is 'an agreement giving rise to obligations which are enforced or recognised by law'.[65] Contract law is different from other areas of law in the sense that it is 'based on an agreement of the contracting parties'.[66] Under contract law, there are various factors that vitiate the requisite consent. When these factors are present, consent is deemed to not be freely given or to be invalid. These include misrepresentation, mistake, duress and undue influence. Whilst most of these will be relevant to the discussion of consent in the context of AVR, the issues of duress and undue influence are the most obviously relevant. The idea of duress is broadly understood as any threat which has the effect of bringing about coercion of the will which vitiates consent.[67] Canonical

[63] See generally: Martha Albertson Fineman, 'Vulnerability in Law and Bioethics' (2019) 30 (4 Supplement) Journal of Health Care for the Poor and Underserved 52; Fiona David, Katharine Bryant and Jacqueline Joudo Larsen, *Migrants and Their Vulnerability to Human Trafficking, Modern Slavery and Forced Labour* (IOM 2019); Martha Albertson Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4 Oslo Law Review 133; Martha Albertson Fineman, 'Vulnerability and Social Justice' (2018) 53 Valparaiso University Law Review 341; Noemi Magugliani, '(In)Vulnerable Masculinities and Human Trafficking: Men, Victimhood, and Access to Protection in the United Kingdom' (2022) 14 Journal of Human Rights Practice 726.

[64] Moritz Baumgärtel, 'Facing the Challenge of Migratory Vulnerability in the European Court of Human Rights' (2020) 38 Netherlands Quarterly of Human Rights 12.

[65] G H Treitel, *The Law of Contract* (10th edn, Sweet & Maxwell 1999).

[66] Ibid.

[67] See *Pao On v Lau Yiu Long* [1980] AC 614, 636; cf. *North Ocean Shipping Co v Hyundai Construction Co* (The Atlantic Baron) [1979] QB 705; *Syros Shipping Co SA v Elaghill*

cases in contract law demonstrate that duress may include threats of detention. Of particular interest for the purposes of this chapter is the 1847 case of *Cummings v Ince*[68] where an elderly woman was told to sign over all her property or face not ever having a committal order to a 'mental asylum' lifted. That contract was found to be void.

Parallels can be drawn here to situations where recruitment for IOM's AVR programmes is done within the context of detention centres, and where continued detention is a looming threat, whether explicit or implicit. Also relevant is the issue of undue influence. This refers to a situation where an individual is able to influence the consent of another due to the relationship between the two parties. This could be the case, for instance, for an officer working in a detention centre who is able to 'convince' a detained migrant to sign up to an AVR programme. The multiple services offered by IOM, which is involved in both service provision in detention centres and promoting voluntary return, can therefore raise significant concerns.[69]

On a related note, it is worth recalling that contract law is based on questions of legality. One may not contract into something that is otherwise illegal. For instance, an employer who is failing to pay minimum wage is not exempted from his obligations merely because the employee has signed a contract of employment where the agreed salary is below that statutorily established for the country. In the same way, if the return in question would violate law (e.g. the principle of non-refoulment), one cannot use the agreement to return voluntarily as an excuse for the violation of the international legal principle.

14.5 Information

Beyond the question of whether consent was freely given, the other key requirement for 'real' consent is that it is an 'informed decision'. Information must be available; it must be accessible and there must be some form of comprehension by the person receiving the information.

Trading Co (The Proodos C) [1980] 2 Lloyd's Rep 390, 393 Brian Coote, 'Duress by Threatened Breach of Contract' (1980) 39 Cambridge Law Journal 40; *Re T* [1993] Fam 95, 115–116. See also: Treitel (n 65).

[68] *Cumming v Ince* (1847) 11 QB 112.

[69] On IOM's work in detention contexts, see Angela Sherwood, Isabelle Lemay and Cathryn Costello, 'IOM's Immigration Detention Practices and Policies: Human Rights, Positive Obligations and Humanitarian Duties' 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).

There are two thresholds of requirements regarding information. The first is of conduct: the organization must show that it has informed the individual of what AVR is, what the implications are, and what the potential risks and benefits are. The second is one of result, where the organization must show that the individual concerned has understood the various repercussions of their decision.

Given the implications of the decision to return, one must surely lean towards the second 'level' of requirement (obligation of result) even if the reality would seem to fall somewhere in between these two standards. Special attention must be given to particularly vulnerable individuals. What works for an educated adult might not work for a less educated young or older person, for instance. Beyond issues of return, the applicants should also receive information on the meaning and implications of the waiver of liability forms that they are expected to sign (see above).

This is further complicated by the question of uncertainty of information provided. With situations constantly evolving, some of the information provided may soon become out of date as the realities change, whilst information about specific risk or protection factors may be difficult to access. Organizations involved have a duty to diligently ensure that information is constantly updated and that they provide the best information they can, but equally to clarify uncertainties about the information as part of the information delivery process. Lessons from the medical space, on the way uncertainty should be shared with the recipient of information, could be relevant here.

Parallels in terms of information provision can also be drawn from other areas of European asylum law, especially Article 29 of the Eurodac Regulation,[70] Article 5 of the Reception Directive,[71] Article 22 of the

[70] Regulation (EU) 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice [2013] OJ L 180/1.

[71] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L 180/96.

Qualification Directive,[72] Article 8 of the Procedures Directive[73] and Article 12 of the Returns Directive.[74] Requirements include ensuring that the information is provided in writing, and where required orally, in an age-sensitive way and in a language that the individual understands or is reasonably supposed to understand.[75]

Beyond freedom of choice, access to adequate information is critical to ensure that the return is indeed voluntary, keeping in line with IOM's own limitation of only engaging with voluntary returns. Arguably, the obligation of information also comes with an obligation to inform about alternative options.

14.6 Consent and Voluntariness as Process

Given the above consideration, this chapter posits that voluntariness, expressed as consent to return, in the context of AVR must be seen as a process and not as an isolated decision. It must be present throughout the process of return and not simply a one-off element. It is not something that should be assumed. Given the sensitive nature of decision-making around the return, the vulnerable situations in which most people will find themselves and the potential risks upon return, additional safeguards must be put into place.

Such safeguards include training for IOM staff involved in AVR programmes, time for the migrant to think over the information provided (the idea of a reflection period can also be gleaned from the context of human trafficking), a requirement that the information given is comprehensive, clear, up to date and understood, and that the individual in question is given every opportunity to seek advice and assistance. An understanding of the risks of return, including the implications for future migration opportunities, should not be assumed.

[72] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L 337/9.

[73] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L 180/60.

[74] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98.

[75] Other areas of law which may also provide relevant parallel analysis include data protection regulations.

Neither is voluntariness something that can be enforced. If a person changes her mind, then she must be allowed to revoke her consent if the return is really to be voluntary. Indeed, a reversal of consent to participate in an AVR programme should be assumed where the person involved takes measures as to indicate that she no longer wishes to return – such as for instance seeking an additional level of appeal through judicial means in the country of current residence. A parallel can be drawn here to the idea of implied withdrawal of asylum applications. In asylum procedures, there are any number of situations where an asylum application is considered to have been withdrawn when an applicant does something that indicates that he or she is no longer interested in the protection of the State. In the context of AVR, IOM, States and other actors involved in the process ought to use the same approach. This means that even if an individual has applied to be returned, if they then undertake measures such as applying for a further level of appeal or a similar measure then it should be assumed that they are no longer voluntarily returning. If implied withdrawal in the context of asylum applications is an accepted approach, there is no reason why it should not also be allowed in the context of voluntary return.

This, however, comes with many practical challenges to the implementation of AVR programmes, raising the question as to whether there is a reasonable cut-off point that can be legitimately imposed by organizations such as IOM that are spending money to assist returns. These issues can be mitigated if issues of informed consent and free choice are maintained throughout the process. Whilst frustrating, and potentially costly, theoretically, if AVR is to be truly voluntary, the possibility of retracting one's decision must be a possibility until the last possible opportunity.

14.7 Further Considerations

Before concluding, there are a number of issues that are worth highlighting when discussing the question of AVR, and IOM's role in it. The first is that some people will genuinely wish to return despite the possibility of remaining in the current host country or indeed despite the difficult or dangerous circumstances in the country of origin. The reasons for this are varied and beyond the scope of analysis in this chapter. They may include attempts to retry their migration project or simply to return home due to family or other obligations. Those reasons may be related to improvements in the home countries or deterioration of conditions in the host country. It is therefore imperative that the right balance is struck between ensuring that the willingness to return is 'real' and valuing the expressed wishes of

the migrants involved. Put differently, one must avoid paternalistic or discriminatory attitudes (or infantilizing the decisions of migrants) whereby assumptions on the desirability of return replace the informed wishes of the migrant themselves.

This then links to the question of whether an international organization like IOM should be involved in returns, which are genuinely voluntary, but to places where the safety and security of the returnee cannot be guaranteed. The balance to be struck in such situations is an incredibly difficult one. If truly and genuinely voluntary, meaning there is no pressure to return and there is a genuine understanding of the risks, then one could argue that IOM should at the very least facilitate the return in such scenarios.

Second, there is a significant impact of financial incentives on consent and this is something that merits further analysis. Many people may decide that certain risks are worthwhile for a particular price, and this is not irrelevant in determining the reality of consent to return through an AVR programme. Related to this is the question of how the financial incentive is determined and whether there are concerns raised by the idea of financial incentives being increased to secure further buy in into the relevant schemes.[76]

Third, training and support are needed for those involved in promoting and securing AVR participation. This includes training and information but also psychological support for people implementing a role which is psychologically and otherwise taxing. Those working for organizations like IOM must have access to the country of origin information in the same way that those supporting asylum applicants must. They must also be provided with ongoing on-the-job support.

