

The Legal Relationship between the UN and IOM

What Has Changed since the 2016 Cooperation Agreement?

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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/RES/73/195 (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) I 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 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 matters⁴⁹ 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/RES/73/195 (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 possesses⁸⁸ 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.