

An Overview of IOM's Role in the Externalisation of Borders

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1. Introduction

International law scholars have paid little attention to the International Organisation for Migration (IOM). The Organization has remained largely under-researched, at least until very recently,¹ for reasons that include the following:

1. A complex and chaotic history: during the first 40 years of its existence, IOM – as a tool of the Western bloc in the Cold War era – was not a permanent organisation and struggled to survive; it only became perennial in 1989.² Since 2016, it has been a ‘related agency’ of the UN system.
2. IOM’s high informality and overall lack of transparency have not facilitated researchers’ access to information about its activities.
3. The impression that IOM is nothing more than a service-provider to States on specific projects covering a series of issues, e.g. emergency assistance, human trafficking, assisted voluntary return, border management.³

In the XXI century, IOM developed its international role and States’ membership considerably expanded. The number of member States has grown from 67 in 1998 to 173 in 2019, while its budget increased sevenfold from \$242.2 million in 1998 to \$1.8 billion in 2018.

2. The IOM as an Intergovernmental Organization

IOM is a ‘classical’ international organization having legal personality. It has a complex institutional structure consisting of organs established in its founding instrument, i.e. the Constitution, and further sub-committees set up by decision of the two main governing bodies, the Council and the Executive Committee.⁴

At first sight, the IOM – like any other intergovernmental organization – seems to reflect the fundamental tension inherent in any international organization: it is a creature of States, but it is also an autonomous entity.⁵

¹ See Klabbers, “Notes on the Ideology of International Organizations Law: The International Organization for Migration, State-Making, and the Market for Migration” (2019) 32 *Leiden Journal of International Law* 383.

² See Perruchoud, “From the Intergovernmental Committee for European Migration to the International Organization for Migration” (1989) 1 *International Journal of Refugee Law* 501.

³ Pécoud, “What do we know about the International Organization for Migration?” (2018) 44 *Journal of Ethnic and Migration Studies* 1621, 1622.

⁴ See Bast, “International Organization for Migration (IOM)” in *Max Planck Encyclopedia of Public International Law* (December 2010).

⁵ See *inter al.* Collins and White, “International Organizations and the Idea of Autonomy: Introduction and Overview” in Collins and White (eds) *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order* (London: Routledge, 2011) 1.

However, at a closer look, the nature of the IOM seems to be more difficult to capture. Essentially, certain peculiar features of an entity that aspires to be the “UN migration agency” seem to depart from the basic assumptions of how a universal organization is defined. In particular: first, its mandate; second, the fundamental legal relationship between the organization and its members. For what concerns its mandate, it shall be underlined that, usually, States create IOs to do what they cannot achieve unilaterally. One could expect that, as part of the UN family, the functions of the IOM would be essentially aimed at the realization of certain common or general interests (e.g. peace and human rights). However, the IOM seems to depart from this understanding, since its projects and activities essentially seem to serve the particular interests of individual States. As to the interaction between the IOM and its member States, it seems to challenge the nature of the fundamental legal relationship between an international organization and its members. I will address these two issues (mandate and legal relationship with member States) in turn.

A. The Mandate

The first purpose and function of the IOM, according to its Constitution, is to make arrangements for the organized transfer of migrants, offering opportunities for orderly migration. Its focus indeed is, as the preamble to the Constitution makes clear, on “orderly flow of migration movements throughout the world”. As a matter of fact, the IOM’s voluntarily broad and flexible mandate, based on an extensive definition of ‘migrants’, enables the organisation to encompass a wide range of situations, well beyond the narrower categories that characterise other IOs (refugees for the UNHCR, migrant workers for the ILO).

B. The Human Rights Dimension

In the relationship agreement with the UN, IOM is recognised “as an independent, autonomous and non-normative international organization”. The language of normativity has been central to the debate about IOM and human rights: however, ‘non-normative’ should not mean that the IOM is not required to work in conformity with UN human rights standards.

The lack of an express IOM mandate in the field of human rights has not gone unnoticed by scholars. It is made more problematic by the primacy which the Constitution gives to national law and policies, and the absence of any reference to international law.⁶ Criticism has been also levelled against IOM because it would lack a legal protection mandate. The lack of a rights-based protection mandate, in some authors’ view, has made the IOM an attractive option for states seeking to outsource their migration policies.⁷

⁶ Micinski and Weiss, “International Organization for Migration and the UN System: A Missed Opportunity”, <www.futureun.org/media/archive1/briefings/FUNDS_Brief42_IOM_UN_Migraton_Sept2016.pdf>; Guild, Grant and Groenendijk, “IOM and the UN: Unfinished Business”, Queen Mary Legal Studies Research Paper No. 255/2017.

⁷ Hirsch and Doig, “Outsourcing Control: the International Organization for Migration in Indonesia” (2018) 22 *The International Journal of Human Rights* 681.

C. A Donor-driven Organisation

Although the annual budget in its entirety is drawn up by the Director General and subject to approval by the Council and the Executive Committee, the project-based funding by donors characterizes IOM as a donor-driven organization. The operational part of the budget is funded through voluntary contributions from Member States, other States, or international organisations such as the European Union. Article 20 of the IOM Constitution provides that “any contributor to the Operational part of the Budget may stipulate with the Organization terms and conditions, consistent with the purposes and functions of the Organization, under which its contributions may be used”.