Fourth, in order to ensure that return is really voluntary, the manner in which the success of AVR programmes is assessed requires an overhaul. If AVR programmes are to be more respectful of individuals' actual voluntariness, one must ensure that organizations working in these programmes (such as IOM) are funded to provide services such as support information and counselling over and above the individual successful case of an individual being returned. For so long as the measure of success for AVR programmes remains the number of people returned then the incentive for organizations to hasten the process and push people into AVR schemes remains problematic. The addition of 'reintegration' services as part of AVR programmes is a welcome development, not

[76] See on this: Mollie Gerver, 'Paying Refugees to Leave' (2017) 65 Political Studies 631.

least because it purports to provide support to individuals upon return. Its monitoring, however, must not override the need to also monitor the voluntariness of return itself.

Finally, whilst there is indeed important scope for looking at the organizations that are implementing problematic AVR programmes, we must also look to the entities that fund and promote AVR. Responsibility and accountability for problematic programmes must be sought both from the direct implementors of such programmes (including IOM) and also from the States and other international organizations (such as the EU) that are funding and otherwise requiring and supporting these programmes.

14.8 Conclusions and Proposals for Reform

This chapter has argued that in various circumstances, AVR may not be 'voluntary' and may cross the line into a form of disguised deportation. It has highlighted the role that IOM plays in AVR programmes and the implications that the actual voluntariness of that return might have on the suitability of its engagement and accountability under human rights law. As an international organization, IOM is bound by its own constitutive documents, its internal policies, as well as other sources of international law, including human rights law.[77] Its engagement must therefore be reformed so as to ensure that it continues to provide AVR programmes that are genuinely voluntary and that engagement in soft deportations is not wrongly disguised as 'voluntary return'.

IOM should resist pressures from governments and others, often channelled through funding schemes, to offer AVR programmes to individuals who may not genuinely be signing up to return out of their own free choice. It might consider developing alternative channels to provide assistance and support, including re-integration support to those being deported by States, outside the realm of the AVR programmes subject to relevant assessments on whether it is appropriate for IOM to engage in such processes, most notably based on whether appropriate safeguards (including under the principle of *non-refoulement*) have been considered.

[77] See: S Fine and Walters (n 3); Kalir (n 3); Leerkes, Os and Boersema (n 3). See also: Dapo Akande, 'International Organisations' in Malcolm Evans, *International Law* (5th edn, Oxford University Press 2018); Sarooshi (n 20); Nigel D White, *The Law of International Organisations* (3rd edn, Manchester University Press 2016).

IOM must exercise due diligence to avoid tacitly endorsing policies and practices that violate international standards. It should seek to break the link between migrant detention and AVR and ensure that counselling about AVR includes, where relevant and appropriate, information and support in exploring other viable options in the country.

IOM should also ensure that all information given is indeed accurate and up to date. In order to ensure that the information provided meets the criteria discussed above, IOM should continue to critically and regularly evaluate the information that it provides to migrants seeking information and advice about returning home, ensuring that the information provided is comprehensive, clear and up to date. Such evaluations should be publicly available (open to scrutiny by civil society for example); incorporate the views of a broad range of governmental and non-governmental stakeholders (including NGOs); and consider relevant credible assessments of the country's situations (including but not limited to UNHCR).

IOM and its donors should revise and replace the indicators of success for AVR programmes so as to ensure that a holistic approach to return counselling is provided and that the successful application of that approach is monitored and considered for IOM's monitoring and evaluation of programmes. The number of persons returned should not be the measure of success of AVR programmes. This should be coupled with strengthened internal processes to monitor the implementation of AVR programmes, including a constant evaluation of AVR programmes against IOM's relevant policies and standards, and against international law more broadly. Such processes should incorporate the views of and proactively (genuinely) engage NGOs and other bodies,[78] and the results of the same should be publicly available for scrutiny by researchers, civil society, migrant groups and others.

[78] On potential contributions of human rights advocacy NGOs to this process, 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).

15

Holding IOM to Account

The Role of International Human Rights Advocacy NGOs

ANGELA SHERWOOD AND MEGAN BRADLEY

15.1 Introduction

Non-governmental organizations (NGOs), particularly human rights advocacy groups, have played influential roles in recent years in holding international organizations (IOs) to account for their involvement in human rights violations and other harms. NGOs have, for example, brought IO abuses to light and pushed for the creation of stronger policies and mechanisms to ensure that IOs adhere to their commitments and obligations under international law. NGOs have helped catalyse accountability and institutional change at the World Bank and International Monetary Fund in relation to the negative human rights and environmental implications of lending practices and economic reforms, and in UN peace operations involved in trafficking, detainee abuse, and sexual exploitation.[1] While a growing body of research explores the ways in which NGOs affect IO accountability, relatively little high-level, sustained international advocacy has focused on the International Organization for Migration (IOM), and IOM has been under-examined in the literature on NGOs and IO accountability.[2] This is surprising as IOM is now among

[1] On NGOs and IMF accountability generally, see e.g. Jan Aart Scholte 'Civil Society and IMF Accountability' in Jan Aart Scholte (ed), *Building Global Democracy? Civil Society and Accountable Global Governance* (Cambridge University Press 2011). On accountability in peace operations, see e.g. Gisela Hirschmann, 'Guarding the Guards: Pluralist Accountability for Human Rights Violations in International Organizations' (2019) 45 Review of International Studies 20.

[2] On NGO-IO relations, see e.g. Jonas Tallberg and others, *The Opening Up of International Organizations: Transnational Access in Global Governance* (Cambridge University Press 2013), and Jan Aart Scholte (ed) *Building Global Democracy? Civil Society and Accountable Global Governance* (Cambridge University Press 2011). On IO accountability for human rights violations specifically, see e.g. Gisela Hirschmann, *Accountability in Global Governance: Pluralist Accountability in Global Governance* (Oxford University Press

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the largest IOs worldwide, and has a history of involvement in activities such as migrant returns and detention that may threaten or actively violate migrants' rights – activities that call out for careful external scrutiny from NGOs.[3] Much of the academic literature on IOM is highly critical of the organization and tacitly assumes that IOM is the target of concerted NGO advocacy.[4] To be sure, some local NGOs and activist groups have attempted to take on this task. However, closer examination demonstrates that more well-resourced and influential international human rights NGOs that are concerned with migration and displacement have generally eschewed this role vis-à-vis IOM, although they serve as important watchdogs in relation to other IOs, particularly the Office of the UN High Commissioner for Refugees (UNHCR), the largest and most prominent IO focused on human mobility.

This chapter explores the drivers and implications of this puzzling disconnect, and opportunities to overcome it. We map out the limited ways in which international human rights advocacy organizations have engaged with IOM and identify key reasons why advocacy NGOs have not more actively pushed for increased accountability from IOM. International advocacy NGOs have important but under-examined and still underdeveloped roles to play in advancing accountability for the human rights implications of IOM's work. We suggest that enhancing accountability is a two-way street: there is a need for advocates to devote more attention to IOM, and develop more concerted advocacy strategies vis-à-vis IOM, leveraging commitments made in the extensive set of frameworks, policies and guidelines it has released in recent years. At the same time, IOM should clearly recognize the importance of external advocacy, and engage

2020); Monika Heupel and Michael Zürn (eds) *Protecting the Individual from International Authority: Human Rights in International Organisations* (Cambridge University Press 2017).

[3] On IOM's involvement in migrant detention, see Angela Sherwood and Cathryn Costello '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). On IOM's returns programs, 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).

[4] See e.g. 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.

more openly and systematically with human rights advocates, moving beyond traditional postures of defensiveness, dismissal and secrecy. We begin by discussing IOM's accountability deficit and situating this study in relation to the growing body of literature on NGOs and IO accountability. This literature has not yet considered the case of IOM; rather it has focused significantly on 'positive' cases in which NGOs have successfully pushed for greater accountability from IOs. This chapter adds to understandings of IO-NGO relations by shedding light on the curious case of IOM, and the question of why in some instances advocacy NGOs do *not* emerge as key protagonists in efforts to advance IO accountability, even when they may be expected to play significant roles. Second, we analyse past patterns of (limited) engagement between major human rights NGOs and IOM. Building on this discussion, we identify and explain some of the primary reasons why IOM has not been the target of more concerted and sustained international advocacy efforts. We close with brief reflections on how advocacy NGOs' contributions to IOM accountability efforts may be strengthened.

