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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

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[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.

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.

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.

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.