One might wonder whether the growth of voluntary contribution is propitious, or whether, on the contrary, all activities of international organizations should be financed through their regular budgets. Financing by means of voluntary contributions offers several advantages, including that it may lead to higher income generation.⁸ However, there are important disadvantages as well. First, voluntary financing of programmes has a disuniting effect on the organization: “It is no longer the organization that acts when the action is financed by only a group of its members or even by outsiders. The separately financed programmes may become organizations within the organization”.⁹ Second, “[p]rogrammes financed through voluntary contributions are largely dependent on a limited number of wealthy states [...]. The power unilaterally to increase or decrease contributions puts a strong instrument of pressure into the hands of the states that contribute, or might contribute, generously”.¹⁰

A key element to be assessed is to what extent the contributor to the operational part of the budget can stipulate the terms and conditions under which its contributions may be used.

Moreover, the point has been made that the financial structure contributed to the highly decentralized and at times inconsistent character of the whole organization since the country offices were more or less free to design their projects and programmes but needed to lobby for their own funds.¹¹

D. The Relations among Organs and between the IOM and its Staff

With head office, two administrative offices, nine regional offices and two liaison offices and some 9,000 operational staff spread over the globe, the IOM should not be considered as a small or negligible entity.

Many aspects of the IOM’s infrastructure remain under-researched.

As for the institutional architecture, there is no much analysis on the role of the IOM Council and the Director-General. Similarly, very little is known on the internal structure of IOM, on the relationship between its different units and field offices, on formal and informal power relations, or on its organisational culture.¹²

⁸ Schermers and Blokker, *International Institutional Law* (5th edn, Leiden, Boston: Nijhoff, 2011) at 663.

⁹ *Ibidem*, 664.

¹⁰ *Ibidem*, 665.

¹¹ van Krieken, “IOM and Beyond: Migration and Institution Building” (2006) 44/53 *AWR-Bulletin* 50.

¹² Klabbers (n. 1).

3. The Relationship with the UN System

Art. 1(2) of the IOM Constitution states that “In carrying out its functions, the Organization shall cooperate closely with international organizations, governmental and non-governmental, concerned with migration, refugees and human resources”. On 25 July 2016, IOM entered into formal legal relationship with the UN to become a related organization. This has been considered as somehow surprising: other related organizations are concerned with issues of trade, atomic energy, and weapons control; not with the social and economic wellbeing of a defined population. As a related agency, IOM enjoys very considerable independence and autonomy.

As for the obligation to comply with UN policies, the agreement reads as follows: “The International Organization for Migration undertakes to conduct its activities in accordance with the Purposes and Principles of the Charter of the United Nations and with due regard to the policies of the United Nations furthering those Purposes and Principles and to other relevant instruments in the international migration, refugee and human rights fields”.

Finally, there is the issue of the overlap between the IOM and UNHCR, as to the material scope of their respective mandate. The initial division of labour between them – UNHCR offering legal protection and the IOM providing the logistics for the transportation of migrants and refugees – has been blurred by the subsequent evolution of the mandate.¹³

4. On the Fundamental Legal Relationship with Member States and Third States

Between 1997 and 2001, the ‘migration management’ concept emerged as the ‘New International Regime for the Orderly Movement of People’. The IOM performs five functions within the migration management paradigm:

- (1) facilitating movement of emigrants, migrant workers and refugees;
- (2) building states’ capacities to control migration;
- (3) active migration control through practices such as running detention centres and conducting public information campaigns;
- (4) participating in humanitarian emergency operations; and
- (5) shaping discourse on international migration policy.

Much criticism was directed against IOM’s claim that migration management functions “for the benefit of all”: migration management primarily benefits the IOM’s major donor States, States of the global north, who aspire to control migration, particularly by combatting irregular migration. Second, migration management as implemented by the IOM disadvantages refugees and asylum seekers by strengthening border controls.¹⁴

¹³ See 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.

¹⁴ Hirsch and Doig, “Outsourcing Control” (n. 7), at 4.

A. States Hiding behind the IOM

The fact that member States entrust an international organisation with tasks that they do not intend to carry out directly is not a new phenomenon. However, with respect to IOM, it happens in ways that do not apply to most other international organizations, often commissioned by individual member States. Furthermore, this “makes decisions more difficult to trace and hides from view the political authority behind decisions”.¹⁵ One of the advantages for governments entrusting the IOM with tasks is that while they continue to exercise control, this control becomes indirect; thus, it becomes more difficult to hold governments accountable.

Against this background, it shall be considered that the UN International Law Commission, when dealing with the issue of the responsibility of a State in connection with the conduct of an international organization, addressed the problem of avoiding that States would be able to hide behind the conduct of an international organisation, by individuating the two scenarios of the State “aiding or assisting” and that of the State “directing or controlling” an international organisation in the commission of an internationally wrongful act.¹⁶

B. A Non-normative Organization Aspiring to Influence State Conduct

The last element to be emphasised is the characterisation of the IOM as “a non-normative organisation”. In that context, is it again useful to quote the lucid observations by Jan Klabbers. In his opinion, “the IOM actually does influence, and aspires to influence, the policies and practices of its member states to a considerable extent”. This is nothing particularly unusual, as international organizations tend to influence member State policies: however, “it is just that the IOM does so in greater depth than others, and without having been granted a general regulatory power”.¹⁷

¹⁵ Klabbers (n. 1), at 387.

¹⁶ See Draft Articles 58 and 59 on the responsibility of international organizations, in *Yearbook of the International Law Commission 2011*, Vol II Part Two.

¹⁷ Klabbers (n. 1), at 384.