A word on terminology and the focus of this chapter: This discussion looks beyond legal accountability, which focuses on 'accountability through jurisprudence and legal sanctioning that is limited to rights that can be subjected to judicial review'.[5] Instead, it is informed by a broader, sociopolitical conception of accountability as a relationship in which the accountability holder helps set and uphold the standards for the accountor's actions, including through monitoring and sanctioning deviations from these standards.[6] On this view, international human rights NGOs, such as those examined in this chapter, may serve as accountability holders in relation to IOs by, for instance, investigating, monitoring, and publicly shaming IOs that transgress human rights principles; providing evidence to support formal accountability mechanisms; supporting victims of IO abuses; recommending policy changes; and lobbying member states to rein in IOs that fail to adhere to appropriate standards. International human rights NGOs (which we also refer to, in shorthand, as 'advocacy NGOs' or 'human rights NGOs') are certainly not the only actors involved in efforts to advance the accountability of IOs including IOM. Member states, grassroots NGOs, affected communities, and IO staff also play pivotal parts. However, the roles of large, international human rights NGOs

[5] Hirschmann, *Accountability in Global Governance: Pluralist Accountability in Global Governance* (n 2) 5.
[6] Ibid.

vis-à-vis IOM have not been systematically analysed and merit more concerted analysis, with a view to better understanding how these actors may engage and influence IOM. We concentrate on large and medium-sized, internationally active, 'professionalized' and comparatively well-resourced human rights organizations such as Amnesty International and Human Rights Watch (HRW) (arguably the two most prominent and influential transnational NGOs in this field), as well as NGOs that focus specifically on forced migration.[7] These actors deserve greater attention as they have the potential to orchestrate international advocacy campaigns and influence member states' policies towards IOs working on migration and displacement issues; indeed, as we will demonstrate, these organizations have a long history of critiquing and influencing IOs such as UNHCR but have been much less vocal regarding IOM. This focus on major advocacy groups is not to discount the significance of smaller NGOs and activist networks that have been outspoken about IOM's complicity in human rights violations and may help promote accountability in relation to particular issues such as detention.[8] Rather, this chapter is an initial if limited contribution to discussions of how NGOs may influence accountability on the part of IOM.

Our analysis draws on 70 in-depth interviews conducted from 2015 to 2021 with human rights advocates, IOM officials, government and UN agency representatives, staff of major humanitarian agencies, and independent experts. Interview data were analysed through a grounded coding process, distilling key themes, insights and arguments.[9] We additionally incorporate findings from our analysis of a set of more than 850

[7] This is in keeping with the recognition that while IOM is involved with a wide range of migrants moving within and across borders, the majority of individuals directly affected by IOM programs and interventions are IDPs and other forced migrants. See Megan Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (Routledge 2020) 4. While we focus primarily on accountability in relation to human rights norms, we also consider related principles under international humanitarian and refugee law.

[8] See e.g. Global Detention Project, 'The Dilemmas of the International Organization for Migration' (2018) <www.globaldetentionproject.org/the-dilemmas-of-the-international-organization-for-migration> accessed 15 May 2022.

[9] To enable frank discussion of potentially sensitive issues, interview participants were each assigned a number used in lieu of identifying details. With participants' agreement, their institutional affiliations are noted; otherwise, more general designations are used (e.g. human rights advocate). Interviews were conducted with approval from the McGill University Research Ethics Board (File #199–1015) and from the University of Oxford Central University Research Ethics Committee (CUREC) (File #61177/RE001).

reports on migration, refugees and other displaced populations published by Amnesty International and HRW from 1998 to 2020.[10] It is also broadly informed by the first author's experience working on humanitarian affairs at IOM, and as a senior researcher on migrants' rights at Amnesty International.

15.2 Context: IOM's Accountability Deficit and the Potential Roles of Human Rights NGOs in Holding IOs Accountable

In terms of budget and staff, IOM is now among the largest IOs worldwide and is involved in a huge range of activities loosely organized under the banner of 'migration management', from providing humanitarian aid to displaced persons, gathering and disseminating migration data, and facilitating international talks on human mobility, to advising states on migration policies, training border officials, and delivering services to detained migrants. While IOM was created outside the UN, it became a related organization in the UN system in 2016, further increasing its international profile. Its facilitation of the Global Compact for Migration process and its position as the coordinator of the UN Network on Migration reflect the public authority IOM now exercises in the field of migration, alongside the prominent roles it now occupies in the humanitarian regime. As IOM has gained power and prestige, its actions and decisions have increasingly important consequences for vulnerable populations, including precarious migrants, IDPs and refugees.[11]

Yet IOM suffers from an accountability deficit, fuelled in part by its imprecise mandate, organizational structure and culture, and has lagged behind other IOs in terms of establishing accountability mechanisms sensitive to human rights concerns and accessible to individuals affected by its interventions.[12] IOM's formal mandate, laid out in its Constitution, is

[10] The analysis included all major reports from 1998–2020 that were posted to the websites of Amnesty International (669 reports) or HRW (185 reports), and tagged as focused on migrants, refugees and/or other displaced populations.

[11] 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. On IOM's roles in the Global Compact for Migration, see Nicholas Micinski, *The UN Global Compacts: Governing Migrants and Refugees* (Routledge 2021).

[12] On IOM's internal accountability structures, see Stian Øby Johansen, 'An Assessment of IOM's Human Rights Obligations and Accountability Mechanisms' 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).

imprecise and includes no explicitly articulated obligation to protect or promote migrants' rights.[13] The agency receives almost no core funding from its member states, and is instead reliant on a project-based funding model that can foster competitiveness, undermine transparency, and incentivize IOM to stifle criticism of governments and undertake activities that bring in money needed for the organization to survive, but arguably serve states' interests in controlling mobility over advancing the rights and wellbeing of migrants themselves.[14] IOM has a reputation for operational efficiency, delivering services quickly and cost-effectively even in very challenging environments, sometimes at the expense of careful deliberation about protection and human rights concerns, which are seen by some IOM staffers as overly abstract or academic issues for a definitively action-oriented organization. It is also known for being highly deferential to states, many of whom have looked to IOM as an IO they can turn to in order to have migration 'dirty work' done with little push-back about human rights concerns.[15]

That said, IOM's institutional discourse increasingly references migrants' rights and protection concerns, and although the agency is sometimes portrayed as having no human rights commitments or obligations, this is incorrect.[16] In addition to its general obligations under international law as an IO, it has initiated a number of internal policy processes that address (in varying degrees of specificity) IOM's interpretation of, commitments to and obligations regarding key human rights norms and humanitarian principles. These include the development of the Migration Crisis Operational Framework (2012), the Migration Governance Framework (2015), the IOM Humanitarian Policy (2015),

[13] For discussion of the evolution of IOM's mandate, see 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).

[14] See Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (n 7); Asher Lazarus Hirsch and Cameron Doig, 'Outsourcing Control: The International Organization for Migration in Indonesia' (2018) 21 The International Journal of Human Rights 681.

[15] Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (n 7) 2.

[16] See e.g. Antoine Pécoud, 'What Do We Know about the International Organization for Migration?' (2018) 44 Journal of Ethnic and Migration Studies 1621. On IOM's 'rights talk', see Megan Bradley and Merve Erdilmen, 'Is the International Organization for Migration Legitimate? Rights-talk, Protection Commitments and the Legitimation of the IOM' (2022) Journal of Ethnic and Migration Studies.

and the Framework for Addressing Internal Displacement (2017).[17] The issue is the sufficiency of IOM's policies and rhetoric, and the tensions and contradictions that remain between its evolving discourse and frameworks, and its more controversial (and even sometimes rights-violative) field operations.[18] For example, in countries such as Indonesia, at the behest of the Australian government, IOM has infringed on the rights of people seeking protection, including by limiting their access to territory where they could claim protection.[19] Such activities call into question IOM's claims to be rights-based and 'migrant-centric'.

Human rights advocacy groups could, in theory, make important contributions to assessing IOM's policies and appropriately resolving these tensions, but the critical bent of most scholarship on IOM has not been matched by sustained critical attention from the influential international human rights advocacy organizations that often play important roles in both legitimating organizations and holding them to account for human rights norms.[20] What insights does the literature on NGOs and IO accountability offer into this disconnect? Within the international relations (IR) scholarship, rational institutionalists have privileged the actions of states in explaining changes in IO accountability, arguing that member states demand reforms from IOs when the costs of monitoring them or incurring

[17] For analysis of the 2015 Humanitarian Policy, see Geoff Gilbert, 'The International Organization for Migration Humanitarian Scenarios' 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). For examination of IOM's 2017 IDP Framework, see Bríd Ní Ghráinne and Ben Hudson, 'IOM's Engagement with the UN Guiding Principles on Internal Displacement' 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).

[18] On contradictions between IOM's professed support for migration and migrants, and its provision of services to member states to control and limit mobility, see e.g. Fabian Georgi, 'For the Benefit of Some: The International Organization for Migration (IOM) and Its Global Migration Management' in Martin Geiger and Antoine Pécoud (eds), *The Politics of International Migration Management* (Palgrave Macmillan 2010); Ashutosh and Mountz (n 4). For discussion of how IOM's reliance on project-based funding and its institutional incentive structures can prompt it to undertake activities in tension with its privileges, immunities and obligations as an IO, see 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 388.

[19] Hirsch and Doig (n 14).

[20] On NGOs' roles in legitimizing IOs, see Jan Aart Scholte, 'Relations with Civil Society' in Jacob Katz Cogan, Ian Hurd, and Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (Oxford University Press 2016).

liability from their actions are unfavourably high.[21] On this view, pressure for IO reform, including certain forms of accountability, is driven by states and emerges when it is in their interests. In contrast, various constructivist scholars have broadened and complemented this picture by demonstrating how IOs may be prompted to 'give themselves rules' through processes of normative persuasion and socialization involving social interactions not only between IOs and states but also with civil society.[22] While states may direct IO behaviour through hierarchical or contractual relationships, civil society organizations, particularly NGOs, can exert other forms of compulsory power. For some NGOs, this is tied to their claims to representative legitimacy; human rights NGOs also wield normative and symbolic power via their claims to impartiality and the production of objective truth, including through their involvement in investigating and documenting human rights violations.[23] Through normative interpretation, knowledge production, victim support, protest and mobilization, civil society actors may become a force for IO accountability, in part by destabilizing IOs' claims and identities, shaping notions of appropriate conduct, and bringing into question IOs' governing authority.[24] Civil society actors' efforts to advance accountability are often most successful when they are able to demonstrate clear examples of harm or show the contradictions between IOs' commitments and their actions on the ground, generating reputational costs.[25] These attributes and strategies put human rights NGOs in a potentially powerful position to examine IOM and hold it accountable.

That said, the existing literature offers scant insight into when and why NGOs do *not* push for greater accountability from IOs, even when there is a recognized need for improved accountability, and NGOs could in theory

[21] Heupel and Zürn (n 2) 10–11.

[22] Ibid 11.

[23] Mike Schroeder and Paul Wapner, 'Non-governmental Organizations' in Thomas Weiss and Sam Daws (eds), *The Oxford Handbook on the United Nations* (Oxford University Press 2008). On these dynamics in relation to Amnesty International, see Stephen Hopgood, *Keepers of the flame: Understanding Amnesty International* (Cornell University Press 2013).

[24] Margaret Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Cornell University Press 1998); Dingwerth and others, 'International Organizations under Pressure', in Dingwerth and other (eds), *International Organizations under Pressure: Legitimating Global Governance in Challenging Times* (Oxford 2019).

[25] See e.g. Keck and Sikkink (n 24); Jonathan Fox and L David Brown, 'Introduction' in Jonathan Fox and L David Brown (eds), *The Struggle for Accountability* (MIT Press 1998). On the limits of reputation vis-à-vis IO accountability, see Kristina Daugirdas, 'Reputation as a Disciplinarian of International Organizations' (2019) 113 American Journal of International Law 221.

make important contributions on this front. Instead, much work on this issue has concentrated on explaining how NGOs have been able to successfully influence change in IOs.[26] However, a few additional points do stand out from the growing literature on civil society and IO accountability for the ensuing discussion of IOM. First, human rights principles are increasingly central to how civil society organizations, particularly advocacy NGOs, evaluate, legitimize, and sanction (e.g. 'shame') IOs. One consequence of this is that IOs face growing demands to demonstrate their legitimacy and justify their existence and performance. They are vulnerable to normative shifts in the interpretation of what they do and why they are needed, but at the same time, they may affect such normative shifts through their own roles as norm entrepreneurs.[27] In the case of IOM, this dynamic translates into multiple ways of evaluating its behaviour that go beyond a cut-and-dry application of legal standards. Second, NGOs may be powerful actors in the push for accountability, but their influence is also starkly limited. A particularly important limitation stems from the fact that many IOs and NGOs exist in mutually dependent relationships that work both for and against accountability.[28] Improved interaction and inclusion of NGOs in IO policymaking and programming can help resolve the 'democratic deficit' in global governance, while interactions with IOs can bolster NGOs' own claims of political relevance and representativeness.[29] Interdependencies between IOs and NGOs are evident in relation to funding, but also other 'goods' such as access to data and policymaking processes. These interdependencies may create closer and more reliable mechanisms for consultation and debate in relation to accountability, but they may also undermine NGOs' potential roles in advancing accountability by distorting their incentives to call out, pressure or persuade IOs to change their behaviour.[30] Third, in terms of civil society strategies and effectiveness in influencing IOs, it is increasingly recognized that NGOs rarely achieve their goals alone.[31] Rather, to be effective, civil society actors often mobilize broad-based transnational coalitions or

[26] See e.g. Scholte, *Building Global Democracy? Civil Society and Accountable Global Governance* (n 2).
[27] See Dingwerth and others (n 24).
[28] Schroeder and Wapner (n 23).
[29] Anderson, Kenneth. '"Accountability" as "Legitimacy": Global Governance, Global Civil Society and the United Nations' (2011) 36 (3) Brooklyn Journal of International Law 843, 855.
[30] Scholte, 'Relations with Civil society' (n 20)
[31] Christopher L Pallas and Anders Uhlin, 'Civil Society Influence on International Organizations: Theorizing the State Channel' (2014) 10 Journal of Civil Society 184.

advocacy networks to engage other levers of institutional power capable of controlling or influencing IOs' policies, practices, and decision-making processes.[32] This may include targeting the executive heads of IOs, their member states and donors, and national parliaments and parliamentary networks, amongst other influential actors.[33] In particular, civil society actors looking to influence IOs must be able to strike a chord with states, appealing to their own accountability concerns.[34] With these insights in mind, we now examine the limited ways in which human rights NGOs have interacted with IOM over time, and perspectives on IOM held by human rights advocates; this history and these views are important to understand in order the explain the overall lack of sustained, strategic NGO advocacy targeting IOM.

15.3 Interactions between IOM and International Advocacy NGOs: Key Patterns

This section examines past, albeit limited, interactions between IOM and international advocacy groups, as a foundation for assessing their potential contribution to increased IOM accountability. Broadly, IOM's relations with NGOs may be described as traditionally weak, albeit improving. UNHCR relies on NGO 'implementing partners' to deliver many of its programs, is often the target of NGO advocacy campaigns, and has held large, annual civil society consultations since the 1980s. In contrast, IOM implements most of its projects directly, has been less regularly targeted by NGO advocacy, and has been much slower to institutionalize mechanisms for civil society actors to access and influence the organization. Over the last ten to fifteen years, however, this dynamic has shifted somewhat, with IOM taking modest steps towards becoming more actively consultative with civil society, a development prompted by NGO advocacy and especially by senior IOM officials' sense that civil society consultations and engagement processes are expected of 'mature' and serious IOs – a status they aspire to for IOM.[35]

[32] David Wirth, 'Partnership Advocacy in World Bank Environmental Reform' in Jonathan Fox and L David Brown (eds), *The Struggle for Accountability* (MIT Press 1998).

[33] Alnoor Ebrahim and Steven Herz, 'The World Bank and Democratic Accountability: The Role of Civil Society' in Jan Aart Scholte *Building Global Democracy? Civil Society and Accountable Global Governance* (Cambridge University Press 2011).

[34] Fox and Brown (n 25).

[35] On IOM's attempts to develop the polices and processes expected of 'mature' IOs as part of its organizational expansion, see Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (n 7).

Increased interactions between IOM and NGOs were influenced by its involvement in the facilitation of migration policy dialogues. For example, in 2001 IOM established and opened up its International Dialogue on Migration to civil society organizations; its lead role in the Global Forum on Migration and Development (GFMD), beginning in 2007, also helped foster more routinized interactions with NGOs through the establishment of 'civil society days'. Looking beyond interactions in the context of such policy dialogues, Amnesty's 2003 statement to the IOM Council stressed the need for IOM to institutionalize mechanisms for consultation with NGOs and suggested establishing an NGO focal point or unit within IOM's structure. These changes were finally made under the institutional restructuring introduced by Director General William Swing in 2010. In 2011, IOM introduced its Annual Civil Society Organization (CSO) Consultation. In addition to participating in the Annual CSO Consultation (and, in some instances, regional consultations), NGOs seeking to influence IOM can apply for observer status to the IOM Council, which allows for some engagement with IOM's leadership and member states, although the agenda is set by IOM itself. During Swing's time as Director General, the number of NGOs with observer status increased considerably. Civil society actors may make public statements during Council proceedings, a channel used by some NGOs.

While IOM-NGO interactions have thus increased in some ways, opportunities for NGOs to contribute their perspectives to IOM policies and practices are still deeply circumscribed.[36] For example, civil society groups have been invited to provide feedback on some major IOM policies but not on others, and many decisions with significant human rights repercussions are still taken behind closed doors.[37] Whether IOM recognizes an obligation to 'render an account' to civil society thus remains an open question.[38]

[36] For IOM's own description of its engagement with civil society organizations, see IOM, 'Mandate to Engage with CSOs' <www.iom.int/mandate-engage-csos> accessed 15 May 2022.

[37] See e.g. IOM, 'IOM-CSO Consultations Protecting and Positively Impacting Migrant Lives IOM Headquarters: Geneva, Switzerland 18 September 2015' (2015) <www.iom.int/sites/default/files/our_work/ICP/CSO/2015/2015-IOM-CSO-Consultations-Final-Report.pdf> accessed 15 May 2022.

[38] See Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13(4) European Law Journal 447.

15.3.1 *Contrasting Engagement with IOM and UNHCR*

One way of exploring this issue is through comparison of IOM and UNHCR and their relationships with civil society actors, particularly advocacy NGOs. Human rights NGOs generally assume that UNHCR will make itself available to discuss and explain its conduct and decisions concerning the protection and governance of refugees.[39] UNHCR's self-identification as an advocate for refugees informs a generally mutual expectation that the agency demonstrate that its actions are in the best interests of refugees, and that this includes being responsive to advocacy NGOs and other civil society actors who also claim to be representing refugees' rights and interests.[40] UNHCR's specific legitimation needs, in other words, have created openings and opportunities for civil society to influence its policies and accountability.

Although IOM increasingly makes claims to represent and advocate for the rights of migrants, it has not exhibited the same levels of responsiveness or answerability to civil society stakeholders for its actions, in part because unlike UNHCR, IOM's legitimacy claims have not historically been seen to require this. Instead, IOM's value and perceived legitimacy from the perspective of its member states has stemmed from other qualities such as its responsiveness, flexibility, and grounding in field operations.[41] Broadly speaking, international advocacy groups' interactions with IOM have been much more limited, fluid and dependent on individual personalities and relationships.[42] Given IOM's ingrained deference to states and its 'business model' of attracting and efficiently executing contracted projects, advocacy groups are reportedly met with suspicion, silence, and hostility from IOM representatives in their pursuit of information and accountability from the organization.[43] As one leading human rights advocate expressed it: 'If [my organization] flags UNHCR policies, performance, etc. in a report, [we] will get a call or

[39] Interview with human rights advocate (HRA) 11 (December 2016).

[40] Ellen Reichel, 'Navigating between Refugee Protection and State Sovereignty' in Dingwerth and other (eds), *International Organizations Under Pressure: Legitimating Global Governance in Challenging Times* (Oxford 2019).

[41] Bradley and Erdilmen (n 16).

[42] Interview HRA 11 (n 39); Interview with HRA 9 (November 2016); Interview with HRA 14 (June 2020).

[43] Interview, HRA 11. See also IOM's defensive response to an evaluation of its work in Erlend Paasche, Sine Plambech and May-Len Skilbrei, 'Response by Erlend Paasche, Sine Plambech and May-Len Skilbrei to IOM's response' Anti-Trafficking Review <http://gaatw.org/ATR/Paasche_Plambech_Skilbrei_Response.html> accessed 15 May 2022.

meeting from a regional director at UNHCR to follow up. But with IOM, they don't engage with NGOs. They don't feel accountable to them'.[44]

A systematic examination of reports from international human rights NGOs demonstrates that while these groups have regularly investigated and issued recommendations to UNHCR, they have not been a reliable force for holding IOM to account in relation to human rights standards. This suggests that the weak accountability relationships between IOM and human rights advocacy NGOs are not only a result of IOM's actions and attitude but also the strategies and priorities adopted by advocacy organizations themselves. For example, in reports on migration and displacement issued by Amnesty International and HRW from 1998 to 2020, IOM's activities are remarkably under-examined, with IOM's work receiving far less scrutiny than UNHCR's. Only slightly more than a quarter (27.8%) of 183 reports on migration and displacement produced by HRW from 1998 to 2020 made reference to IOM. Of these, only 14.2% analysed IOM's role and only 9.1% explicitly referenced IOM in their recommendations. Amnesty International's reports showed even less interest in IOM. Only 13.7% of Amnesty's reports related to migration and displacement directly mentioned IOM; 9.6% analysed IOM's role and 2.4% issued recommendations to the organization. In contrast, between 1998 and 2020, 66.5% of HRW reports and 46.5% of Amnesty reports on migration and displacement mention UNHCR; 47.7% of HRW reports and 21.9% of Amnesty reports analyse UNHCR's role; 44.9% of HRW reports and 46.5% of Amnesty reports make recommendations to improve UNHCR practice. Some discrepancies in the level of attention devoted to these organizations are to be expected: IOM remains a smaller IO than UNHCR (particularly in terms of budget). Neither agency played a major role in all of the contexts addressed in these reports, but UNHCR is specifically mandated to work with refugees, who are often a more high-profile or visible population and may therefore be more likely to attract the attention of international advocacy NGOs. Nonetheless, the difference is striking, particularly as some of these reports neglect IOM even when it was actively involved in the cases at hand, or could potentially have made valuable contributions if urged to do so.

15.3.2 2002–2007: Modest but Increased Attention from Major Human Rights NGOs

A closer, historical reading of statements on IOM issued by Amnesty and HRW suggests that perhaps the strongest period of these NGOs' scrutiny

[44] Interview HRA 11 (n 39).

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of IOM occurred between 2002 and 2007. This timeframe overlaps with significant growth in IOM's roles and budget, renewed conversations on global migration governance, and organizational involvement in programmes such as Australia's Pacific Solution and 'assisted voluntary returns' (AVR) from European countries, which raised major human rights concerns.[45] Four key issues attracted the interest of Amnesty and HRW, prompting them to more thoroughly investigate IOM's actions in the field and release a series of reports and public statements critiquing IOM. First, these NGOs directly addressed IOM's lack of a formal protection mandate or 'standard of accountability' to orient its actions, arguing that IOM was missing the institutional safeguards necessary to ensure its activities respected international refugee and human rights norms.[46] The NGOs contended that as IOM expanded, these shortcomings posed particular risks to the ability of refugees, asylum seekers and other migrants to enjoy their fundamental rights. This is linked to their second set of concerns related to IOM's functions within an increasingly restrictive migration policy environment. Amnesty and HRW offered legal arguments on

[45] Conversations on global migration governance took place in particular through the Berne Initiative, the Global Commission for International Migration (GCIM), the Global Migration Group, and the High Level Dialogue on Migration and Development. See Martin, Philip, Susan Martin, and Sarah Cross, 'High-level Dialogue on Migration and Development' (2007) 45 (1) International Migration 7.

[46] These themes are present for example in the statements of Amnesty to the IOM Council in 2003, 2004 and 2005, and of HRW in 2003, 2004 and 2007. Amnesty International, Statement to the 86th Session of the Council of the International Organization for Migration (IOM)' (20 November 2003) hereafter: Amnesty, 'Statement to IOM Council' (2003) <www.amnesty.org/download/Documents/108000/ior300112003en.pdf> accessed 15 May 2022; Amnesty International, 'Statement to the 88th Session of the Governing Council of the International Organization for Migration (IOM)' (30 November – 3 December 2004) hereafter: Amnesty, 'Statement to IOM Council' (2004) <www.iom.int/sites/g/files/tmzbdl486/files/2019-02/amnesty.pdf> accessed 15 May 2022; Amnesty International, 'Statement to the 90th Session of the Governing Council of the International Organization for Migration (IOM)' (1 December 2005) hereafter: Amnesty, 'Statement to IOM Council' (2005) <www.amnesty.org/download/Documents/84000/ior300172005en.pdf> accessed 15 May 2022; Human Rights Watch, 'The International Organization for Migration (IOM) and Human Rights Protection in the Field: Current Concerns' (18–21 November 2003) hereafter: HRW, 'Statement to IOM Council' (2003) <www.hrw.org/legacy/backgrounder/migrants/iom-submission-1103.pdf> accessed 15 May 2022; Human Rights Watch, 'Statement to the IOM Governing Council' (30 November–3 December 2004) hereafter: HRW, 'Statement to IOM Council' (2004) <https://governingbodies.iom.int/system/files/jahia/webdav/shared/shared/mainsite/about_iom/en/council/88/humanrights.pdf> accessed 15 May 2022; Human Rights Watch, 'Statement to the IOM Council' (27–30 November 2007) hereafter: HRW, 'Statement to IOM Council' (2007) <www.hrw.org/node/232231/printable/print> accessed 15 May 2022.

why IOM should not perform certain functions – most importantly, the management of offshore detention centres – when state policies clearly infringed upon the human rights of migrants and asylum seekers, and identified serious procedural flaws in how IOM performed such services.[47] In particular, they argued that IOM's assisted return programmes often involved 'directly and indirectly' coercive methods, which pressured people to prematurely return to situations where their lives were at risk.[48] In light of this, HRW called upon IOM to cease its involvement in detention as well as in assisted returns, unless it could prove with certainty that returns were voluntary and compliant with international norms.[49] Third, both organizations were unconvinced IOM provided a suitable forum for global policy debates on migration. This reflected their general unease with migration management as an orientating concept for IOM's work. They worried that the language of 'control and containment' attached to IOM's migration management strategies signalled a practical and rhetorical shift away from the focus on states' human rights obligations.[50] Finally, both organizations were concerned that IOM was overstepping its mandate at the request of states, effectively moving refugee issues into the migration regime.[51] In particular, IOM's failure to coordinate with UNHCR on matters of asylum and protection fuelled mistrust of the organization. The following excerpt from a joint 2003 statement to the IOM Council brings together some of these different layers of critique:

> Amnesty International and Human Rights Watch are also concerned that IOM should not provide an alternative agency for states where they prefer to avoid their human rights obligations or where UNHCR has declined engagement in a given situation on the basis that it sees grave problems or dangers. Even with the best of motives, IOM involvement in such situations can end up unwittingly facilitating abuses and harming migrants, refugees and asylum seekers. IOM's presence should not have the effect of prolonging untenable state policies and practices which themselves

[47] See e.g. HRW, 'Statement to IOM Council' (2003) (n 46) and HRW, 'Statement to IOM Council' (2004) (n 46).

[48] HRW, 'Statement to IOM Council' (2003) (n 46) 8; Amnesty, 'Statement to IOM Council' (2004) (n 46); Amnesty, 'Statement to IOM Council' (2005) (n 46); HRW, 'Statement to IOM Council' (2004) (n 46); HRW, 'Statement to IOM Council' (2007) (n 46).

[49] See e.g. Amnesty, 'Statement to IOM Council' (2004) (n 46); Amnesty, 'Statement to IOM Council' (2005) (n 46).

[50] See Amnesty, 'Statement to IOM Council' (2004) (n 46) 3.

[51] See e.g. Amnesty, 'Statement to IOM Council' (2003) (n 46); HRW 'Statement to IOM Council' (2003) (n 46), which address IOM's work in returning asylum seekers from offshore detention sites who were prevented from accessing UNHCR.

> fail to comply with international human rights standards. Such policies range from certain border control and deterrent measures, to arbitrary and unlawful detention to encouraging premature return to countries of origin. In such circumstances, states should be required to act in their own name and should be held directly accountable for their actions.[52]

During this period, Amnesty and HRW made several recommendations to the IOM Council, including proposals for strengthening its internal and external oversight mechanisms to ensure greater normative compliance. For instance, they recommended that IOM develop mechanisms to answer abuse allegations; refrain from undertaking protection roles for which it lacked a mandate or expertise; and establish clear criteria to assess the legitimacy of its operations.[53] In 2007, HRW further recommended that IOM apply 'strict human rights conditionality' to its migration management projects, specifically those related to border management, to avoid strengthening the capacities of states whose practices breached international law.[54]

It appears that in this early period of comparatively focused engagement and indeed in the years since, leading international advocacy NGOs failed to significantly catalyse IOM reform. Aside from heightening IOM's sensitivities to its reputational vulnerabilities, little substantive impact can be traced from this early period of peak – but still modest – engagement from major international human rights NGOs. Only minimal changes were made in line with some of the observations and recommendations made by Amnesty and HRW, and these mainly pertained to finessing IOM's language around the relationship between migration management and human rights. While analysing why these advocacy efforts were not more fruitful is largely outside the scope of this chapter, a few observations can be made: A key reason why these early analyses and critiques, while normatively strong and well-evidenced, did not impact IOM's behaviour is that they were not backed up by a particularly sophisticated, sustained or effective advocacy strategy that concertedly targeted multiple channels for pressuring and persuading IOM. Leading advocacy groups did not recruit a strong network of other NGOs to the cause, nor did they engage with IOM's donors, domestic parliaments in key member states, or other IOs

[52] HRW, 'Statement to IOM Council' (2003) (n 46) 16.

[53] See e.g. Amnesty, 'Statement to IOM Council' (2004) (n 46); Amnesty, 'Statement to IOM Council' (2005) (n 46); HRW, 'Statement to IOM Council' (2003) (n 46); HRW, 'Statement to IOM Council' (2004) (n 46); HRW, 'Statement to IOM Council' (2007) (n 46).

[54] HRW, 'Statement to IOM Council' (2007) (n 46).

(e.g. UN actors) capable of exerting leverage against IOM. Nor were there strategic attempts to take advantage of ongoing, piecemeal changes to IOM policies and consultation practices. These factors limited the impact of Amnesty and HRW's advocacy efforts in this period.

15.3.3 2008–2021: Reduced Engagement from Advocacy NGOs

Analysis of Amnesty and HRW reports suggests that these organizations have largely retreated from their brief focus on IOM in the early 2000s, when they attempted to illuminate and constrain some of IOM's most controversial and risky activities, particularly in relation to AVR programmes, such as those run on behalf of Australia. The fundamental logics underpinning these programmes remains largely unchanged, yet there has been a tendency to overlook IOM's responsibility for organizing returns under circumstances that advance states' interests over migrants' rights, and contribute (if indirectly) to deportation and containment systems. For example, Amnesty has not devoted serious attention to IOM in reports on the Central American-US migration corridor, Algerian expulsions of Nigerians, and the externalization of EU migration policy, although IOM has had significant roles in these contexts. Similarly, while HRW offered robust critiques of the IOM-Australia relationship in its 2002 report *By Invitation Only*, more recently it adopted a light touch in commenting on IOM's AVR work in Central America.[55] Local human rights groups in Greece have condemned the Greek state for pressuring asylum seekers to take up IOM's return assistance, but in its discussion of this issue, HRW stops short of carefully analysing and critiquing IOM's role and obligations in this case.[56] In another example, an Amnesty report on EU externalization in Libya questions IOM's 'voluntary humanitarian return' programmes and their compliance with the principle of voluntariness, given that many asylum seekers and other migrants are making decisions about returning while being detained in abysmal conditions in Libya, having been prevented from accessing EU territory. While Amnesty's report suggests

[55] See HRW, 'US Move Puts More Asylum Seekers at Risk' (25 September 2019) <www.hrw.org/news/2019/09/25/us-move-puts-more-asylum-seekers-risk#:~:text=Human%20Rights%20Watch%20concluded%20in,and%20physical%20violence%20in%20Mexico> accessed 15 May 2022.

[56] HRW, 'Greece: NGOs Decry Policy Limiting Asylum Appeal Rights' (9 May 2017) <www.hrw.org/news/2017/05/09/greece-ngos-decry-policy-limiting-asylum-appeal-rights> accessed 15 May 2022.

that IOM's assisted returns may place migrants and asylum seekers at risk of harm and *refoulement*, it solely targets EU states and the Libyan government to change their policies around detention, pushbacks and asylum, skirting IOM's role and responsibilities in return processes.[57]

On occasion, reports from human rights NGOs do remind IOM of its responsibilities and obligations under international law or apportion blame to IOM for its part in controversial or rights-violative programmes. For example, a 2015 Amnesty report on the right to adequate housing in post-earthquake Haiti explicitly mentions IOM's involvement in events that led to police attacks and violence at a camp where residents resisted enrolling in IOM's rental subsidy programme, which was intended to enable camp closures.[58] By and large, however, these reports suggest that influential human rights NGOs have not consistently worked to hold IOM accountable, even in cases in which it plays complex and concerning roles. Perhaps most strikingly, major international advocacy organizations concerned with migration and displacement were virtually silent during the negotiation of IOM's entry into the UN system as a related organization in 2016. Arguably, this could have been an opportune moment to press for key reforms related to IOM's mandate and accountability deficits.[59] Instead, human rights NGOs – admittedly already stretched in responding to the global migration 'crisis' at the time – seem to have bypassed the opportunity to try to shape this watershed moment in IOM's institutional development, despite its considerable long-term impacts on migration governance, humanitarian action, and the rights and wellbeing of migrants.

15.4 Why Are Many Human Rights NGOs Disengaged from IOM?

Having discussed the rather surprising disengagement of major international human rights advocacy organizations from accountability efforts

[57] See Amnesty, 'Libya's Dark Web of Collusion: Abuses against Europe-Bound Refugees and Migrants' (11 December 2017) <www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF> accessed 15 May 2022.

[58] Amnesty, '"15 Minutes to Leave": Denial of the Right to Adequate Housing in Post-Quake Haiti' (8 January 2015) <www.amnesty.org/download/Documents/212000/amr360012015en.pdf> accessed 15 May 2022.

[59] See 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 22 April 2022.

targeting IOM, this section addresses the key question this analysis raises: *why* have major human rights groups not been more involved in pressing for increased accountability from IOM? Our interviews suggest that perceptions of IOM amongst human rights advocates are increasingly nuanced and multi-faceted. Some advocates have followed and welcome institutional developments at IOM over the last decade, such as its attempts to clarify its position on human rights and humanitarian principles, and to better institutionalize knowledge of protection principles amongst its staff. IOM's adoption of human rights language to frame its work has also created the impression in some quarters that protection features more prominently within IOM's goals and priorities as the 'UN migration agency'. Against this backdrop, we identify three issues that have nonetheless limited international advocacy NGOs' engagement with IOM. First, institutional developments at IOM over recent decades and the existence of multiple standards for considering IO accountability make judgements about IOM's performance more 'slippery' and complex. Second, IOM's vague mandate, and its lack of a formal protection mandate have resulted in continued confusion about IOM's role and responsibilities, and have made some NGOs reluctant to make IOM an advocacy target. Third, many organizations are increasingly dependent on IOM for access to particular populations, and for data gathered or managed by IOM, which advocacy organizations use to ground their own analysis, claims, and advocacy functions. This has contributed to the legitimizing of IOM and arguably dissuaded more direct confrontation with the organization.

To be sure, these are not the only factors that have shielded IOM from more targeted advocacy from international human rights NGOs, akin to the ways in which these groups have engaged other IOs such as UNHCR. For example, IOM's expansion is closely linked to its assumption of greater roles and responsibilities vis-à-vis IDPs and international migrants who are not refugees; indeed, IDPs are now the largest group of IOM 'beneficiaries'.[60] Yet these populations typically receive less attention from the media and advocacy groups than refugees do, which may also help explain why prominent human rights NGOs have been less focused on IOM compared to UNHCR.[61] We focus on these three factors not because they tell

[60] Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (n 7) 4.

[61] Amnesty International, for example, has a specific, well-resourced team to conduct research and advocacy on refugee issues, but does not have one for IDPs, and does not prioritize advocacy on IDP issues.

the full story, but because our interviews suggest that they have been particularly influential in shaping this disconnect.

15.4.1 Implications of Institutional Developments and Diverse Standards of Accountability

Recent decades have witnessed considerable institutional change at IOM. The organization has, for instance, more actively adopted human rights rhetoric; employed more staff with protection expertise; and taken (tentative) steps to clarify its position on human rights and humanitarian principles through various frameworks and policies, and better institutionalize knowledge of protection principles amongst its staff.[62] Our interviews suggest that international human rights advocates have varying levels of knowledge of these developments; compared to UNHCR, IOM remains poorly understood among refugee, IDP and migrants' rights advocates. Yet many are broadly aware of these developments and see them as an improvement over the situation in the 1990s and early 2000s, when IOM was reluctant to acknowledge its protection responsibilities and sometimes openly defiant of human rights critiques. As one human right advocate expressed it, IOM 'has definitely become a lot more sophisticated, it's become a lot more mainstream, in the sense of adopting "UNHCR's language" around protection issues'.[63] Some influential advocates with longstanding knowledge of IOM suggest that it has reached a turning point in terms of recognizing international norms and its obligation to respect them.[64] Among many advocates, IOM now seems to be viewed less as an organization that refuses to conform to established rules, and more as one that has diverse roles (including but not limited to protection) and some compliance problems, but perhaps no more so than other international organizations.

While these developments may create the impression that focused advocacy interventions are less necessary today than they were in the past, staff at many prominent NGOs do remain concerned about IOM's practices, accountability deficits, and decision-making processes, although they generally stop short of transforming these concerns into focused advocacy interventions. Many of our respondents criticized

[62] On these changes, see e.g. Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (n 7).
[63] Interview with HRA 13 (January 2018).
[64] Interview with HRA 10 (December 2016).

IOM for its continued institutional bias toward serving states over migrants; its weak normative basis; and lack of coherence in its work.[65] Many saw its managerial style and focus on 'efficiently' running large projects as undermining its claims to be 'solving' migration problems.[66] For example, one advocate complained that IOM's overriding focus on 'the numbers' – that is, on rolling out interventions and gathering data – has blinded it to the reality that 'if your job is' at least in part 'to protect people, [doing] less may in fact be more'.[67] Amongst human rights NGOs, IOM also has a lingering reputation for being willing to 'do anything for money', although some argue that IOM's lack of independence from its donors is not necessarily that different from other IOs, such as UNHCR.[68]

Importantly, our interviews underscored that human rights standards are not the only touchstone guiding advocacy NGOs' assessments of IOM's conduct. Benchmarks such as institutional relevance, expertise, capacity, and operational effectiveness also shape impressions of the organization and structure perceptions of its legitimacy, even among human rights NGOs. Whether explicitly or implicitly, advocates use multiple and sometimes competing standards to interpret and assess IOM's role, which can result in contradictory views about the organization and helps explain why human rights advocates may be hesitant or disincentivized to contest behaviours they suspect to be rights-violating or detrimental to respect for migrants' rights. For example, while many of our respondents expressed concerns about IOM's lack of knowledge about or adherence to human rights standards, they also expressed highly favourable views of IOM's operational and 'field-based' characteristics. Many suggested that because of these characteristics, IOM added 'incredible added value', particularly in emergency contexts where it plays critical roles in addressing unmet humanitarian assistance needs, such as in relation to IDPs and vulnerable cross-border migrants who do not qualify for refugee status.[69] Despite its shortcomings on protection issues, many felt that IOM played a pivotal role in executing tasks that fall between the cracks of UN agencies'

[65] Interview with HRA 2 (November 2015); Interview with HRA 7 (December 2016); Interview with HRA 8 (December 2016); Interview HRA 9 (n 42).
[66] Interview HRA 10 (n 64).
[67] Ibid.
[68] Interview with HRA 3 (November 2015); Interview HRA 7 (n 65); Interview HRA 8 (n 65).
[69] Interview with HRA 1 (November 2015); Interview with HRA 4 (November 2015); Interview with HRA 12, (October 2017); Interview HRA 7 (n 65); Interview HRA 9 (n 65); Interview HRA 13 (n 63).

mandates and operational competencies.[70] Illustrating how appeals to managerial standards – such as quantity, efficiency, and effectiveness – can help shape opinions and legitimize IOs, several respondents drew upon such concepts to suggest that IOM had exceeded their expectations or sometimes outperformed other agencies such as UNHCR.[71] While more systematic evaluations of IOM projects would of course be needed to more fully substantiate such impressions, these rather positive observations are noteworthy in part because they contrast strikingly with the censorious tone of much of the academic scholarship on IOM, and help to explain why IOM has not attracted more rigorous critique from international advocacy NGOs.

In terms of accountability, having multiple reference points for evaluating IOM can have the effect of tempering or muting criticism about its adherence to human rights norms – particularly when IOM's involvement in a particular operation results in tangible benefits, such as the provision of emergency aid. This dynamic was evident for instance in the case of the response to the Rohingya refugee crisis in Bangladesh, in which IOM initially took on a leading coordination role. In our interviews, several advocates knowledgeable of the situation criticized IOM for agreeing to the Bangladesh government's request for it to lead coordination efforts in the emergency response, pointing out that this was UNHCR's responsibility. By overstepping its mandate, they argued, IOM endangered the process of recognizing the Rohingya as refugees, diminished the response's focus on protection, and fuelled competition and coordination problems with UNHCR.[72] However, advocates also conceded that access to refugees and living conditions in some camps improved considerably as a consequence of IOM's operational effectiveness and its relationships of trust with state authorities.[73] As one advocate reflected, IOM positioned itself as a 'gatekeeper' to both the population and the government, and arguably undermined the possibility of achieving formal refugee status for the Rohingya. Yet, he suggested, there was broad if grudging acknowledgement that formal recognition of the Rohingya was unlikely in any event, as Bangladesh

[70] Interview HRA 1 (n 69); Interview HRA 7 (n 65); Interview HRA 8 (n 65). On IOM's gap-filling functions, see Bradley, 'The International Organization for Migration (IOM): Gaining Power in the Forced Migration Regime' (n 11).

[71] Interview HRA 1 (n 69); Interview HRA 4 (n 69); Interview HRA 7 (n 65).

[72] On these dynamics, see also Sebastian Moretti, 'Between Refugee Protection and Migration Management: The Quest for Coordination between UNHCR and IOM in the Asian-Pacific Region' 2021 42 (1) Third World Quarterly 34.

[73] Interview HRA 12 (n 69); Interview with HRA 15 (June 2020).

is not party to the 1951 Refugee Convention, and that in an incredibly difficult situation IOM enabled small, gradual improvements, 'because the Bangladesh government feels it has a partner it can trust'.[74]

This example reflects the conflicting sentiments often embedded in advocates' perceptions of IOM. Weighing up IOM's performance against competing standards can deflect attention from rights-based concerns about the organization's practices.[75] Within extremely complex political and operational environments, advocates can sometimes be persuaded by IOM that they should tailor their expectations to the realities on the ground, rather than push for 'unrealistic' human rights goals.[76] Adopting such perspectives can dilute or divert concerns about IOM's roles and activities that persist despite developments in the organization's discourse, policies and practices on rights protection.

15.4.2 Consequences of IOM's Mandate and Structure for NGO Accountability Efforts

Accountability scholars emphasize that accountability processes presuppose certain questions, such as accountability 'for what' and 'towards whom'?[77] In attempts to hold IOs to account, these questions naturally lead to an examination of the constitutional mandates that guide them, as well as policies or commitments that clarify the rules to which an IO understands itself to be bound in the execution of its functions. Such an exercise can be challenging in relation to IOM, as its formal mandate as articulated in the IOM Constitution is primarily a vague, open-ended list of services it may provide states in managing migration, and it is only in recent years that IOM has started to more concertedly develop publicly available frameworks and policies that begin to clarify the principles it accepts it is bound to respect. Coupled with its highly decentralized structure, IOM's ill-defined formal mandate has offered it substantial leeway to define and expand its activities, but at the expense of confusion and debate about its proper role.

IOM's imprecise mandate and decentralized institutional structure have influenced NGO engagement in holding IOM accountable in three main ways. First, NGO advocates often struggle to comprehend and

[74] Interview HRA 12 (n 69).
[75] Interview HRA 9 (n 42); Interview HRA 12 (n 69); Interview HRA 15 (n 73).
[76] Interview HRA 12 (n 69); Interview HRA 15 (n 73).
[77] See Bovens (n 38).

critically engage with the breadth of IOM's tasks and responsibilities across different jurisdictions and areas of governance.[78] As one advocate indicated: 'To keep track of IOM you really have to keep track of different contexts and the changing situations and statuses of people. It is already such a complex situation, and then you have to try to locate what IOM is doing in respect to that'.[79] IOM's approach and reputation in one area of intervention may not necessarily travel to other areas, giving rise to compartmentalized views of the organization among NGO advocates, depending on the particular fields in which they work (e.g. humanitarian response, labour migration, climate change, etc.). Second, in the absence of a well-defined mandate grounded in a specific body of law, human rights advocates may lack clarity about IOM's legal obligations and the standards to which it can and should be held to account.[80] Certainly, a lack of sustained interest from civil society actors in IOM and its ongoing policy development processes has compounded this problem, as has IOM's traditional evasiveness about its own legal obligations.[81] It is only recently, following IOM's entry into the UN system as a 'related organization', that IOM's Legal Office confirmed that it recognizes that IOM is obliged to uphold all common laws and principles that bind UN agencies, and even then, many human rights advocates concerned with migration appear unaware of this development.[82] Last, as IOM lacks a formal mandate to promote human rights or protect a specific group, international human rights advocates have tended to underestimate or dismiss the significance of IOM's activities, and the influence the organization can have on states' policies and practices – for better or for worse.[83] This limited recognition of IOM's agency and authority in global governance can inadvertently shield the organization from demands for accountability.[84]

Differences in human rights NGOs' approaches to advocacy targeting IOM and UNHCR (and their comparative neglect of IOM) underscore the importance of organizational mandates and institutional structure

[78] Interview HRA 1 (n 69); Interview HRA 11 (n 39); Interview HRA 15 (n 73).
[79] Interview HRA 15 (n 73).
[80] Interview HRA 1 (n 69); Interview HRA 2 (n 65); Interview HRA 3 (n 68); Interview HRA 4 (n 69); Interview HRA 7 (n 65); Interview HRA 9 (n 42). Determining the applicability of different bodies of international law to particular IOs is, admittedly, a general challenge pertaining not only to IOM.
[81] Interview HRA 7 (n 65).
[82] Interview with IOM official 17 (December 2019); Interview with IOM official 19 (January 2020).
[83] Interview HRA 10 (n 64); Interview HRA 15 (n 73).
[84] Interview HRA 14 (n 42).

in attracting NGOs' attention and positioning civil society as potentially powerful proponents of IO accountability. Our interviews suggested that UNHCR's recognized authority, its strong protection mandate for a legally defined group, and its explicit legal obligations and policies rendered it a more attractive advocacy target than IOM. Many NGO advocates are well-versed in UNHCR's roles in refugee protection, and are able to point to UNHCR's Statute, which establishes its responsibilities in accordance with refugee law and protection principles, and to the 1951 Refugee Convention which confers supervisory responsibility to UNHCR for its implementation.[85] From the perspective of NGO advocates, these instruments and related UNHCR policies provide a robust framework for demanding accountability from the organization. Furthermore, advocates can engage with UNHCR's Executive Committee in debates on programming and budgets. In contrast, advocates we interviewed perceived that IOM's Constitution offers little leverage for human rights NGOs to demand accountability, and even generates confusion regarding IOM's role and legal obligations. (IOs have human rights obligations irrespective of their constitutions, but our interviews suggested that explicit, constitutional obligations were significant in garnering NGOs' attention and informing advocacy strategies.) IOM's amorphous mandate makes it more difficult for advocacy NGOs to bring powerful member states on-side in accountability efforts, as there is a lack of consensus around IOM's purpose and proper role. Accountability efforts are further constrained by the fact that IOM does not run large programmes but myriad projects which are difficult to monitor, and follow budgets set outside of the oversight of the IOM Council. Given these differences, UNHCR offers a much better opportunity structure for external scrutiny and activism than IOM. Advocates' preference to scrutinize and engage with UNHCR – as demonstrated by their reports and testimonies – also reflects UNHCR's greater perceived importance. By nature of the role that UNHCR plays in the refugee regime and the weight of its decision-making, monitoring UNHCR's actions and seeking to persuade the organization to acknowledge and address deficiencies is often deemed strategically smart, and vital to advocates' goals. Meanwhile, IOM's nebulous mandate makes it seem like a less important, and less promising, advocacy target.[86]

[85] UNGA 'Statute of the Office of the United Nations High Commissioner for Refugees' (14 December 1950) UNGA Resolution 428(V); Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

[86] Interview HRA 7 (n 65); Interview HRA 8 (n 65); Interview HRA 10 (n 64); Interview HRA 15 (n 73).

15.4.3 *Dependency on IOM as a Data Source and Gatekeeper*

IOM's roles as a gatekeeper to particular populations, especially in camps, and as a leading provider of data on migration and humanitarian crises also create challenges for advocacy groups who may be interested in pushing for increased accountability from IOM.[87] Human rights organizations are increasingly reliant on IOM for access to victims of human rights violations and information about their plight. In migration governance, the quantitative data produced by IOM has become central to many NGOs' assessments of the situation of mobile populations.[88] That international human rights NGOs now base many of their own claims and analyses on IOM's data is a new dynamic that raises questions about the extent to which the NGO consumers of IOM data are willing to scrutinize and confront the organization.[89] Organizations such as the Internal Displacement Monitoring Centre (IDMC), for example, have developed formal partnerships with IOM, bringing together their technical, operational, analytical and advisory capacities.[90] Their partnership involves joint fundraising and aims to produce 'authoritative recommendations for policies to integrate displacement into broader policy agendas', amongst other goals.[91] Amnesty and HRW also rely on and incorporate IOM data into their reports, even as they sometimes disagree with how IOM groups and categorizes populations: between 1998 and 2020, 8.81% of Amnesty reports and 10.9% of HRW reports on migration and displacement drew on IOM data. Reliance on IOM data is increasing: between 2015 and 2020, 13.3% of

[87] For a discussion of obligations associated with IOM's evolving roles in relation to migration data, particularly in humanitarian contexts, see Anne Koch, 'The International Organization for Migration as a Data Entrepreneur: The Displacement Tracking Matrix and Data Responsibility Deficits' 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).

[88] See Stephan Scheel and Funda Ustek-Spilda, 'The Politics of Expertise and Ignorance in the Field of Migration Management' (2019) 37 Environment and Planning D: Society and Space 663.

[89] NGOs also draw on data from other IOs, such as UNHCR, but the longer history of engagement between UNHCR and advocacy groups may temper conflicts associated with reliance on UNHCR-generated data.

[90] IDMC presents itself not so much as an advocacy organization but as a provider of data and expertise on internal displacement, with the aim of informing policy and operational decisions. In practice, however, this has involved advocacy on the basis of human rights frameworks, including in relation to UNHCR's approach to IDPs.

[91] IOM and IDMC, 'Global Partnership on Internal Displacement: 2019–2023' 2 <www.iom.int/sites/default/files/our_work/DOE/iom_idmc_global_partnership.pdf> accessed 15 May 2022.

Amnesty reports and 14.3% of HRW reports used IOM data. Precisely how these intensifying data and access relationships shape NGOs' willingness and incentives to monitor and speak out about IOM remains to be seen. However, these dependencies are an aspect of the social relations between IOM and advocacy organizations that cannot be ignored when contemplating NGOs' actual and potential role in holding IOM to account.

A final point bears making on why advocacy NGOs have not actively and consistently pushed for IOM accountability in relation to human rights standards. The human rights industry itself thrives off clear narratives and easily identifiable perpetrators to generate moral outrage.[92] The legal and moral murkiness that often surrounds IOM's practices defies this requirement of much contemporary activism. Many advocates themselves admit that they lack the knowledge and resources necessary to probe the gaps between IOM's institutional rhetoric and its more contentious practices.[93] States' abuses of migrants' rights are often much more brazen, making them more immediately pressing targets for NGO advocacy. Thus, even when advocacy NGO staff have moral or legal concerns about what they witness in the field, they are unlikely to pursue specific accountability issues involving IOM unless they can produce a clear-cut case of harm and wrongdoing – one that meets the high thresholds of evidence set by professionalized advocacy organizations. Among the advocates we interviewed, some had documented IOM's involvement in rights violations but, for the reasons discussed above, hesitated to 'go public' with their findings.[94]

15.5 Conclusion: Strengthening Advocacy NGOs' Contributions to IOM Accountability

Enhancing IOM's accountability to human rights standards, to advocacy NGOs working on behalf of victims of rights violations, is a two-way street. Despite longstanding concerns about some IOM programmes, particularly its work on returns and in detention centres, international human rights NGOs have not been at the forefront of promoting organizational learning or institutional change within IOM in relation to respect for human rights norms. Instead, these pressures have largely come from certain member states, and from inside the organization – particularly from

[92] Keck and Sikkink (n 24).
[93] Interview HRA 10 (n 64); Interview HRA 11 (n 39); Interview HRA 15 (n 73).
[94] Interview HRA 14 (n 42); Interview HRA 15 (n 73).

proponents of rights-based approaches among IOM staff, and from senior officials aware that the organization's continued expansion and entrance into the UN system required a clearer commitment to human rights and protection standards.[95] This is not to say that human rights groups have been wholly disengaged from processes of institutional reform and efforts to promote increased accountability. While modest, waves of human rights advocacy in the early 2000s helped IOM internalize the sense that failing to be seen to follow international rules and norms can carry reputational risks. Human rights organizations have also encouraged IOM to be more consultative. Yet compared to the role they have played with UNHCR, human rights NGOs have not served as effectively as watchdogs involved in monitoring and calling out IOM's inappropriate practices. As we have shown, this state of affairs is not only the result of particular weaknesses in international human rights advocacy efforts; it is also linked to IOM's own narrow interpretation of its obligation to render an account and justify what it does to civil society. As an organization that has framed its value to the world primarily in terms of providing operational services for states, IOM does not appear to see the information, analysis, methods and advice provided by human rights NGOs as important to the success of its operations, or how it defines success in the first place.

Certainly, international human rights NGOs could do much more to push IOM to be more transparent and accountable to the populations affected by its actions and to the public at large, especially in terms of ensuring that it lives up to its rhetoric and claimed commitments to human rights and related humanitarian principles. For a start, advocacy organizations could better familiarize themselves with IOM's diverse roles, policies and commitments. Some key instruments that may form the basis of analysis include IOM's Migration Governance Framework (2015), Migration Crisis Operational Framework (2012), Humanitarian Policy (2015), Data Protection Policy (2010), and Framework for Addressing Internal Displacement (2017). Understanding how IOM's entanglements with different UN mechanisms and its status as a 'related organization' in the UN system affects its legal and political accountability is also integral to improving the current state of advocacy toward the organization. In the various countries where international advocacy organizations analyse human rights conditions and document violations, there is a need for them to better unpack and scrutinize IOM's discourses on human rights,

[95] On these dynamics, see Bradley, *The International Organization for Migration: Commitments, Challenges, Complexities* (n 7).

humanitarianism, and accountability that legitimize its activities, and to evaluate what it claims against the interests and powers that are being served by IOM's interventions. Because migration is a such contentious political issue, international human rights organizations will need to form effective alliances between themselves, domestic NGOs and grassroots associations, concerned member states (and their domestic legislators), and like-minded allies inside the organization to achieve greater accountability. Finally, when international human rights NGOs do in fact document IOM's involvement in human rights violations, they should use their position and resources to support victims to submit claims to IOM's mechanisms for internal oversight and redress, with a view to improving access to adequate remedies, and to testing and strengthening IOM's accountability systems. As a starting point, IOM should make a practice of systematically reflecting on and responding to concerns raised by human rights advocacy NGOs; strengthening and expanding fledgling civil society consultation processes; and publicly recognizing the important role that external NGO scrutiny can play in strengthening IO accountability. IOM member states, particularly donor officials, should use their leverage to call attention to recommendations for improved accountability raised by human rights NGOs, and press IOM to respond appropriately. These suggestions certainly do not exhaust the ways in which accountability relationships between IOM and international human rights NGOs may be strengthened, but they hopefully provide a useful starting point.

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